MAINE REPORTS

126

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

DECEMBER 1, 1926—FEBRUARY 10, 1928

FREEMAN D. DEARTH[1]
EDWARD S. ANTHOINE[2]

REPORTERS

[1]Term expired December 21, 1927.
[2]Appointed December 29, 1927.

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

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HON. LUERE B. DEASY
HON. GUY H. STURGIS
HON. CHARLES P. BARNES
HON. NORMAN L. BASSETT
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REPORTER OF DECISIONS

FREEMAN D. DEARTH

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1927

LAW TERMS

BANGOR TERM, First Tuesday of June.

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

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

SITTING: WILSON, Chief Justice; PHILBROOK, DUNN, BARNES, BASSETT, PATTANGALL, Associate Justices.

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

WILLIAM E. DILL ET AL., ADMINISTRATORS

vs.

ANDROSCOGGIN & KENNEBEC RAILWAY COMPANY.

Kennebec. Opinion December 10, 1926.

The rule that a motorman of a trolley car when approaching highway junctions is required to exercise due care and vigilance, according to the exigencies of the situation, to have his car under such control, in anticipation of the crossing of teams, that it may be stopped to prevent collision, is applicable to situations where a railroad track crosses a street which it traverses.

But to this rule there is an important qualification. The motorman is not bound to stop whenever he sees an approaching motor car. He has duties to his own passengers who are entitled to reasonably speedy transportation.

The negligence of the automobile driver, in an action resulting from a collision between an automobile and a trolley car, is not imputable to a person who is riding with such driver as a mere passenger. In so far however as such negligence may have affected and qualified the duty of the defendant's servant it is a matter for the jury's consideration.

On exceptions and general motion. An action brought by William E. Dill and Villa M. Dill, as administrators of the estate of Frederick A. Dill, their minor son, for damages sustained by them by reason of the death of their said son alleged to have been caused by the negligence of the defendant corporation in the operation of one of its passenger cars. A collision between one of defendant's cars and an automobile in which plaintiff's intestate was riding as a passenger, oc-

curred in Farmingdale, October 3, 1923, resulting in the death of the minor son.

During the trial defendant excepted to the admission of certain evidence, and also excepted to a refusal to direct a verdict for defendant, and to certain parts of the charge. A verdict of $1,891.75 was rendered for plaintiff and defendant filed a general motion for a new trial.

Exceptions sustained.

The case is fully stated in the opinion.

Benedict F. Maher and E. L. Goodspeed, for plaintiff.

Andrews, Nelson & Gardner, for defendant.

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

DEASY, J: This case grows out of a collision between an automobile and a trolley car. The scene of the accident is a point in Farmingdale where the defendant's car track crosses the highway from the east to the west side. The time was October 3rd, 1923, at about eleven o'clock P. M. The plaintiff's intestate was Frederick A. Dill, then about nineteen years old, who was riding as a guest with his friend, Ashley Welsh, driver of the automobile. The automobile was being driven southerly toward Gardiner. The trolley car was proceeding northerly toward Hallowell. As a result of the collision young Dill sustained fatal injuries. The plaintiffs recovered a verdict. The case comes forward on motion and exceptions.

In *Denis* v. *Street Railway Co.*, 104 Maine, 39, upon authority of other cases cited therein, it is held that the motorman of a car when approaching these junctions is required to exercise due care and vigilance, according to the exigencies of the situation, to have his car under such control, in anticipation of the crossing of teams, that it may be stopped at the junction in season to prevent a collision with teams that may suddenly turn to drive over the track.

The rule as thus stated applies to highway junction points. With as great reason it is applicable to situations where a railroad track crosses a street which it traverses, especially where it crosses from the right to the left side.

But the defendant is not in the declaration charged with violation of this rule. Neither in the writ is it alleged nor in the briefs of counsel argued that the motorman failed to have his car under proper control.

But there is another rule, perhaps a corollary of the above quoted, necessary to give it effect, and yet distinct from it. Having his car so under control the motorman is required at all times to exercise due care and vigilance to avoid collisions, especially at crossings, and he must before making a crossing stop if necessary to avoid a collision with an approaching automobile or other vehicle, which is itself lawfully controlled. His duty is analagous to that of the driver of a motor car who crosses a street from right to left to enter a connecting road or driveway. It is this rule the violation of which is reiterated in the declaration and emphasized in the brief of the plaintiffs' learned counsel.

We may fairly assume that the jury found the defendant's servant negligent in failing to observe the duty thus enjoined. But to this rule there is an important qualification. The motorman is not bound to stop whenever he sees an approaching motor car. He has duties to his own passengers who are entitled to reasonably speedy transportation. He may assume, at all events, until the contrary appears, that approaching automobiles will be driven carefully. He is not bound to anticipate negligence on the part of their drivers. *Fernald* v. *French*, 121 Maine, 10; *Shaw* v. *Bolton*, 122 Maine, 235; *Gordon* v. *Street Railway Co.*, (Mo.) 134 S. W., 26; *Morton* v. *Smith Hoisting Co.*, 151 N. Y. S., 1087. This qualification is important in view of one of the defendant's exceptions which is decisive of the case.

The Presiding Justice instructed the jury that "it makes not a particle of difference in this case whether Welsh was negligent or whether he was not," and again, "negligence or want of care of the driver is not to be considered," and still again, "You may disregard entirely the negligence or want of negligence on the part of the driver of the car." At the close of the charge one of the possible implications of such instructions was properly negatived thus: "If the accident was caused entirely by the negligence of Welsh the plaintiffs cannot recover." Thereupon the defendant's counsel said: "I ask an exception to that part of the charge which states that the evidence concerning the negligence of the driver of the car, Welsh, is not to be considered, on the ground that the law is that such evi-

dence may be considered, not upon any theory of imputation of negligence, but to show that the defendant was not required to anticipate such carelessness, and would therefore be excused from the charge of negligence if the servant was otherwise operating the car in a prudent manner."

The motorman did not stop his car before crossing. The jury may have found and probably did find such failure to be negligent. Casey, the motorman, testified: "About half way across I saw this light coming through the fog. * * * I did'nt have no idea he was coming that rate of speed, and I worked slow to my switch."

Was the automobile coming at an excessive and negligent rate of speed, or was it otherwise improperly and carelessly controlled? If so, Casey was not bound to anticipate such negligence. The defendant was fairly entitled to an instruction to this effect.

The plaintiffs may recover, notwithstanding the contributory negligence of Welsh, the automobile driver. In so far, however, as it may have affected and qualified the duty of the defendant's servant, the negligence of Welsh was a matter for the jury's consideration.

The other exceptions disclose no error that we perceive. It is unnecessary to consider the motion.

Exceptions sustained.

ROLAND ANDERSON PRO AMI

vs.

ANDROSCOGGIN PULP COMPANY

Cumberland. Opinion December 13, 1926.

Where one not an employee goes upon the premises of an employer only by permission or sufferance of the workmen and a foreman who has no authority to employ, and for his own pleasure or the convenience of the workmen is allowed to operate some machinery, he is not a servant of the employer, but as to him is a trespasser or a mere licensee to whom the employer owes no duty, except not to wantonly injure him.

The burden of affirmatively showing due care commensurate with his years rests on a minor who is injured as well as on an adult.

In the instant case the evidence fails to show how the accident occurred or whether the plaintiff exercised any care to avoid it.

On exceptions by plaintiff. An action to recover damages for the loss of four fingers and a part of the right hand of plaintiff, a minor, while operating a machine in the pulp mill of defendant at Steep Falls, on December 20, 1924. The general issue was pleaded and at the close of plaintiff's testimony defendant moved for a non-suit which was granted and exceptions taken by plaintiff. Exceptions overruled.

The case fully appears in the opinion.

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

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

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

WILSON, C. J. An action to recover for personal injuries received by the plaintiff, a lad of fourteen years, through his hand being caught between two rolls while attempting to operate one of the machines in the defendant's pulp mill. At the trial below after the evidence for the plaintiff was in, on motion of the defendant, the Justice presiding granted a non-suit. The case is before this Court on exceptions to this ruling.

The exceptions must be overruled. The case is clearly governed by the principles laid down in *Welch* v. *Me. C. R. R.*, 86 Me., 552, and *Nelson Admr.* v. *Burnham Morrill Co.*, 114 Me., 213. The plaintiff was not in the employ of the defendant company. No obligation of master to servant existed. He was not in the defendant's mill to further any purpose of the defendant or of his own, except that of his own pleasure. He was not an invitee. The superintendent had ordered him to stay out. He was by permission or sufferance of the workmen and a foreman, but without authority, so far as the case shows, allowed to play about the mill and, for his own pleasure or to convenience some of the workmen, occasionally allowed to operate some of the machines.

On the occasion of his injury, he had taken the place of one of the workmen while he went out to smoke. So far as the defendant was concerned, he appears to have been a trespasser, but, even if a licensee, it owed him no duty, except not wantonly to injure him. *Russell* v. *M. C. R. R. Co.*, 100 Me., 406; *Stanwood* v. *Clancy*, 106 Me., 72; *Austin* v. *Baker*, 112 Me., 267; *Elie* v. *Street Railway*, 112 Me., 178. The evidence would not warrant a jury in finding such wanton disregard for the plaintiff's safety as the law requires to render an owner of property liable for injuries to a mere trespasser or even a licensee.

Again, in an action of this nature, the burden of showing due care on his part rests upon the infant as well as the adult, differing only in the degree required of one of his years. In the case at bar, however, there is not a scintilla of evidence showing due care on the part of the plaintiff or any care whatsoever. In fact no evidence was offered to show how he happened to catch his hand in the rolls, except that he reached over them to smooth out the pulp as it passed through, as he had seen the operators do, but how he did it, or how it happened that his hand was caught is not disclosed. Due care must affirmatively appear.

Exceptions overruled.

ETTA CLARK

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

Hancock. Opinion December 20, 1926.

Where provisions of statute are to be read into an insurance policy, the statute, if of another state, must be proved. The Court has no authority to go outside the record and consider facts not in it, and this rule includes foreign statutes.

While a court of equity will decree that to be done which ought to have been done, yet this equitable rule can not be employed in defense of action at law.

Where procedure and rules relating to change of beneficiary are intended only for the benefit of the company and may, therefore, be waived by it, yet this does not give to the insuring company the privilege of destroying vested rights of a third party by waiver.

In the instant case the change in beneficiary has never been made in accordance with the terms of the contract, the insured is long since dead, and at his death the right of his widow as named beneficiary in the policy is vested.

On report. An action to recover under a life insurance policy issued by defendant company April 28, 1923, and payable to the insured on April 28, 1943, if then living, but in the event of the death of the insured before that date, the policy was payable to the plaintiff the wife of the insured. Just before the death of the insured which occurred on April 13, 1924, an attempt was made to change the beneficiary in the policy from the plaintiff, the wife of the insured, to Blanch Clark, mother of the insured, to whom the policy was paid. The cause was heard by the Court with jury waived and at the close of the evidence, by agreement, was reported to the Law Court for final determination.

Judgment for the plaintiff.

The case fully appears in the opinion.

D. E. Hurley, for plaintiff.

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

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

PHILBROOK, J. This is an action at law, in assumpsit, to recover the amount due under the terms of an insurance policy issued by the defendant, and in which the plaintiff, now widow of the insured, was named as the beneficiary. After a jury waived hearing, by consent of the parties, the presiding justice reported the case to the law court for final determination.

The policy was written with express right of the insured to change the beneficiary, and to designate a new one "by filing written notice thereof at the home office of the company, accompanied by the policy for suitable indorsement. Such change shall take effect upon the indorsement of the same on the policy by the company and not before." The policy was dated April 28, 1923. On April 2, 1924, using a blank form furnished by a local agent of the company, but not printed on, nor attached to, the policy, the insured directed that his mother, Blanche M. Clark, was thereafter to be the beneficiary. This direction was delivered to the local agent, but the policy was not so delivered, and, in fact, the policy remained in the hands of this plaintiff, or in the hands of Fannie Lovell, mother of the plaintiff, until after the death of the insured.

The insured, Earl R. Clark, died April 13, 1924, and the proceeds of the policy were paid to his mother May 21, 1924. The plaintiff, claiming that no change of beneficiary was legally and properly made before the death of the insured, brings this action to recover the same proceeds.

In view of the positions taken by the parties, and the authorities cited by counsel, we deem it proper to briefly discuss the following propositions: I. To what class of life insurance does the policy involved belong? II. The form of action by which the plaintiff seeks to enforce her rights. III. The terms of the contract as to change of beneficiary. IV. Sufficient action on the part of the insured to effectuate such change. V. Waiver of such action by the insuring company.

I. Life insurance is known by different names, according to the nature of the terms and conditions of the different forms of contracts or policies. *Knott* v. *Security Mutual Life Ins. Co.*, 161 Mo. App.

579, 144 S. W. 178. We are here concerned with the distinguishing differences between assessment insurance policies and that class of policies known as old-line. In *Haydel* v. *Mutual Reserve Fund Life Ass'n* (*C. C.*) 98 F. 200, the court held that assessment insurance is where the benefit to be paid is dependent upon the collection of such assessments as may be necessary for paying the amounts insured. "In other words," said the court, "it is assessment insurance if payments to be made by the insured are not fixed—unalterably fixed—by the contract. On the contrary, an old-line policy is a contract where the amount to be paid by the insured is fixed, the premiums to be paid are unalterable, and the liability incurred by the defendant company is also fixed, definite, and unchangeable." This rule is in harmony with the decisions of many of our state courts, and may be safely declared to be settled law.

The policy was offered as Plaintiff's Exhibit 1, and admitted without objection. Although it was not printed as an exhibit, yet the declaration states that a copy thereof was annexed to, and made part of, the declaration, and such copy is so annexed. Apparently the parties, in making up the record, did not deem it necessary to increase the expense by printing the policy as an exhibit. From this copy it is plain that the contract of insurance was in the form of an old-line policy, so that the rights of the parties must be determined by application of the law governing old-line policy contracts. The reason for referring to this point is because counsel have cited many authorities where decisions have been rendered in cases which arose under assessment policies, most of which embody statutory provisions of the state from which they derive their charter, and hence are not pertinent to cases of old-line insurance. Moreover, where provisions of statute are to be read into an insurance policy, the statute, if of another state, must be proved, for it is well settled that the statutes of another state are to be proved as a matter of fact, and he who relies upon a foreign statute must prove it. The court has no authority to go outside the record and consider facts not in it, and this includes foreign statutes. *Franklin Motor Car Co.* v. *Hamilton*, 113 Me. 63, 92 A. 1001. In the case at bar the defendant company was chartered by the statutes of New York, but those statutes were not proved, and we have no right to presume that a New York statute is similar to any statute in our own state, nor to inject, or try to inject, the statutory law of New York into the decision of this case. We must

interpret the contract as we find it, and declare the rights of the parties in the light of that interpretation.

II. The form of action by which the plaintiff seeks to enforce her rights. As we have above stated, this is an action at law, and not a proceeding in equity, so that certain equitable rules invoked, and decisions rendered in equity suits, are not applicable to the decision of cases on the law side of the court. We are now referring especially to the doctrine that a court of equity will decree that to be done which ought to have been done. This equitable rule cannot be employed in actions at law. *Killion* v. *Modern Woodmen*, 202 Ill. App. 525, sustained by the Supreme Court on certiorari. It is doubtless settled law in this state that equitable estoppels may be interposed in an action at law (*Milliken* v. *Dockray*, 80 Me. 82, 13 A. 127, and cases there cited), but in the case at bar none of the elements of equitable estoppel exist. The rights of these parties, so long as the action continues to be an action at law, depend upon the contract, as guaranteed by its terms, and upon legal principles applicable thereto.

III. The terms of the contract as to change of beneficiary. Those terms expressly state that the beneficiary may be changed "by filing written notice thereof at the home office of the company, accompanied by the policy for suitable indorsement. Such change shall take effect upon the indorsement of the same on the policy by the company and not before." How can plainer language be used in a contract? The place where the indorsement must be made and the time when the indorsement would become effective are stipulated, yet it clearly appears from the record that the policy was either in the possession of the plaintiff, or her mother, Mrs. Fannie Lovell, from or before April 2, 1924, until after April 13, 1924; the latter date being that of the death of the insured, as we have just stated. It was therefore a physical impossibility for the indorsement to have been made by the company between those two dates in the manner and at the place designated by the policy. If the terms of the contract have any meaning whatever, it is plain that they have never even yet been complied with. In other words, the change by indorsement on the policy has not yet been made, and the terms of the contract are that the change would become effective when such indorsement has been made, in accordance with the terms of the contract, "and not before."

It is urged that, where the consent of the insurer is not expressly required in the policy, or by some statute, the trend of authority seems

to treat the indorsement required, in a clause similar to the one in this case, as a mere ministerial act, which, if the insured has done all he can do to perfect the change prior to his death, an equity court if the insurer does not object, will treat as done, or regard it as waived, even after the death of the insured, on the ground that it was a mere ministerial act for the benefit of the insurer. So far as we have been able to examine the authorities presented in support of this doctrine, they are all cases rising on the equity side of the court, and none appear to have arisen in an action at law.

Our attention is particularly called to *White* v. *White* (Sup.) 194 N. Y. S. 114, a case in which the original defendant, and the defendant in the case at bar, are one and the same insurance company. That case may be easily differentiated from the instant case. The White Case was begun as a suit at law, as the present case was begun, naming the insurance company as defendant. The company made a motion of interpleader, which was duly granted, substituting as defendant one Mamie White, wife of the decedent. A supplemental complaint was served, demanding judgment against this new defendant, and a supplemental answer was made thereto, demanding equitable relief. The court said that the granting of the order, and the supplemental pleadings, changed the nature of the action from one at law to an action in equity. The court then proceeded to say that "a far more liberal rule obtains," in cases of this character in an equity court, where it is sought "to do that which the insured apparently intended to have done." Had the defendant in the case at bar proceeded as it did in the White Case, then the decision in the latter case would be entitled to great weight in deciding the case before us. But it did not so proceed, evidently preferring to adhere to its defense at law wherein the equitable principle referred to does not obtain.

IV. The terms of the contract as to change of beneficiary. These terms have been already stated, and do not call for repetition. Our own court, speaking by Mr. Justice Deasy, in *Grand Lodge, A. O. U. W.* v. *Martin et. al.*, 118 Me. 409, 108 A. 355, said that a provision in a beneficiary certificate, prescribing that substitution of a new beneficiary must be made in the presence of a designated official, is a material and substantial requirement, without conformity to which, or waiver by the member during his lifetime, no substitution can be legally effected.

In *French* v. *Provident Life Assurance Society of New York*, 205 Mass. 424, 91 N. E. 577, that court, speaking by Mr. Justice Rugg, said:

> "The provisions of the present insurance contract plainly pointed out the way in which the beneficiary might be changed; they were clearly called to the attention of the insured, and the means were placed in her hands for complying with them. The signing of the request for such a change was, as she well knew, but one step, and that an indecisive one, in the process of substitution. Her failure to perform the other acts necessary to complete the designation of a new beneficiary rendered what she had done wholly unavailing. It was an incomplete attempt looking in that direction, which falls so far short of complying with the terms of the contract as to be of no effect. The express stipulation was that the time when a change of beneficiary would go into effect was its indorsement upon the policy.
>
> "A mere intention on the part of the member to change the beneficiary, not acted upon in the manner required by the constitution of the association during the lifetime of the member, is ineffectual, and the first beneficiary, on the death of the member without the required steps having been taken to effect a change, acquires a vested right." *Wandell* v. *Mystic Toilers*, 130 Iowa, 639, 105 N. W. 448.

In the case at bar, the terms of the contract were not complied with before this suit was begun, and have not yet been performed as to place, manner, and time of performance.

V. Sufficient action on the part of the insured to effectuate the change of beneficiary. It is insisted by the defendant that, if the insured does all that he is required to do, and all that it is in his power to do, and dies, equity will declare the change complete. In 2 Joyce on Insurance, 751, it is held, as a general rule, that, if the assured has taken all necessary steps, and otherwise done all in his power to effect a change of beneficiary, and all that remains to be done is some purely ministerial duty on the part of the officers of the society, then the change will be regarded as complete.

Here again we must not overlook the fact that this action is not on the equity side of the court. But, even if we were, it is plain that the insured, in his lifetime, had not done all in his power to effect a change of beneficiary. The wife, here plaintiff, never denied her husband, in his lifetime, the privilege of physical possession of the policy so that he might send it to the New York office of the company. Indeed, she never denied that privilege to any one until death has given her vested rights therein, and then her denial was to officious persons who were hostile to those vested rights. No fraud on her part appears. Claims of fraud and performance of all necessary steps, by the insured, are not sustained by the record.

VI. Waiver of action by the insuring company. It is claimed by the defendant that the procedure and rules relating to change of beneficiary are intended only for the benefit of the company, and may therefore be waived by it; that it did in fact waive the requirement of indorsement of change of beneficiary on the policy when it paid the proceeds thereof to the mother of the insured. If we concede the rights of the company to waive its own rights, yet it would be a strange doctrine which would hold that the company could destroy vested rights of a third person by waiver of any right which the company might claim to possess.

As we have already seen (*Wandall* v. *Mystic Toilers*), supra, under the record in this case, this plaintiff had obtained a vested right in the proceeds of the policy at the death of her husband, and the mandate must be

Judgment for plaintiff for the sum named in the policy, and interest thereon from date of writ.

WILLIAM H. MILNER

vs.

DENNIS HARE.

Knox. Opinion December 27, 1926.

The essential elements of civil liability for perjury under R. S. Chap. 87, Sec. 159 are (1) a judgment obtained against a party (2) by the perjury of a witness (3) introduced at the trial by the adverse party.

A declaration that contains no allegation satisfying the third requirement is demurrable.

In the instant case for aught that appears by such declaration the perjured witness, though he were the adverse party in the former trial, may have been introduced at that trial by the present plaintiff.

In such case a special demurrer was not necessary. Such a defect is a matter of substance. The declaration is silent in a matter that is of the essence of liability.

On exceptions by plaintiff. An action to recover damages under R. S. Chap. 87, Sec. 159, for perjury by defendant in a former action between same parties. At return term defendant filed a general demurrer which was joined and sustained by the presiding justice and plaintiff excepted. Exceptions overruled. Demurrer sustained.

The case fully appears in the opinion.

E. W. Pike, for plaintiff.

R. I. Thompson, for defendant.

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

DEASY, J. Action brought under R. S. Chap. 87, Sec. 159 by a defeated litigant, in a case heard by a referee, against his successful adversary, to recover damages caused by the alleged perjury of the latter. A demurrer to the declaration was sustained by the Presiding Justice. The Plaintiff excepts.

The statute in question reads thus:—"When a judgment has been obtained against a party by the perjury of a witness introduced at the trial by the adverse party, the injured party may bring an action on the case within three years after such judgment or after final judgment in any proceedings for a review thereof, against such adverse party, or any perjured witness, or confederate in the perjury, to recover the damages sustained by him, by reason of such perjury; and the judgment in the former action is no bar thereto."

The defendant contends that, within the purview of the statute, a party whose testimony is introduced by himself or his counsel is not a witness, or at all events is not introduced as such. The plaintiff contends that the contrary is true.

The defendant maintains that a mere witness is civilly responsible for the consequences of his perjury, but that a witness who is also a party is not so responsible; and he says further that under the statute a party is accountable for the perjury of his witnesses but not for his own. The plaintiff replies that the Legislature did not intend to make distinctions so unreasonable and illogical.

The defendant fears that the plaintiff's construction will cause interminable litigation. To this it is rejoined that the very little litigation that this statute has caused in the sixty-two years of its existence has been speedily terminated; and that the statute has been and will be very seldom invoked for the reason that there are other and much better legal remedies.

The defendant cites some cases. The plaintiff replies that the cases cited are inapplicable, inasmuch as they do not construe the Maine Statute nor any statute.

Another theory advanced on one side, and denied on the other, is that the word "trial" in the statute, read in the light of the original enactment (Act of 1864 Chap. 253) means a trial in court and not a hearing by a referee.

We have thus stated the contentions of the parties. But the case does not require a decision of these controversies. For another reason the ruling of the Presiding Justice must be sustained.

Perjury is a heinous offence against the state and against the administration of justice. For this offence there are provided the drastic penalties of the criminal law. Redress for private wrongs wrought by perjury is afforded by motions for new trial and petitions for review. The statute above quoted creates a further civil remedy.

But he who seeks to avail himself of such statute, if he would guard against the consequences of a demurrer, must state a case coming within the terms of the statute. "The case must be brought within its (the statutes') provisions by alleging the requisite facts" *Peru* vs. *Barrett* 100 Me. 215, *Karahalies* vs. *Dukais* 108 Me. 530; 36 Cyc. 1237.

The essential elements of liability under the statute are (1) a judgment obtained against a party (2) by the perjury of a witness (3) introduced at the trial by the adverse party.

The declaration contains no direct or even indirect allegation that satisfies the third requirement.

For ought that appears the defendant may have been called to the stand by the plaintiff. This procedure is authorized by our statute (R. S. Chap. 87, Secs. 112 and 116) and is not infrequently resorted to.

In such case perjury is none the less criminal, but the statute above quoted creating the civil remedy does not apply.

The plaintiff might have moved to amend his declaration upon payment of costs. R. S. Chap. 87, Sec. 36. But the unamended declaration was demurrable.

The demurrer is general. A special demurrer was not necessary. The defect is a matter not of mere form but of substance. The declaration is silent in a matter that is of the essence of liability.

Exceptions overruled.
Demurrer sustained.

ALDERIC RICHARDS, JR., ADMR.

vs.

JOSEPH E. NEAULT.

Cumberland. Opinion December 27, 1926.

In an action for personal injuries to plaintiff's intestate, brought for the benefit of a minor child, evidence tending to show intoxication of driver of car in which plaintiff's intestate was riding, if known to her when accepting an invitation to ride, is admissible as bearing on the question of her contributory negligence if the jury find that his intoxication contributed to the accident.

Exceptions to any portion of the charge of the presiding justice must be taken before the jury retires, and this rule is not waived or suspended because of the disability of a minor.

In the instant case the record of the driver's acquittal in a criminal proceeding upon a charge involving his condition as to intoxication at the time of the accident not admissible.

Upon the evidence in this case, while it is susceptible of interpretations involving the defendant's negligence, this Court can not say that the jury was clearly wrong in accepting the version of the defendant as to how the accident occurred and that he did all that a reasonably prudent man would have done to avoid it.

On exceptions and general motion by plaintiff. An action for the benefit of a minor daughter of Albina Richard, deceased, to recover damages for personal injuries suffered by the deceased which resulted in her death, caused by a collision between an automobile in which deceased was a passenger, driven by one Auguste Lavoie, and an automobile owned and operated by the defendant in Brunswick November 22, 1925.

Plaintiff alleged negligence on the part of defendant and contributory negligence on the part of intestate was urged by defendant. Exceptions were taken to the admission and exclusion of certain testimony, and a verdict for defendant was rendered and plaintiff filed a general motion for a new trial. Exceptions and motion overruled.

The case is stated in the opinion.

Ellis L. Aldrich, for plaintiff.
Ralph M. Ingalls and S. Arthur Paul, for defendant.

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

WILSON, C. J. An action under secs. 9 and 10, Chap. 92, R. S., to recover for injuries resulting in the immediate death of the plaintiff's intestate, the injuries being received in an automobile collision alleged to have been due to the negligence of the defendant. The plaintiff's intestate was his wife who is also survived by a minor child, for whose benefit this action is alleged to have been brought.

The defendant pleaded in defense the contributory negligence of the deceased. The jury returned a verdict for the defendant. The case is before this Court on exceptions by the plaintiff to the admission and exclusion of certain evidence and on a general motion for a new trial.

The exceptions must be overruled. Evidence tending to show the intoxication of the driver of the car, in which plaintiff's intestate was riding as a passenger, if known to her before accepting the invitation to ride, was admissible as bearing on the question of her contributory negligence in the event of the jury finding that the driver's intoxication in any degree contributed to the accident. Its weight was for the jury.

The record of the driver's acquittal, however, in a criminal proceeding upon a charge involving his condition as to intoxication at the time of the collision was not admissible in a civil proceeding between third parties. Greenleaf Ev. Vol. 1., Sec. 537.

Counsel for the plaintiff, however, also contends that the presiding Justice at the trial below erred in his instruction to the jury, in that he submitted to them the question of fact as to whether the driver of the car in which the plaintiff's intestate was riding was to her knowledge intoxicated, when she and her husband accepted the invitation to ride, which was tantamount to an instruction that there was evidence on which such a finding could rest, when, in fact, and in law, the evidence warranted no such finding and the jury should have been instructed that there was no evidence to support such a finding; and that he further instructed the jury, that, "if the mother knew that the driver was in such a condition, that it was not safe for him to drive the car, it would have been negligence for her to entrust the

lives of herself and her baby to him; that if she knew it, the defense of contributory negligence was made out"; but failed to instruct the jury that it would not be contributory negligence unless the negligence of the driver also contributed to the accident.

No exceptions were taken to any portion of the charge, nor were any requests made for additional instructions by counsel at the trial covering these points. Counsel, however, invokes the doctrine that inasmuch as this action is brought for the benefit of a minor, this Court will not permit the interests of such minor to be prejudiced by errors of the trial court, even though counsel failed to properly safeguard and protect them in accordance with the rules of the Court or the law of procedure.

While the courts, in all proceedings in which a minor is a party, by reason of his presumed disability, jealously guards his rights, *McClellan* v. *McClellan*, 65 Me., 508; Ann. Cases 1913B 440 Note, yet where substantial rights are not clearly affected, and he is represented by a guardian *ad litem* and by counsel, whose good faith is not questioned, the appellate courts will not reverse verdicts at law, simply because through some oversight of counsel, or inadvertent omission of the trial court the interests of a minor may have been adversely affected, unless the question is raised in the court below. *Byrnes* v. *Butte Brewing Co.*, 44 Mont., 328; *Tripp* v. *Gifford*, 155 Mass., 109.

Litigation involving minors might be interminably prolonged if counsel in their behalf may sit silent at the trial below, and in case the trial court does not secure an errorless trial, take advantage before the appellate court of every error of commission or omission and secure a reversal of a verdict in case it is against the minor.

However, we do not think there are any grounds for applying the rule invoked by counsel to a case brought under the statute here involved. While a minor is a beneficiary, the action, by the terms of the statute, is brought by the personal representative of the deceased. A personal representative is in all cases qualified to prosecute and defend suits involving an estate or its beneficiaries. No question can arise as to his disability or his capacity to properly safeguard and protect the estate or the interests of those for whose benefit an action is brought. There is, therefore, no occasion, where a personal representative prosecutes or defends, for the Court to suspend its rules designed to secure orderly procedure and terminate litigation, because the interests of a minor who is not a party may be adversely

affected as an heir, or beneficiary under a will, or even under the statute here involved.

The only question left for consideration, therefore, is whether the motion for a new trial should be sustained. The jury were clearly instructed that, while the burden was on the plaintiff to prove the accident was due to the defendant's negligence, the burden was on the defendant to prove contributory negligence on the part of the plaintiff's intestate and that any negligence of the driver could not be imputed to her. It is inconceivable, we think, upon the evidence that the jury could have found that any negligence of the plaintiff's intestate contributed to the accident, which the defendant now concedes. The verdict, therefore, must have been based upon the ground that the plaintiff did not sustain the burden of proving negligence on the part of the defendant.

The injuries resulted from a collision between two automobiles in Brunswick about 10 o'clock at night at two intersecting streets in a built-up portion of the town. The car in which the deceased was riding with her husband and little child as passengers driven by one Lavois, and which we shall hereafter refer to as the Lavois car, was proceeding along Union Street, which runs approximatey north and south and crosses at right angles Pleasant Street, the main thoroughfare between Brunswick and Portland, which runs approximately east and west. The Lavois car was going north and the defendant's car was proceeding west toward Portland.

At these intersecting streets the defendant's car, therefore, under the statute, had the right of way over the Lavois car. While there was, of course, a conflict of testimony as to the respective speed of the two cars at the time of the collision, the defendant's car was, according to his own testimony, violating the law as to speed in the built-up portions of a town.

However, each saw the other approaching and, notwithstanding each had a right to presume the other would obey the law, each was bound to exercise that degree of care that a reasonably prudent man would use under like circumstances to avoid injuring the other, and to exercise that degree of care under the circumstances as they arose.

Each has a different version as to how the accident occurred, and, according to their respective versions, the other party was at fault. Lavois, corroborated by the other witnesses for the plaintiff, testified that he was proceeding slowly along Union Street, and as he

approached Pleasant Street, he slowed down to permit another car to pass along Pleasant Street, and seeing the defendant's car approximately one hundred and seventy-five feet distant, started up to cross Pleasant Street, believing he had sufficient time to cross, but, owing to the rapid rate, estimated at thirty to thirty-five miles per hour, at which the defendant's car was being driven, before the Lavois car had reached the other side, it was struck by the defendant's car and turned completely over, causing the injuries which resulted in the death of the plaintiff's intestate.

The defendant and his witnesses, however, say that the Lavois car was being driven at an excessive rate of speed along Union Street, while the defendant's car was proceeding at a reasonable rate, viz., eighteen to twenty miles per hour, and as he approached Union Street he saw the Lavois car coming on Union Street, and expected the driver would stop or slow down and give him the right of way, and it was not until he was so near the point of collision that he could not avoid it, that he first realized that the Lavois car was not going to give him the right of way, but was attempting to cross Pleasant Street in front of him.

To accept the version of the plaintiff and his witnesses *in toto* involves the acceptance of the improbable, viz., that with the Lavois car proceeding slowly, as Lavois says he was, across Pleasant Street and in full view of the defendant, the defendant, with abundant room to turn to the left where there was an unobstructed passage, as no cars were approaching from the opposite direction, and with no apparent effort to avoid the Lavois car, and when the Lavois car had nearly reached the other side of Pleasant Street, drove his car at thirty to thirty-five miles per hour directly into the Lavois car. Since, according to the plaintiff's witnesses, the defendant's car was travelling at three times the rate of the Lavois car, it must have become apparent to the defendant when he was fifty to seventy-five feet away that the Lavois car was about to cross Pleasant Avenue without stopping. Upon the plaintiff's version, it was not a case where the cars might be said to have arrived at the same point at the same time, but of one car having nearly crossed the street and the other deliberately running into it. His explanation involves such an absolute indifference on the part of the defendant, not only to the safety of whoever might be in the Lavois car, but of the occupants of his own car, that it may well have seemed to the jury improbable.

On the other hand, if Lavois was proceeding at a rapid rate of speed as claimed by the defendant, or even if at no greater rate than the defendant's car according to the defendant's witnesses, it would not be unreasonable for the jury to conclude, as the defendant testified, that he did not realize that the Lavois car was not going to stop and give him the right of way until he was so near the point of collision that he could not avoid it, that he turned his car to the left as far as he could and put on his brakes; that he was not guilty of negligence in assuming that Lavois would give him the right of way and that his exceeding the statutory limit of speed in no way contributed to the accident.

The jury evidently accepted the version of the defendant and his witnesses, and while it is true that the evidence is susceptible of other constructions involving the negligence of the defendant, we are unable to say that the jury was so clearly wrong in accepting the defendant's version, and in finding that the plaintiff failed to sustain the burden of showing that the defendant was at fault, as to require the verdict to be disturbed.

Exceptions and motion overruled.

S. D. WARREN COMPANY

vs.

MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion December 30, 1926.

A complaint against proposed changes in freight rates filed under sec. 2 of chap. 44 P. L., 1917 is seasonably filed if a hearing thereon can be fixed after reasonable notice to all parties within thirty days after such proposed changes become effective.

While the Public Utilities Commission possesses only statutory powers, if it has jurisdiction over the subject matter, and keeps within the bounds marked out by the statutes, its orders and decrees unreversed or unmodified in the manner provided by the statutes have the effect of judgments, and can not be attacked in another proceeding

The form of the order of the Public Utilities Commission involved in this case is sufficient. The provision in chapter 55, sec. 47, R. S. as to fixing a time for an order to become effective is permissive and not mandatory. Without a definite time being fixed, an order becomes effective upon its service upon the utility.

The order to refund in the case at bar must be construed to apply only to sums collected prior to the date of the order. As to all sums unlawfully collected after the date of the order, the plaintiff has a remedy at common law.

It is not essential in case of a Public Utility where an individual is obliged to pay to obtain the service that it be paid under protest; or a demand be made before action is brought.

On report. An action to recover the difference between freight rates paid on shipments of pulp wood by plaintiff and those ordered by the Public Utilities Commission. The case was reported to the Law Court on an agreed statement of facts.

Judgment for the plaintiff.

The case is fully stated in the opinion.

Johnson, Clapp, Ives & Knight and Drummond & Drummond, for plaintiff.

Charles H. Blatchford, for defendant.

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

WILSON, C. J. An action to recover moneys collected of the plaintiff by the defendant, a common carrier, for the transportation of pulpwood, which the plaintiff contends were in part ordered refunded by the Public Utilities Commission under section 2 of chapter 44, P. L. 1917, and in part were unlawfully collected, being in excess of the maximum rates established by the commission as reasonable for such service.

On January 4, 1924, the defendant company under section 28, chapter 55, R. S., as amended (P. L. 1917 c. 135), filed with the Public Utilities Commission a schedule of proposed changes in its freight rates, including those for the transportation of pulpwood, to become effective February 5, 1924. On February 15th, following, the plaintiff filed a complaint with the commission, alleging that the proposed rates were unreasonable, and on the same day the commission issued its order for a public hearing on the plaintiff's complaint on the 28th day of February, of which hearing due notice was given to all parties interested.

At the hearing on February 28, the defendant, by a motion to dismiss, raised the question of the jurisdiction or authority of the commission to act on the complaint, upon the ground that the complaint was not filed in accordance with chapter 44, P. L. 1917, nor signed by ten persons as required by section 43, c. 55, R. S. The commission overruled the motion and held that the complaint was seasonably filed under section 2 of chapter 44, P. L. 1917, and the hearing was continued until May 6, 1924, when the defendant again renewed its motion to dismiss for lack of jurisdiction, which the commission overruled, and proceeded to hear the parties, and on August 4, 1924, filed its findings: That the proposed rates were unreasonable, in that they were excessive, and fixing a maximum rate that might thereafter be lawfully charged for the transportation of pulpwood within the state, and also ordering the defendant company to refund within six months all sums collected by it of the plaintiff for such service in excess of the maximum rates established by the commission.

In September, 1924, on a petition of the defendant for a rehearing, a hearing was ordered, and the petition dismissed, and the defendant was ordered to file a new schedule of rates to conform to the order of the commission issued on August 4, 1924. Exceptions were taken to the rulings of the commission, but were not presented within the time prescribed by its rule, and were never perfected.

The plaintiff now contends that the order of August 4th is final and binding on the parties, and cannot be attacked collaterally in this action, while the defendant contends that the commission had no jurisdiction over the complaint; that, in ordering a hearing thereon, it acted without authority, and its final order was therefore a nullity; and, further, that the order as issued was not in the form required by the statute, and was of no effect, and the sums collected by it on the shipments in question were the sums legally established by its schedule filed on January 4, 1924.

The case is reported to this court on an agreed statement and the pleadings, which include a count for moneys had and received.

It is true that the Public Utilities Commission possesses only statutory powers. If it exceeds those powers, or, though it has jurisdiction over the subject-matter, proceeds in a manner unauthorized by the statute, or otherwise exceeds its authority, its decrees are of no validity, *Spofford* v. *B. & B. Railroad*, 66 Me. 26, and may be attacked collaterally. If, however, it keeps within the bounds marked out by the Legislature, its orders, unreversed or unmodified in the manner provided by the statutes, have the effect of judgments, and cannot be attacked in another proceeding, because of some alleged error of law, which might have been corrected on proper application to the court of last resort under the statute. *Hamilton* v. *Water Co.*, 121 Me. 422, 117 A. 582; *Public Serv. Com.* v. *Indianapolis*, 193 Ind. 37, 137 N. E. 705; *Ala. Water Co.*, v. *Attalla*, 211 Ala. 301, 100 So. 490.

It is urged by the counsel for the defendant that to authorize the commission to proceed under section 2 of chapter 44, P. L. 1917, a complaint must be filed before the rates have become effective, otherwise the investigation would be, not of proposed rates, but of effective rates, which can only be done under sections 43–50 of chapter 55, R. S.; and he bases his contention on the ground that the title of the act contained in chapter 44, P. L. 1917, indicates that it relates only to "proposed rates," and that the hearing authorized under section 2 is for the purpose of investigating the propriety of "proposed change or changes."

But the terms of the act clearly indicate, we think, that with respect to complaints against changes in rates for all other public service, except for the transportation of freight, and changes in freight rates, the Legislature established two entirely distinct methods of procedure:

> "Under section 1, "whenever the Public Utilities Commission receives notice of any change or changes proposed to be made in any schedule of rates filed with said commission * * * it shall have power at any time before the effective date of such change or changes, either upon complaint or upon its own motion," etc. (changes affecting the transportation of freight being expressly excepted); while section 2 provides that, "whenever the Public Utilities Commission receives notice of any change or changes proposed to be made in any schedule * * * affecting the transportation of freight, * * * said commission shall have power at any time within thirty days after the effective date of such change or changes, either upon complaint or upon its own motion, * * * to * * * make investigation * * * of such proposed change or changes."

The legislative reason for distinguishing between freight rates and other public service rates is immaterial; but, if for any reason it is deemed advisable that proposed changes in certain utility rates, if complained against, should not be collected until they have been determined to be reasonable by the Utilities Commission, than a complaint must be filed and a hearing and investigation had, before they become effective, which may involve the power of suspension pending investigation. On the other hand, if for any reason it is deemed proper that proposed changes in certain rates would not be suspended upon complaint, but should become effective and be collected pending investigation as to their reasonableness, a provision for refunding any excess collected over what the Utilities Commission may determine to be the maximum reasonable rate for such service seems both logical and appropriate; but there can be no occasion, and no sufficient reason has been suggested, for the complaint being filed in such cases before the rates become effective, if it is filed and a hearing held within a reasonable time following, which the Legilature has fixed in this instance as 30 days. It is also strongly indicative of the legislative intent that it provided in express terms for the filing of a complaint before the changes become effective under section 1, when suspension is authorized, and omitted such a provision and left it to implication, if required, in section 2, where the proceedings are based

on the assumption that the rates may become effective before the hearing and investigation.

That chapter 44 by its title relates to "proposed" changes is of no weight against the express provisions of the act itself. The investigation also by the terms of section 2 relates to the "proposed" change or changes, the implication, therefore, might be said to be just as strong that the hearing and investigation must be prior to the "effective date" as that the complaint must be filed before the roposed change became effective; yet no one would urge construing the language of section 2 to require the hearing and investigation to precede the effective date of the proposed changes. To require the complaint and notice of hearing under section 2 to precede the "effective date" would be reading into the statute something that is neither expressed or implied.

As to the form of the order issued by the commission after the hearing and investigation, we think it was sufficient under the statute. In some instances, conditions might warrant the fixing of a future date on which an order establishing the maximum rates that might be charged by a utility should become effective. We construe the provision in section 47, c. 55, R. S., for the fixing of a date on which its orders shall become effective as permissive, and not mandatory. No limit is fixed. It is left to the discretion of the commission. Without a definite date being fixed, it becomes effective upon the signing of such order and its service on the utility. In this case, the defendant was permitted to file a new schedule complying with the order of the commission, to become effective in 3 days, instead of the 30 provided in section 28, c. 55, R. S., as amended, if the defendant desired to increase its rates from those obtaining on January 4, 1924, to the maximum permitted by the commission. In such a case the commission may have deemed it unnecessary to postpone the date on which its order should become effective. A "proper" order under the statute is not an order in any prescribed form, but one appropriate to the situation and to carry out the findings of the commission.

The order to refund, however, must be construed as applying only to sums collected under its schedules in effect prior to August 4, 1924, the date of the order. It is to persons from whom sums "have been collected" that the statute applies, and to whom by the order of the commission the refund is to be made. The commission will not assume that a utility will not comply with its order, if, indeed, it can

under the statute order refunded money that may be collected in the future in excess of such maximum rates as it may establish. *Baer Bros. v. Denver & R. G. R. R.*, 233 U. S. 479, 485, 34 S. Ct. 641, 58 L. Ed. 1055. As to all sums unlawfully collected after August 4th, the plaintiff has its remedy at common law.

As to the sums collected prior to August 4, 1924, in excess of the maximum rate established by the commission, therefore, the plaintiff is entitled to recover in this action by virtue of the order to refund under section 2 of chapter 44, P. L. 1917; as to the sums collected after August 4th, in excess of the lawful rates for such service, or, as claimed in the writ, in excess of the maximum rates established, the defendant is liable as for money had and received. *Mitchell Coal Co.* v. *Penn. R. R. Co.*, 230 U. S. 247, 257, 33 S. Ct. 916, 57 L. Ed. 1472; *Southern Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, 38 S. Ct. 186, 62 L. Ed. 451.

It is not essential, in case of money collected by a public utility, where the individual is obliged to pay to obtain the service, that it be paid under protest or a demand be made before suit. *Boston* v. *Edison Co.*, 242 *Mass.* 305, 310, 136 N. E. 113; *Clough* v. *B. & M. R. R.*, 77 N. H. 222, 254, 90 A. 863; *Carew* v. *Rutherford*, 106 Mass. 12, 8 Am. Rep. 287.

The plaintiff is also entitled to receive interest on the sums recovered. *Hall* v. *Huckins*, 41 Me. 574, 580; *Lynch* v. *De Viar*, 3 Johns. Cas. (N. Y.) 310; *Fletcher* v. *Belfast*, 77 Me. 334, 337. On the sums collected prior to August 4, 1924, the commission ordered them refunded within six months. Interest on such sums will therefore run from February 5, 1925. On the sums collected after August 4, 1924, in excess of the maximum rates fixed by the commission, interest will run from the date of collection. *Fletcher* v. *Belfast*, supra. The plaintiff is therefore entitled, according to the claim in its writ, except for slight error in computation, to a judgment for $551.78, with interest on $250.82 from February 5, 1925, to date of judgment, and on the several sums that make up the balance from the date of payment to date of judgment, interest to be computed by the clerk.

So ordered.

JAMES A. CROSSMAN.

vs.

EDWARD W. MORPHY.

Androscoggin. Opinion January 20, 1927.

Upon the plaintiff rests the burden of establishing the truth of his case by the preponderance of the evidence.

In the instant case the plaintiff has failed to sustain the burden of proof, and, having failed in this, his cause must fall.

On report. An action in assumpsit to recover $1949.51 which the plaintiff claims he overpaid to defendant by reason of an error unrecognized by each in the purchase by plaintiff from defendant of capital stock owned by him in a corporation all of the outstanding shares of capital stock of which was owned by them in equal amounts. Plaintiff contended that in an inventory and appraisal of the assets of the corporation for the purpose of determining the value of the capital stock the appraisers had placed upon shoes "in process" of manufacture the same value at which completed shoes were taken, while defendant claimed such inventory and appraisal were not to be conclusive on the parties, but rather for the purpose of affording bases for proposals, each to the other, to buy or sell his respective holdings. After the evidence was taken out before a jury, by agreement of the parties, the cause was reported to the Law Court. Judgment for the defendant.

The case fully appears in the opinion.

Frank A. Morey, for plaintiff.

William B. Skelton, for defendant.

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

DUNN, J. In this action the plaintiff seeks to recover the sum of $1949.51 which he claims to have overpaid the defendant in con-

sequence of the error, then mutually unrecognized by them, that affected the purchase price in the capital stock transaction they had.

These litigants once owned in equal separate holdings, all the authorized and outstanding shares of a shoemaking corporation in Lewiston, except one share held by the third corporate director, of which share each major stockholder stood to and did regain the title to one-half.

One of the large stockholders said that he was desirous to sell all the stock and interest that he had to the other, or to buy all that other's. And the other replied that buying or selling there would be.

What was the fair worth of a share? The balance sheet of the company reflected certain accounts receivable at face value which at this time seemed undeserving to be rated thus. The ratings were changed, but matters different yet needed adjusting. So it was agreed to inventory and appraise all the remaining tangible assets of the concern and to cause its affairs to be audited.

When the appraisal and audit had been perfected, the defendant proposed in the alternative (1) to sell to the plaintiff; (2) to buy from the plaintiff—naming in each instance like price. The plaintiff chose to buy, and bought.

One day about three months later, the buyer insisted it had come to his notice since the purchase that the appraisers had valued shoes, but in the process of making, at only the same discount from selling price as would be applicable in the case of completed shoes, instead of the higher deduction previously fixed by the parties, wherefore the book value of the capital stock became excessively larger, and for the purchased shares there was paid and received as supposed consideration, in reciprocal ignorance on the part of buyer and seller of the appraisal inaccuracy, and at variance with the underlying agreement between them, the amount of money in controversy.

The seller said otherwise, and the plaintiff brought suit.

Plaintiff has the burden of establishing the truth of his case by the preponderance of the evidence. Witnesses, to be sure, should be weighed and not counted. The testimony of a single witness, and what it rationally implies, may carry conviction to the mind of the trier of facts more convincingly, more conclusively, than contrary evidence in greater numerical volume. Not so here.

The taking of the inventory and the making of the appraisal of the shoes in process was supervised by the plaintiff himself. Of the other

persons who had to do therewith, none while on the stand was asked whether he had been instructed, as, on the plaintiff's contention, it would have been consistent for the witness to have been, nor was such inquiry made of him who checked the appraisal figures, nor of the representative of the auditing firm, and what perhaps is of increased significance, the testimony of one disinterested witness is uncontradicted that the plaintiff paused in reading the auditor's report, and questioned touching the valuation on "in-process" shoes. The auditor answered, in substance, 20% from the total shoes of all kinds, without detail and without reference to the stage of manufacture; whereon the plaintiff rejoined, 'It is satisfactory to me.' And then the defendant spoke similarly.

Moreover, the testimony of the defendant, and the written offers which he submitted, not to pause for other things probative that can be permitted to remain in the background, negative that the inventory and apprasial were normally to evaluate the corporation stock, and tend to show the purpose thereof to have been that of affording bases for the making of proposals to buy or sell the respective holdings at market value.

The plaintiff has failed to sustain the burden of proof, and, having failed in this, his cause must fall.

On the authority of the report, the mandate will be

Judgment for defendant.

PAULAUSKIS' CASE.

Oxford. Opinion January 24, 1927.

The findings of the Industrial Accident Commission on questions of fact are final if supported by some evidence, or based upon rational inferences drawn from proven facts, but such findings when based upon mere conjecture, surmise or probability, are erroneous.

From the agreed statement of facts in the case at bar there is no evidence from which the Commissioner was warranted in finding that Congress Street was other than a public way; the accident having occurred upon a public way, when the employee was prosecuting no duty incumbent upon him by reason of his employment, is not compensable because not arising out of his employment, and not occurring in the course of his employment.

On appeal from an affirming decree awarding compensation under the Workmen's Compensation Act. A petition of Amiele Paulauskis as dependent widow of Antanas Paulauskis who was killed on January 12, 1925, by being hit by a railroad train at a crossing on a public street in Rumford while on his way to his work for the Oxford Paper Company. Upon an agreed statement of facts compensation was awarded and an appeal taken. Appeal sustained. Decree reversed.

The case is sufficiently stated in the opinion.

Peter M. MacDonald, for petitioner.

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

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

BARNES, J. This is an appeal by the employer from a decree sustaining and affirming the finding of the associate legal member of the Industrial Accident Commission, hereafter called the Commissioner, awarding compensation.

Petition was filed by the widow of Antanas Paulauskis, as his dependant. Upon hearing the Commissioner was furnished with a

statement of the facts upon which he was to decide the right of the petitioner to compensation.

Where evidence is presented, "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. 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."

Johnson v. *Highway Commission*, 125 Me., 443. But this case was not tried upon evidence produced before the commission: the facts of the elements essential to a decision were agreed upon by counsel for petitioner and employer.

From the statement of facts agreed upon and from the record in the case we learn that about the hour of 5–30 in the afternoon of Jan. 12, 1925, the employee, proceeding along a public way in the village of Rumford to his place of employmet, and approximately thirty minutes before his employment was to begin, at a point about 125 feet distant from the door of the mill of his employment was hit by an engine or car of a railroad company, upon its crossing of the public way, and killed.

It is common knowledge that Congress Street in the village of Rumford is one of the principal public ways of that town.

On a blue print submitted with the record of this case that portion of Congress Street which terminates at the door of the mill where the deceased workman was to have been employed on the day of his injury, is designated "Congress Street Extension," but the fact, as agreed, is that the workman was killed while "Walking to the place of employment on Congress Street," and that "Congress Street is a public highway laid out and accepted by the Town of Rumford in March, 1913."

Remarking upon the fact that this portion of Congress Street was fenced on either margin; that its major use was by employees of the respondent company, and that it was "not conceivably in any general use," the Commissioner classes it as "a publicly maintained private way"; finds that the workman, when the accident occurred, "was within the zone, environment and hazards of the scene of his labors", and rules that compensation is due.

But the conclusion that Congress Street is less or other than a public way is not sustained.

"The Industrial Accident Commission while primarily an administrative body exercises certain judicial functions. In the exercise of these functions it acts judicially. While it determines finally the trustworthiness and weight of testimony its findings must be based on evidence. This would be true even if there were no express statutory mandate. Moreover the statute requires that the merits of the controversy be decided "from the evidence thus furnished", R. S., Chap. 50, Sec. 34, now Chap. 238, Sec. 34, P. L. 1919. Gauthier's case, 120 Me., 73.

When the facts attendant upon the accident are assembled and stated, inferences, as distinguished from mere conjecture, surmise or probability, may be drawn by the Commissioner; but a finding by him cannot stand unless the facts thus found are such as to entitle him reasonably to infer his conclusion from them.

From the facts agreed upon there is no evidence from which the Commissioner was warranted in finding that Congress Street was other than a public way, and, this accident occurring therein, the question for settlement is, did it arise out of and in the course of the workman's employment?

From the reasoning of decisions of unquestioned standing it may be deduced that the words "out of" refer to the origin, or cause of the accident, and the words "in the course of" to the time, place and circumstances under which it occurred, and we hold that an accident occurring upon a public way, when the employee is prosecuting no duty incumbent upon him by reason of his employment, is not compensable because not arising out of his employment, and not occurring in the course of his employment. For decisions from other jurisdictions holding as above see *Reed* v. *Bliss* et. al., 225 Mich., 164 (1923) and cases cited therein and appended thereto, and decisions of this Court, Westman's Case, 118 Me., 133, Mailman's Case, 118 Me., 180, Fogg's Case, 125 Me., 168 and *Johnson* v. *Highway Commission*, 125 Me., 443.

It is incorporated in the agreed statement of facts that petitioner is an alien residing in a foreign country. But, no argument having been made upon the point it must be deemed to have been waived.

The mandate will accordingly be

Appeal sustained.
Decree reversed.

ANSEL B. ROWE

vs.

THEODORE KERR ET TR.

Kennebec. Opinion January 27, 1927.

It is not within the discretion of the court to direct a verdict for either party, when the case shows material and admissible evidence upon which a verdict for the other party may be based.

The declaration in this case was conceived to be in deceit, and the defendant clearly understood that deceit was the issue, and the case was tried upon that issue, and should not be dismissed, or the verdict disturbed because of omissions in the declaration.

Upon the evidence in this case it is not for the court to say the damages are excessive.

On exception and motion for new trial by defendant. An action for deceit in a real estate transaction. At the conclusion of the evidence counsel for defendant moved for a directed verdict on the ground that the plaintiff had not made out a case of deceit, to a denial of which defendant excepted. A verdict of $1975.00 was rendered for the plaintiff and defendant filed a general motion for a new trial. Motion and exception overruled.

The case is stated in the opinion.

Robert A. Cony, for plaintiff.

Ralph W. Ferris, for defendant.

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

BARNES, J. This is an action for deceit in selling a farm. Verdict was for the plaintiff in the sum of $1975.00, and the case comes up on general motion and defendant's exception to the refusal of the judge to direct a verdict, after the evidence was in. Upon the ex-

ception; it is not within the discretion of the judge to direct a verdict for either party, when the case shows material and admissible evidence upon which a verdict for the other party may be based. *Wellington* v. *Corinna*, 104 Me., 252.

On the motion that the verdict be overthrown because against evidence and the weight of evidence, practically the same question controls; hence it becomes the duty of this Court to review the evidence.

The case was tried in a maze of uncertainties and indirection which rendered the task of the jury particularly difficult, and makes that of the Court, in reviewing the testimony unnecessarily arduous. The declaration was conceived to be in deceit, and since the defendant clearly apprehended that deceit was the issue, and the case was tried upon that issue, it should not be dismissed, and the verdict should not be overthrown because of omissions in the declaration.

It might be said that the evidence on material points is so unintelligible that the jury was left to hazard where certainty is demanded. But the jury not only heard the evidence; it had the benefit of arguments of counsel and the instructions of the judge, and the latter confessedly correct.

The problem for this Court is not to set out the verdict which we would have rendered, if we had heard the case as a jury, but on the contrary merely to decide whether or not the jury had competent evidence upon which they may have based the verdict which they found, evidence that in their minds outweighed the evidence of the defendant, and then whether their verdict is so manifestly wrong as to justify its reversal.

The transaction was one of everyday occurrence, the exchange of two parcels of real estate.

It is claimed that the defendant deceived the plaintiff by pointing out to him as boundaries of the estate to be deeded to the plaintiff natural monuments, as woods and a brook, which lay far outside the property to be deeded; that defendant asserted that the road frontage of the farm was 1950 feet, whereas, as matter of fact, the frontage was but 450 feet; that all incumbrances were cleared from the land before sale, while in truth a tax deed and a mortgage for nearly the value of the property were outstanding against it when sold; that plaintiff was assured by defendant that this property was worth $5000, when its value was but half that sum; that plaintiff was prevented from inspecting the Registry records of deeds by the insistence of

defendant that inspection was unnecessary and of great expense, and that plaintiff could not read the papers presented to him for signature, and was corruptly induced by defendant to sign them, to his great loss.

These, with other allegations of deceit, were testified to, and it is not improbable that the jury decided certain of the alleged matters of deceit sufficiently proven.

Denying all these accusations, defendant introduced a paper, dated nearly six months later than the conveyance, bearing plaintiff's signature and seal and the attestation of a most reputable attorney, which purports to release defendant from all obligations, of whatever nature and scope, "and particular from any alleged claim for damage on account of any possible imperfection in title to" the real estate conveyed to plaintiff.

On the one hand defendant testifies that he read this "release" to plaintiff, word for word, and that plaintiff read and studied it over for himself, and signed it, and further that the attorney said to him "That is a release, Mr. Rowe, is that right?" plaintiff replying, "Yes that is right"; while the plaintiff's testimony on this point is as follows:—

Q. Mr. Rowe, I hand you a paper, I don't know whether you can read it or not, but did you sign a release of the real estate in Manchester occupied by you, dated August 8th, 1925, do you remember signing that paper?

A. Yes, sir.

Q. Can you tell the court and jury how you happened to sign that paper?

A. I did not have my glasses with me. When I signed the paper the car was going, and I had to get the train home that night or stay over in Portland, and that would put me out where I had no one on the farm to look after the cattle, and Mr. Kerr brought this paper out in a hurry and said "Just put your signature in there and I will put it in and send it down to the Savings bank and get some papers and have them return it."

That is all I know about the paper.

Q. Was there any typewriting?

A. There may be, as there is there.

Q. You mean printing?

A. Yes, sir, but no typewritten words on it at all.

Q. Did you trust Mr. Kerr at that time?
A. Yes, sir.

* * * * * *

Q. Mr. Rowe, you say you was in an awful hurry when you signed that release?
A. Yes, sir.
Q. You do admit that you noticed printing on it?
A. Yes, sir.
Q. You looked it over?
A. No, sir, I didn't have my glasses, but the coarse print I saw and the stamp.
Q. Don't you know the coarse print was typewriting and the other was printing?
A. I could tell the difference between the two.
Q. Where was it signed?
A. Right in his house at Westbrook on the big desk that is right in his office.
Q. Was not that witnessed by Attorney Conolly?
A. Not by anyone I know of. It could not be for we were in his house in Westbrook.
Q. Don't you know that you signed that in Conolly's office in Portland?
A. No, I don't know it.
Q. You do not remember?
A. No, I don't remember ever signing it.
Q. How many times did you go to Portland?
A. Either 10 or 11 times; I don't know which.
Q. Was you ever at Connolly's office with Mr. Kerr?
A. Yes, sir. I never was at his office after we got our writings done, the transfers.

The attorney above referred to was not called as a witness, and the jury may have decided, under the instructions of the judge, that notwithstanding the so-called release may have been duly executed and witnessed and the plaintiff had forgotten where it was executed; the defendant, in obtaining the plaintiff's signature thereto, did not act in good faith, and that the release was procured by fraud. Upon the whole, the detached and sometimes incoherent testimony apparently convinced the jury that the defendant willfully and purposely de--

ceived the plaintiff, or that he recklessly stated, as of his own knowledge, material facts susceptible of knowledge which were false; and a painstaking reading of the entire record fails to convince us that the verdict is wrong.

The record as made is hopelessly bewildering as to title at various times to the farm which plaintiff received, but again it is confessed that the judge correctly instructed the jury on this point.

Lastly, can we say that the damages are excessive?

If the jury found, and there is testimony directly affirmative on these points, that the road frontage was less than one-fourth of that represented, and that in other quarters the area was materially less than pointed out to the plaintiff upon inspection, it is not for us to say the damages are excessive.

Hence,

Motion and exception overruled.

JOSEPH BLANCHETTE

vs.

WATERVILLE, FAIRFIELD & OAKLAND RAILWAY.

Kennebec. Opinion February 4, 1927.

In an action of tort for injury sustained by plaintiff, it is not enough that negligence of the defendant is shown. It must also appear that plaintiff was free of contributory negligence.

In the instant case from the evidence there is but one rational inference to be drawn, and that is that the plaintiff by his own negligent conduct helped to bring on the accident.

The principle of the last clear chance does not apply in this case for the reason that, if the defendant were guilty of negligence, it was not subsequent to and independent of the plaintiff's contributory negligence, as the contributory negligence of the plaintiff was operative to the moment of the accident.

In this case it is apparent that the jury failed to understandingly analyze the evidence on the one side and the other, with reference to the burden of proof, or failed to appreciate the duty of the plaintiff, or were influenced by prejudice or emotion in rendering a verdict.

On general motion for new trial by defendant. An action of tort to recover damages for personal injuries and damage to property resulting from a collision on Water street in Waterville on October 3, 1925, between a motor truck owned and operated by plaintiff and a trolley car of defendant company. A verdict of $400 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.

F. Harold Dubord, for plaintiff.

Perkins & Weeks, for defendant.

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

DUNN, J. On motion by the defendant to set aside the verdict, the grounds pressed being that the verdict is counter to facts and law.

The action is of tort for injury sustained by the plaintiff, and for damage both to the motor truck which he owned and was operating and to its load, caused by collision with a trolley car of the defendant.

The collision occurred in Waterville, about noontime on October 3, 1925, at the junction of the cul-de-sac called Dennis court and the street known as Water. The excessive and unlawful speed of the trolley car, and the failure to give timely warning that it was approaching, were the acts of negligence counted on.

The car was running southwards on Water street, which Dennis court entered laterally and easterly twenty five feet still south of the nearest regular stopping place ahead.

Coming up Dennis court, which was short, comparatively level, and rather thinly settled, the car track in the street in front was in sight. On the north side of the court, the side of especial concern in this action, there were dwellings and small garages, and at the northeasterly corner of the ways, the Cloverdale store building. From the southwesterly corner of the store, that is, the corner on the court and the street, to the inner rail of the car track, the distance was but ten feet. From that corner, except for the wire-carrying pole, which was near, the field of vision along the car line was unobstructed northward for from thirty five to forty feet.

Plaintiff was familiar with the surroundings. He went into Dennis court that day to sell garden truck and other things, as he had before. His business done, he started back for Water street, sitting in the truck behind the steering wheel, six feet from the end of the front spring. He drove slowly in low gear, apparently no vehicle coming toward him, seemingly none following, the way thirty four feet in width, the position of the truck, when opposite the store, three feet from that side of the road, with the plaintiff aware of the location of the street railway, and of the fact that a car was supposed to be coming.

At the Cloverdale store, but not at the store corner, plaintiff "almost stopped" his car and looked. In front, there was no car, there was none to the southward, and that which later came from the north direction, the building alongside shut from his survey. He continued on, the truck in low gear still, to the edge of the inner rail of the track, where, without having seen or heard anything while traveling the distance, he brought the truck to a full stop to see if a trolley car were near. He looked to the south,

on which the outlook already had been fair from the court, and the track was clear. He turned his head oppositely and just then the crash was. The plaintiff was hurt, the motor truck virtually demolished, and the freight of produce and other things destroyed.

So much for the case, on the version of the plaintiff.

The forty-three-foot trolley car was on wet rails, for the day had been rainy. Touching the rate of speed of the car, there is no precise testimony. On the one side, the estimate was ten to fifteen miles the hour; on the other, the motorman testified that the car was coasting at from eight to ten miles, and that he made it come to a stop within three-fourths of its length.

Such is fair synopsis of the material record. From it but one rational inference is permitted, and that adverse to the plaintiff.

If the driver of a motor truck would prevail in an action for damages from a collision between his vehicle and a trolley car at a junction of streets, he must establish by the preponderance of all the evidence, not merely negligence of the defendant in proximate relationship to injury, but the further factual proposition that as driver he himself was in the exercise of that degree of care which an ordinarily prudent man in like circumstances would exercise, and that no want of the like care on his part was contributory to the injury.

Speaking in a broad way, motor trucks and trolley cars have coextensive rights and reciprocal duties at street crossings, but more exactly this is in the qualified sense that the respective rights must be exercised in a reasonable and careful and vigilant manner, with dutiful regard for the right of the other, and so as not unreasonably to interfere with or curtail the right of that other.

"Close watch" is required of the motorman. *Cobb* v. *Cumberland County Power & Light Company*, 117 Maine, 455. But watchfulness by him is not all. It is the law that, if a traveler approach a steam railroad crossing, unmindfiul of the rule requiring him to stop and look and listen, he may not have damages for injury from a collision between his vehicle and the train, because of negligence contributory in character legally and conclusively inferred against him.

Like rule does not obtain at street car crossings. But thereat it may be imperative that the vehicle traveler stop, and there he must use his senses of sight and hearing when manifestly available. *Warren* v. *Bangor, Orono & Old Town Railway Company*, 95 Maine, 115, 119. Electric railroad crossings are places of danger toward which no one

should come without senses alert, and over which no highway traveler should attempt to pass without reasonable regard for his own safety and for the safety of the employees of the railroad company and that of the passengers in the car. *Philbrick* v. *Atlantic Shore Line Railway*, 107 Maine, 429, 432. Whether failure to look and listen for an on-coming street car before attempting to cross the track is to be deemed negligence must be determined from all the attendant facts and circumstances in evidence. *Denis* v. *Lewiston, Brunswick & Bath Street Railway Company*, 104 Maine, 39, 46.

Of course, what might be great care under one condition of things and under one set of circumstances might be the very essence of negligence under another; in other words, the care which ordinarily careful and prudent persons take should be and is commensurate with the necessity for care and the dangers of the situation. This doctrine, true when defined first, is even truer, in these days of rapid transportation when the motor vehicle, for which all the public way may be usable, vies with the trolley car, running on its fixed track, in the annihilating of distance.

It is not so much that this plaintiff stopped his truck at the store building, nor that he listened in vain for whistle or gong from the car, but of vital significance is it that he did not look, did not look to his right onto the other street, look there from the corner of the Cloverdale store, or look, on that street, as he might have, shortly before he had come to the corner, had his truck been farther toward the south in the court. To look was the essential thing. *Dansky* v. *Kotimaki*, 125 Maine, 72. Had plaintiff looked he ought to have seen the car. Seeing, as he was in duty bound to see, the trolley car obviously to be seen, he, in the exercise of ordinary care and prudence, should have stopped his truck. The truck was moving, he attested, as slowly as was possible. It therefore could have been brought to a standstill instantly, and thereby the truck and car would not have come into collision. Instead, the plaintiff heedlessly kept on to known danger, on to the edge of the car rail and disaster.

However, argues his counsel, though the plaintiff were negligent, that motor man, watching requisitely, ought to have seen the plaintiff on his truck, and, having then the last chance so to do, avoided both injuring him and damaging his property. The answer is that, if the defendant were guilty of negligence, it was not subsequent to and independent of the plaintiff's contributory negligence. *Butler*

v. *Rockland, Thomaston & Camden Street Railway*, 99 Maine, 149; *Welch* v. *Lewiston, Augusta & Waterville Street Railway*, 116 Maine, 191. The principle of the last clear chance does not apply where, as here, the contributory negligence of the plaintiff was operative to the moment of accident. *Moran v. Smith*, 114 Maine, 55; *Bechard* v. *Waterville, Fairfield & Oakland Railway*, 122 Maine, 236.

The jury failed to analyze the evidence on the one side and the other, and therefrom, with reference to the burden of proof, to fashion an authoritative decision illuminated by a sense of justice. Either what duty on the part of the plaintiff involved was unappreciated, or prejudice or emotion swayed the making of the verdict. *Harrington* v. *Androscoggin & Kennebec Railway Company*, 124 Maine, 435.

It remains but to record that the verdict is manifestly wrong.

Motion sustained.
New trial granted.

OCTAVIA M. LOUD

vs.

IDA V. POLAND.

Lincoln. Opinion February 4, 1927.

A deed of real estate conveying a life estate to wife of grantor and "whatever remains" to his heirs, construed as giving a power to sell, by implication, to grantee of the life estate, adopting the same principle of construction as prevails in cases of devises.

In the instant case, Ruth Loud, having the right to sell, when necessary, and, in the absence of fraud, being the judge of the necessity, could and did by her deed to the defendant convey good title to the premises.

On report. Agreed statement of facts. Petition for parttion. The case involved is the construction of a deed which conveyed a life estate to wife of grantor and "whatever remains" to his heirs.

The question at issue was as to whether the grantee of the life estate had, by implication, power to sell. Petition dismissed in accordance with the stipulation of the parties.

The case is fully stated in the opinion.

Howard E. Hall, for plaintiff.

Rodney I. Thompson, for defendant.

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

PATTANGALL, J. This is a petition for partition coming to this court on an agreed statement of facts.

The real estate in question was, prior to October 9, 1897, owned by Robert Loud. Plaintiff claims ownership in two undivided thirds of same by reason of certain conveyances to her by his children. Defendant admittedly owns one undivided third of the property by

certain similar conveyances and claims title to the whole under a deed from her mother, Ruth Loud, widow of Robert Loud.

The parties stipulate that the petition be dismissed provided that this court finds that the deed from Ruth Loud conveys the fee to the defendant, otherwise judgment for partition shall be ordered.

On October 9, 1897, a few days before his death, Robert Loud executed and delivered to his wife Ruth Loud, a deed of the premises in question, which deed contained the following provisions:

> "Meaning to convey to said Ruth Loud, the grantee above named, all my estate, to her use and benefit during her natural life. She to have the use and custody of same but not to make unnecessary waste or use thereof and the understanding is that my children shall still continue to come and go and have a home on the place as they have been accustomed heretofore and at the decease of my said wife said property or estate, whatever remains, shall descend in order of law to my children or their representatives."

On December 15, 1913, Ruth Loud conveyed the property in fee to this defendant, taking back a bond for support secured by mortgage on the property. She was then living with and supported by the defendant and continued to so live and be supported until her death at the age of eighty-five.

The issue in this case is whether or not under the deed from Robert Loud, Ruth Loud acquired title that would enable her to convey the fee to the defendant.

The wording of the instrument is not precise, but the intent of the parties thereto may be ascertained by a study of its various provisions and may be given full effect by reasonable interpretation.

To Ruth was conveyed a life estate. She was to have the use and benefit of the property during her lifetime. She was not to make unnecessary waste or use thereof. She was to have the use and custody of the same.

Her interest was limited by the understanding that the children of Robert should have a home on the place as they had been accustomed heretofore. Under this clause in the deed the children were entitled to certain equitable rights. *Poland* v. *Loud*, 113 Maine 260. If Ruth conveyed the property, she must convey subject to those rights.

The undefined equitable interest passing to Robert Loud's children was personal. It did not extend to their heirs and assigns.

The plaintiff took nothing on that score by her deed from them.

Ruth Loud had a life estate in the property subject to or limited by the equitable rights of her stepchildren. But "a power to dispose of land in fee may be and often is given to a tenant for life." *Sedgwick* v. *Laflin*, 10 Allen, 430.

Such a power is implied, in the instant case, by the closing clause of the paragraph quoted. "And at the decease of my said wife, said property or estate, whatever remains, shall descend in order of law to my children or their representatives."

The words "whatever remains" are significant. It has been held many times both in this state and in Massachusetts that these words or others of similar import, when added to a devise of a life estate, imply a power to sell, unless controlled, limited, negatived or modified by other words or phrases, or unless such construction is plainly contrary to the intent of the testator.

Among the many cases in point are *Shaw* v. *Hussey*, 41 Maine 495; *Warren* v. *Webb*, 68 Maine 133; *Stuart* v. *Walker*, 72 Maine 145; *McGuire* v. *Gallagher*, 99 Maine 334, and *Young* v. *Hillier*, 103 Maine 20. In the latter case the court said: "It is generally conceded that the expression 'whatever may remain of said estate' in the devise of a remainder after a life estate is expressly created, or by the use of the expression, 'if any remains', or by the use of any words of similar import, a power of sale is annexed to the life estate by implication." This doctrine is approved in *Harris v. Knox*, 21 Pick. 412, *Johnson* v. *Battelle*, 125 Mass. 453, Words and Phrases, Second Edition, Vol. 4, Page 257.

These cases all relate to devises of real estate and not to conveyances by deed, but a like principle of construction should apply in the one case as in the other. The effort in the first instance is to ascertain the intent of the testator, in the latter to ascertain the intent of the parties. Broadly speaking, language used in a will which would indicate a certain intent, would indicate a similar intent when used in a deed. Unless the words "whatever remains" as used in this conveyance imply a right to dispose of the property, they have no meaning. Omitting them from the sentence in which they occur, that sentence would read: "At the decease of my said wife said property or estate shall descend in order of law, to my children or their

representatives," an entirely different proposition from that presented when they are included.

Ruth Loud then, acquired, by deed from Robert, a life estate in the premises, subject to the equitable rights of Robert's children, to which was annexed, by implication, the power to sell if and when such a sale constituted that necessary use of the property to which she was entitled. She was the judge of the necessity. In the absence of fraud her judgment must govern. *Richardson* v. *Richardson*, 80 Maine 585. *Hodgdon* v. *Clark*, 84 Maine 319. *Small* v. *Thompson*, 92 Maine 545. *Haselton* v. *Shepherd*, 99 Maine 495. A contrary view is expressed in *Haines* v. *Brown*, 114 Maine 320, in an opinion in which the cases cited above are not discussed and were apparently overlooked. Notwithstanding this later opinion, *Richardson* v. *Richardson*, supra, and the supporting cases may be regarded as authority on this point.

Having the right to sell, when necessary, and, in the absence of fraud, being the judge of the necessity, Ruth Loud could and did by her deed to the defendant convey to her good title to the premises.

This construction gives effect to every clause and is not inconsistent with what reasonably appears to have been the intention of the parties.

The entry should be

Petition dismissed.

CLIFFORD LAMBERT, IN EQUITY

vs.

ANNIE ALLARD AND JOHN F. HARRIMAN.

Kennebec. Opinion February 3, 1927.

The interest of a vendor in a bond for a deed in the land is subject to attachment and levy.

The interest of such vendor differs from the non-attachable interest of a mere trustee, in that he (the vendor) has not only the legal title but as such legal owner has, while the purchase money remains unpaid, a personal and beneficial interest or estate.

The interest of such vendor differs from non-attachable interest of mortgagee (or levying creditor).

One who purchases land with full knowledge of an outstanding bond for a deed has no greater rights than had the vendor.

On appeal from decree of sitting justice in equity. A bill of interpleader in which the plaintiff seeks judicial determination as to which one of the defendants he shall pay certain sums of money due and to become due. The plaintiff was vendee in a bond for a deed of real estate, and an action was brought against the vendor and a general real estate attachment made on the writ. The question involved was as to whether the vendor had an attachable interest in the real estate described in the bond for a deed. A hearing was had upon bill and answers and the sitting justice sustained the bill and from a decree John F. Harriman, one of the defendants, appealed. Decree affirmed.

The case fully appears in the opinion.

George W. Heselton, for plaintiff.

Harry Manser, for John F. Harriman.

Ernest L. Goodspeed, for Annie Allard.

SITTING: WILSON, C. J., DEASY, STURGIS, BASSETT, JJ., MORRILL, A.R.J.

DEASY, J. Bill of Interpleader. The case involves the construction of R. S. Ch. 86, Sec. 57 and Ch. 81, Sec. 32 providing for attaching and levying upon real estate.

The plaintiff maintains that a vendor of land who has given a bond for a deed, even though he has received a negotiable promissory note for the purchase price, has an attachable interest in the land contracted to be conveyed. The defendant contends that under such conditions the vendor has no attachable interest. This, quoting the language of the decree appealed from, is "the fundamental question here to be decided."

To summarize the facts: In 1923 Clifford Lambert, the plaintiff, received from one Lillie A. LaPlain, owner of land in Gardiner, a bond for a deed of it. Of the total consideration agreed upon which was $3900, the sum of $500 was paid when the bond was given and the balance agreed to be paid in monthly installments of $25 with interest. For the deferred payments the plaintiff gave his promissory note.

In 1924, the defendant, Annie Allard, brought suit against said Lillie A. LaPlain and attached all of her real estate in Kennebec County.

In 1925 Mrs. LaPlain in consideration of $3000 received, conveyed to the defendant, John F. Harriman, by warranty deed, the land bonded to the plaintiff, and also endorsed to him the plaintiff's said note.

In 1926 the defendant Mrs. Allard having recovered judgment, received a Sheriffs deed of the property in question including "all the right, title and interest which the said Lillie A. LaPlain has or had in and to the same on the 13th day of June 1924, being the date of attachment on the original writ in said suit."

The defendant, Mrs. Allard, does not dispute that when she made her attachment she had actual knowledge of the plaintiff's bond for a deed. The defendant, Harriman, when he received his deed had constructive and actual knowledge of the Allard Attachment and a recital in the deed itself informed him of the bond.

It is contended that upon and after the giving of the bond to Lambert and receiving his money and note Mrs. LaPlain, in the contemplation of Equity, held the land as trustee for the vendee. This contention is sound. *Linscott* vs. *Buck*, 33 Me. 534. *Woodbury* vs. *Gard-*

ner 77, Me. 75. *Cross* vs. *Bean,* 83 Me. 61. Equity also deems the vendee trustee of the consideration for the vendor.

It is true, moreover, that a trustee merely as such, without beneficial interest in the trust property, has no attachable estate in it, (*Houghton* vs. *Davenport,* 74 Me. 594) unless credit was given in good faith upon the credit of the trustee's apparent title. 17 R.C.L. 125.

It matters not whether the trusteeship is active or passive i. e. naked. A levying creditor cannot provide a substitute for a trustee.

But the rule is different when a party is not a mere trustee, but has a personal and beneficial interest in the property. He cannot put such interest beyond the reach of creditors by hiding it behind his trusteeship.

It should go without saying that the vendor's valuable personal interest is subject to the payment of his debts. The only doubt concerns the remedy.

The interest cannot be reached by joining the vendee in a process of foreign attachment. R. S. Ch. 91, Sec. 55.

If it "cannot be come at to be attached", and this appears by a return on execution, Equity affords a remedy. R. S. Ch. 82, Sec. 6, Par. XI.

But when a debtor holds the legal record title to real estate and has in it a valuable personal interest it can "be come at to be attached."

The learned counsel for the defendant, Harriman, does not dispute the liability to attachment of estates wherein "legal and beneficial interests are united in the debtor". Indeed he cites cases so holding, 6 C. J. 202 and *Warren* vs. *Ireland,* 29 Me. 65, from which the words next above quoted are taken.

But he argues that one who has the full legal ownership of land which he has contracted to convey and as such legal owner has also the equitable title to the unpaid purchase money, has no beneficial interest in the land. His theory is that such party has a "substantial" but not a "beneficial" interest. This theory we think displays its own infirmity and proclaims its own unsoundness.

He argues further and correctly that Lambert's note was not attachable in a suit at law. It is true that if the note had before maturity passed into the hands of an innocent holder for value, such holder would have been protected by the rules of the Law Merchant now codified in the Negotiable Instruments Act.

But Mr. Harriman was not such an innocent holder. He was fully informed as to the whole situation. He knew that the note was a mere incident of a contract for the sale and purchase of land, that the note would be of no value to him without the land and that the land was subject to Mrs. Allard's attachment. Fully aware of these things he took the note and deed. He acquired no greater rights than were possessed by Mrs. LaPlain.

The note is not subject to attachment and is not attached. The title to the land however has through attachment and levy passed to Mrs. Allard, subject to the plaintiff's rights. Thereupon equity requires and this court sitting in equity directs that the note, which was merely incidental to the main transaction, be surrendered.

Counsel presents decisive authorities holding that the interest of a *mortgagee* before completed foreclosure is not attachable. He urges that the position of a vendor, especially when a note for the consideration is given, is precisely like that of a mortgagee.

There are however significant and vital differences.

As between the parties the mortgagee is deemed the legal owner. *Allen* vs. *Emerton*, 108 Me. 224. The mortgage conveys the property to the mortgagee "to have and to hold to him and his heirs and assigns forever." As between the parties the law gives full effect to this language. *Stewart* vs. *Davis*, 63 Me. 544.

But as to third parties the mortgagor is deemed the owner. In their behalf the law looks beyond the language and perceives the real nature of the transaction. *Hawes* vs. *Nason*, 111 Me. 195. *Atwood* vs. *Paper Co.* 85 Me. 380.

As to third parties the mortgagee's interest before completed foreclosure is a mere pledge or lien. *Smith* vs. *Peoples Bank*, 24 Me. 194. *Hussey* vs. *Fisher* 94 Me. 307.

The same is true, during the redemption period, of a purchaser at Sheriff's sale. His interest is a pledge or lien merely. *Hawes* vs. *Nason* supra.

Another distinction between the interest of a mortgagee and that of a vendor is suggested in an earlier paragraph. It is held "that the debt is the substance, and that the mortgage securing it is a mere incident." *Hussey* vs. *Fisher* supra, or stated in another way that "the debt (is) the principal thing, and the mortgage only an incident, or accessory to it." 27 Cyc 1286 and cases cited. *Jordan* vs. *Cheney*, 74 Me. 359.

But a vendor's legal title is not in the same sense subservient to the vendee's debt, even if such debt is represented by a note.

In one case a mortgage is given to secure payment of a note. In the other a note is given to secure performance of the vendee's obligation to purchase.

It is said that in case the levy were upon a part only of the land agreed to be conveyed, great difficulties would be encountered.

Happily it is not necessary to prolong this opinion by solving the suppositious problems of hypothetical cases. No suitor will suffer deprivation of his just and equitable rights because of difficulty in protecting or enforcing them.

It is argued that the interest of an owner of land who has made a contract to convey it, is not in the statute specified as attachable. Neither are estates for life, or those subject to condition, lease or lien. It is not necessary. All are interests in real estate. All are subject to attachment and levy, each bearing its own burden.

No Maine decision is at variance with the opinion. Reliance is placed by counsel upon dicta in certain cases, but even these are not in point.

In *Ricker* vs. *Moore*, 77 Me. 295 the only question at issue was the assignability of a vendee's interest, the contract running to the vendee, and not to him and his assigns.

In determining the vendee's right to be assignable the opinion says that "in this respect" a mortgagor's interest "is exactly analagous to the equitable estate of a vendee."

The other dictum relied upon is found in *Woodbury* vs. *Gardner*, 77 Me. 75, wherein the opinion says that the vendor holds "the vendee's legal estate on a naked trust."

This is true as applied to the facts in that case, and the opinion means no more. The vendee's contract had been largely performed and the balance tendered and refused. But when, as in the instant case, the consideration is in large part unpaid the vendor's trusteeship is by no means dry, passive or naked. *Sawyer* vs. *Skowhegan*, 57 Me. 505.

Some cases in other States sustain the position of Mr. Harriman's counsel. But this opinion is supported by the weight of authority in other jurisdictions.

"The (judgment) lien binds the land, so far as the rights of the vendee will not be affected thereby." Tiffany on Real Property 2nd Ed. Vol. 3, Pg. 2781.

"His (the vendor's) interest may be taken in execution subject to the rights of the vendee." Freeman on Executions 3rd Ed. Vol. 2, Sec. 81.

"The (vendor's) interest—may be levied on and sold under execution or attachment". 39 Cyc 1658.

See *Doe* vs. *Startzer* 62 Neb. 718, 87 N. W. 535; *Dalrymple* vs. *Trust Co.*, 11 N. D. 65, 88 N. W. 1033; *Wells* vs. *Baldwin* 28 Minn. 408, 10 N. W. 427; *Kinports* vs. *Boynton* 120 Pa. St. 306, 14 At. 135; *Brown* vs. *Hardee* 75 Ga. 457; *May* vs. *Emerson* 52 Or. 262, 96 Pac. 454. *Marston* vs. *Osgood* 69 N. H. 96, 38 At. 378; *Reid* vs. *Gorman* 37 S. D. 314, 158 N. W. 780; *Coggshall* vs. *Bank* 63 Ohio St. 88, 57 N. E. 1088.

From the case last cited we quote:

"The rule undoubtedly is that while in a general sense, the vendor holds the legal title in trust, yet so long as any purchase money remains unpaid he still retains a personal right and interest in the land * * * the interest of the vendor while any of the purchase money remains unpaid is subject to levy by attachment or execution".

The decree of the single justice orders that the defendant Harriman execute and deliver a deed of the property in controversy, to Mrs. Allard, that the note be delivered to her, that payments be made by the plaintiff through the Clerk of Courts and endorsed on the note and that when same is fully paid Mrs. Allard shall convey the property to the plaintiff.

Decree affirmed with further costs for the plaintiff against the defendant, John F. Harriman.

CHARLES A. ROBINSON et uxor

vs.

FRED B. HIGGINS COMPANY.

Lincoln. Opinion February 4, 1927.

If the construction or extension and maintenance of a wharf in tide water below low water mark in front of the shore or flats of another would result in injury to, or injuriously effect, the enjoyment by such owner of his rights incident to such ownership, his consent must be obtained. No consent required if the rights of such owner are not infringed upon.

In the instant case the contention by the plaintiffs, that the proposed extension of the wharf would impede unreasonably and unlawfully, the right of egress and ingress from and to their land over the deep waters is sustained.

On appeal from a decree of sitting justice in equity. A bill in equity seeking to enjoin the defendant corporation from extending its tide-water wharf in front of the shore of land owned by plaintiffs on Spruce Point in Boothbay Harbor. A hearing was had upon bill, answer, replication and proof and the sitting Justice found that the proposed extension of the wharf would injuriously effect the rights of ingress and agress of the plaintiffs in their property by way of the sea, and from a decree for permanent injunction defendant appealed. Appeal dismissed. Decree below affirmed.

The case sufficiently appears in the opinion.

Verrill, Hale, Booth & Ives for plaintiff.

Cyrus R. Tupper, for defendant.

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

DUNN, J. From the decree which enjoined the defendant corporation from extending its tidewater wharf in front of the shore of the plaintiffs without their consent, this appeal was made.

Plaintiffs own littoral land in Boothbay Harbor. They occupy it in the summer months as cottagers. Of the upland and shore property adjoining on the southwest, defendant is proprietor. The business of the defendant is that of dealing in lobsters.

Two different grantors, of whom the defendant company was one, and he whose name the defendant corporation bears the other, on the same day in 1910, conveyed to the immediate predecessors in title of these plaintiffs two contiguous parcels of real estate.

That which the defendant conveyed was the smaller in area. Its base line runs along a sea wall for thirty eight feet, from whence the calls and courses are to low-water mark and by low-water mark and back to where the base line begins.

In front of this lot, when it was conveyed, and between it and the open sea, in the deep waters about sixty feet beyond low-water mark, was the northeasterly part of the wharf of the defendant.

That wharf, thus to speak in convenience of the aforesaid portion of the whole, is still there. Behind it the defendant moors lobster cars. The cars are long, though not as long as the wharf, and, when moored successively, the last lies well in toward low-water line.

The other lot begins on the highway. A boundary which extends to low water describes it. Of the sea wall, thirty linear feet are embraced, or less by eight feet than the first lot has; the distance figures being approximate.

Speaking relatively, the lots together form a quadrangle, having sea frontage of sixty eight feet.

The second lot, where the cottage is, was conveyed subject to the restriction, for the benefit of other land of the grantor, and to run therewith, that on the shore of the conveyed lot there must be no wharf.

In conveying, by consolidated description, the two lots as one, plaintiffs' grantors incorporated in the deed, the same restrictive phraseology which one, and but one, of their own title deeds, contains. Later they essayed to annul the restriction. But the title to that estate, as pertaining to which the limitation was imposed originally, had not come to the grantors, and hence it was not for them to abrogate the primal restriction. So far as that restriction is concerned, it remains. But this defendant, not being owner of the estate or tenement in favor of which the limitation is and to which it is attached, may not insist that the limitation be observed.

However, in portraying the situation in this cause, it is consistent to remark that, since the restriction, there has been placed below low-water mark on the shore or flats a removable wooden structure indifferently called a float or wharf.

To that structure, boats have been made fast, and to it persons have come from the higher ground and thence returned, by means of the pier and the slip built and maintained on the shore for the purpose, under circumstances which it has been adjudicated are equivalent to waiver to such extent by the owner of the controlling estate, of the restriction.

The float when in station marks the ocean avenue of the plaintiffs.

In this stage of matters, the defendant concern became desirous of extending the end of its wharf, at the same width, for thirty feet farther below low-water mark in front of the shore of the plaintiffs.

License for the proposed extension has been had from the municipal officers. R. S., chap. 4, sec. 121, as amended by 1925 Laws, chap. 180.

Besides the license, the consent of the owner of the land in front whereof the extension would be is prerequisite. R. S. same chapter, sec. 125.

Not every owner of upland and shore, or shore, where the owner has divided upland and flats, need be consulted. *Sawyer* v. *Beal*, 97 Maine, 356.

The consent of legislative contemplation is to be given by a shore owner whom the wharf extension, in consequence of its nearness or position, would injure, or injuriously affect, in the enjoyment of his rights, as such owner. *Sawyer* v. *Beal*, supra. Injury, real or menacing, to rights incident to the ownership of property bordering on tide waters, is the criterion in determining whether assent is essential.

Not only did the plaintiffs deny consent, but they brought these enjoining proceedings.

The cause was heard below on bill, answer, replication, and proof. Contention by the plaintiffs, that the extension would impede unreasonably and unlawfully the right of egress and ingress from and to their land over the deep waters was sustained. Absolute injunction was decreed.

Defendant brought the record here.

First, is the urge that the plaintiffs, instead of filing the bill, should have exhausted remedy by appealing from the municipal officers to the commission of sea and shore fisheries. 1925 Laws, chap. 180.

At common law it is the presumption that the owner of sea frontage has, in virtue of his ownership, the right of ocean access for the whole width of the frontage.

Without here going into distinctions, nor attempting to demark boundaries, it is sufficient to note that the invoked statute deals with rights of the public, and not with the private right of the adjacent owner to grant that consent made essential in certain instances legislatively.

The bank of the shore of the plaintiffs is rockbound and rough. Way of approach from the sea may be had, in reasonable safety and comfort, only by wharfing out, an end the aforementioned float subserves.

Against sailing southwesterly from the shore, the pier of the wharf of the defendant is barrier.

The conformation of the opposite shore is precluding in that direction.

Ahead, the existing wharf partially bars passage.

If the wharf were extended as proposed, in front of the shore, there would be but little clear space.

Boats fastened by painters to the shore side of the extension, or to the floating cars astern, might collide with the not far away float.

In the plaintiffs' harbor, as it would be if the extension were built, a craft of ordinary length would lack for a place to turn, and want for anchorage berth.

A boat, there is testimony, that came in directly, might have to go out backward.

On the other hand, nothing would hinder extending the wharf from the other end, with equally good protection from winds, equally good lee, and equally good storage for cars. Or, in the stead of extending an end, it would be feasible to project the whole wharf farther into the sea.

The record is not an uncontroverted one.

The prevailing winds, the advantage in unlading smacks to leeward, that the piling beneath the extension would be breakwater of no mean moment, the unsuitableness of the shore, and the bottom, all these and other things are stressed and countered.

Amid the contradictions, the equity judge, whose advantage it was to guage the testimony after seeing as well as hearing the witnesses, determined for the plaintiffs. And so does this court from the printed pages that perpetuate the evidence.

There is no issue touching relative property rights, the right to maintain the so-called float has been decided finally, that the defendant proposes to make the extension is conceded, and that the extension would unduly trench upon the right which is that of these plaintiffs, to come to and go from their land by water, is shown clearly.

The plaintiffs have made their case for equitable relief from threatened injury. *Props. Maine Wharf* v. *Props. Custom House Wharf*, 85 Maine, 175.

Appeal dismissed.
Decree below affirmed.

JOHN G. SMITH, BANK COMMISSIONER, ET ALS.,

vs.

BATH LOAN & BUILDING ASSOCIATION

Sagadahoc. Opinion February 9, 1927.

As a rule it is the proper procedure to apply to the court in equity for the appointment of a receiver of a loan and building association.

In view of the dual relation of membership and debtor between the association and the borrowing stockholder, the equitable doctrine of set-off is not applicable in the case at bar.

On report on an agreed statement. A petition by the receiver of the Bath Loan & Building Association seeking instruction as to the performance of certain of its duties. The issue involved principally is as to whether a stockholder in a loan and building association in case of voluntary liquidation, who is indebted to the association, upon a loan secured by mortgage of real estate, or the pledge of his shares , is entitled to the right of set-off. By agreement the case was reported to the Law Court on an agreed statement of facts. Decree below to

be drawn by the attorney for the receiver in accordance with the opinion.

The case is fully stated in the opinion.

Walter S. Glidden, for Bath Trust Company, the petitioning receiver.

Cram & Lawrence, for borrowing shareholders.

SITTING: WILSON, C. J., PHILBROOK, STURGIS, BASSETT, JJ., MORRILL, A.R.J.

PHILBROOK, J. The defendant association is in the hands of a receiver, and this proceeding is brought by that official asking for instruction as to the performance of certain duties.

On taking possession of the books, records and papers of the defendant association, the Receiver ascertained that out of a total number of approximately two hundred seventy-five shareholders, one hundred and thirty-four, on May 10, 1926, the date of the injunction against doing further business, were what is commonly known as "borrowing shareholders;" that is to say, had procured cash loans from the association, evidenced by their respective promissory notes, and secured by mortgage of real estate and by a pledge of their respective shares of stock, as additional collateral; all of such loans being made in the ordinary course of business, and in accordance with the by-laws of the association, and the statutory provisions regulating the same. None of said borrowing shareholders were required to pay a premium for their respective loans. The remaining shareholders of the association, (with the exception of five who effected so-called "share loans," that is, had borrowed money from the association upon the security of their shares alone), were, on said date, ordinary shareholders, who had not availed themselves of their privilege as members of the association to apply to and receive from it, any cash loans, and who may be designated as "investing shareholders."

Immediately upon the qualification of the Receiver, the claim was made to it by the so-called "borrowing shareholders" or by some of them, that, in settling and adjusting their respective loans, they were legally and equitably entitled to set off against the original amount of such loans, the withdrawing value of their respective shares, as at May 10, 1926, and were legally and equitably entitled, upon payment

of the difference between the original amount of such loans, plus accrued interest, if any, and the withdrawing value of their shares, to receive a full discharge of their obligations to the association and a cancellation, surrender and release of their respective promissory notes, and of the mortgages given to secure the same, and of the shares pledged as additional collateral thereto.

In consequence of such claim the receiver instituted this proceeding asking the court for instruction as to whether it shall allow in set-off, to such borrowing shareholders, the full withdrawing value of their respective shares in the association. The case was heard below by a single justice, on an agreed statement of facts, and reported to this Law Court, which tribunal is to render such decision thereon, and give such instructions, as may be equitable and proper.

Except in a few jurisdictions where the statutory remedy of dissolving building and loan associations on suit brought by state officials is exclusive, and precludes the appointment of a receiver in an ordinary action in equity, it is the rule, both under statute and otherwise, that resort may be had to a court of equity for the appointment of a receiver of a building and loan association, and on the filing of a sufficient bill by the proper party, the court will appoint a receiver when it appears that it is unsafe and inexpedient to further continue the business, either because of a loss of public confidence therein, or because of its insolvency or mismanagement. 9 C. J. 993, and cases there cited. Hence, *quere*, whether this proceeding may be properly said to have been instituted under the provisions of P. L. 1923, chap. 144, sec. 50, as suggested in the agreed statement of facts, since that section applies only to "any savings bank, or other institution for savings," and, strictly speaking, building and loan associations do not fall within either of these two classes.

In *Palmer* vs. *Construction Co.*, 121 Maine, at Page 190, our court has said that "The principal object of a loan and building association is to create a loan fund for the benefit of its borrowing members, the underlying idea being that by means of the system of small periodical payments provided, people of limited means will be enabled to become the owners of homes, and thrift, economy, and good citizenship will thereby be promoted." Reducing the above quotation to its lowest terms, it is plain that the principal object of a loan and building association is to produce a loan fund for the benefit of its

borrowing members, hence it is not a "savings bank or other institution for saving."

That such is the object has also been held in *Johnson* vs. *National Building Asso.* 125 Ala. 465; 28 S. 2; 82 Am. St. Rep. 257; *National Home Building Asso.* vs. *Home Savings Bank,* 181 Ill. 35; 54 N. E. 619; 72 Am. St. Rep. 245; 64 L. R. A. 399. *Commonwealth* vs. *Home Building Asso.* 127 Ky. 537; 106 S. W. 221; *Eversman* v. *Schmitt,* 53 Ohio, St. 174; 41 N. E. 139; 53 Am. St. Rep. 632; 29 L. R. A. 184; (a case arising where the association was insolvent) *Folk* vs. *State Capital Asso.* 214 Pa. 529; 63 Atl. 1013; *Robertson* vs. *American Homestead Asso.* 10 Maryland, 397; 69 Am. Dec. 145, and extended note thereunder.

Under the general rule of equity jurisdiction above quoted, however, this case is properly before us.

As already intimated, the principal issue, as between the non-bordowing and the borrowing shareholders is whether the latter must, by reason of the insolvency of the association, and its consequent inability to carry out its original plan of operation, pay to the receiver the entire amount of their original loans, and await the settlement of the receiver's account for a return to them of the value of their shares as established by subsequent developments, or be allowed the withdrawal value of their shares in their settlement with the receiver.

The receiver's position is that all borrowers must at once pay the full amount of their original loan, being allowed no set-off or credit for any value inhering in their shares, but being obliged to wait for liquidating dividends at the end of the receivership. The borrowing shareholders oppose this contention.

Loan and building associations are creatures of statute, and it follows that the statues which give them being must be followed so far as provisions for their existence, powers, rights and liabilities, as well as the rights and liabilities of their members, are concerned. In respect to those matters where no such provisions are made, the general principles of law and equity will prevail.

Neither in R. S. Chap. 52, nor in P. L. 1923, Chap. 144, an extensive act "to revise and consolidate the banking laws of this state," are to be found any provisions relating to the marshalling of assets, or determination of the rights and liabilities of members, in those instances where the association has become insolvent.

The borrowing shareholders, to some extent at least, rely upon the provisions of P. L. 1923, chap. 144, sec. 110, which reads as follows:

> "A borrower may repay a loan at any time upon ap-
> "plication to the association, whereupon, on settlement of
> "his account, he shall be charged with the full amount
> "of the original loan, together with all monthly install-
> "ments of interest, premium and fines in arreas, and shall
> "be given credit for the withdrawing value of his shares
> "pledged and transferred as security, and the balance shall
> "be received by the association in full satisfaction and dis-
> "charge of said loan."

This section is applicable only when the association is a going, solvent concern, for it is thoroughly settled by the authorities that when insolvency ensues the contract between the borrower and the association is abrogated. *People's Building and Loan Asso.* vs. *McPhilamy*, 81 Miss. 61; 32 South, 1001; 95 Am. St. Rep. 454; 4 R. C. L. 387; 9 C. J. 991, and cases there cited.

Statutes and rules conferring the right of withdrawals are not applicable after the association becomes insolvent, and a member then has no right to withdraw or to perfect an incompleted withdrawal. In *New Jersey Bldg. Loan & Inv. Co.* v. *McNulty*, 71 At., 493, the court says that "these provisions as to the right to withdraw, and the terms upon which such withdrawals are to take place, are dependent upon the association being a going concern. They cannot apply during insolvency. Insolvency at once abrogates such provisions of the contract between the association and the shareholders." See also *Groover* v. *Pac. Coast Sav. Soc.* 164 Cal. 67; 127 P. 495; Ann. Cas. 1914 B. 1261; *Chapman* v. *Young*, 65 Ill. A, 131, where this rule is fully discussed.

Where a building and loan association becomes insolvent, three views have been advanced in regard to the relative rights and obligations of the borrowing and the non-borrowing shareholders. The first view is that the relation between the association and the borrowing shareholder has been changed by the circumstances to one subsisting between an ordinary creditor and debtor, and that the borrowing shareholder is to be charged with the amount actually received by him, with interest at the legal rate, and credited with all payments made, whether by way of dues, interest, or premium, according to

the rule governing partial payments. Such view is commonly called the Maryland rule and is followed in *Flinn* vs. *Interstate Bldg. Association,* 141 Fed. 672; *Miles* vs. *New South Bldg. Association,* 111 Fed. 946; *Manorita* vs. *Fidelity Trust Co.* 101 Fed. 8; *City Loan Association* vs. *Goodrich* 48 Ga. 445; *Preston* vs. *Woodland,* 104 Md. 642; 65 A. 336; 10 Am. & Eng. Ann. Cas. 389; *Cook* vs. *Kent,* 105 Mass. 246; *Carpenter* vs. *Lewis,* 65 S. C. 400; 43 S. E. 881; *Snyder* vs. *Fidelity Sav. Asso.* 23 Utah 291; 64 P. 870. These are leading cases in these jurisdictions. To cite all the decided cases in the same jurisdictions would unnecessrily prolong this opinion.

This rule has been criticized in a vigorous, logical and learned opinion, by the late Chief Justice Whitefield, *People's Building and Loan Asso.* vs. *McPhilamy,* supra, on the ground that it ignores the fact that the borrower was a member of the association up to the time of insolvency, and that he proceeded on that basis, bearing his proportionate part of the losses and expenses. Quoting from that opinion the words of the learned Chief Justice we have this statement; "Close analysis makes it plain that this is not just to the non-borrower, for under this method the borrowing member would get back, entire, all his stock dues, without abatement of a single cent, whereas the non-borrower would only get back such portion of his stock dues paid in as would result from the winding up of the affairs of the association—less than the whole in every case of insolvency. The true doctrine undoubtedly is that the contracts are to be abrogated for the future—that is to say, so far as they are executory—but that prior to insolvency, they shall stand. In other words, up to insolvency the payments must stand in the character they had when made; for example, stock dues as payments made by the member in his capacity as member, but after insolvency the borrower's obligation to pay stock dues, etc. shall cease because the consideration for such payments fails from that time forward. Merely because the association becomes insolvent, what he has theretofore paid as his allotted part of expenses and losses has not by some occult process changed its character and become interest or principal paid on the debt." In amplification the learned justice says; "A borrowing member of a building and loan association occupies a dual relation to the association. In his capacity as borrower he is a debtor. In his capacity as shareholder, he is a member of the corporation. What he pays as interest is paid in his character as debtor on his loan. What

he pays as stock dues is paid in his character as stockholder. The two are separate and distinct and must be so dealt with. When a building and loan association becomes insolvent there is nothing to do but wind up its affairs. The shareholder who has been a member remains a member, liable to his just proportion of losses and expenses. He suffers a hardship in this; that, instead of having his payments on his loan distributed in small instalments over many years, he is compelled by the necessity of the situation, and the nature of the building and loan association, to pay up his loan in one lump sum, with legal interest. This often involves great injustice to him, but it is, nevertheless, one of the risks which he assumed in becoming a member of this mutual association."

The second view, commonly known as the Pennsylvania rule, is that the borrowing stockholder is entitled to credit on his loan for the amount of interest and premium paid by him, but is not entitled to have the amount of the dues paid by him on account of stock applied on his loan. Under this view, credits and debits relating solely to the borrower's rights and liabilities as a stockholder, such as dividends, withdrawal value of stock, and charges for losses and expenses, are not made, but are left until the final winding up of the association and the settlement with members—borrowers as well as non-borrowers. This view is admirably and concisely stated in *Rogers* vs. *Hargo*, 92 Tenn. 35; 20 S. W. 430; where, in a brief opinion, stating a case very similar to the one at bar, the court says, "We are content to follow the decision of the Pennsylvania court. Charge defendant " (in that case a borrowing member) "with money actually received by him, treating same as due and drawing interest from time received, and credit him thereon by payments of interest and premium when made. Ascertain balance due, making calculation upon principle of partial payments, and give recovery for such balance. Let amount paid by defendant as dues on stock stand to his credit on the books of the corporation until time for final adjustment, when he and all other stockholders, borrowers and non-borrowers, will be paid pro rata from the fund for ultimate distribution. Thus the loss will be apportioned equally."

This second view is adopted by a larger number of courts than those adopting the first view, and in our opinion is based upon better reasoning. Some of the leading cases in jurisdictions adopting this second view are *Cooper* vs. *Newton*, 160 Fed. 190; *Hale* vs. *Phillips*,

68 Ark. 382; 59 S. W. 35; *Groover* vs. *Pacific Coast Sav. Soc.*, 164 Cal. 67; 127 Pac. 495; Ann. Cas. 1914 B 1261, with very extended note in which it is declared that the weight of authority favors the Pennsylvania rule; *Curtis* vs. *Granite-State Provident Asso.* 69 Conn., 6; 36 Atl. 1023; 61 Am. St. Rep. 17, with note, an oft cited case; *Fell* vs. *Securities Co.*, 95 At., 346, a case decided by the Chancery Court of Delaware in 1915; *Number Four, etc., Union* vs. *Smith*, 155 Ind. 679; 58 N. E. 70; *Tootle* vs. *Singer*, 118 Iowa 533; 88 N. W. 446; *Eisenhart* vs. *Scammon Inv. Asso.* 71 Kan. 855; 80 Pac. 960; *Kentucky Bldg. Asso.* vs. *Daugherty*, 27 Ky. L. 759; 86 S. W. 705; *Home Savings Soc.* vs. *Mason*, 127 Mich. 676; 87 N. W. 74; *Knutson* vs. *Northwestern Loan Asso.* 67 Minn, 201; 69 N. W. 889; 64 Am. St. Rep. 410; *People's Bldg. Asso.* vs. *McPhilamy*, supra; *Woerheide* vs. *Johnston*, 81 Mo. A. 193; *Anselme* vs. *American Sav. Asso.* 63 Neb. 525; 88 N. W. 665; *Bank Com.* vs. *Granite State Prov. Asso.* 68 N. H. 554; 44 Atl. 605; *New Jersey Bldg. Co.* vs. *McNulty*, (Ch.) 71 Atl. 493; *Monier* vs. *Clark*, 12 N. M. 118; 75 Pac. 35; *Hale* vs. *Cairns*, 8 N. D. 145; 77 N. W. 1010; 73 Am. St. Rep. 746; *Leechburg Bldg. Asso.*, vs. *Kinter*, 233 Pa., 354; 82 Atl. 498; *Johnston* vs. *Grosvenor*, 105 Tenn. 353; 59 S. W. 1028; *Price* vs. *Kendall*, 14 Tex. Civ. Ap. 26; 36 S. W. 810; *Young* vs. *Martinsburg Impr. Loan Asso.* 48 W. Va. 512; 38 S. E. 670; *Leahy* vs. *National Bldg. Asso.*, 100 Wis. 555; 76 N. W. 625; 69 Am. St. Rep. 945.

A third view, adopted in only a few jurisdictions, differs from the second in that, instead of crediting the borrowing shareholder with the whole premium, it credits him with only the part estimated as unearned.

It is well settled that the equitable right or set-off is not dependent upon the express provisions of statute, but is derived from the rules of the civil law, and founded upon principles of natural equity and justice, *Crummett* vs. *Littlefield*, 98 Me. 317, but it is equally well settled that the general rule in equity, as well as at law, is that demands to be set off must be mutual, and that debts accruing in different rights cannot be set off against each other. *Rodick* vs. *Pineo* 120 Me. 160; *Merrill* vs. *Cape Ann Granite Co.* 161 Mass., 212. In view of the dual relation of membership and debtor, between the association and the borrowing stockholder, as above pointed out, the equitable doctrine of set-off, as claimed by the borrowing stock holders, is not applicable in the case at bar.

The rapidly increasing amount of litigation arising from loan and building associations in the various states of this Union, to say nothing of cases in the English courts, with all the varying details occurring in the multitude of cases, makes it impossible to entirely harmonize all conflicting views held by so many courts, or to make a single, simple, hard and fast working rule which may obtain in every case. After careful examination of many leading cases, and comparison of the logic by which results have been reached, for the purposes of the case at bar, at least, we adopt the rule enunciated by Mr. Justice Caldwell, in *Rogers* vs. *Hargo*, supra, as answer to the receiver's request for instructions.

So ordered.

Decree below to be drawn by the attorney for the receiver in accordance with this opinion.

STATE TRUST COMPANY

vs.

ELLEN D. PIERCE, ET ALS.

Kennebec. Opinion February 16, 1927.

Extrinsic evidence is always admissible to identify a devisee or legatee, and beneficent bequests are not to be defeated by mere misnomers.

On appeal. A bill in equity seeking the construction of the will of Charles L. Spaulding and the determination as to whom the principal of a trust estate should be paid. Upon a hearing on bill and answer the sitting Justice found that the Maine State Society for the Protection of Animals was the beneficiary intended by the testator, and an appeal was taken. Appeal dismissed. Decree below affirmed.

The case sufficiently appears in the opinion.

Beane & Beane, for State Trust Company, petitioner.

Pattangall, Locke & Perkins, for Ellen D. Pierce.

Frank G. Farrington and E. O. Greenleaf, for Maine State Society for the Protection of Animals.

Andrews, Nelson & Gardiner, for Ellie Evans, Georgia C. Adams, and C. L. Andrews, Admr.

SITTING: WILSON, C. J., STURGIS, BASSET, JJ., MORRILL, A.R.J.

STURGIS, J. Charles L. Spaulding, late of Hallowell, died testate, leaving a will containing as the fourth paragraph thereof the following:

> "All the rest, residue and remainder of my estate, real personal, and mixed, wherever found and however situated, I give, bequeath and devise to the State Trust Company, a corporation duly organized by law and located in Augusta, Maine, in trust, however, to invest and reinvest and to pay over the net annual income thereof to my wife, Ellie L. Spaulding for and during her life. At her decease, I direct my said trustee to pay over one-half the net income thereof to Walter D. Spaulding of said Hallowell for and during the term of his natural life, and the other half of said income I direct the said trustee to pay over to the proper officers of the Maine State Society for the Prevention of Cruelty to Animals, which society is located at Portland, Maine, the said income to be used by said society in the performance of the business for which they are incorporated or created. At the death of said Walter D. Spaulding I direct my said trustee to pay over the principal of said trust fund together with the accumulated income thereof, to the proper officers of the said Maine State Society for the Prevention of Cruelty to Animals."

The widow of the testator, Ellie L. Spaulding, as also Walter D. Spaulding, have now deceased, and the Trustee brings this bill, praying for a construction of the will and a determination of who is entitled to the fund now in its hands.

It appears that there is not now and never has been a corporation or society located at Portland, Maine, bearing the name of "Maine State Society for the Prevention of Cruelty to Animals." The defendant, Maine State Society for the Protection of Animals, located at Portland, Maine, however, claims the fund.

After hearing on bill and answer, the sitting Justice decreed that the testator intended to make the claimant, the Maine State Society for the Protection of Animals, the recipient of the entire residue of his estate at the death of Walter D. Spaulding, and that this Society is entitled to receive the trust fund now in the hands of the Trustee, with all accumulated interest and income thereon, less certain deductions for expenses and fees of the Trustee. The case is brought to this Court on appeal from this decree.

It is a familiar rule of interpretation that when the name or designation in the will does not designate with precision any person or corporation, but so many of the circumstances concur to indicate that a particular person or corporation was intended, and no similar conclusive circumstances appear to distinguish any other beneficiary, the person or corporation thus shown to be intended will take. *Preachers' Aid Society* v. *Rich,* 45 Me., 552; *Howard* v. *American Peace Society,* 49 Me., 288; *Tucker* v. *Seaman's Aid Society* et als, 7 Met. (Mass.), 188. Extrinsic evidence is always admissible to identify a devisee or legatee, and beneficient bequests are not to be defeated by mere misnomers. This rule applies to a devise or a bequest to a corporation. 40 Cyc, 1447, and cases cited; 28 R. C. L., 276. Numerous cases in support appear in notes of 47 L. R. A. (N. S.), 539, and Ann. Cas. 1915 B, 30.

With these rules undoubtedly in mind, the sitting Justice found that the testator intended that the claimant Society should be the final recipient of his gift in trust. It is unnecessary to review the facts. They abundantly justify the finding appealed from. And such facts,—and they are few in number,—as non-concur with the intent found, are not convincingly conclusive of a contrary intent nor do they distinguish another as the intended beneficiary.

Appeal Dismissed.
Decree below affirmed.

SAWYER BOOT & SHOE COMPANY

vs.

ABRAHAM I. BRAVEMAN.

Penobscot. Opinion February 18, 1927.

Ratification is the intentional recognition of some previous promise with the intention of rendering it binding. It always resolves itself into a question of intention.

In the instant case the statements made by the defendant in his bankruptcy petition and schedules do not meet the essential requirements of a valid ratification under the statute, and therefore have no tendency to establish such a ratification and were properly excluded.

On exceptions. An action in assumpsit to recover of defendant for merchandise sold and delivered to him while a minor, alleging and relying upon ratification. During the trial plaintiff excepted to several rulings excluding evidence, and also excepted to a directed verdict for defendant. Exceptions overruled.

The case is sufficiently stated in the opinion.

James D. Mawxell, for plaintiff.

Albert L. Blanchard, for defendant.

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

STURGIS, J. The plaintiff corporation sold and delivered to the defendant while a minor several lots of boots and shoes to the amount of $122. The sale was upon credit and the title passed to the defendant. At the time of the sale the defendant was engaged in the retail boot and shoe business and purchased this merchandise for resale in his store. He attained his majority September 13, 1924, and four days later, September 17, 1924, filed a petition in bankruptcy in the United States District Court, listing the plaintiff as a creditor with the amount due stated. The action is upon account annexed for merchandise sold and delivered, and the plea is infancy.

Revised Statutes, Chap. 114, Sec. 2, provides: "No action shall be maintained on any contract made by a minor, unless he, or some person lawfully authorized, ratified it in writing after he arrived at the age of twenty one years, except for necessaries, or real estate of which he has received the title and retains the benefit."

The plaintiff relies upon the inclusion of the plaintiff's name in the list of creditors filed in the bankruptcy proceedings as constituting a written ratification of the defendant's original promise to pay. The defendant's petition and schedule in bankruptcy were offered in proof of ratification and excluded.

An extract from the testimony of the defendant before the Referee in Bankruptcy was offered for the same purpose and also excluded.

The minority of the defendant at the time the purchase was made having been established, on motion the presiding Judge directed a verdict for the defendant. The case is brought forward on exceptions to the exclusion of the evidence offered and the direction of the verdict.

Ratification, as applied to promises made by the person ratifying is simply the intentional recognition of some previous promise with the intention of rendering it binding. The ratification of a voidable promise is a recognition of it and an election not to avoid it but to be bound by it. *Ditcham v. Worrall,* 5 C. P. D., 410; Eversley, Dom. Rel., Sec. 841; 10 American & English Encyc. of Law (1st Ed.), 646. Ratification always resolves itself into a question of intention. *Durfee* v. *Abbott,* 61 Mich., 471, 477. The ratification required by the statute must be something more than a recognition of the existence of the debt and the amount due thereon. *Thurlow* v. *Gilmore,* 40 Me., 381. It must be a "deliberate" written ratification. *Hilton* v. *Shepard,* 92 Me., 164.

BANKRUPTCY PETITION AND SCHEDULE.

No statements by the defendant in the petition or schedules filed in these bankruptcy proceedings meet the essential requirements of a valid ratification under the statute. Such listing of creditors is required by the Bankruptcy Act, and if deemed an acknowledgement of the existence of the debt and amount due thereon, it contains no express or implied promise to pay the debt or election to be bound by it. In fact, the schedule is attached to and a part of the

petition, in which the defendant under oath asserts his inability to pay his debts to the plaintiff and other creditors listed.

In *Roscoe* v. *Hale*, 7 Gray (Mass.), 274, it is held that the insertion of the debt in a schedule of insolvency is an admission of the existence of the debt, but affords no just ground to infer any intent to renew the promise. The Court says: "It was an admission made entirely diverso intuitu. So far from implying any new promise—it rebuts any such presumption or inference. It was an act done as a necessary part of a proceeding by which the defendants sought to be absolved and discharged from their contracts and obligations, not to renew or extend them."

In *Christy* v. *Flemington*, 10 Pa., 129, in considering the effect of the listing of a creditor's name in an insolvency schedule, the Court says: "The whole import of the proceedings is an assertion on the part of the applicant that he is unable to pay his debts. * * * * This acknowledgement, therefore, is nothing more than an admission of the debt accompanied with a declaration that the debtor is unable to pay."

In *Hidden* v. *Cozzens*, 2 R. I., 401, the effect of listing creditors in an insolvency petition and schedule is stated in these words: "A petitioner for the benefit of the insolvent law is required by that law to annex to his petition a true inventory of all his debts. This is not made with any view to payment of the debt, but on the contrary, is annexed to and made a part of the petition in which the debtor under oath states he is unable to pay; and so far from being an acknowledgement of a subsisting debt which the party is liable and willing to pay, the acknowledgement is made to protect him from process by the creditor to compel him to pay it. The substance of the proceeding is, he says to the Court the debt is due, but I cannot pay it."

In *Hellen* v. *Hellen*, 170 Ill. App., 464, and in *Nonotuck Silk Co.* v. *Pritzker*, 143 Ill. App., 644, the same effect is given to similar statements in bankruptcy proceedings.

While these decisions cited involve the statute of limitations and not a plea of infancy, in *Henry* v. *Root*, 33 N. Y., 534, it is said that the contracts of an infant may be revived and ratified by him on arriving at age upon the same principles and for the same reason and by the same means as a debt barred by the statute of limitations. It is our conclusion that the defendant's petition and schedule in

bankruptcy had no tendency to establish a statutory ratification of his contract and their exclusion was not error.

DEFENDANT'S TESTIMONY BEFORE REFEREE.

Plaintiff's Exhibit 3 C, a transcript of testimony given by the defendant before the Referee in Bankruptcy, was properly excluded. It was produced from the files of the District Court. The testimony when given was oral. It was not then a written ratification. When and under what circumstances the transcript was signed by the defendant does not appear. Undoubtedly his signature was subscribed at some date after the hearing and under the necessity of complying with the rules of the Bankruptcy Court, and so far as the record shows, never came into the possession of the plaintiff or his attorney. When the testimony was given the bankrupt was seeking a discharge of his debts, not intentionally renewing his previous promise or electing to bind himself to its fulfillment. At most, his statements must be construed only as an admission of the existence of the debt, which does not meet the statutory requirements. To hold that the statements of a person under such circumstances afterwards reduced to writing, and signed not voluntarily but of necessity, can be seized upon by his creditors as a written ratification of his contracts made in infancy, is to destroy the shield of protection with which the law surrounds the contracts of minors. Ratification must be voluntary and not obtained by circumvention. *Thing* v. *Libbey*, 16 Me., 57. The transcript offered is neither supported by extrinsic facts nor intrinsic proof indicating any probative value on the question of ratification.

DIRECTED VERDICT.

Sale and delivery of the merchandise to the defendant and failure to pay were admitted. Infancy was clearly proven. There was no evidence in the case to establish ratification of the contract after majority, and the fact that the infant falsely represented that he was of age when he ordered the goods, if proven, does not create an estoppel. *Whitman* v. *Allen*, 123 Me. 1, and cases cited. The merchandise was not necessaries. *Utterstrom* v. *Kidder*, 124 Me., 10. There being no disputed facts requiring determination by the jury, the verdict was properly ordered for the defendant.

Exceptions Overruled.

JAMES L. BOYLE, TRUSTEE IN BANKRUPTCY

vs.

LEWISTON TRUST COMPANY.

Kennebec. Opinion February 21, 1927.

Upon a person or corporation receiving a check of a corporation signed by one of its officers, and applied in payment of such officer's debt, rests the burden of proving that the issuance of such check was authorized for that purpose, and when not so authorized proceeds may be recovered back.

In legal contemplation, no such thing exists as an innocent holder of negotiable paper executed by an officer of a corporation and payable to his personal creditor.

Trustee in bankruptcy has authority under his appointment to bring suit in a state court, and the principle of estoppel can not be invoked in an action for recovery of corporate funds diverted to paying private debts of officers of the corporation.

On report. An action by the trustee of the estate of the Oakland & Belgrade Silver Black Fox Ranch Company, bankrupt, to recover the sum of $1635.40 alleged to have been paid unlawfully by the treasurer of said company out of the funds of said company to defendant and applied on a personal note of said treasurer held by defendant, said payments having been made by checks drawn in the name of the corporation, signed by its treasurer. At the conclusion of the evidence the cause was reported to the Law Court. Judgment for plaintiff for $1635.40 with interest from the date of writ.

The case fully appears in the opinion.

Maurice E. Rosen, for plaintiff.

Frank A. Morey, for defendant.

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

PATTANGALL, J. On report. Action for money had and received

by trustee in bankruptcy of Belgrade Silver Black Fox Ranch Company who seeks to recover certain moneys paid to defendant by Charles J. Clukey, treasurer and manager of the bankrupt corporation.

The Belgrade Silver Black Fox Ranch Company was organized as a corporation on January 23, 1925, Charles Clukey was its treasurer, business manager and one of three directors. The corporation engaged in active business until July 6, 1925, and in November of the same year was adjudicated bankrupt.

At the time of the organization of the corporation defendant held certain overdue notes of Clukey's. On various dates, beginning January 30, 1925, and up to and including July 3, 1925, defendant received from Clukey checks of the corporation signed by Clukey as treasurer, payable to the defendant's order, the proceeds of which, in accordance with Clukey's instructions, it credited on his personal notes. The checks so used were eight in number and aggregated $1635.40 in amount. Defendant had no business relations whatsoever with the bankrupt corporation, at any time.

There is no evidence that the corporation ever authorized Clukey to issue its checks for the purpose of paying his personal debts or that defendant ever made any inquiry as to his authority to do so. The principle questions arising in this case were decided and fully discussed in *Gilman* vs. *Carriage Co.*, 125 Maine, 108.

On the authority of that case and cases there cited, it may be unhesitatingly stated that when it is found as a fact that the check of a corporation, signed by one of its officers, is used by that officer in payment of his personal debt, the proceeds of the check received may be recovered back unless the party receiving it proves that the officer in question was authorized to issue the corporate check for that purpose. A defendant admitting that he received a corporate check, drawn by an officer, in payment of his private obligation, has the burden of proving the officer's authority to use corporate funds. No attempt is made, in the present case, to sustain that burden.

Defendant is not in the position of an innocent holder. Each check on its face bore warning of its irregular and illegal character. They were, themselves, danger signals which a discounter or a purchaser could not safely disregard. In legal contemplation no such thing exists as a bona fide holder of negotiable paper executed by an officer in the name of a corporation and payable to his personal creditor.

The payment by Clukey to the defendant of his personal debt with corporate funds constituted a plain misappropriation of such funds and the form and manner of payment sufficed to put the defendant on its inquiry and to notify it that it accepted the payments at its peril. *Gilman* vs. *Carriage Co.*, 125 Maine, 108, and cases cited. *Johnson and Kettell Co.* vs. *Lomgley Luncheon Co.*, 207 Mass. 52. *Back Bay National Bank* vs. *Brickley* et al. 150 N. E. 11. *McCullum* vs. *Hotel Co.*, 199 S. W., 417.

No principle of estoppel operates against this plaintiff. A trustee in bankruptcy is not estopped from recovering corporate funds diverted to paying private debts of officers even though such payments were acquiesced in or consented to by directors or stockholders. The trustee represents the creditors of the corporation. They are not estopped. *McCullum* vs. *Hotel Co.*, supra.

It was argued by defendant that the money paid to it by Clukey was, in fact, Clukey's money, altho in form it appeared to be corporate money, because it was due him from the corporation as salary and that the checks were drawn as heretofore stated merely as a matter of convenience. In support of this claim it was shown that on July 10, 1925, a few days after the corporation ceased to do active business, the directors of the corporation voted to pay Clukey an annual salary of $10,000, payable monthly, to begin as of January 24, 1925, and that Clukey entered up, on the books of the company, salary credits which on July 24, 1925, totalled $10,000 as an offset to the amounts previously drawn by him.

Aside from the question of the validity of a vote of salary to one director by a board of directors, a question thoroughly discussed and fully disposed of in *Camden Land Co.* vs. *Lewis*, 101 Maine, 78; *Pride* vs. *Pride Lumber Co.*, 109 Maine, 456; *Conners* vs. *Conners Bros. Co.*, 110 Maine, 435, this vote of the directors neither gave Clukey authority to draw corporate checks for the purpose of paying his personal debts nor ratified previous acts of that nature. The evidence is that, at the time of the vote, the directors did not know of the transactions with this defendant. Obviously they could not ratify that of which they were ignorant. Also it should not be overlooked that the corporation did no active business after the date of this vote; that it was adjudicated bankrupt about four months later and that Clukey at all times knew of its real financial condition. Under such circumstances the vote of July 10th can only be regarded as an attempt to

cover one fraudulent act with another, and cannot be considered seriously regardless of the angle from which it is approached.

Question was raised as to the right of plaintiff to bring suit without allegation or proof of his having obtained authority to do so from appointing court. A trustee in bankruptcy is not required to obtain specific authority before beginning an action, such as this, in a state court. The general powers conferred on him by the terms of the bankruptcy act are sufficient. *Collier* on Bankruptcy 13th Ed. 1048; *Cartwright* vs. *West*, 155 Ala. 619; *Traders Insurance Co.* vs. *Mann*, 118 Ga., 381; *Chism* vs. *Clarksdale Citizens Bank*, 77 Miss., 599; *Chism* vs. *Friars Point Bank*, 27 So., 610; *Callahan* vs. *Israel*, 186 Mass., 383.

Plaintiff is properly in court. The payments by Clukey to defendant constituted a misappropriation of corporate funds. Defendant was warned of that fact by the instruments themselves.

The money so paid may be recovered back.

The entry should be,

Judgment for plaintiff for $1635.40 with interest from the date of writ.

ETHEL LEIGH HILLER

vs.

ALICE TAPLEY LORING, EXECUTRIX.

Cumberland. Opinion February 23, 1927.

The word "revert" as used in a will construed as "go to" or "pass to", the technical rule yielding to a practical construction.

In this case the will, read in the light of the facts stated in the report and inferences fairly to be drawn therefrom, furnishes sound reason for holding that the decease of Frank W. Loring, mentioned in the fifth Section of the will, refers to his death whenever it should occur, whether before or after the decease of the testatrix.

On the death of Frank W. Loring the share of the estate of Ella B. Loring which he held during his lifetime passed to the plaintiff, and she is entitled to recover the same from his personal representative.

On report on an agreed statement. Plaintiff seeks in an action of debt to recover from defendant, as executrix of the will of Frank W. Loring, moneys which she claims belong to her as beneficiary under the will of Ella B. Loring. In accordance with the stipulation as to amount of recovery, judgment for the plaintiff for $1113.03.

The case fully appears in the opinion.

Frank I. Cowan, for plaintiff.

Carl W. Smith and Sidney St. F. Thaxter, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DUNN, STURGIS, BASSETT, JJ., MORRILL, A.R.J.

STURGIS, J. Ella B. Loring of North Yarmouth died January 30, 1907. Her will, dated January 29, 1907, was duly allowed. After providing for the payment of her debts, funeral charges and expenses

of administration, she made certain bequests which are not here involved, and by the fifth Section of her will provided:

> "The remainder of my property to be divided equally between Frank W. Loring of North Yarmouth, and Ethel Leigh Hilton Her share to be held in trust by Frank W. Loring, and paid to her to use for educational purposes.
>
> Should Frank W. Loring decease, his share to revert to Ethel Leigh Hilton. I do hereby appoint Charles R. Loring of Yarmouth, Maine, to be sole executor of this my last will and testament, without bonds."

Both Frank W. Loring, and Ethel Leigh Hilton, now by marriage Ethel Leigh Hiller, survived the testatrix. The residue of the estate amounted to $1,870.64. One half that sum, $935.64, was paid to Miss Hilton for educational purposes, and the balance of equal amount was held by Mr. Loring in his lifetime. November 12, 1923, Frank W. Loring died testate, leaving an estate of substantial amount. The defendant, Alice Tapley Loring, is his widow, and named in his will as executrix.

This action is brought to recover from the personal representative of Frank W. Loring the moneys which he received and retained under the fifth Section of Ella B. Loring's will. The case is submitted upon report of agreed statement of facts.

The cardinal rule for the interpretation of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it is consistent with the established rules of law. *Philbrook* v. *Randall*, 114, Me. 397; *McGuire* v. *Gallagher*, 99 Me., 334; *Shaw* v. *Hussey*, 41 Me., 497. The intention, however, must be gathered from the language which the maker used. If the language used is of doubtful meaning, if it is inapt, crude or imperfect interpretation may aid in ascertaining this intent. The language will be subordinated to the intention. *Philbrook* v. *Randall*, supra.

To the foregoing must be added the equally well established canon, that when technical words or expressions are used they are presumed to have been used in the sense that has been ascribed to them by usage and sanctioned by judicial decisions, unless a clear intention to use them in another sense is apparent from the context. *Morse* v.

Ballou, 112 Me., 124; *Houghton* v. *Hughes*, 108 Me., 233; *Jacobs* v. *Prescott*, 102 Me., 63.

The question which is at the foundation of this case is the proper construction of the provision, "Should Frank W. Loring decease, his share to revert to Ethel Leigh Hilton." At the treshold of our inquiry we are met with an inaccuracy of expression. In its technical, legal significance, "revert" is defined as, "to return, come, or fall back"; in other words, for property to return or go back to a person who formerly owned it, but who parted with the possession or title to it by creating an estate in another. Words & Phrases (1st Series), 6213. When a will affords no satisfactory clue to the real intention of the testator, technical rules of construction of wills are to be followed so far as they aid in determining that intention; but when the testator's intention is clearly manifest from the whole will and violates no rule of public policy or positive law, technical rules, if they would tend to defeat such intention, must yield to a practical construction of the will. *Belding* v. *Coward*, 125 Me., 305; *Bradbury* v. *Jackson*, 97 Me., 449. Hence it is held in numerous decisions that the term "revert" may be construed as "go to" or "pass to", regardless of the fact that the taker has no prior interest in the property, or whether that which passes is real or personal. *Beatty* v. *Trustees*, 39 N. J. Eq., 452; *Goerlitz* v. *Matawista*, 8 N. Y. S., 832; *Johnson* v. *Askey*, 190 Ill., 58; *Warrum* v. *White*, 171 Ind., 574; *Estate of Bennet*, 134 Cal., 320; *Bates* v. *Dewson*, 128 Mass., 334. An examination of "the four corners" of this will convinces us that "revert" as here used should be construed as meaning "go to" or "pass to."

In the first paragraph of the fifth Section of the will the testatrix provides that the remainder of her property is to be divided equally between her brother Frank and her grandniece Ethel, with provisions that the share of the latter be placed in trust for educational purposes. This clause as written then ends, its conclusion marked by a period. A new paragraph follows with the initial provision, "Should Frank W. Loring decease, his share to revert to Ethel Leigh Hilton," and without punctuation or break continues with an appointment of an executor.

The plaintiff advances the contention that by this provision a life estate in Frank W. Loring was created, with an interest in the nature of a remainder over to Ethel Leigh Hilton.

The defendant as insistently contends that the gift over is contin-

gent upon the death of the first taker in the lifetime of the testatrix, and he having survived the latter, the gift to him became absolute. She relies upon the rule of construction stated in *Briggs* v. *Shaw*, 9 Allen (Mass.), 516, 517, as follows: "In bequests of personal property, the leaning in favor of vested interests, and the absurdity of speaking of the one event which is sure to occur to all living as uncertain and contingent, have led the courts to interpret the words 'in case of the decease' of the first legatee, when followed by a second legacy of the same property, not to mean death at any time in the future, but death within a certain period, and, when no other period is indicated by the will, within the lifetime of the testator."

In *Vanderzee* v. *Slingerland*, 103 N. Y., 53, the rule is stated in these words: "It is said by Mr. Jarman (2 Jarm. on Wills, 752) to be an established rule that where a bequest is simply to one person, and in case of his death to another, the primary devisee surviving the testator, takes absolutely. This rule applies both to real and personal estate, and so far as I know the authorities in this country uniformly sustain the construction that where there is a devise or bequest simpliciter, to one person, and in case of his death, to another, the words refer to a death in the lifetime of the testator."

Statements and applications of this rule to facts sufficiently similar to bring the cases in point are found in *Britton* v. *Thornton*, 112 U. S., 526; *Hull* v. *Hull*, 101 Conn., 481; *Burnham* v. *Burnham*, 101 Conn., 529; *Tomlin* v. *Tomlin*, 301 Ill., 616; In *re Freeman's Estate*, 280 Pa., 273.

This general rule, however, is not a fixed canon of interpretation. In *Vanderzee* v. *Slingerland*, supra, the Court says: "This rule of construction in this class of cases is founded in part upon the disinclination of the courts to cut down a fee once given, except upon clear words, but rests more upon authority and precedent than reason. The rule established by the courts applies only where the context of the will is silent, and affords no indication of intention other than that disclosed by words of absolute gift, followed by a gift over in case of death, or of death without issue or other specified event. Indeed the tendency is to lay hold of slight circumstances in the will, to vary the construction and to give effect to the language according to its natural import."

And in accord with the rule well settled in this State, that if the language of a will is of doubtful meaning, in ascertaining the testator's

intention the words of the will are to be read in the light of the circumstances and conditions under which it was written, *Danforth* v. *Reed*, 109 Me., 93; *Palmer* v. *Palmer*, 106 Me., 28; *Roberts* v. *Stevens*, 84 Me., 325,—this general rule that a gift over, in the event of death of the first taker, applies strictly to death within the lifetime of the testator, must be subordinated not only to the language of the will itself but such language read in the light of the circumstances under which the testament was written and the relative situation of the parties. In *re Cramer*, 69 N. Y. S., 298; *O'Dell* v. *Uhl*, 116 N. Y. S., 187; *Stone* v. *McEckron*, 57 Conn., 198; *Willits* v. *Conklin*, 88 Neb., 805; see annotation 26 A. L. R., 609.

"Should (he) Frank W. Loring decease", gramatically is a conditional expression of uncertainty. It is the equivalent of "if he should decease" or "in the event of his decease." By the agreed statement of facts it appears that when the will was made the testatrix was in her last sickness, death following on the next day. The report states that "her condition grew rapidly worse, and on January 29th she sent word to call Charles R. Loring (the scriviner) right away to make her will." The inference is clear that she realized that her condition was critical and death perhaps not far off. Her brother undoubtedly was then in middle life, and nothing to the contrary appearing, we must presume then possessed normal health and vigor. It is stated that he did not die until November, 1923. The grand-niece, Ethel Hiller, was but a young child and apparently motherless. She had been the especial care of Miss Loring, and during the latter's illness was daily at her bedside. The scheme of the will as intended by the testatrix, we think, anticipated that the brother would survive the testatrix—for life enjoy one half of her estate as trustee, manage the other half for the educational benefit of the young grand-niece, and finally, whenever he should die, in the testatrix' lifetime or afterwards, his share should "go to" the child. It is not reasonable to suppose that the testatrix, almost in extremis as she then was and apparently realized, intended to provide for her brother's death before her own.

This Court is committed to the doctrine that after a gift of personal estate, absolute in terms and without words of inheritance or power of disposal,—a gift over of the same property may in itself be sufficient to rebut the presumption that follows from the general gift without words of limitation. *Gregg* v. *Bailey*, 120 Me., 263. The

necessity of the application of this general rule under discussion to preserve the integrity of estates apparently absolute except as cut down by express words, is therefore lacking in this jurisdiction, as is also the binding effect of long established precedent. We think that in the instrument itself, and in the circumstances and conditions attending its execution, exists sound reason for holding that the decease of Frank W. Loring, mentioned in the fifth Section of the will, refers to his death whenever it should occur, before or after the decease of the testatrix. Hence, upon his death November 12, 1923, the share of Miss Loring's estate which he then had in possession passed to the plaintiff, and she is entitled to recover the same from his personal representative into whose possession the money has been taken.

The form of action is questioned. It is debt. We do not, however, think it necessary to consider technical questions of pleading. As in *Wright* v. *Holmes*, 100 Me., 508, 511, the case comes up on report, and we think it wiser to determine the vital questions at issue between the parties than to send the case off on a question of pleadings, if, which we do not decide, that be necessary.

In accordance with the stipulation of the parties, the finding being for the plaintiff, judgment must be for $937.32, with interest from November 12, 1923.

Judgment for plaintiff for $1,113.03.

MYRA L. GARLAND, APPELLANT

FROM

DECREE OF JUDGE OF PROBATE.

Somerset. Opinion February 23, 1927.

On an appeal to the Supreme Court of Probate where questions are submitted to a jury, exceptions lie to erroneous rulings of the Presiding Justice admitting or excluding evidence or to erroneous instructions to the jury.

The appellant on appeal is confined to the issues raised by the reasons assigned in the Court below as grounds for his appeal. The notice of appeal can not be amended in the Supreme Court of Probate by adding thereto additional grounds for appeal.

Where the evidence admitted is not harmful, exceptions to the admission will not be sustained.

Joint tenancies are not favored in this state, and evidence of an intent to create such tenancies should be clear and convincing. The four unities of title, time, interest, and possession must be present.

Where there is any evidence to support a finding of fact by the Supreme Court of Probate, it must stand.

In the instant case, not only is proof of a completed gift of a joint interest lacking, but, at least, one or more of the unities essential to the creation of a joint tenancy.

Both the doctrine of a joint interest created by such a deposit with a right of survivorship or a right of survivorship by contract violate well-settled principles of law in this state as to the creation of joint tenancies and the transfer of property by gift as well as the Statute of Wills, where the alleged donor has retained control for his own uses during his lifetime.

On exceptions to a decree of Supreme Court of Probate. George H. Garland, husband of the appellant, died November 1st, 1922. At the time of his death, there was in the house six hundred dollars in cash, and on deposit in the Savings Department of the First National Bank of Bangor the sum of $5713.00 in an account opened November 18th, 1915, and according to the deposit card kept by the bank, subject to the withdrawal by George H. Garland or Myra L. Garland

or the survivor. On November 3rd following his death, the six hundred dollars was deposited by the appellant in an account in the Pittsfield National Bank, payable to Myra L. Garland or George H. Garland, and on November 7th, the account in the Bangor Bank, together with the account in the Pittsfield Bank were closed and the deposits were transferred to a new account in the Bangor Bank in the name of the appellant.

The appellant was appointed administratrix of her husband's estate and filed an inventory showing his estate to consist solely of real estate valued at $3500.

Following the dismissal of a petition for license to sell the real estate to pay the debts and expenses of administration, the appellant resigned as administratrix and filed her first and final account in which she did not charge herself with either the six hundred dollars found in the house at the time of her husband's death or the sum on deposit in the Bangor Bank. The Judge of Probate disallowed the account, and ordered a new account filed, containing these items. From this decree the appellant appealed, assigning as her reasons of appeal the following:

First: Because her said account was disallowed, the same being just, true, and correct in every particular.

Second: Because the Court ordered her to file a new account, when the one disallowed embraced all the items relating to the matter of which she had knowledge.

Third: Because the Court ordered her to charge herself with the amount of the deposit in the First National Bank of Bangor standing in the name of George H. Garland and Myra L. Garland either or the survivor to draw.

Fourth: Because the Court ordered her to charge herself with the sum of six hundred dollars which was in the possession of the deceased at the time of his death and later deposited by the accountant in the Pittsfield National Bank.

The appellant further set forth under the third reason assigned, that the money on deposit in the Bangor Bank was owned by her and her husband in joint tenancy, and under the fourth reason, that the sum found in the house at the time of his death was her own property, and that she was not liable to account for it to his estate.

In the Supreme Court of Probate, certain questions at the request of the appellant being submitted to a jury, before the case was opened,

the appellant offered an amendment to the reasons of appeal by adding to the third reason assigned the further statement that the transaction with the First National Bank of Bangor at the time the joint account was opened in 1915 constituted a contract between the Bank, her husband, and herself by which the Bank was to hold the deposit, subject to withdrawals by either during their joint lives and by the survivor after the death of either.

The amendment was allowed by the presiding Justice *pro forma* as a matter of right. Three questions were submitted to the jury: (1) whether it was the intention of the parties to create an estate in joint tenancy in the deposit in the First National Bank of Bangor; (2) whether there was a contract entered into between the Bank and the appellant and her husband, by which the Bank was to hold the deposit subject to withdrawals by either during their joint lives and by the survivor after the death of either; (3) whether the six hundred dollars found in the house were wages of the appellant's personal labor not performed in her family?

The jury answered each question in the negative. The Supreme Court of Probate issued a decree in effect affirming the decree of the Probate Court and holding that the funds in the Bangor Bank were not held in joint tenancy; that no contract between the bank and the appellant and her husband existed by which the Bank was to hold the fund subject to withdrawal by either during their joint lives or by the survivor; and that the six hundred dollars was the property of George H. Garland and that both items should be included in the administratrix's account as part of his estate. To which decree appellant excepted. Exceptions overruled. Decree of Supreme Court of Probate affirmed with costs. Case remanded to the Probate Court for further proceedings in accordance with the decree of the Supreme Court of probate.

Harvey D. Eaton and A. Raymond Rogers, for appellant.

Edward F. Danforth, Butler & Butler and Merrill & Merrill, for appellee.

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

WILSON, C. J. This case is before this Court on exceptions to the admission of certain evidence submitted to a jury in the Supreme

Court of Probate, and to certain instructions by the presiding Justice to the jury, and also to his decree.

The first question that arose at the trial was over the right of the appellant to amend her reasons of appeal. The question is not directly before this Court on the appellant's bill of exceptions, as the amendment was allowed; but as it may be involved in the exceptions to the charge of the presiding Justice, since if the amendment was improperly allowed, the appellant would not be aggrieved by any errors in the Court's instructions relating to the issues raised by the amendment, and because the bar should not longer be left in doubt as to the law, we will consider it.

Until the case of Thompson Applt, 92 Me., 563, the right in probate appeals to amend the reasons of appeal in the Supreme Court of Probate not only had never been "mooted in argument", so far as the reported cases show, but had never been even suggested by the bar or Court. In the above case, the Court only said in passing, "Whether any amendment would be admissible affording relief to the proponent, we need not consider, as none was offered," although the defect was one readily cured by amendment.

In every previous case where the question of the sufficiency of the reasons of appeal had arisen: *Hughes* v. *Decker*, 38 Me., 162; *Lunt* v. *Aubens*, 39 Me., 397; *Gilman* v. *Gilman*, 53 Me., 184; *Bradstreet* v. *Bradstreet*, 64 Me., 211; *Barnes* v. *Barnes*, 66 Me., 286, the Court had unequivocally stated, without an intimation that the lack could have been cured by an amendment, that the appellant was confined to the reasons stated in the appeal. Appeals have frequently been dismissed where an amendment would have so patently cured the defect that if any doubt had existed, an amendment would at least have been offered and the right to amend determined long ago.

In *Smith Applt.* v. *Chaney*, 93 Me., 214, the Court in sustaining an amendment to the statement of the appellant's interest contained in the notice of appeal held that a statement of the appellant's interest was not one of the reasons of appeal; but inadvertently, it may be, used language indicating that the right to amend the reason of appeal in substance was in doubt.

In *Abbott Applt.*, 97 Me., 278, the Court dismissed an appeal, because the notice of appeal did not show that the appellant was aggrieved, and merely suggested that the notice of appeal might have

been amended showing the interest of the appellant, as was done in *Smith* v. *Chaney supra.*

But in *Merrill Trust Co., Applt.*, 104 Me., 566 and in *Burpee* v. *Burpee*, 109 Me., 379, the Court again in unequivocal language stated the rule: "It is a well settled, and familiar rule in this state on such appeals that the appellant is strictly confined to such matters and questions as are specifically stated by him in his reasons of appeal", without even an intimation that they could be enlarged by amendment.

Under such an apparently accepted construction of the statute governing probate appeals, without the right to amend the reasons of appeal in substance ever being claimed, so far as the reported cases show, and over a period of more than seventy years, the suggestion in the case of *Clark Applt.*, 111 Me., 399, that it was still a "mooted question" carries but little weight, especially as the Court expresses no opinion upon the question.

A probate court and the Supreme Court of Probate are statutory courts and the procedure therein is governed by statute and not according to the common law, *Bradstreet* v. *Bradstreet, supra.* The statute requires the reasons of appeal to be filed in the probate court and the statutory provision for notice must be strictly followed. *Townshend Applt.*, 85 Me., 57. No express authority to allow amendments to the reasons of appeal is given to the Supreme Court of Probate. Necessary authority to take all steps essential to the determination of all issues raised by the appeal is no doubt implied, but we think none is implied to consider issues on appeal other that those filed in the probate court as the grounds for the appeal.

Such appears to have been the accepted construction of this statute since its enactment. If it works a hardship, the Legislature can at any time readily enlarge it. But under the views held by the Court upon the other questions involved, it will work no hardship in this case,—if indeed, the amendment proposed in the case was more than additional specifications under the third reasons of appeal.

Passing to the issues raised by the exceptions, it is urged at the outset that in such cases exceptions do not lie to the admission of evidence or erroneous instructions of the Court to the jury in such proceedings, as the jury's verdict is only advisory, and the Court may not follow it. But it can not be presumed that the Court does not base its decree in any part on the jury's findings or answers, and

if their answers to questions submitted were the result of improper evidence submitted to them or of erroneous instructions as to the law, the error may also appear in the decree of the Court, especially where the decree follows the answers of the jury. *Rawley Applt.*, 118 Me., 109.

Appellant's exceptions one and two are overruled. The evidence of the withdrawal of the funds from the joint account and the deposit in her own name was admissible to show that the funds were in the possession of the administratrix. At least it was harmless. The evidence of her testimony given at a prior hearing has some bearing on the intent of the parties and her own credibility as a witness.

Exceptions three, four, five, six, seven, and eight were to instructions given to the jury by the presiding Justice as to the nature and creation of joint tenancies and the rights of parties under the contract entered into with a bank when deposits such as existed in this case are made. Under the view of the law held by this Court governing such transactions, the instructions given by the Court to the jury, even if not literally complying with the rules hereinafter laid down, the errors were not harmful and the exceptions thereto as well as to the decree must be overruled.

The crux of the case lies in the issue of what the rights of the parties are in such a deposit as the evidence shows existed here. At the time of their marriage in 1911 or 1912 according to the evidence in the case, each had a personal deposit: he in the Bangor Savings Bank of approximately $1100.00 and she in the Pittsfield National Bank of approximately $800.00. On July 5th, 1913, according to the statement of facts contained in the bill of exceptions, they went to work for the Great Northern Paper Co.,—he to have charge of one of its farms; she as housewife and cook. They remained in its employ in one capacity or another until July 14, 1919. What his or her occupation was after that time, whether he alone was the wage earner until his death, is not discolsed, except as her occupation may be inferred from the fact that for more than a year prior to his death they kept a boarder.

From the time of entering the employ of the Great Northern Paper Co., in July, 1913 to July 21, 1919, there is no direct testimony in the case as to what became of their earnings, or where their savings, if any, were kept by them, or under what conditions, or whether either had other property than the personal bank account above mentioned.

On November 18th, 1915, they went to the First National Bank of Bangor and deposited the sum of $1800, which was made payable to either or the survivor. No other deposit was made on this account until after their employment with the Great Northern Paper Co. was terminated in July, 1919.

For three years their pay was seventy dollars per month, and was paid by separate checks, $40 to Mr. Garland and $30 to Mrs. Garland. On August 23rd, 1916, their pay was advanced to $75 per month, but how divided between them does not appear, and July 1st, 1917 they went to work at another farm where they received $85 per month, and after March 1st, 1918, $100.00 per month. After July, 1917 their wages were paid in one check and to Mr. Garland.

In July, 1919, the joint account in the First National Bank of Bangor had increased from interest dividends to $2038.83 and Mr. Garland's personal account in the Bangor Savings Bank to $1847.29. On July 21, 1919, he drew out the entire sum in his personal account and all but one dollar of the joint account on an order payable to himself. As to what was done with this money, nearly $4,000, the evidence does not disclose, except that about this time a farm was bought in Orrington, Maine, which two years later was sold for at least $3,000.00, which was redeposited on the account; nor is the Court informed as to whence came a deposit of $3,000.00 on the joint account in October, 1919, three months after the withdrawals in July, or what was done with a withdrawal by the husband of $2,000 from the joint account in April, 1921. At some time a home was purchased in Pittsfield appraised in his estate at $3500, but with what funds is not disclosed. Nor is the Court informed whence came the deposits on the joint account between October, 1919, and April, 1922 after they had ceased to work for the Great Northern Paper Co., totalling nearly one thousand dollars, whether from his individual earnings, or in part from her earnings outside the family, or whence came three deposits during that period on what originally was her personal account in the Pittsfield National Bank and totalling $272.00.

Without any positive evidence—except a general statement that the real estate was the result of their earnings together and an irresponsive answer by her that some sum without designating any particular amount was the result of their joint earnings—that any part of the joint account in question was the result of their joint efforts, or

that she contributed in any respect to any sums deposited after July, 1919, except as every housewife assists her husband in saving, this Court is asked to find that the Court below erred as a matter of law in finding that there was no joint tenancy in the funds on deposit at her husband's death in the First National Bank of Bangor amounting to nearly $6,000, or any right of survivorship by virtue of the contract entered into with the Bank in consequence of an entry on its books that the sums on deposit should be paid to either or the survivor.

If the appellant sought to establish a joint tenancy under her reasons of appeal, the burden was on her to affirmatively sustain the allegations of her appeal by "unequivocal and compelling language" *Stetson* v. *Eastman*, 84 Maine, 366, 12; *Staples* v. *Berry*, 110 Me., 36, and not leave it to inference and conjecture. She was an unsatisfactory witness, disingenuous, and evasive. The jury were clearly warranted in finding the facts against her where they were in dispute or in rejecting her testimony, unless corroborated by convincing evidence.

But assuming, as we are requested to find, that the original deposits on the joint account came from their joint earnings with the Great Northern Paper Co., such an employment as is shown here neither created them joint tenants in their wages as earned, nor does it necessarily follow from the evidence that Mrs. Garland must now be held to hold in her own right any part of the money so earned.

While under our statute a married woman may claim her wages earned outside of her family, she may also waive her right to them. Mrs. Garland might have claimed and retained her wages in her own right while working with her husband for the Great Northern Paper Co.; but if she permitted them to be mingled with his funds in a deposit in a bank in such manner that they can not be identified, and permitted them to be used by him at his pleasure in purchasing real estate in his name, as the evidence shows that she did, and *a fortiori* if she permitted them to be paid to him as she did during the last two years of their employment, she might well be held to have waived her rights under the statute and they became his by virtue of his common law rights. *Hawkins* v. *Providence & Worcester R. R.*, 119 Mass., 596; *Kelly* v. *Drew*, 12 Allen, 107; *Birkbeck* v. *Ackroyd* 74 N. Y., 356; *McCluskey* v. *Provident Institution for Savings*, 103 Mass., 300, 306; *McCowan* v. *Donaldson*, 128 Mass.. 169, 171; 30 C. J. 825-6.

While this Court has not had the precise question before it to pass on, *Sampson* v. *Alexander*, 66 Me., 182; *Robinson* v. *Clark*, 76 Me., 493 and *Gould* v. *Carlton*, 55 Me., 511 clearly indicate that, unless the facts are brought within the statute, the common law applies. The statute being in derogation of the common law, must be construed strictly. Its language is permissive not declaratory. "She may receive her wages." The Massachusetts statute is stronger in her favor, as it expressly declares that her labor is presumed to be on her own account.

It is not necessary, however, for the Court to pass on this question; and we do not, as it does not appear to have been raised or passed on at the trial below; but, if prior to the original deposit in the joint account she had not waived her right to her wages, she and her husband did not hold the wages paid them as joint tenants, but a definite part belonged to him and a definite part to her, each in his or her own right. If such funds were afterward mingled in a bank deposit, they must still be deemed to have held their respective shares in common, unless the form of such deposit created a joint tenancy in the entire fund with a right of survivorship.

Under her reasons of appeal, however, the appellee bases her claim solely on a joint tenancy with a right of survivorship. If any part of their earnings were claimed by her in her own right, she makes no claim to them in these proceedings on that ground, but solely as surviving joint tenant or under the contract with the bank. It has long been settled that she is bound in the Supreme Court of Probate by her reasons of appeal. If, therefore, any part of the joint account was her separate property, unless her claim to a joint tenancy can be established, or a right of survivorship under a contract, she must seek her remedy in some other proceeding than this. In these proceedings, the parties and the Court are bound by the pleadings and the evidence in support of them.

Upon the pleadings, the funds deposited in the joint account, therefore, must be treated as held either in joint tenancy prior to the deposit; or as tenants in common, or the sole property of the husband, and a joint tenancy created by the form of the deposit; or with a right of survivorship created by contract with the bank, in order for the contentions of the appellant to be sustained.

For the reasons above stated, there was clearly no joint tenancy in the earnings prior to the deposit. With the funds the sole property

of the husband or of both as tenants in common, the funds of the husband could only become the property of the wife, without some consideration passing, so that she may hold them against his personal representatives; by gift *inter vivos* or *causa mortis* or by a declaration or conveyance in trust. *Getchell* v. *Bank*, 94 Me., 452, 458. The last may be eliminated as well as a gift *causa mortis*. We are, therefore, only concerned as to whether there was a gift *inter vivos* by the husband to his wife, if the funds were his, or each to the other, if owned in common, which created a joint tenancy in each other's share with the right of survivorship, or in some way the right of survivorship resulted from the contract with the bank—omitting for the moment any question as to whether the amendment was properly allowed. The burden of proof is on the appellant. *Lane* v. *Lane*, 76 Me., 521.

It should be kept in mind that joint tenancies are not regarded with favor in this state, and the evidence establishing such an estate must be clear and convincing. Neither are tenancies in the entirety recognized, Robinson Applt., 88 Me., 17; nor, at least, since the enactment of the statute authorizing married women to hold property has any common law doctrine been recognized here that choses in action payable jointly to husband and wife pass to the survivor.

This Court does not recognize any joint interest in either real or personal property, except that of copartners, tenants in common and joint tenancies. It adheres to the common law rule that in the creation of joint tenancies four essential elements must be present: unity of time, unity of title, unity of interest, and unity of possession. It recognizes as an essential condition of its existence that the unity of interest must continue until the death of one of the joint tenants, that a transfer of the interest of one co-tenant will destroy the joint tenancy and that proof of a right of appropriation of any part of the property alleged to be so held for the sole use of either party is inconsistent with a claim of a joint tenancy. These are well established principles of governing the estates in joint tenancy. *Staples* v. *Berry* 110 Me., 36; 7 R. C. L. 811, 815; 17 Am. & English Ency. of Law, p. 649 and cases cited *Stetson* v. *Eastman*, 84 Me., 366; *Case* v. *Owen*, 139 Ind., 22; *Denigan* v. *San Francisco Sav. Union*, 127 Cal., 142; *Robinson v. Mut. Sav. Bk.*, 7 Cal. App. 642.

Even if the four essentials of a joint tenancy can be present in case of a gift of property direct from one person to another, at least all the essentials of a gift as to surrender of absolute control and delivery

must be complied with. *Sav. Bank* v. *Merriam*, 88 Me., 146; *Nutt* v. *Morse*, 142 Mass., 1; *Savings Inst.* v. *Hathorn*, 88 Me., 122; *Savings Ins.* v. *Fogg*, 101 Me., 188; In re Bolin, 136 N. Y. 177.

Not only is proof of a completed gift of a joint interest lacking in the case at bar, but at least one or more of the unities essential to the creation of a joint tenancy. There is no evidence outside of the bank records as to the intent of these parties in opening the new account on November 18, 1915 subject to the right of either or the survivor to withdraw, except such inference as might be drawn from their relations as husband and wife.

The mere entries themselves are not sufficient alone to prove a gift *inter vivos* of any interest either joint or otherwise. There is no evidence of any delivery of the bank book. Presumably, Mrs. Garland had it in her possession when she deposited, as she testified, on two occasions. Other than that, so far as the evidence discloses Mr. Garland may have retained, at least, exclusive physical possession until his death.

The reservation of the right of absolute control during his lifetime, and the exercise of that right by withdrawals for his own uses, not only contravenes any gift *inter vivos*, but without other evidence than the bank's record, is inconsistent with an intent to create a joint tenancy. *Marble* v. *Rec. Gen.* 245 Mass. 505, 507, 509. Without evidence of other intent, it is more consistent with a convenient arrangement for withdrawals during the joint lives of the parties and an intention to make a testamentary disposition of the balance, which being in violation of the Statute of Wills can not be upheld. *Staples* v. *Berry*, 110 Me. 36.

This Court has so frequently held that an entry of this kind, even with other evidence of an intent for the survivor to take, is insufficient to satisfy the requirements of a gift *inter vivos*, or the Statute of Wills, that it can not now be expected to change a rule so well established and withal so obviously sound. *Savings Bank* v. *Merriam supra; Savings Bank* v. *Mahoney*, 121 Me., 49; *Howard Adm'r* v. *Dingley*, 122 Me., 5; *National Bank* v. *Ward*, 122 Me., 227; nor are authorities lacking in other jurisdictions to the same effect. *Gordon* v. *Toler*, 83 N. J. Eq., 25; *McCullough* v. *Forrest*, 84 N. J. Eq., 101; In re Bolin, 136 N. Y., 177; *Denigan* v. *San Francisco Sav. Union*, *supra*, 3 R. C. L., 714.

Even if there was sufficient evidence of an intent on the part of

either to make a gift of a joint interest with a right of survivorship, we think it must fail under the law of joint tenancies held in this state. The essential unities are not present. *Denigan* v. *San Francisco Sav. Union*, supra., p. 149. In case of a gift of an interest in a chattel or chose in action, there appears to be no unity of time or title. The source of the title of the donor and the time of acquisition appears to be entirely different from that of the donee. Even in case of a change in a bank deposit, the novation by the bank in acknowledging a joint obligation, when its obligation before was only several, does not constitute the source of the donor or donee's title. The donee receives his title of the chose in action from the donor; the bank by novation simply acknowledges a new obligation in place of the old by direction of the donor. The title of the donee does not come from the bank.

It is true that the New York Courts have held that, where there is proof of an intent to create a joint interest in a bank deposit with a right of survivorship, a joint tenancy in the fund is created, and several other states have adopted the same rule, but without reasoning as to the basis on which it rests. *Whitehead* v. *Smith*, 19 R. I., 135; *Blick* v. *Cockins*, 252 Pa. St. 56. Other states which still recognize an estate in entirety treat such deposits as between husband and wife as creating an estate of this nature. *Baker* v. *Baker*, 123 Md., 32; *Craig* v. *Bradley*, 153 Mo. App., 586.

The New York rule also appears to have its origin in the common law relation between husband and wife under which choses in action payable to them jointly passed to the survivor. *Borst* v. *Spelman*, 4 N. Y., 284; *Sanford* v. *Sanford*, 45 N. Y., 723; *West* v. *McCullough*, 108 N. Y. S., 493.

From this beginning, the rule has been extended to others than husband and wife until in later decisions a deposit of this nature, if the intent to create a joint interest is shown, is held to create a joint tenancy in the funds. *Kelly* v. *Beers*, 194 N. Y., 49. This result has not been reached, however, without some questioning. *West* v. *McCullough supra*, p. 497. In more recent years, the status of such funds has been fixed by statute as it has been in Michigan, California, and Illinois. *Clary* v. *Fitzgerald*, 140 N. Y. S., 536; *Wayne Co. Sav. Bank* v. *Smith*, 194 Mich., 151; *Svenson* v. *Hanson*, 289 Ill., 242..

Inasmuch as in this state the common law rule of survivorship as to choses in action payable jointly to husband and wife, as well as

estates in entirety, have been considered as abolished by the statute conferring on married women the right of holding property to their sole and separate use, Robinson Applt., *supra*, and as this Court adheres to the principles of the common law in the creation of joint tenancies, the New York rule finds no logical resting place in the jurisprudence of this state.

Other states have sustained the right of the survivor in such a deposit upon the theory that such a transaction creates a contract between the bank and the parties in whose name the deposit is made, and under which the funds remaining at the death of either become the property of the survivor, not by gift, but by virtue of the contract, *Deal's Admr.* v. *Mer. & Mech. Sav. Bank*, 120 Va., 297; while others treat the depositing of the funds in the bank, or the novation in case of a change in an existing account, as in effect a transfer to the bank and a reconveyance to the parties, named as entitled to draw, and analogous to a transfer to a third party of real estate and a reconveyance to the grantor and another as joint tenants so that the requirement as to the essential unities is thus complied with. *Chippendale* v. *No. Adams Sav. Bk.*, 222 Mass. 499.

But we can not assent to the doctrine, that where the party to whom the fund belonged retains full control over it during his lifetime, and no actual gift *inter vivos* either of the fund or the chose in action is shown, though made payable to him or another or to the survivor, any title passes to the survivor by virtue of a contract between the bank and the owner and the survivor.

An intended gift can no more pass after death by contract than by a simple order to pay. If the donor retains control for his own uses during his lifetime there can be no gift *inter vivos*, and the theory of a *post mortem* transfer by contract is as clearly of the nature of a testamentary disposition as a gift to take effect after death without such contract.

In view of the disfavor with which joint tenancies are held in this state, neither can we assent to the doctrine of a creation of a joint tenancy by such a transaction by any analogy to a conveyance of real estate to a third person and a reconveyance to his grantor and another as joint tenants.

In the latter case, there is an actual transfer of title to the joint tenants by deed, while in case of a bank deposit, there is no transfer of the funds and a reconveyance, but a transfer of the funds which

the bank retains and a mere acknowledgement of the debt thus created which the bank assents to pay in accordance with the order given by the depositor, and which it does either upon the assumption of a right already vested in both parties, or to be vested, or otherwise upon the mere authority given by the person in whose name the account originally stood or who made the deposit which authority must, of course, cease with his death, if not previously cancelled. Assuming the title in one of the parties named as entitled to draw, a transfer of title must be effected before the deposit, or of the chose in action afterward. In either case, the right of the survivor must come from the original owner by gift of the funds or assignment of the chose in action during his lifetime and not from the bank; and even if the change of title was effected at the time of the deposit, there would still be a clear sequence in point of time between the acknowledgement of the debt and the transfer of the title, or *vice versa*, hence both unity of title and of time essential to the creation of a joint tenancy is lacking, even assuming an intended gift of a joint interest with a right of survivorship and a compliance with all the essentials of a valid gift.

Therefore, both the doctrine of a joint interest thus created with a right of survivorship, or of a right of survivorship by contract, appear to violate well settled principles of law of this state as to the creation of joint tenancies, and the transfer of property by gift, as well as the Statute of Wills, especially when the right of control for his own uses is not surrendered by the donor during his lifetime.

Nor is the case of *Atty. Gen.* v. *Clark*, 222 Mass., 291, controlling of the case at bar. In that case, there was real estate and certificates of stock held in joint tenancy, a bank deposit to which the parties contributed equal amounts and no funds were withdrawn, except for joint benefit. Here the proportion contributed by each party is left to conjecture and the withdrawals appear to have been on the husband's sole account and proof of any intent to create a joint tenancy outside of the entry on the books of the bank is entirely lacking; nor can we adopt the view that by a mere agreement between the parties, as was held in *Marble* v. *Rec. Gen. supra.*, property owned severally in common can be changed to a joint tenancy, or where the right to the full use during life is reserved, a right of survivorship can be created without contravening the Statute of Wills.

If the creation of a joint interest in bank deposits with the right

of survivorship is desirable, the Legislature has power by its fiat to authorize it. The amendment to sec. 25, chap. 52 under chap. 144 P. L. 1923, however, indicates that the revisers of our banking laws were of the opinion that the adoption of such a rule would not only open wide the door to fraudulent claims, but also encourage the evasion of our tax laws and the circumvention of the Statute of Wills.

There appears to be no real inconsistency between the decision in *Staples* v. *Berry supra* and *Barstow* v. *Tetlow*, 115 Me., 96. The latter case was decided according to the law as laid down by the Rhode Island Court, which follows New York, and which law governed the case. *Staples* v. *Berry* should not be construed as holding that there may not be withdrawals on a deposit held in joint tenancy, if once shown to exist, by one tenant for the joint uses; but only that the reservation of the right of withdrawal, if for the sole use of one, especially of the donor is not consistent with an intent to create a joint tenancy, and might destroy such tenancy if one existed. *Marble v. Rec. Gen. supra* p. 507. As evidence, at least, it is contrary to such intent.

As to the six hundred dollars found in the house after the death of Mr. Garland, no evidence was offered that would warrant a finding, except by conjecture, that it was other than the property of the husband. Evidence was introduced, apparently intended to support her contention that the six huundred dollars that was in the house at the time of his death was hers, to the effect that a boarder who was her brother, paid the money for his board to her, though she does not even state when she took the stand that the money thus received constituted any part of the six hundred dollars, but even if it did, we think the presumption upon the testimony in the case is that the money belonged to the husband and the Court's finding in this respect can not be disturbed as a matter of law. 30 C. J. 827; *Flynn* v. *Gardner* 3 Ill. App. 253; *Brown v. Walker*, 81 Ill., Appl. 396; *Porter* v. *Dunn*, 131 N. Y. 314; Re Mallory 35 N. Y. S. 155; *Sampson* v. *Alexander*, 66 Me., 182; Quin Applt., 120 Me., 546.

The decree of the Supreme Court of Probate was in accord with the pleadings and the evidence in the case, and the law applicable thereto.

Exceptions overruled. Decree of Supreme Court of Probate affirmed with costs.
Case remanded to the Probate Court for further proceedings in accordance with the decree of the Supreme Court of Probate.

MARY A. GREGORY

vs.

BENJAMIN C. PERRY.

Knox. Opinion February 25, 1927.

It is entirely within the discretion of the presiding justice as to whether or not a mistrial shall be granted because of the sudden illness of the husband of the plaintiff occurring in the court room in the midst of the trial and in the presence of the jury, and to his ruling no exceptions lie, in absence of abuse of discretion.

The fixing of damages for mental and physical suffering is purely a jury question, and the verdict in this case not being so grossly excessive as to clearly indicate bias or prejudice, must stand.

On exception and general motion. An action of tort to recover damages for personal injuries sustained by plaintiff by being hit while walking along the Atlantic Highway in Rockport on January 13, 1926, by an automobile owned by defendant and being operated by one Lewis G. Coltart, with whom defendant was riding. Plaintiff alleged negligence, and defendant pleaded the general issue and under a brief statement set up contributory negligence. Defendant moved for a mistrial which was denied, and exception taken. A verdict of $8,293.50 was rendered for plaintiff and defendant filed a general motion for a new trial. Exception and motion overruled.

The case fully appears in the opinion.

O. H. Emery, for plaintiff.

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

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

WILSON, C. J. An action for personal injuries received by the plaintiff through the alleged negligence of the defendant in operating

his automobile. In the course of the trial, the plaintiff's husband while sitting within the bar in the full view of the jury, suffered a cerebral hemorrhage, received medical attention, and was removed from the court room, resulting in a temporary suspension of the trial. The jury awarded a verdict for the plaintiff and assessed damages in the sum of $8,293.50.

The defendant requested that a mistrial be ordered by reason of the husband's illness occurring in the presence of the jury on the ground that it may have unduly enlisted the sympathy of the jury, which motion was denied and exceptions allowed. The case is before this Court on the defendant's exceptions, and a motion for a new trial on the ground that the damages are excessive.

The exceptions can not be sustained. The ordering a mistrial in such a case was discretionary with the presiding Justice. No abuse of discretion is shown. He was present and could better judge whether the incident would be likely to adversely affect the defendant than this Court from the printed page or a description by counsel in argument. There is no suggestion of feigned illness or improper conduct.

That a verdict was warranted upon the evidence is not questioned. The only ground upon which it is attacked is that it is clearly excessive.

That the plaintiff was severely bruised and received a severe shock was not questioned, and from the testimony, the jury was warranted in finding that her physical conditions described by her family, friends, and physicians were due to the accident and the defendant's negligence, and were also warranted in concluding that at her age, her complete recovery was doubtful, that she might reasonably be expected to pass the remainder of her days suffering in a greater or less degree from the injuries and the shock she received. Her physical pains may disappear, but from the testimony of the physicians and of the expert medical testimony, the jury may have properly concluded that not only the injury to her nervous system from the shock may prove to be permanent but that a "lighting up" of a previous tendency to arteriosclerosis may have resulted, and that she will pass the remainder of her days in impaired health.

Courts recognize that compensation for such injuries is difficult to measure. No standard exists. It is distinctly a question for a jury. Juries upon a similar state of facts in different cases have differed widely in their estimates of the damages. Individual cases, there-

fore, offer little help by way of comparison. The only rule for this Court to follow is that, unless the damages for this class of injuries in a given case appear to be grossly excessive, the judgment of twelve men acting under their oath as jurymen must stand. "It is always a delicate undertaking to set aside a verdict on account of excess of damages, especially in cases where the rules by which they are to be measured are vague and uncertain." *Howard* v. *Grover*, 28 Me., 97. It must appear that, taking the evidence most strongly in favor of the plaintiff, the verdict was clearly excessive. *Donnel'y* v. *Granite Co.*, 90 Me., 110, 119; *Boyd* v. *Bangor Ry. & Elec. Co.*, 111 Me., 332, 335.

The verdict in the case at bar was large and approaches, if it does not reach, that "ultimate bounds", that it is the duty of this Court to see is not "greatly overstepped." *O'Brien* v. *J. G. White & Co.*, 105 Me., 308. But taking the testimony of the physicians as to her probable recovery in its strongest light in her favor, we are unable to say that the verdict was so clearly the result of bias or prejudice or sympathy and not the calm, dispassionate judgment of the twelve men who heard the evidence that it must be set aside, even though from the printed record this Court might have awarded a materially lesser sum.

Exception and motion overruled.

HUTCHINSON'S CASE.

Penobscot. Opinion February 25, 1927.

The construction of the contract of assent and the insurance policy under the Workmen's Compensation Act is a question of law.

If a division of employees is permitted by the Industrial Accident Commission that is not warranted under the Act, it does not follow that all employees must of necessity be included under the assent or are covered by a policy of insurance that is expressly limited to only a part.

In this case the additional evidence introduced at the rehearing clearly shows that the deceased when injured was not engaged in any work covered either by the written assent of the employer or the policy of insurance.

On appeal. A petition by Lucy A. Hutchinson as dependent widow of Fred A. Hutchinson who was killed, September 8, 1919, at the Veazie Power Plant, so-called, while in the employ of the Bangor Railway & Electric Company, by coming in contact with live wires. The case has once before been before the Law Court, 123 Maine, 250, and was recommitted for further hearing. A second hearing was had and compensation awarded and appeal taken on the ground that the work deceased was engaged in at the time of the accident was not covered by the assent of the employer nor by the insurance policy. Appeal sustained. Decree of sitting Justice reversed. Petition dismissed.

The case is sufficiently stated in the opinion.

Albert G. Averill and W. H. Waterhouse, for petitioner.

Andrews, Nelson & Gardiner and Ryder & Simpson for respondents.

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

WILSON, C. J. The Bangor Railway and Electric Co., in 1918 began the reconstruction of one of its power plants located at Veazie on the Penobscot river. The work was done by the company, not according to a single plan, but in separate units at separate times.

While in the construction of a unit which included the installing of a new switchboard, which was composed of a series of brick cells containing transformers, meters, and other equipment used in connection with the transposing or reducing and metering the current as it was transmitted from the generators to the distribution system, which unit is designated on the company's books as Job Plan 3082, the claimant's husband was fatally injured.

At the time of the accident, plans had been drawn and some preliminary work done in the reconstruction of three flumes in a series of fifteen and the installing of three new water wheels and generators in connection therewith. This unit was designated on the company books as Job Plan 3083. The only electrical work connected with this unit was the connecting of the new generators with the transmission system.

Up to the beginning of the work on the reconstruction of the flumes and installation of the new water wheel and generators, the company was not an assenting employer, but, owing to the hazards connected with this work, it filed its written assent to the Compensation Act as to the employees engaged on the construction work covered by Plan 3083, and an insurance policy covering the employee engaged on Job Plan 3083, and expressly stipulating that it covered no others.

Its written assent and insurance policy received the approval of the Industrial Accident Commission and a certificate was issued to it under Sec. 6, III of the Act.

The Chairman of the Commission on December 11, 1922 handed down a decision holding the company liable to compensation either because the work on which the deceased was engaged at the time of his injury was a part of and incidental to the work contemplated under Job Plan 3083 or because he was engaged in work directly connected with the development of the plant as set forth in Job Plan 3083.

From the decree of the court in accordance with his decision an appeal was taken and this Court ruled, 123 Me., 253, that neither the assent nor the contract of indemnity can be construed to cover any electrical work, except such as may be connected with the relocating of the generators under Job Plan 3083, and held that there was no evidence in the printed record as then presented to show that the work on which the deceased was engaged at the time of his injury was covered by the assent or insurance policy; but as the Commission visited the plant, he may have there received such evidence, and

although improperly received under the circumstances disclosed by the evidence, in order that no injustice might be done the claimant, the case was remanded for further hearing.

A rehearing has been had, and the evidence now before us settled beyond question that the work on which the deceased was engaged was no part of the work contemplated under Job Plan 3083. The Commissioner, in order to hold that the deceased was covered by the assent, was compelled to find either that he was engaged in the work covered by Job Plan 3083 or hold that the assent and policy covered all the employees engaged in making the contemplated improvements at this plant, including both Plan 3083 and Plan 3082. The former he could not do. The evidence was conclusive. He adopted the latter. His process of reasoning is: that either the assent and policy were null and void as covering only part of the men employed in a single enterprise or they are good as to all the employees; again, it is folly to say that an employer can become an assenting employer as to certain men who are installing machinery in one part of a plant with which certain wires must be connected and at the same time exclude from the benefit of the assent other employees engaged at the same time under the same roof for the same employer and all paid from a common fund and all engaged in the erection of a single completed unit for the production of power; and, therefore, the assent and contract of indemnity must cover all.

If such a division of employees is not permitted under the statute, it is, of course, a *non sequitur* that such a limited assent and policy must cover all. If to hold that the assent and indemnity contract in this case was so limited be folly, it was committed with the full knowledge and consent of the Industrial Accident Commission when it approved the assent and policy. This Court has not been called on to pass on the validity of the assent, and has not. Having been passed on by the Industrial Accident Commission, it has assumed they were valid, until questioned. Assuming that validity, the construction of the assent and the contract of indemnity is a question of law not of fact. This Court has already placed its construction upon them. It sees no reason to change it. *Nash* v. *Drisco*, 51 Me., 417; *Hoyt* v. *Tapley*, 121 Me., 239.

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

WHITE'S CASE.

Aroostook. Opinion March 1, 1927.

Under the Workmen's Compensation Act an assenting employer is bound to furnish or pay for medical aid, for a period of thirty days and to the extent of one hundred dollars, but a longer period or a greater sum may be determined by the Industrial Accident Commission upon a hearing on a petition by either in such cases only where the employee and employer do not agree, a prerequisite to jurisdiction.

In the instant case, the employer and insurance carrier, in their relationship to the injured employee, are as one and the same, and the procedure being by petition by the employer against the insurance carrier is unauthorized. The proceedings should have been instituted by the employee, or some one claiming under him adversely to the employer after a disagreement between them; a preliminary essential to the jurisdiction of the Commission.

On appeal in a compensation case. Compensation was awarded and paid to a dependent widow until her remarriage. From the date of the injury to the death of the employee more than thirty days elapsed and more than one hundred dollars expense for medical-aid was incurred. These proceedings were instituted by petition of employer against the insurance carrier for the purpose of having the Industrial Accident Commission determine how much of such medical-aid expenses should be paid. The commission ordered a part of the bills to be paid by the petitioner and a part of them to be paid by the insurance carrier, and from an affirming decree both the petitioner and the insurance carrier appealed. Appeal sustained. Decree below reversed.

The case fully appears in the opinion.

J. Frederic Burns, for petitioner (employer).

Robert Payson, for insurance carrier.

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

DUNN, J. This case presents a question under the Workmen's Compensation Law.

Narrowed down to specific details, in reference to the sequence of events the case is:

One Everett D. White, an employee of the assenting firm of W. E. Robinson & Son, sustained an industrial injury on the twenty-fourth day of January, 1924.

He was removed to an Houlton hospital, and there remained for longer than two months, when, following the amputation of his crushed leg, which to this time it had been hoped to save, he died.

Though the injury was compensable, the injured man neither applied for nor received compensation, either in the form of medical aid or of weekly payments.

Mr. White was survived by his wife. She claimed the benefit of compensative payments (*Mary A. White's Case*, 124 Maine 343), and for a time had such. The privilege of having further payments terminated on her remarriage. 1919 Laws, chap. 238, sec. 12, as amended by 1921, chap. 222.

Next, the erstwhile employer filed against its insurance carrier to the commission that petition by which the present proceeding was begun. The petition alleges the inability of the "parties," and the expression "parties" must be taken to relate antecedently to the employer and the carrier, to agree upon the amount to be allowed toward the bills and charges aggregating $995.50, that were incurred for medical and other care furnished Mr. White at the hospital.

The carrier answered, and answering, moved the dismissal of the petition on the ground that the petitioner was without standing. The motion was overruled. The hearing progressed; the commission ordered that, in the respective amounts sanctioned by it, the bills be paid, not by the carrier alone, but by either carrier or employer. From the enforcing decree, entered by statutory direction, both employer and carrier appealed.

Their appeal has merit.

Upon the happening of the accident, the contractual right of Mr. White to have compensation vested, and the obligation to pay it became definite. *Gauthier's Case*, 120 Maine 73. That is, to begin with, the employer was bound to furnish, or pay for, medical, surgical, and hospital services, nursing, medicines, and the like, during the first thirty-day period, to an extent not exceeding one hundred dollars; the obligation being enforceable by petition to the Indus-

trial Accident Commission in behalf of the employee. *Ferren* v. *Warren Company*, 124 Maine 32.

That right to have professional skill and services and care was property. *Melcher's Case*, 125 Maine 426.

On occasion, as employee or employer, the one or the other, in any compensable case may show, the Accident Commission can fix a longer period or a greater sum, for medical and related attention. 1919 Laws, chap. 238, sec. 10.

But the Compensation Act does not provide to an assenting employer a remedy against his insurance carrier, to determine whether there shall be an increased time or amount. It is not meant to say that an employer would be without remedial right, where the underlying contract breached by the carrier, in neglect or refusal to furnish or pay for the services or care; rather is meaning that the procedure employed in this instance is unauthorized.

The Workmen's Compensation Act, it seems becoming in passing to remark, is binding upon employers and employees electing to be bound, and upon none others. The act deprives no creditor of his right to resort to the courts for the establishment and collection of his claim.

Under the act, in relationship to an employee injured, the employer and the insurance carrier are as one and the same. This is because the employer, in the stead of proving to the commission his ability to pay all awards of compensation, optionally filed the insurance policy which the carrier had issued. 1919 Laws, chap. 238, sec. 6.

Respecting medical aid, as has been noted, whenever an employer and an employee are disagreeing on a longer period or a greater sum, the power to hear and determine the controversy is in the Industrial Accident Commission.

Which is but another way of saying that disagreement between them who have or claim an interest in proceedings instituted by an employee adversely to an employer, or conversely, to settle a medical-aid difference, is prerequisite to jurisdiction within the meaning of the Compensation Law.

And of such preliminary essential, in the instant case there is lack.

Appeal sustained.
Decree below reversed.

CHARLES B. JOHNSON, ADMR., ET AL.

vs.

C. BRIGHAM COMPANY.

Somerset. Opinion March 2, 1927.

When a right is created by statute and a specific remedy is provided, the right can be vindicated in no other way than by pursuing the prescribed course, step by step.

A minority stockholder in order to avail himself of the privilege provided under Sec. 61, Chap. 51, R. S., must comply strictly with its provisions, and vote either himself, or by proxy, in the negative on the proposal to sell, and file his written dissent.

In the instant case the minority stockholder did not vote in the negative, a requisite of the statute and an essential condition precedent.

On appeal. A petition by a dissenting stockholder under R. S. Chap. 51, Sec, 61, for a judicial determination of the value of his stock in the defendant corporation. At a meeting of the shareholders of the defendant corporation, at which all the shareholders were present or represented except the petitioner, it was unanimously voted to sell the entire property of the corporation. The petitioner within the limitation duly filed his written dissent from the action taken. The question at issue was as to whether the petitioner had complied with the statute by actually voting in the negative on the proposal to sell. At the close of petitioner's case at the hearing, on motion of counsel for defendant, the bill was dismissed, and an appeal taken. Appeal dismissed. Decree below affirmed.

The case appears in the opinion.

Harry R. Virgin, Edward N. Chase, and Freeman & Freeman, for plaintiff.

Bradley, Linnell & Jones, and John F. Cusick, for defendant.

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

DUNN, J. An appeal from the decree which, by dismissing a petition under the Minority Stockholders Act, (R. S., chap. 51, sec. 60 et seq.), on the ground that no case had been made out, denied the valuing of certain shares of capital stock.

Conferring rights, the act provides in effect that, in the instance of a solvent going corporation, the majority stockholders whereof have voted to sell its entire property, otherwise than in the ordinary and usual course of business, any minority stockholder who voted in the negative on the proposition of selling may, after the filing of written dissent, if the corporation does not petition, himself petition for the corporation to pay the value of his shares, as the same shall be judicially determined. Time limitations are of unimportance on the present record.

Notwithstanding that he voted differently, the minority stockholder will be bound by the majority decision, unless he confirm his preference by writing. Section 65.

On petition and hearing, it is for the court to fix a valuation on the minority stock, and give judgment.

When the judgment is satisfied, the stock passes to the corporation, and the stockholder retires. Section 63.

The remedy rests wholly upon the statute, and is enforceable only on making evident that conditions precedent had been observed. First, it must be established that on the proposal to sell he who invokes relief voted in the negative. The minority stockholder, or his proxy, must have done the active, positive thing of recording a vote against selling.

That such vote was not recorded is the crux of this proceeding.

The corporation of C. Brigham Company was not insolvent or in failing condition. Of shares of stock, three thousand were outstanding. At the meeting on May 1, 1922, no action was taken on whether the business be sold out and the assets conveyed, because of the absence of a quorum. Adjournment to another day one fortnight ahead was made.

Next time, all the stockholders were present or represented, but the owner of sixty-nine shares, he who later filed the petition. It was voted that, for the consideration of shares in another company, there be sold to that company by the Brigham corporation its property and rights of every kind, except its right to be an artificial being. The vote was unanimous.

Seasonably after the meeting, the owner of the sixty-nine shares filed his written dissent.

The corporation never petitioned to have the shares valued. But the owner did. An interposed demurrer was not pressed. Answer was made, and the case of the petitioner heard. On suggestion of the death of the petitioner, the cause was revived for his administrator and for trustees. They prosecuted. Then came the decree, and the appeal.

It is the position of appellants that the minority stockholder must be held to have voted in the negative in the sense that he did not vote in the affirmative. The argument is that his not having been present and voted, followed by the fact of his later dissent, is equivalent to his having voted in the negative at the time that the other stockholders actually voted in the affirmative.

The primal requisite of the statute is a vote which refused assent. This essential condition the petitioner did not meet.

When a right is created by statute, and a specific remedy is provided, the right can be vindicated in no other way than by pursuing the prescribed course, step by step.

It was proper to dismiss the petition.

And the appeal ends.

Appeal dismissed.
Decree below affirmed.

JESSIE F. CUMMINGS, APPLT.

FROM

DECREE OF JUDGE OF PROBATE.

Cumberland. Opinion March 8, 1927.

A party is aggrieved by and has the right to appeal from a probate decree that operates on his property, or bears upon his interest directly.

A decree of adoption which divests a mother of all legal rights in respect to her minor child bears directly upon the mother's interest. By such decree she is aggrieved and from it has the right of appeal.

R. S. Chap. 67, Sec. 31 providing for appeals by persons aggrieved is not in any part repealed or superseded by the statute providing for adoption of children, R. S. Chap. 72, Sec. 39.

The latter statute though a subsequent enactment does not supersede or limit the former, but rather supplements and extends it.

On exceptions. A petition by Nellie F. Cummings for the adoption of Evelena F. Cummings, child of Jessie F. Cummings and Ralph G. Cummings. Written consent was given by the father who had the custody of the child under a decree of the Probate Court. The required notice was given to the mother who appeared and contested the petition. A hearing was had and the Judge of the Probate Court found "that the mother is unfit to have the custody of said child," and from the decree an appeal was taken by the mother, Jessie F. Cummings. A hearing was had in the Supreme Court of Probate on the appeal and the presiding justice dismissed the appeal and appellant excepted. Exceptions sustained.

The case fully appears in the opinion.

Harry B. Ross and F. J. Laughlin, for appellant.

Edmund P. Mahoney, for appellee.

SITTING: PHILBROOK, DUNN, DEASY, STURGIS, BARNES, BASSETT, PATTANGALL, JJ.

DEASY, J. Jessie F. Cummings the appellant is the divorced wife of Ralph G. Cummings and the mother of Evelina F. Cummings, a minor child. Nellie F. Cummings, Evelina's grandmother, petitioned under the Statute (R. S. Ch. 72, Sec. 35 as amended) for leave to adopt the child. The father consented in writing. The child's mother (the appellant) was given legal notice. (R. S. Chap. 72, Sec. 36). The Probate Court, finding "that the mother is unfit to have the custody of said child" granted the petition for adoption.

The question before this Court is whether the mother has a legal right to appeal from the decree. Upon this issue the single justice hearing the case decided against her, dismissing the appeal. Thereupon she brings the case forward on exceptions.

Revised Statutes Chap. 67, Sec. 31 provides that "any person aggrieved by any order, sentence, decree or denial of such (probate) judges—may appeal therefrom to the Supreme Court." Is the child's mother "aggrieved?" The point has not been settled. *Moore vs. Phillips*, 94 Me., 422, cited by the appellee is not decisive. There the mother lost her right of appeal through failure to give bond.

The law does not base the right of appeal upon sentimental grounds. Aggrieved does not mean grief stricken. A fortiori it does not mean merely dissatisfied.

In legal acceptance a party is aggrieved by a probate decree that operates on his property or "bears upon his interest directly." *Deering* vs. *Adams* 34 Me., 41; *Lunt* vs. *Aubens* 39 Me., 392.

The decree in the present case does not operate upon property of the appellant. But there are interests, tangible, valuable, enforceable interests—which are not property.

(1) Because the decree bears directly upon her interest the statute makes the mother a necessary party in the Probate Court proceeding. If she does not consent to the adoption, notice must be given to her. R. S. Chap. 72, Sec. 36.

(2) The mother is one of the child's heirs presumptive. By depriving her of this status a decree of adoption bears upon her interest though it does not operate upon her property.

(3) The Probate Decree finds and declares that the appellant "is unfit to have the custody of said child." If this is an erroneous finding the mother has a direct interest in having it corrected.

(4) The mother has (jointly with the father) the right to the child's care and custody. R. S. Chap. 64, Sec. 44.

This is a right enforceable against all the world, except the father. The decree of adoption absolutely takes away from her this legal right.

By the decree the mother is "divested of all legal rights in respect to such child and he is freed from all legal obligations of obedience and maintenance in respect to (her)." R. S. Chap. 72, Sec. 38. Such a decree bears directly upon the mother's interest.

But assuming that the mother is aggrieved by the decree the appellee still denies her right of appeal. It is argued that R. S. Chap. 67, Sec. 31 giving "any person aggrieved" an appeal from a probate decree, is so far as relates to decrees of adoption, repealed or, at all events, superseded by the later statute specifically authorizing appeals from such decrees.

The earlier general statute, (omitting irrelevant words) is as follows: "Any person aggrieved by any decree of such (probate) judge may appeal therefrom to the Supreme Court" R. S. Chap. 67, Sec. 31.

The later specific act reads thus: "Any petitioner, or any such child by his next friend, may appeal from such decree to the supreme court of probate, in the same manner and with the same effect, as in other cases, but no bond to prosecute his appeal shall be required of such child or next friend, nor costs be awarded against either." R. S., Chap. 72, Sec. 39.

It is argued that this act impliedly repeals or supersedes the general statute.

This would be true if the later act were repugnant to the former; (*U. S.* vs. *Tynen*, 11 Wall, 92), if it were "absolutely conflicting"; (*Collins* vs. *Chase*, 71 Me., 436) or were "so clearly repugnant and inconsistent that they cannot stand together"; (*Newport* vs. *R. R. Co.* 123 Me. 387,) or if it clearly appear that a repeal or substitution is intended. 25 R. C. L. 917.

But "a critical comparison of these two statutes under consideration dissipates any apparent repugnancy." *Eden* vs. *Southwest Harbor*, 108 Maine, 494.

It is apparent that the later statute is not designed as a substitute for the former, nor to limit it, but rather is intended to supplement and extend it.

Under the former statute the child being aggrieved may appeal

upon giving bond. The later statute relieves the child or next friend from the bond requirement.

The petitioner is not as such, aggrieved by a refusal to grant the petition. Such a decree or denial does not operate upon his property not affect his legal rights. But the later statute gives the petitioner, merely as such, the right of appeal.

The theory of the appellee is that the Legislature intended to take away the right of appeal from persons aggrieved and grant such right to persons not aggrieved.

To ascribe such an intent to any legislature is, to say the least, uncomplimentary.

For its genesis, Chap. 67, Sec. 31 (giving appeal to all persons aggrieved) harks back to the statute of 1821. The first act authorizing adoption of children was passed many years later. The appellee stresses this circumstance urging that "the words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted." This rule is supported by authority. It has its place. It is useful and may be decisive in construing ambiguous statutes.

But the present case is governed by a larger principle well stated by R. C. L. thus: "Statutes framed in general terms apply to new cases that arise and to new subjects that are created, from time to time, and which come within their general scope and policy. It is a rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects and business within their general purview and scope coming into existence subsequent to their passage." 25 R. C. L., 778 and cases cited.

This principle applies clearly to the general and comprehensive language: "Any person aggrieved by any (probate) decree may appeal" &c.

Certain language used in *Gray* vs. *Gardner*, 81 Me. 558 is relied upon as supporting the position of the appellee. The language is the merest dictum.

Upon principles which we regard as well settled and decisive we hold that any person aggrieved by a probate decree may still appeal, and that by a decree severing every tie between her minor child and herself a mother may justly claim to be "aggrieved."

Exceptions sustained.

STATE

vs.

ROBERT H. JORDAN.

Cumberland. Opinion March 14, 1927.

The admission of a photograph in a jury trial is a question addressed to the discretion of the trial judge, and in the absence of abuse of discretion, exceptions do not lie, and the testimony of the photographer is not a prerequisite if the photograph is shown to be an accurate representation by other competent testimony.

The word "unnecessarily" in section 44 chapter 126, R. S. cannot be so construed as to excuse failure to provide animals with proper food because to do so involves inconvenience or additional expense.

On exceptions. The respondent was indicted for cruelty to animals under section 44, chapter 126, R. S., and found guilty by a jury. During the trial, counsel for respondent excepted to the admission of photographs of the cattle; to a refusal to direct a verdict for the respondent; and to a refusal to instruct. Exceptions overruled.

The case sufficiently appears in the opinion.

Ralph M. Ingalls, County Attorney, and Franz U. Burkett, Assistant County Attorney, for the State.

Joseph E. F. Connolly, for respondent.

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

PATTANGALL, J. On exceptions. Respondent was convicted of violating the provisions of section 44, chapter 126, of the Revised Statutes by reason of an unnecessary failure on his part to provide certain cows, of which he was the owner, with proper food.

The exceptions relied upon are (1) to the admission in evidence of

photographs of four of the cows, and, (2) to the refusal of the presiding Justice to direct a verdict. Other exceptions were noted, but not argued and apparently not relied upon.

Respondent concedes that, ordinarily, no exception lies to the admission or exclusion of photographs, such admission or exclusion being a matter of discretion, but urges that in this instance the discretion was abused, in that the photographs were not shown to have been fairly representative of the objects portrayed and not sufficiently verified as photographs of respondent's cattle.

Our court has granted to trial judges a very wide latitude in receiving or refusing this kind of evidence. Whether or not photographs may be admitted as evidence is a question addressed to the discretion of the trial judge. Whether any given photograph appears to be fairly representative of the object portrayed and whether or not it may be useful to the jury are preliminary questions addressed to his discretion, and, except for abuse of that discretion, no exception lies. *State* vs. *Hersom*, 90 Maine, 273; *Jameson* vs. *Weld*, 93 Maine 345; *Stone* vs. *Street Railway* , 99 Maine 248; *Babb* vs. *Paper Co.*, 99 Maine 298; *Rodick* vs. *M. C. R. R.*, 109 Maine 530. The same rule and the same wide latitude prevails in Massachusetts. *Blair* vs. *Pelham*, 118 Mass. 420; *Carey* vs. *Hubbardston*, 172 Mass. 106; *Everson* vs. *Casualty Co.*, 208 Mass. 214.

The admissibility of a photograph does not depend on its verification by the photographer, provided it is shown to be an accurate representation by any one competent to speak from personal observation. The sufficiency of the verification is a preliminary question of fact for decision by the trial judge. *McGar, Admr.* vs. *Bristol*, 71 Conn. 652. In *State* vs. *Cook*, 75 Conn. 267, a case involving a prosecution under a similar statute to that under which this indictment was brought, a like question arose and the court said, "Whether the photographs so represented the condition of the horses at the date referred to by the state's witnesses as to be of any value as evidence was a preliminary question to be decided by the court; but, in the absence of any finding that they were inaccurate, or useless to the jury, it was error to exclude the evidence."

The identifying testimony in this case came principally from one witness, who testified as follows:

"Q. Handing you States Exhibit 4 do you remember that cow when that photograph was taken?

A. I do.

Q. Handing you States Exhibit 3 do you remember that cow when that photograph was taken?

A. I do.

Q. Handing you States Exhibit 5 do you remember that cow when that photograph was taken?

A. I do.

Q. Handing you States Exhibit 2 do you remember that cow when that photograph was taken?

A. I do.

Q. Were those cows that way in Robert Jordan's barn when you went there?

A. Sure.

Q. What about these pictures? Are they fair representations of the cows and the condition of them?

A. They flatter them greatly."

There was some corroborating evidence to the same effect. There was none offered to rebut it. On that evidence it was clearly within the discretion of the trial judge to decide the question of admissibility, and no abuse of that discretion to admit the evidence.

The exception to the refusal to direct a verdict raises a like question to that raised on general motion to set aside a verdict in a case in which such motion is appropriate. If on any tenable view of the evidence the jury were justified in finding that the respondent's guilt was proven beyond a reasonable doubt, the verdict must stand.

The evidence fully measures up to that standard. The definite charge concerning these cows was that they were not being properly fed. On the most favorable view of the testimony their food consisted of meagre pasturage, supplemented by eight pounds of hay and two quarts of bran, per day, for each of the grade Holstein involved. Whether or not this was properly providing the animals with food was a question of fact.

Respondent urged the impossibility of procuring adequate pasturage in that vicinity, and argued that the word "unnecessarily" in the statute should be so construed as to excuse his failure to properly feed the animals, in view of the fact that he had earnestly though unavailingly endeavored to secure pasturage for them. But cows may be fed without the aid of a pasture. The hay and grain stores presented avenues through which he could supply them with sufficient

food had he desired to do so. His failure to so supply them was not a matter of necessity.

The case presented a plain issue of fact which was properly submitted to the jury. Respondent takes nothing by his exception to refusal of the presiding justice to do otherwise.

Exceptions overruled.

AGNES L. TOURTLOTT

vs.

WEST BANGOR AND HERMON MUTUAL FIRE INSURANCE COMPANY

Penobscot. Opinion March 14, 1927.

In any contract there must be a meeting of minds. There must be an offer, and an acceptance conforming to the terms of the offer in some manner communicated to the offerer.

When the applicant for insurance and the Company are in different towns, and a policy, conforming to an application, is deposited in the mail, postpaid, properly directed to the applicant, the contract is complete as of the time when the acceptance is so posted.

If the policy is sent to the agent of the company to deliver pursuant to a prior intended acceptance by the company the contract is complete, whether delivery is made to applicant or not. If it is sent to the agent with authority to make delivery as and for an acceptance, the contract is incomplete until delivery to the applicant or offerer. The contract may be complete notwithstanding that the company or its agent retains the policy. But it cannot be so presumed.

In the instant case the defendant sets up as a defense the plaintiff's violation of the conditions of her policy. It says that she did "make" other insurance, i. e. that she did enter into a completed contract of insurance with another company upon the same property. The burden is upon the defendant to prove this defense well founded. It has failed to sustain this burden.

On exceptions. An action of assumpsit to recover on an insurance policy issued by defendant company. The only question involved by the pleadings was as to whether plaintiff had procured other in-

surance on the same property without the assent in writing of the defendant company. At the trial the Court excluded an application and policy of another company unless delivery or waiver of delivery were shown, and defendant excepted. At the conclusion of the testimony the Court directed a verdict for plaintiff and defendant excepted. Exceptions overruled.

The case is fully stated in the opinion.

Fellows & Fellows for plaintiff.

Gillin & Gillin for defendant.

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

DEASY, J. In this action upon a fire insurance policy,—ownership, destruction of buildings by fire, proof of loss, value and waiver of arbitration are all admitted. The presiding justice ordered a verdict for the plaintiff. It is agreed that the defendant's exceptions must be overruled and the verdict sustained unless the facts next hereinafter summarized require that the exceptions be sustained.

The policy upon which this suit is brought is made expressly subject to the following conditions:—"This policy shall be void—if the insured now has or shall hereafter make any other insurance on the said property without the assent—of the company."

On Sept. 5, 1925, during the term of the policy sued upon, the insured made application to another insurance company to wit, York County Mutual Fire Insurance Co. for insurance upon the same buildings covered by the defendant's policy. A premium note was given. A policy was written by the York County Company and forwarded to George P. Gould, its agent in Bangor.

It was not delivered to the plaintiff. While the policy was still in possession of Mr. Gould, the Company's agent, the buildings were destroyed by fire.

It is not claimed that the defendant assented to the making of further insurance.

The sole question is whether when the York County Company forwarded, presumably by mail, directed to its own agent, the policy upon the plaintiff's buildings, the contract became complete. If so the plaintiff did "make" other insurance and did thus violate the condition of her policy.

What the plaintiff was, by the condition above recited, forbidden to do was to "make any other insurance upon the said property."

To "make" insurance is to enter into a contract of insurance. In any contract whether relating to insurance or any other subject there must be a meeting of minds. There must be an offer, proposal or application upon one side and upon the other, an acceptance conforming to the terms of the offer (*Carleton* vs. *Ins. Co.* 109 Me. 83) and the acceptance must in some manner be communicated to the offerer.

"To constitute acceptance of such an offer there must be an expression of the intention by word, sign or writing communicated or delivered to the person making the offer or his agent." 6 R. C. L. 606 and cases cited. *Jenness* vs. *Iron Co.* 53 Me. 20.

Mrs. Tourtlott, the plaintiff made app'ication for insurance to the York County Company. To prove acceptance the defendant shows that the York County Company wrote and executed a policy conforming to the plaintiff's application and sent it to the company's local agent at Bangor.

Undoubtedly an acceptance of an application for insurance may be proved without showing the issuance of a policy. In this case, however, the acceptance is proved, if at all, by the issuance and alleged delivery of a policy.

When as in this case the applicant for insurance and the company are in different towns, and a policy, conforming to an application, is deposited in the mail, postpaid, properly directed to the applicant, the contract is complete as of the time when the acceptance is so posted. 32 C. J. 1127. *Emerson* vs. *Proctor* 97 Me. 360.

If instead of being directed to the applicant, such acceptance is mailed to the company's own agent, the contract is complete at the time of mailing if so intended by the company and if it is sent to the agent as a mere medium of transmission to the insured.

Some authorities state this same principle in a different form. It is said that if the policy is sent to the Company's agent for "unconditional delivery" the contract is complete. If sent for delivery "upon the performance of conditions" the contract remains incomplete until delivery to the insured. 32 C. J. 1127 and cases cited. 14 R. C. L. 899 and cases cited.

We think that the true theory may be better stated thus: If the policy is sent to the agent to deliver pursuant to a prior intended

acceptance by the company the contract is complete, whether the agent makes delivery to the applicant or not. If it is sent to the agent with authority to make delivery of it as and for an acceptance, the contract is incomplete until actual delivery to the offerer. The contract may be complete notwithstanding that the company or its agent retains the policy. But it cannot be so presumed.

Turning to the evidence, we find ourselves quite in the dark as to the purpose of the company in sending the policy to its agent. The agent testifies that the policy was sent him to deliver, but whether to deliver it as an acceptance or in pursuance of a prior acceptance by the company does not appear.

The defendant sets up as a defence the plaintiff's violation of the conditions of her policy. It says that she did "make" other insurance, i. e. that she did enter into a completed contract of insurance with another company upon the same property. The burden is upon the defendant to prove this defence well founded. It has failed to sustain this burden.

Exceptions overruled.

JENNIE E. PAINE

vs.

ALBION L. SAVAGE

Franklin. Opinion March 17, 1927.

Sections 56, 57, and 58, of Chapter 24, of the Revised Statutes, authorizing the taking of private property for private uses, declared unconstitutional, as being in violation of Art. I, Sec. 21, of the Constitution of Maine, and of the Fourteenth Amendment to the Constitution of the United States.

The statute, including its several sections making up the complete provision, is not severable, hence is void in its entirety.

Lumber operations as carried on in this State are private enterprises; and while the promotion of their successful operation indirectly benefits the public at large, the power of eminent domain cannot rest on public benefit of this character.

Necessity of the individual cannot justify a grant of the power of eminent domain. Public necessity alone justifies governmental taking of private property. The entry and crossing of another's land authorized by the statute is for the benefit of, and is limited in its exercise to, lumber operators who find necessity therefor. The general public have no right to demand or share in it.

A public use must be for the general public or some portion of it who may have occasion to use it, not a use by or for particular individuals. It is not necessary that all the public shall have occasion to use the property taken. It is necessary that every one, if he has occasion, shall have the right to use it.

On report on an agreed statement. An action of trespass quare clausum. The acts complained of by plaintiff are admitted by defendant but he attempts to justify under sections 56, 57 and 58, chap. 24, of R. S., which purport to authorize one engaged in a lumbering operation to cross the land of another by paying the actual damage. The constitutionality of the statute is the question involved. The cause was reported on agreed statement with the stipulation that if the action is maintainable the damages to be one dollar; otherwise a non-suit to be entered.

Judgment for the plaintiff. Damages assessed at $1.00.

The case fully appears in the opinion.

Frank W. Butler for plaintiff.

Cyrus N. Blanchard for defendant.

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

STURGIS, J. Action of trespass quare clausum reported to this Court on agreed statement of facts.

R. S., Chap. 24, Sec. 56, provides: "When it is necessary for any person or persons, by themselves, or with men, teams, or log haulers, to cross or enter upon any tract of land outside of the thickly settled portion of any town, for the purpose of hauling supplies, wood, bark, logs or lumber, or to yard or land the same, such person or persons shall not be liable in an action of trespass therefor, provided, the bond is furnished as provided in the following section, but the person or persons carrying on said lumbering operation, shall be liable for all the actual damage done to said land by said men and teams or log haulers so crossing said land."

By Sec. 57 following, should the person or persons carrying on said

lumbering operation and the owners of the land be unable to agree upon the amount of damages, such person or persons before crossing or entering the land shall give bond with sufficient sureties to the owners, the amount of said bond to be determined and approved by the commissioners of the county in which the land lies.

By Sec. 58, if the lumber operators and the land owners are unable to agree upon the damages, either party may within twelve months after the bond is approved apply to the county commissioners and cause said damages to be ascertained and determined in the same manner and under the same conditions and restrictions as are prescribed by law in the laying out of railroads. A failure to apply for damages within one year after the bond is approved constitutes a waiver of the same. Provision is also made for tender.

By the agreed statement of facts it is admitted that the defendant, having purchased stumpage on certain land, found it necessary in order to cut and haul his logs to enter and cross a tract of land owned by the plaintiff, which lies outside the thickly settled portion of the town in which it is situated, and before making the entry filed a bond with the county commissioners which was duly approved.

The plaintiff justifies the bringing of this action of trespass contrary to the provisions of this statute by an attack upon the constitutionality of the law, contending that the defendant's acts constitute a "taking" of his property within the meaning of Article 1, Sec. 21, of the Constitution of Maine, and being for a private use are in violation of his constitutional guarantees. The crucial question for determination is, does the statute authorize a "taking" in the constitutional sense? and if so, is the "taking" for a public use?

"Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." Const. of Maine, Art. 1, Sec. 21. It is universally held that private property cannot be taken by another under governmental authority for private use, with or without compensation, except by the owner's consent. This settled principle is necessarily implied from the constitutional provision. *Bowden* v. *York Shore Water Co.*, 114 Maine, 157; *Brown* v. *Gerald*, 100 Maine, 351; *Allen* v. *Jay*, 60 Maine, 124. Such a taking also violates the Fourteenth Amendment to the Constitution of the United States.

Private property can be taken only for public uses, and then only in case of public exigency. Whether there is such an exigency—

whether it is wise and expedient or necessary that the right of eminent domain should be exercised, rests solely within the determination of the Legislature. Whether the use for which such taking is authorized is a public or private use, however, is a judicial question for the determination of the Court. *Laughlin* v. *City of Portland*, 111 Maine, 486; *Brown* v. *Gerald*, supra; *Kennebec Water District* v. *Waterville*, 96 Maine, 234.

In *Cushman* v. *Smith*, 34 Maine, 247, an early decision of this Court, it was stated that this constitutional inhibition was not designed to prevent legislation which might authorize acts upon private property which would by the common law be denominated trespasses, including exclusive possession for a temporary purpose where there was no intent to appropriate it to a public use.

In 20 Corpus Juris, 678, with cases cited, it is said that a temporary occupation or injury to land may constitute a taking under the law of eminent domain "unless the act constitutes a mere trespass."

But in *Brigham* v. *Edmands*, 7 Gray (Mass.), 359, that Court says that the exclusive appropriation of the property of an individual for a distinct period of time, depriving the owner of its actual possession and enjoyment and exposing it to necessary and essential damage, is a "taking."

We are not here considering an incidental, temporary taking preliminary to actual appropriation, nor indirect or consequential damages occasioned in the course of authorized condemnation, and it is unnecessary to discuss the principles of law involved in cases presenting these issues. Our consideration is directed to the question whether entry or crossing for the purpose enumerated in our statute is a taking within the meaning of the constitutional provision.

The statute includes within the purposes for which entry as well as crossing may be made "to yard or land" logs and lumber. These are not ordinarily temporary uses in the strict sense of the term temporary. They may continue through the lumbering operation and call for repeated and more or less continuous entry, crossing and occupation. A careful reading of the several Sections of the statute convinces us that it includes within its provisions, not only a single entry or crossing, but also repeated and continuous use of the land owner's property for a sufficient length of time to complete the particular lumbering operation then being carried on. Such a use, we think, is "an exclusive appropriation for a distinct period of time."

The authority to cross and enter is not expressly stated in the statute; it rests on implication. The literal import of the statute is to provide a remedy in substitution for the common law action of trespass. Its sufficiency in this regard we do not need to decide in view of the conclusions we reach on other questions involved. The plain intendment of the Legislature, however, goes beyond a question of remedy. Counsel in argument assume that the statute confers authority upon the lumber operators to "take," and we are satisfied from a careful examination of the entire statute, in the light of the subject matter and the objects to be attained, that such assumption is warranted. We think the Legislature intended to grant authority as well as provide a remedy for the acts enumerated. The meaning of the statute cannot be confined to the precise words used. That which is within the intention of the makers of this law is as much within the statute as if included in the precise language used. *Stewart* v. *Small*, 119 Me., 269; *Gray* v. *County Comm.*, 83 Me., 429; *Holmes* v. *Paris*, 75 Me., 559.

Recognizing the rule that private property cannot be taken under the right of eminent domain for private uses, counsel for the defendant points out the impracticability, if not impossibility, of operating large areas of timber lands lying back from public thoroughfares and surrounded by the land of others who will not consent to the use of their land by the operators. He asserts that passage and use as provided by this statute under consideration are absolutely necessary to the successful enjoyment of these natural resources of the State. cannot be otherwise provided, and are therefore a public benefit and a public necessity.

Lumber operations as carried on in this State are clearly private enterprises conducted upon private capital for private gain. Promotion of their successful operation undoubtedly indirectly benefits the public at large, but nevertheless they are but private enterprises. The power of eminent domain cannot rest merely on public benefit of this character. "Due protection to the rights of private property will preclude the Government from seizing it in the hands of the owner and turning it over to another on vague grounds of public benefit to spring from the more profitable uses to which the latter may devote it." Cooley's Const. Lim. (6 Ed.), 653. See *Brown* v. *Gerald*, supra, p. 370. The public benefit doctrine does not obtain in this State.

Nor can the necessities of the individual control. Public necessity alone justifies governmental taking of private property. In the words of Justice Kent, in *Bangor & Piscataquis R. R. Co.* v. *McComb*, 60 Me., 290, "This exercise of the right of eminent domain is, in its nature, in derogation of the great and fundamental principle of all constitutional governments, which secures to every individual the right to acquire, possess and defend property. As between individuals, no necessity, however great, no refusal, however unneighborly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can compel or require any man to part with an inch of his estate."

Again, the entry and crossing of the lands of others authorized by this statute is for the benefit and is limited in its exercise to lumber operators who are under the necessities defined by the statute. The general public have no right to demand or share in it. A public use must be for the general public, or some portion of it, who may have occasion to use it, not a use by or for particular individuals. It is not necessary that all of the public shall have occasion to use. It is necessary that every one, if he has occasion, shall have the right to use. *Ulmer* v. *R. R. Co.*, 98 Me., 579; *Brown* v. *Gerald*, supra.

Courts of other states have considered similar legislation. In those holding that public use means public utility, advantage, or what is productive of public benefit,—a doctrine from which we dissent,—purposes in close analogy to those of our statute are held public and the statutes authorizing the same constitutional. Such decisions are not precedents in this jurisdiction.

But in states where judicial opinion accords in the rule that the public must have a right to use the property, such purposes and statutes receive a contrary construction, and it is accordingly there held that the taking of land for logging roads and other incidental lumbering purposes for private use and benefit, the public receiving only an incidental benefit, is not appropriation for a public use and the legislative authority therefore is void. *Cozard* v. *Kanawha Hardwood Co.*, 139 No. Carolina, 293; *Apex Trans. Co.* v. *Garbade*, 32 *Oregon*, 582; *Anderson* v. *Smith-Powers Logging Co.*, 71 Oregon, 276; *Boyd* v. *Ritter Lumber Co.*, 119 Va., 348; *Hench* v. *Pritt*, 62 W. Va., 270; *Healy Lumber Co.* v. *Morris*, 33 Wash., 490. Numerous cases supporting this principle are collected in 20 C. J., 562; 21 R. C. L.,

1250; L. R. A., 1917 A, 102; 1 L. R. A., N. S., 969. See also Cooley's Const. Lim., 7 Ed., 764; Lewis on Eminent Domain, 3 Ed., 520.

For the foregoing reasons, with full regard for the fixed rule of construction that all doubts are to be resolved in favor of the constitutionality of a statute, we think the conflict between the powers granted by this statute and the inhibitions of the Constitutions of this State and of the United States is so clear, manifest and irreconcilable that we are duty bound to declare the Act unconstitutional. The responsibility is great but the obligation in such a case is imperative. *State* v. *Butler*, 105 Me., 91; *Trustees* v. *Bradbury*, 11 Me., 126; *Proprietors Kennebec Purchase* v. *Laboree*, 2 Me., 275.

The statute is not severable. A contemplation of the statute and of the purposes to be accomplished by it convinces us that it would not have been passed at all except as an entirety. The general purpose of the Act will not be served by sustaining the validity of the remedial provisions, or the Act itself only as a provision for procedure and remedy in cases of temporary trespasses not amounting to appropriation. It must be therefore held void in its entirety. *State* v. *Webber*, 125 Me., 319; *State* v. *Montgomery*, 94 Me., 192.

The defendant unlawfully entered the plaintiff's lands. The statute, Sections 56, 57 and 58, R. S. Chap. 24, affords him no defense. An action of trespass q. c. will lie. In accordance with the stipulation of the parties the entry must be,

Judgment for plaintiff.
Damages assessed at $1.00.

CHARLES F. YATES, ET AL.

vs.

GEORGE R. TIFFINY

Knox. Opinion March 17, 1927.

An obstruction placed within the limits of a public way is a nuisance at common law and by statute.

One who has sustained special damage from a common nuisance may recover therefor in an action on the case.

In the instant case the obstruction placed in the highway by the defendant, which not only obstructs the rights of the plaintiffs in common with others to pass up and down the street, but cuts off their right of access to their private property, causing special injury differing in kind and degree from that suffered by the community at large.

On exceptions. An action on the case to recover damages for obstructing a public highway over which plaintiffs had a right of ingress and egress to their private property. Defendant demurred generally which was over-ruled and exceptions taken. Exceptions overrruled.

The case appears in the opinion.

O. H. Emery for plaintiffs.

J. H. Montgomery for defendant.

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

STURGIS, J. Action on the case to recover damages for obstructing a public highway. General demurrer filed and overruled. Exception reserved.

The declaration sets out that the defendant erected a fence and building upon a certain public highway in Camden known as Cottage Street over which the plaintiffs had a right to travel.

An obstruction placed within the limits of a public way is a nuisance at common law and by statute. R. S., Chap. 23, Sec. 5. *Smith* v. *Preston*, 104 Me., 156; *Corthell* v. *Holmes*, 88 Me., 376. One who has sustained special damage from a common nuisance may recover therefor in an action on the case. R. S., Chap. 23, Sec. 16; *Smith* v. *Preston*, supra; *Staples* v. *Dickson*, 88 Me , 362; *Brown* v. *Watson*, 47 Me., 161.

It sufficiently appears in the plaintiffs' declaration that they were entitled to use the obstructed portion of the way for egress and ingress to their premises and in a special manner not common to the public. To reach Mill Street, a public way in the village, from the Cottage Street side of their premises, they were obliged to pass over the obstructed section of the way. The fence and building not only obstructed the plaintiff's right in common with others to pass up and down the street, but cut off their right of access to their private property. This constitutes special injury differing in kind and degree from that suffered by the community at large. *Smart* v. *Lumber Co.*, 103 Me., 37; *Cobe* v. *Banton*, 106 Me., 418.

The declaration states a legal cause of action and is sufficient on general demurrer.

Exception overruled.

AMANDA E. MERRIMAN, IN EQUITY

vs.

SADIE JONES, INDIVIDUALLY AND AS EXECUTRIX.

Washington. Opinion March 17, 1927.

Equity protects the weak, the feeble, the inexperienced and the oppressed, from the strong, the shrewd and crafty, by *annulling contracts or conveyances where the consideration is grossly inadequate, or the condition of the parties, or circumstances surrounding the transaction, are such as to raise a presumption of fraud, imposition, or undue influence.*

In the instant case many of the elements which separately are sufficient to justify the Court in relieving a party from a contract or conveyance are present, and properly compelled the single Justice to find the plaintiff's conveyances unconscionable and void.

It does not clearly appear that the decree of the single Justice upon matters of fact is erroneous, hence is affirmed.

On appeal. A bill in equity seeking the cancellation of conveyances made by the plaintiff to her brother, now deceased, husband of defendant. The bill alleges fraud in the procurement of the conveyances, and that further they were made in consideration of an agreement for the plaintiff's support which has not been performed. Upon a hearing the sitting Justice found for the plaintiff and declared the conveyances null and void, and defendant appealed. Appeal dismissed. Decree below affirmed.

The case sufficiently appears in the opinion.

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

H. J. Dudley and H. H. Murchie, for defendant.

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

STURGIS, J. Bill in equity to cancel conveyances of real and personal property by the plaintiff to her brother, the defendant's husband. The bill alleges that the conveyances were procured by fraud and made in consideration of an agreement for the support of the plaintiff, which was violated by the brother in his lifetime, and since his death by the defendant. A demand for an accounting is included in the prayers of the bill.

After full hearing before a single Justice, a decree was entered sustaining the bill, declaring the plaintiff's conveyances null and void, with an order to the defendant to reconvey to the plaintiff all real and personal property which her deceased husband has received from the plaintiff and by his will had devised or bequeathed to her. She was ordered to account for rents and profits, and a special master appointed to determine the account. Upon the filing of the master's report the same was accepted, and judgment against the defendant for $558.74 with interest from the date of the bill was included in the final decree.

The case is before this Court on appeal; and unless it clearly appears that the decree of the single Justice upon matters of fact heard in equity is erroneous, it will be affirmed. *Wilson* v. *Littlefield*, 119 Maine, 143; *Eastman* v. *Eastman*, 117 Maine, 276.

The plaintiff, a widow, is sixty-one years old. The evidence discloses that she has become the victim of the drug habit now long standing. The resultant mental and physical impairment is marked. Her condition before and in October, 1923, was such that guardianship proceedings were discussed by her family physician and relatives, including among the latter her brother, George H. Jones. Her property then consisted of a house in which she lived, a building nearby rented as a paint-shop with tenement above, household furnishings and fixtures, certain bank stock, and money received as pension.

October 27, 1923, her brother George H. Jones, induced her to execute a warranty deed, conveying to him her house and all other land and buildings owned by her. As consideration for this transfer, he gave her an agreement under seal in which he obligated himself and his heirs and assigns to allow the use of the south room in the house with access by the front door. This room was to be heated

and made comfortable for her, and he was to furnish all necessary food and provisions. It appears that the furniture and fixtures in the house were transferred to the brother at the same time, enough only being reserved by the plaintiff to furnish the south room which she was to occupy.

There is convincing evidence that this plaintiff was in a weakened mental condition at the time this transaction with her brother took place. It is equally clear that he acted with full knowledge of her habits and incapacities. He is quoted as refusing to agree to guardianship, stating that if "she would give him her place he would take care of her," but "if she didn't do it, he would put her in an asylum." In testimony he is charged with commenting upon the report that another relative was to take the place, concluding his statements with "By God! I am going to have that place."

He got the place. He limited the plaintiff in the use of her own home to the south room, and the evidence leaves no doubt that she was barred from access to the rest of the house and left alone for days at a time without sufficient food or fuel. At the death of the brother the property passed to his widow, and her failure to perform the conditions of the agreement for the plaintiff's support and maintenance is evidenced by the testimony of neighbors and relatives who visited the plaintiff and observed her condition and surroundings.

"Equity protects the weak, the feeble, the inexperienced and the oppressed, from the strong, the shrewd and crafty, by refusing to uphold contracts or conveyances, when the relation or condition of the parties at the time of the making of the contract, or the gross inadequacy of the consideration, or the circumstances surrounding the transaction, are such as to lead to the presumption of fraud, imposition or undue influence." *Insurance Co.* v. *LaChance,* 113 Maine, 550.

Upon findings of fact not stated but necessarily involved in the conclusions of the single Justice, the decree below may properly have rested, as in *Insurance Co.* v. *LaChance,* upon the pronouncement that "in this case many of the elements which separately are sufficient to authorize the Court to relieve a party from a contract or conveyance are present", and compel the Court to pronounce the conveyances "unconscionable and void."

The plaintiff is entitled to the remedy of cancellation, which necessarily includes not only her instruments of transfer but also the agree-

ment made by the defendant's testate. The accounting was properly ordered, and the provisions of the decree for reconveyance to effectuate cancellation are in accord with accepted practice.

Appeal dismissed.
Decree below affirmed.
Costs of this appeal to be added to bill of costs below.

ADA LEVEE

vs.

ALVIN J. MARDIN, ET AL

Cumberland. Opinion March 21, 1927.

The jurisdiction conferred upon the Law Court by R. S., Chap. 82, Sec. 46, over "cases in which there are motions for new trials upon evidence reported by the justice," is limited to jury trials, and does not include cases submitted to the trial Judge for decision without the aid of a jury.

It is not necessary to declare specially on a promissory note. An action of money had and received or account annexed which in practice is substituted for the common money counts, lies by the endorsee of negotiable paper against the maker. The paper itself is admissible in support of the action.

In the instant case the allowance of an amendment striking out the second count of the plaintiff's declaration was addressed to the discretion of the trial judge and is not open to exception.

The defendants upon their exception to the admission of the note in evidence are confined to the grounds of objection stated at the trial.

On exceptions and general motion by defendants. An action of assumpsit to recover two installments on a note given by defendants to one Harriett T. Small and by her endorsed in blank to plaintiff. The declaration contained two counts, one on account annexed, and the other on another promissory note. The cause was heard by the trial judge without a jury. The second count on motion was stricken out and defendants reserved exceptions. The plaintiff offered the first note on which it was claimed two installments were due which was admitted against objections by defendants who excepted, and

also filed a general motion for a new trial. Exceptions overruled. Motion overruled.

The case appears in the opinion.

Davidson & Janas for plaintiff.

Charles J. Nichols for defendants.

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

STURGIS, J. Action of assumpsit to recover unpaid installments alleged to be due on a promissory note given by defendants to one Harriett T. Small and transferred by her blank endorsement to the plaintiff. The declaration is in account annexed in the following form:

"Portland, Me., February 1, 1926.

Alvin J. Mardin and—M. E. Mardin to Ada Levee,	Dr.
August 12, 1925, for money had and received..	$250.00
Interest 8 per cent per annum.....	166.00
	$416–"

A count to recover on a certain promissory note of August 12, 1925, was added, but stricken out by amendment allowed, with exception reserved. The plea was the general issue which the plaintiff joined, and the case was heard by the trial Judge with jury waived and the right of exceptions to questions and rulings of law reserved.

Plaintiff's counsel produced and offered in support of the account annexed a note of the following tenor:

> $4150.00 Portland, Me., August 12, 1925.
>
> One year after date, I promise to pay to the order of Harriett T. Small, Forty-one hundred and fifty dollars at any bank in Portland, payable $125 each and every three months with interest payable quarterly at 8%.
>
> Value received. ALVIN J. MARDIN.
> MILDRED E. MARDIN.

The paper bore upon its back an endorsement, "Without recourse to me, Harriet T. Small."

The note was admitted against the defendants' objection and exception taken. The plaintiff rested, and the defendants offered no

evidence in their defense. The Court found for the plaintiff in the sum of $208, and the defendants filed a motion for a new trial on the usual grounds.

The allowance of the amendment striking out the second count was addressed to the discretion of the trial Judge. *South Thomaston* v. *Friendship*, 95 Maine, 206. It is not open to exception. *Cons. Rend. Co.* v. *Harrington*, 114 Maine, 394.

The jurisdiction conferred upon the Law Court by R. S. , Chap. 82, Sec. 46, over "cases in which there are motions for new trials upon evidence reported by the justice," is limited to jury trials and does not include cases submitted to the trial Judge for decision without the aid of a jury. *Espeargnette* v. *Merrill*, 107 Maine, 304.

The note offered in evidence is a negotiable promissory note. The fact it is payable in installments does not destroy its negotiability. 3 R. C. L., 904; 8 Corpus Juris, 141. It is not necessary to decide, upon this exception, when the several installments are due; but upon any reasonable construction of the paper the time for the payment of each installment, we think, is fixed or determinable within the requirements of the Negotiable Instruments Act. P. L. 1917, Chap. 257, Sec. 4. An action lies to recover the installments which have become due. *Burnham* v. *Brown*, 23 Me., 400.

It is not necessary to declare specially on a note. An action of money had and received lies by the endorsee of negotiable paper against the maker. *Titcomb* v. *Powers*, 108 Me., 348; *Carver* v. *Hayes*, 47 Me., 258; *Ware* v. *Webb*, 32 Me., 43. And it is well settled that the paper itself is admissible to sustain the action. *Titcomb* v. *Powers*, supra; *Sturtevant* v. *Randall*, 53 Me., 149; *Fairbanks* v. *Stanley*, 18 Me., 296. That the instant action is account annexed will not vary the rule. In practice, account annexed is a substitute for the common money counts. *Cape Elizabeth* v. *Lombard*, 70 Me., 396; *Elm City Club* v. *Howes*, 92 Me., 211.

The only ground of objection to the admission of the note in evidence stated at the trial is that a note is not admissible in support of an action on account annexed for sums due on the note. The defendants are here confined to the ground stated. *Cowan* v. *Bucksport*, 98 Me., 305; Moore, Appellant, 113 Me., 119. That ground is not supported by authority, and the exceptions must be overruled.

Exceptions overruled.
Motion overruled.

STATE *vs.* MORIN.

Androscoggin. Opinion March 31, 1927.

Under an indictment it is not necessary to prove that the offense charged was committed on the day alleged; it is sufficient if it is shown that it was committed within the period of limitation.

Although an indictment may not be worded in continunando, yet, acts prior to and also subsequent to the acts charged in the indictment, when indicating a continuance of the offense charged, are admissible.

In the case at bar the presumption is unescapable that in his charge to the jury the Judge had alluded to the date on which the evidence might lawfully lead them to find that the offense charged had been committed, and that it must be proved to have been committed within the period of limitation, because no exception was taken to any expression in or omission from the charge proper. While the latitude allowed to the state's attorney in proving the time of commission might have been more certainly hedged about by a different wording of the reply to the question of the jury, yet it is not every failure of perspicacity in instructions to the jury that justifies the awarding of a new trial. Furthermore the respondent was not prejudiced by omission, at this time of reference to the Statute of Limitations, it being incredible that the evidence submitted to them did not relate to acts done shortly prior to the date alleged.

On exceptions by respondent, indicted for permitting her premises to be used for purposes of prostitution. Exceptions overruled. Judgment for the State.

The case is sufficiently stated in the opinion.

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

George S. McCarty and Louis J. Brann for respondent.

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

BARNES, J. In order to decrease the spread of so-called sexual

diseases, Chapter 112 of the Public Laws of 1919 enacted that it should be unlawful for any person to permit any place, structure, building or conveyance owned by him or under his control to be used for the purpose of prostitution, lewdness or assignation with knowledge or reasonable cause to know that the same is, or is to be used for such purpose. And at the October term for the year 1926, at Auburn, trial was had of one Madame Morin, on an indictment, presenting that on August 21, of that year, this Madame Morin, at Lewiston, in our state, did permit a certain tenement, occupied by her, and then and there under her control, to be used by one Madamoiselle Berube for the purpose of prostitution, setting out what is called in law scienter, by further presenting that Madame Morin then had reasonable cause to know that the tenement so occupied by her and under her control was then and there used for such purpose of prostitution.

"When knowledge is part of a statutory description of an offense it must be alleged, to inform the accused of the exact charge against him, and enable the Court to determine whether crime is alleged, and on proof to render judgment;" *State* vs. *Perley*, 86 Me., 427; "to the end that if he be again prosecuted for the same offense he may plead the former conviction in bar;" *State* vs. *Lashus*, 79 Me. 541.

It was incumbent on the grand jury, in preparing a true bill, on consideration of an act forbidden by the statute above cited, to allege guilty knowledge on the part of the respondent; and the state's attorney was in duty bound to present the evidence available, tending to show her guilty knowledge, to the extent at least that she had "reasonable cause to know" that Madamoiselle Berube, on the day named, used the tenement occupied and under the control of Madame, the respondent, for the purpose of prostitution.

After the trial jury had been impaneled and had heard the technical language of the indictment read, it became the duty of the state's attorney, as the lawfully empowered officer of that Court, to state to the jury, if he deemed it advisable, what was the nature of the crime charged in the indictment; what he purposed to bring before them as evidence of the commission of that crime, and what portions of such evidence should by them, under their oaths, be considered with relation to the allegation of guilty knowledge on the part of the respondent; or, even less than this, what evidence he had to present

that the respondent had reason to know of the use of her tenement as a place of prostitution.

It is assumed that, in his opening address to the jury, the state's attorney directed the attention of the jury to the allegation that prostitution, on the part of Madamoiselle Berube, in the tenement occupied and controlled by the respondent, committed on the twenty-first of August, 1926, was knowingly permitted by the respondent, and, somewhere in the line of his opening statement, the state's attorney, gallantly characterizing Madamoiselle as a "young lady," said, "The state will offer evidence to show that on various occasions the respondent counselled and urged the young lady to engage—", whereupon counsel for the respondent interposed an objection. The Judge allowed the attorney to proceed, and entered and allowed the first exception of counsel, and at a later stage of the case counsel specified that his objection was to statements of the attorney as to evidence of conduct or knowledge of respondent, and to any evidence of such conduct or knowledge, or reasonable cause for knowledge, exhibited or had by the respondent, on any day other than the twenty-first of August, 1926, the day set out in the indictment.

Counsel further alleges grievance, by taking his second exception to the instruction of the Judge, "The date has to be alleged in the indictment as of some particular date, but if any other time,—provided the incident, the offense, is identified,—any other time is shown it is sufficient."

Considering the exceptions in reverse order, the instruction quoted was given after the conclusion of the formal charge of the learned Judge, in answer to a question submitted by the foreman of the jury. Counsel urges that the words "any other time" is an unjustifiable enlargement of the rule that the day, the month and the year when an offense was committed must be alleged in the indictment, although it may not be necessary to prove it to have been committed on that day, as recognized by our Court, from *State* vs. *Hanson*, 39 Me., 337, to *State* vs. *McNair*, 125 Me., 358, 133 Atl. 912.

No element of surprise is injected on the one side, or objected to by the other.

The presumption is unescapable that in his charge to the jury the Judge had alluded to the date on which the evidence might lawfully lead them to find that the offense charged had been committed, and that it must be proved to have been committed within the period of

limitation, because no exception was taken to any expression in or omission from the charge proper. While the latitude allowed to the state's attorney in proving the time of commission might have been more certainly hedged about by a different wording of the reply to the question of the jury, yet it is not every failure of perspicacity in instructions to the jury that justifies the awarding of a new trial. Furthermore the respondent was not prejudiced by omission, at this time, of reference to the Statute of Limitations, it being incredible that the evidence submitted to them did not relate to acts done only shortly prior to the date alleged. *State* vs. *Pike*, 65 Me., 111, *Wood* vs. *Finson*, 91 Me., 281.

So the second exception falls. Similarly of the first wherein it is stated that a member of the police force of the city testified that a witness, called by the State, the aforesaid Madamoiselle Berube, said, in the presence of the respondent, "that she had been calling there (at respondent's house) very frequently, most every day, and at several times while there Miss Morin would tell Miss Berube to go into a room and have relations with men."

At what state of the trial this evidence was offered does not appear, but in several junctures it would be admissible, as to attack the credibility of either of the women named, if they had testified to the contrary, or, at all events, to prove scienter of the respondent.

In objecting to the officer's testimony, counsel for the respondent said, "In order that this objection may appear on the record, I wish to make a formal objection to all evidence that is offered here by the state on any day except the day alleged in the indictment," apparently moving under his second exception already disposed of.

Once more, that there be no uncertainly, although an indictment may not be worded in continuando, yet, "acts prior to and also subsequent to the acts charged in the indictment, when indicating a continuance of illicit intercourse, are admissible in evidence as showing the relation and mutual disposition of the parties*****. The same rule applies where intent, or system, or scienter, may be involved, as illustrated in successive cheats or forgeries, or passing counterfeit money to different persons, and the like." *State* vs. *Witham*, 72 Me., 531; *State* vs. *Williams*, 76 Me., 480.

"But evidence of other crimes of a precisely similar nature to that charged, and not connected with it, though deemed inadmissible to prove the commission of the act involved in the substantive charge,

is yet uniformly received for the limited and specific purpose of aiding to determine the quality of the act and the legal character of the offense by illustrating the intent with which the act was committed. "To prove intent," says Mr. Wharton, "similar evidence is pertinent. One blow given by A to B may be accidental; few counsel would have the audacity to claim accident for eight or ten blows given to A by B at successive intervals under varying conditions. One letter sent by A to B demanding money may be ambiguous; it may cease to appear so if seen in the light of a series of prior letters demanding money with threats whose purport is unmistakable." 1 Wharton Ev., Sections 31, 32. "The proof of criminal intent and of guilty knowledge," says Mr. Bishop, "not generally admitting of other than circumstantial evidence may often be aided by showing another crime attempted or perpetrated and when it can be it is admissible." *State* vs. *Acheson*, 91 Me., 240.

To the same effect see the two cases, *State* vs. *Buckwald*, 117 Me., 344, and *State* vs. *Bennett*, ibid, 113.

Wherefore because, so far as the record is cited to us, the testimony objected to is clearly admissible, the mandate must be,

Exceptions overruled.
Judgment for the State.

IN RE

DAMARISCOTTA-NEWCASTLE WATER COMPANY.

Lincoln. Opinion March 31, 1927.

In case of a sale and purchase of the property and franchises of a public utility under section 86 of chapter 51, R. S., the purchaser or purchasers with necessary associates may organize themselves into a corporation, and the proceedings of such reorganization are under the direction of the Court and not of the Public Utilities Commission.

The transfer of the property and franchises by the purchasers to the new corporation organized under section 86 of chapter 51, R. S., is not a purchase or acquisition of property within the meaning of section 37 of chapter 55, nor one of the purposes for which capital stock may be issued and over which the Public Utilities Commission has jurisdiction.

In the instant case the acquiring of the franchises and property, the organization of the new corporation, the fixing of the amount of its capital stock and the determination of the proper amount to be issued to the purchasers and incorporators are a part of the reorganization, and must be done under the direction of and with the approval of the Court, and does not require the approval of the Public Utilities Commission.

On exceptions by the Damariscotta-Newcastle Water Company to rulings of the Public Utilities Commission, involving the interpretation of section 86 of chapter 51, R. S., and section 37 of chapter 55, R. S., certified to the Chief Justice under section 55 of chapter 55, R. S. Exceptions overruled.

The case appears in the opinion.

McLean, Fogg & Southard, for petitioner.

Public Utilities Commission not appearing.

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

WILSON, C. J. This case, involving exceptions to rulings of the

Public Utilities Commission, was certified to the Chief Justice under sec. 55 of chapter 55 R. S.

Some time prior to April 27, 1924, a receiver was appointed under secs. 82-86 of chapter 51, R. S. of the Twin Village Water Company which had the franchise to furnish water to the towns of Damariscotta, Newcastle and Bristol. On April 27th, 1924 the receiver having been duly authorized to sell at public auction all the property and franchises of the Twin Village Water Co., was ordered by the court to accept the bid of James R. Byrne of $23,000 as the highest bidder.

Under sec. 86 of chapter 51 R. S., the purchaser at such sale having acquired all the franchises of the old corporation including the right to exist as a corporation may "reorganize the same" as the language of the statute is, "under the direction of the court." We construe this to mean that the purchaser or purchasers with the necessary associates may organize themselves into a corporation taking over the property and franchises of the old. That it was in this case transferred direct to the new corporation instead of the purchaser makes no difference. The proceedings of reorganization are under the direction of the Court and not of the Public Utilities Commission.

In the instant matter it appears to be assumed in the bill of exceptions that the Damariscotta-Newcastle Water Co. was organized under sec. 86 of chapter 51 by Mr. Byrne the purchaser. On June 27, 1924 he gave notice to the receiver to make the deed conveying the franchises and property to the new corporation upon the payment of $20,700, apparently ten per cent of the purchase price having already been paid. Whether any direction or approval was given by the court to the reorganization as a whole does not appear, though out of what may have been abundance of caution the approval of the transfer by the Public Utilities Commission was obtained.

On June 30th, 1924, the Damariscotta-Newcastle Water Co. petitioned the Public Utilities Commission for authority to issue bonds to the amount of $50,000, and later to execute an open mortgage to secure bonds to the amount of $100,000 and to issue to Mr. Byrne capital stock of the new company to the amount of $100,000 less $20,700, the sum paid by the new company for the property and franchises in cash, being, as it claims, the difference between the sum so paid and the reproduction cost of the property less depreciation. The issue of bonds up to a certain amount was approved by the Com-

mission, but its approval of the issue of the capital stock was withheld upon the ground, as stated in its decree, that the purpose set forth in the petition is not one for which the Utilities Commission may authorize the issuance of capital stock. It is this ruling which is challenged by the exceptions.

The purpose for which it is desired to issue the stock, as set forth in the petition, "is to be used in full payment of all rights and equities of Mr. Byrne as a consideration for his permitting the transfer of the franchises and property of the Twin Village Water Co. to be made directly to this Company and represents the fair replacement value of the properties."

The theory of the petitioner is that the transaction was a sale from the receiver to Mr. Byrne and from Mr. Byrne to the new corporation and the stock to be issued was in part payment of the property and franchises thus acquired by the new company.

But we think that the transfer by the purchaser at a receiver's sale to the corporations organized under sec. 86 of chapter 51 is not a "purchase or acquisition of property" within the meaning of sec. 37 of chapter 55 nor one of the "purposes authorized by law" for which capital stock may be issued and over which the Public Utilities Commission has jurisdiction.

The sale by the receiver of the property and franchises and the organization of a new corporation to hold the same under sec. 86 of chapter 51 is under the direction of the court. It requires no approval or consent of the Public Utilities Commmission. Nor does the issuing of capital stock representing the franchise and property of the corporation so acquired. The approval of the court alone is sufficient.

As to whether under any circumstances the issuing of bonds solely to secure cash for the payment of purchase price may be a part of a reorganization it is not necessary to decide, but bonds to be issued in part to acquire additional property or to make extensions and repairs must have the approval of the Public Utilities Commission.

The acquiring of the franchises and property, the organization of the corporation, fixing the amount of capital stock, the division of it into shares, and the determining of the proper amount to be issued to the purchasers and incorporators as representing the property and franchises thus acquired were, we think, a part of the reorganization and must be done under the direction of and with the approval of the court.

Whether such was done in this instance does not appear from the bill of exceptions; but it is not necessary to the disposal of the case. In any event under such a sale and reorganization the Public Utilities Commission have no control over the sale, transfer to or organization of the new corporation or the issuing of the capital stock representing solely the property and franchises.

The petitioner, therefore, was not aggrieved by the Commission withholding its consent to the issuing of capital stock for the purposes set forth in the petition.

Exceptions overruled.

SAUNDERS' CASE.

Washington. Opinion March 31, 1927.

In the case of an employee residing in Maine and employed by the joint superintendent of two corporations, one a foreign corporation owning the stock in the other, a Maine corporation, but within the limits of this state, though the employee was at once sent to the foreign country to do work and remained there until his injury and death, there is a presumption that it was not the intention of the parties to violate the law of the foreign country, and a finding by the Commission awarding compensation on the ground that the contract was between the employee and the Maine corporation was warranted.

In the instant case though the Maine corporation had no plant in the foreign country or authority to do business there, and the furnishing of labor to do work there may have been ultra vires, yet under the circumstances shown to exist in this case, it was not foreign to its corporate purposes, but in extension thereof, and if its contract with the employee contemplated it, the employee would be entitled to compensation under the extra-territorial clause of the Act.

The evidence in the case does not disclose anything illegal under the laws of the state in the Maine corporation contracting with an employee to do work in a foreign country. An alien labor act of a foreign country applies only to contracts between its own citizens and aliens. No question being raised but that the assent and insurance policy were broad enough to cover an employee engaged in work in a foreign country if contemplated under the contract of employment.

On appeal. Petition of Annie L. Saunders, mother of Claude Ronal Saunders, who was accidently killed May 27, 1925, at St. Stephen, in the Province of New Brunswick, in the course of his employment. Compensation was awarded by the Associate Legal Member, and from an affirming decree an appeal was taken. Appeal dismissed with costs. Decree below affirm.

The case fully appears in the opinion.

Locke, Perkins & Williamson for petitioner.

Harold H. Murchie and Robert Payson for respondents.

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

WILSON, C. J. An appeal from a decree of a justice below confirming the findings of the associate legal member of the Industrial Accident Commission.

The Maritime Electric Co., Ltd., a Canadian corporation, supplies the city of St. Stephen in New Brunswick with electricity, and also the St. Croix Gas Light Co., a Maine corporation, for distribution in the city of Calais and surrounding territory. The Maritime Electric Co. owns all the stock of the Maine corporation. The two corporations are separate legal entities, but are owned and controlled by the same parties, and are managed by the same executives. The evidence discloses that only one crew was employed to do the work of both companies, and the men were assigned by the foreman to do work on either side of the boundary as occasion required. The deceased, a resident of Calais, on May 21st, 1925, was employed in Calais by the foreman of the work crew of both corporations, and was at once assigned to work in the city of St. Stephen on the Canadian side, where on May 27th he received the injuries resulting in his death.

The associate legal member in effect found that he was in the employ of the St. Croix Gas Light Co., at the time he was injured, although he was working on the Canadian side and that section 25 of the Compensation Act applied, and that the petitioner was wholly dependent upon him. The respondents contend that there was no evidence to support the finding that he was at the time in the employ of the Maine corporation and, even if so, section 25 of the Act would not apply to the circumstances shown to exist.

While there was evidence to support the contention of the respondents that all the employees were employed and paid by the Canadian company, inasmuch as it was unlawful for the Canadian company under the laws of New Brunswick to bring alien labor into New Brunswick under contract, and the original hiring appearing to have taken place in Maine, we think the associate legal member was warranted in finding upon the evidence and the presumption that it was not the intent of any of the parties to violate the law of New Brunswick, that the original contract of employment was a legal and not an illegal one, and was, therefore, between the deceased and the Maine company.

It is true that even if the employment was by the Maine company in the first instance, in order for his dependents to recover he must have remained in its employ while working on the Canadian side, and their recovery is by virtue of section 25 of the Compensation Act, although there appears to be a tendency in the later decisions, where the acceptance of the Act is contractual and not compulsory, to extend its operations extra territorially without an express provision to that effect. *Smith* v. *Van Noy Interstate Co.*, (Tenn.) 35 A. L. R., 1409 and note.

While the Maine company has no plant on the Canadian side nor any authority to do business there under its charter, under the decision of the associate legal member he must have found that the contract of employment with the Maine company contemplated the performance of work in connection with the supplying of electric power on both sides of the river by common understanding between the two companies according as their needs required. We can not say there was no evidence to support such a finding. Notwithstanding an agreement to furnish labor for such purposes on the Canadian side and the furnishing of such labor may have been *ultra vires* as to the Maine company, it was not foreign to its corporate purposes but in extension thereof. *Electric Co.* v. *Electric Co.*, 107 Me., 279, 282. If its contract with its employee contemplated it, he would still be entitled to compensation under the extra territorial clause of the Act, *Uhl* v. *Hartwood Club* 163 N. Y. S., 744, unless it appeared that such employment was not covered by the assent or contract of insurance.

The certificate of assent and insurance policy are not made a part of the evidence, but no question is raised in the answer that they

were not broad enough to cover any work on the Canadian side if contemplated by the contract of employment. *McCollor's Case,* 122 Me., 136.

There appears to be nothing illegal, in the sense that it was prohibited, in a contract between an employee and the Maine company to do electrical work when required on the Canadian side. The New Brunswick Alien Labor Act applies only to contracts between its own corporations or residents and aliens.

Therefore, we think the finding of the associate legal member that the contract of employment was between the St. Croix Gas Light Co. and the deceased and that it contemplated work on both sides of the river has sufficient evidence in the case to sustain it; and though *ultra vires* as to work on the Canadian side, yet since such a contract was not prohibited by any Maine statute, and was merely an extension of the corporate power of the Maine corporation, the deceased while engaged in work under such contract on either side of the boundary is entitled to the benefit of the Act, and the mandate must be:

Appeal dismissed with costs.
Decree below affirmed.

RAYMOND FELLOWS, Att'y General

HENRY F. CUMMINGS, Relator

vs.

JOHN M. EASTMAN.

Kennebec. Opinion March 31, 1927

Although the question to be submitted to the electorate when an amendment to the Constitution is proposed is set forth in the resolution passed by the Legislature, it does not become a part of the amendment if the vote is in the affirmative. Its function is not to inform the voter of the full import of the amendment, but a mere formula prescribed by the Legislature to enable the electorate to express its will as to whether the proposed amendment should become a part of the organic law.

In the instant case the amendment to section 10 of article IX of the Constitution was duly submitted to the people, having been printed in full upon the ballot; the vote was in the affirmative; it was duly proclaimed as part of the Constitution, and must be so regarded.

The Governor having proceeded in accordance with the opinion of a majority of the Court as to the proper construction of the amendment in removing the relator, while it may not have rendered the relator's removal res adjudicata, nor do the rules of stare decisis apply to the advisory opinions of the Court under the Constitution; yet when property rights are not involved and the advice is given to guide the Governor in the performance of a constitutional function of government and having been followed, public policy requires that his acts be upheld, unless strong and compelling reasons are presented to the contrary; the petitioner presents no such reasons to this Court in these proceedings.

The existence of the office itself not being involved, and no damage being recoverable under the statutes of this state in these proceedings, no good could come from deciding the moot question of the title to the office, the term of the office having already expired before the case was fully presented to this Court.

On appeal. A proceeding in the nature of *quo warranto* to determine the title to the office of sheriff of Kennebec County for the term expiring January 1, 1927, the relator having been removed by the governor under the provisions of the amendment to section 10 of article IX of the Constitution adopted at the September election, 1917. After a hearing upon petition, answer and replication the presiding Justice entered a decree in favor of the defendant, and relator appealed. Appeal dismissed. Judgment below affirmed.

The case fully appears in the opinion.

Ralph W. Farris and Joseph E. F. Connolly for relator.

Locke, Perkins & Williamson for defendant.

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

DEASY, BARNES, PATTANGALL, JJ., concurring in the result.

WILSON, C. J. A proceeding by information in the nature of *quo warranto* to determine the title to the office of sheriff of Kennebec County for a term expiring January 1, 1927.

The relator was at the September election in 1924 elected sheriff of Kennebec County, and duly qualified and took up the duties of his office on January 1st, 1925 for a term of two years.

On March 12, 1926 Arthur H. Field, Chief of the State Highway Police, complained to the Governor and Council that the relator had not faithfully and efficiently and was not then faithfully and efficiently performing his duties as such sheriff. The proceedings were brought under an amendment to sec. 10 of Art. IX of the constitution and adopted at the September election 1917, which provides a method for the removal of sheriffs when found to be unfaithful or inefficient in the performance of their duties.

A hearing was held by the Governor and Council and by a vote of four to three, the Governor voting—the Council by reason of an unfilled vacancy caused by death then consisting of six members—the relator was found guilty of the charges against him. Question having arisen as to the legality of the procedure and the adoption of the amendment, before proceeding to remove the relator, the Governor under sec. 3 of Art. 4 of the Constitution requested the opinion of the Justices of the Supreme Court as to whether the amendment under which the proceedings were instituted was legally adopted and whether by the terms of the amendment a majority vote of the Council was required before the Governor could remove a sheriff.

The members of this Court, 125 Me., 530, unanimously advised the Governor that the amendment had been legally adopted and proclaimed, and had become a part of the organic law of the state; and a majority advised that the Governor and Council under the amendment were constituted a special tribunal to hear and determine the facts in such proceedings, and as such tribunal their duties were judicial rather than executive and advisory; that the Governor was a member of such tribunal and entitled to vote, and that a majority vote of the tribunal so constituted was sufficient to furnish grounds for the Governor without further action by the Council to remove the offending officer. Whereupon the Governor removed the relator and named the respondent as sheriff of Kennebec County for the remainder of the term, which appointment was duly confirmed by the Council and the respondent duly qualified himself for the performance of the duties of the office.

On June 16th, 1926 the relator instituted these proceedings. After a hearing before a single Justice in July following, the right of the respondent to the office of sheriff of Kennebec County until January 1st, 1927 was found valid and confirmed. Thereupon the relator

appealed to this Court sitting in December, 1926, alleging twenty different grounds of appeal.

His counsel, however, in his brief states that only two questions are involved: (1) whether the amendment was legally adopted and (2) whether if adopted the Governor can vote with and "as a councillor."

We think there is no merit in his first contention, whatever the interpretation put upon the amendment. While the question formulated by the Legislature for submitting the amendment to the people may not have aptly expressed the full import of the amendment as construed by a majority of the Court, the evidence does not disclose that any deceit was intended or practiced. The entire amendment was printed in full on the ballot for the information of the voter. That all are not now agreed as to its construction does not militate against its adoption.

The submission of constitutional amendments by printing on the ballot a brief statement of its general import in the form of a question on which the voter indicates his wishes by voting "yes" or "no" is the common and convenient method in all the states. Different methods of bringing to the attention of the voter the actual provisions of the amendment referred to in the question submitted are followed. In this instance, if it had not already, according to the usual practice, been printed in the public press, the full context was printed on the ballot.

The electorate by voting "yes" or "no" upon the question submitted either adopts or rejects the amendment. By an affirmative vote, it does not adopt the question as a part of the amendment. While the question to be submitted to the voters is contained in the resolution passed by the Legislature, it is no part of the amendment, but a mere formula prescribed, not to inform the voter of the full import of the proposed amendment, but to enable the electorate to express its will as to whether the proposed amendment should become a part of the organic law. *Cooney* v. *Foote*, 142 Ga., 647, 654; *Cudihee* v. *Phelps*, 76 Wash., 314. The procedure outlined by the Constitution in submitting this amendment to the people was followed. The vote was in its favor. It was duly proclaimed a part of the Constitution. To what extent the formula submitted to the voters should control its interpretation is another matter. Of the adoption of the amendment there can be no doubt.

As to its construction, no extended discussion is now necessary, as we think the appeal should in any event be dismissed upon other grounds.

In removing the relator, the Governor proceeded in accordance with the judicial interpretation of the amendment obtained by him under the Constitution. While the legality of relator's removal from the office may not be thereby rendered *res adjudicata;* nor does the rule of *stare decisis* apply to the constitutional advisory opinions of the Justices where property rights are concerned; but where property rights are not involved, a public office being a public trust and not a vested property right, *Taylor* v. *Beckham,* 178 U. S., 548, 577, *Rounds* v. *Smart,* 71 Me., 383; *Prince* v. *Skillin,* 71 Me., 361; *Andrews* v. *King,* 77 Me., 231; *Nichols* v. *MacLean,* 101 N. Y., 526; *McKannay* v. *Horton,* 151 Cal., 711; 22 R. C. L., 377, and the advice being given to guide the Governor in the performance of a public and constitutional function of government, and having been followed, public policy, at least, requires that strong and compelling reasons be presented before the Court sitting *en banc* will hold an act by the Chief Executive of this nature invalid when taken in pursuance of a construction of the organic law given upon request under the constitution by a majority of the Court. The relator presents none, unless he abandons his first proposition and relies upon the alleged inconsistency between the question submitted to the voter and the construction of the amendment adopted by the majority of the Court.

However, a rule, which is decisive of the case as now premised before this Court, seems well established; that unless the existence of the office itself is involved, *State* v. *Butler,* 105 Me., 102, the term of the office in question having expired and damages not being recoverable, no good can now come from deciding the moot question of the title to the office. *Osterhous ex rel* v. *Van Duren,* 168 Mich., 464; *Ham* v. *State,* 172 Ala., 239; *State* v. *Lyons,* 143 Ala., 649; *Tennessee* v. *Condon,* 189 U. S. 64; *Com.* v. *Athearn,* 3 Mass., 285; *State* v. *Porter,* 58 *Iowa,* 19; *State* v. *Powell,* 101 Ia., 382; *Holmes* v. *Sikes,* 113 Ga., 582, *Churchill* v. *Walker,* 68 Ga., 681; *Morris* v. *Underwood,* 19 Ga. 560; *State* v. *Ward* 17 Ohio St., 544; *State* v. *Wickersham,* 16 Wash., 162; Mechem on Public Officers, sec. 484. 22 R. C. L., 722, sec. 45.

Such proceedings even when upon information by the Attorney General are civil and not criminal. *State* v. *York Light and Heat Co.,*

113 Me., 144. The statutes of this state do not authorize the imposition of a fine or the recovery of damages, nor may either be recovered under the common law of this state in such proceedings. See *State* v. *Kearn*, 17 R. I., 391; *Atty. Gen.* v. *Sullivan*, 163 Mass., 446; *Com.* v. *Fowler*, 11 Mass., 339.

So far as the petition or the evidence discloses, therefore, no benefit other than the recovery of costs could now enure to the relator, if this proceeding was decided in his favor. But as the Court said in *State* v. *Porter*, 58 Iowa, 19, "Courts are not organized for the purpose of determining mere abstractions. The Court ought not to be required to spend its time in the accumulation of a bill of costs for no other purpose than that of determining which party should pay for them. As no vital question remained for determination the further prosecution of the case would have been vexatious and unjust."

The United States Court in *Tennessee* v. *Condon*, 189 U. S. 64 has expressed similar views. "The duty of this court, as of every other juducual tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions. It necessarily follows that when pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

The relator when these proceedings were instituted had already been nominated in the primaries as candidate for the term beginning January 1st, 1927, the state election was to take place in September, at which he was re-elected, and he is now occupying the office of sheriff of Kennebec County. By no possibility could the right of the respondent to the office during the remainder of the term expiring December 31st, 1926 have been finally determined in this Court before the term was about to expire and in all probabilities the term would have been completed before a decision could be rendered, as indeed it has, though if the relator had proceeded promptly, an appeal to this Court might have been taken to the June term and an early decision rendered before the term of the respondent had fully expired.

The respondent in the instant case being already out of office, the term having expired, if the relator were entitled to judgment, a judgment of ouster, the only judgment which would be proper here, would be superfluous, and so far as the case discloses, would avail the relator nothing. As no fine can be imposed or damages recovered, the recovery of costs alone is not sufficient to warrant the retention of the case. *Tennessee* v. *Condon supra.*

Appeal dismissed.
Judgment below affirmed.

STATE

vs.

GEORGE B. FLETCHER.

Androscoggin. Opinion March 31, 1927.

To admit statements of an agent not made in the presence of the principal, a prima facie case of agency must first be established aliunde by the party offering the testimony. The statements must also be a part of the res gestae and made in connection with acts within the scope of the agent's authority.

The evidence to establish a prima facie case of agency is such as would alone and unexplained warrant a jury in finding that agency existed.

Without other evidence limiting his authority, a jury would be warranted in concluding that a son of sufficient age and maturity to be left in charge of a farm in the absence of the father and owner on other business would be authorized to sell the ordinary farm products.

In this case it was still a question for the jury, upon all the evidence, under proper instructions by the Court, whether agency was in fact established and the statements of the son properly considered in arriving at their verdict.

Authority to sell for a lawful purpose might have brought the case within section 21 of chapter 127, R. S., if the charge had been a single sale, and the evidence sufficient to convict of an unlawful sale. Unlawful selling of intoxicating liquors renders a place a nuisance under chapter 23, R. S.

On exceptions. The respondent was jointly indicted with his son, Claude, for keeping and maintaining a common liquor nuisance. The son pleaded guilty. The respondent was tried and found guilty. During the trial exceptions by respondent were entered to the admission of certain testimony. Exceptions overruled. Judgment for the State.

The case is fully stated in the opinion.

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

Edgar M. Briggs and Clifford & Clifford, for the respondent.

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

WILSON, C. J. The respondent was indicted for keeping and maintaining a common nuisance. In the course of the trial certain evidence was offered by the state, and admitted subject to exceptions, of statements made by a son of the respondent to the officers in the absence of the respondent.

The bill of exceptions as construed by the respondent's counsel, though somewhat anbiguous, sets forth that the officers on three occasions visited the farm of the respondent on which he lived with his wife and son, and on each occasion found the son at work on the farm and in charge during the absence of the respondent who was away on the road selling goods a greater part of the time.

On each of the first two visits, the officers purchased of the son a gallon of cider and on the third visit seized eight hundred and seventy-five gallons of cider, a jar containing alcohol, and a keg containing what is described as "home brew beer."

The respondent's counsel seasonably objected to the testimony of the officers as to statements made by the son at the time of the purchase incriminating the father upon the ground that no agency had been shown. It is not entirely clear from the bill of exceptions just what evidence of agency was before the court at the time the declarations were offered. The burden, however, is on the respondent to show he was aggrieved.

The rule governing the admissibility of such evidence is that, unless received *de bene,* a *prima facie* case of agency must be first established *aliunde* by the party offering the testimony and the statements

offered must also be a part of the *res gestae* and made in connection with acts within the scope of the agent's authority. Greenleaf Ev. (16th Ed.) Vol. 1, section 184 a, b, c; Wharton Criminal Evidence (9th Ed.) Vol. 11, section 695; Underwood Criminal Evidence, 3rd Ed., sec. 718; *Hazeltine* v. *Miller*, 44 Me., 177, 183; *Com.* v. *MacKenzie*, 211 Mass., 578; *Com.* v. *Riches*, 219 Mass., 433.

The evidence necessary to establish a *prima facie* case of agency is such evidence as would alone and unexplained warrant a jury in finding that agency existed. *State* v. *Intox. Liquors*, 80 Me., 57; *Com.* v. *Kimball*, 24 Pick., 366, 373; See Title, Words and Phrases.

No objection was raised at the trial that the statements made by the son were not made in connection with one of the sales, and it can not now be urged before this Court. The question raised by the exceptions, therefore, is not whether upon all the evidence in the case such agency was established, but whether upon the evidence before the Justice at the time the declarations were admitted, if unexplained or not denied, the jury would have been warranted in finding that agency existed, and the son in selling the cider was acting within the scope of such agency, though if from other competent evidence later introduced the agency was established, a respondent might not be aggrieved by the receipt of such evidence before it was properly admissible. *Com.* v. *Riches*, *supra*. The last proposition, however, is not urged by the state in this case.

From the bill of exceptions, as construed by the respondent's counsel, it appears that at the time the evidence was offered it had been shown or was admitted that the respondent was the owner of the farm and the products thereof, including the cider, but that his principal occupation was that of a traveling salesman; that the son, in the absence of the father "on the road", was in charge of the farm; that on two occasions the son had sold a quantity of the cider, presumably with the intent that it should be used as a beverage, since the bill of exceptions states it was "intoxicating cider" that was sold; that there was on the premises a quantity of alcohol and a keg of "home brew beer."

Under such circumstances, unexplained, would a jury have been warranted in finding that the son in selling the cider was selling as agent of the father and acting within the scope of his agency?

We think the evidence was sufficient to justify the admission of the declarations. It was still a question for the jury under instruc-

tions of the court, whether the agency is established and the declarations can be considered by the jury in arriving at their verdict. Without other testimony limiting his authority, a jury would be warranted in concluding that a son of sufficient age and maturity to be in charge of a farm, while the father was absent over more or less protracted periods in the prosecution of another business than that of farming, would be authorized to sell the products of the farm, including cider,—at least for the lawful purpose of being made into vinegar—according to the usual practice of farmers. Proof of a mere farm laborer or the ordinary relation of master and servant, might not be sufficient to authorize a finding of authority to sell products of a farm, but proof of a son of sufficient maturity to take charge in the absence of the father upon other business might warrant a finding by the jury of broader authority.

We must assume that the presiding Justice, if further evidence was offered in explanation or denial of the circumstances proved, or admitted, at the time the declarations of the alleged agent was received and tending to establish agency, properly instructed the jury that, notwithstanding the declarations had been admitted in evidence, before giving any weight to them, it was still a question for the jury to find, and solely from the evidence outside of the declarations, that agency actually existed, and if they could not so find, the incriminating declarations must be disregarded by them in arriving at their verdict. By their verdict they found the agency established.

Authority to sell for a lawful purpose, if the charge in the case at bar had been a single sale, might bring the case under section 21 of chapter 127 R. S., *State* v. *Wentworth,* 65 Me., 234; *State* v. *Brown,* 31 Me., 520; *Com.* v. *Nichols,* 10 Met., 259; *Com.* v. *Holmes,* 119 Mass., 195; *Com.* v. *Uhrig,* 138 Mass., 492; *State* v. *Lundgren,* 124 Minn., 162; and the evidence in the case be sufficient to convict the respondent of unlawful sales. Unlawful selling of intoxicating liquors is sufficient to render premises a nuisance and the keeper or person selling liable under chapter 23 R. S. Upon the record we think the exceptions must be overruled.

Exceptions overruled.
Judgment for the State.

KINSLOW'S CASE

York. Opinion April 1, 1927.

Under the Workmen's Compensation Act the injuries received by an employee in going to and from his work on a public street or in a public conveyance are not injuries received in the course of his employment unless the means of conveyance is furnished by the employer.

On appeal. A workmen's compensation case where the injuries received by an employee were sustained while he was going along a public street in a conveyance which was neither a public conveyance nor one furnished by the employer, but furnished by himself when going to and from his work. Compensation was awarded and an appeal taken. Appeal sustained; Case remanded to the court below for decree in accordance with the opinion.

The case fully appears in the opinion.

Perley H Ford and Edward S. Titcomb, for petitioner.

Leon V. Walker and Verrill, Hale & Ives, for respondents.

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

PHILBROOK, J. On September 3, 1925, the petitioner, together with several other carpenters, was employed by R. J. Grant on a job at Kennebunk Beach where Grant was constructing a cottage. Mr. Kinslow lived at Kennebunk. While Mr. Grant was responsible for the transportation of other employees to and from Kennebunk to the place where they were doing the work, yet it was agreed that Mr. Kinslow should furnish his own transportation, which he did. On the night of September second, Kinslow had arranged with the owner of a garage located at Kennebunk Landing to leave his car on the morning of September third to have certain repairs made, with the understanding that the garage man would carry him the rest of the way to his work on the morning of September third. On

the arrival at the garage on September third, Kinslow left his car, and with other carpenters, secured an automobile at the garage to be driven by a boy who was working at the garage. Before going far, the automobile was overturned; and Mr. Kinslow received serious injuries.

The respondents filed answer alleging that the injuries set forth in the petition, and under the circumstances above stated did not result from an accident arising out of and in the course of the employment of said petitioner, by said Grant. The chairman of the Industrial Accident Commission held otherwise and awarded compensation. There seems to be no dispute as to the facts of the case; and the question of law herein, is whether under these circumstances the petitioner did or did not receive an accidental injury arising out of and in the course of his employment.

In *Robert's Case*, 124 Maine 129, the court held as an established rule that injuries received by an employee in going to and from his work on a public street or in a public conveyance are not injuries received in the course of his employment unless the means of conveyance is furnished by the employer.

This rule seems to apply plainly to the instant case for the means of conveyance by which the petitioner was riding was not one furnished by the employer but one furnished by himself when going to and from his work on the public street.

The rule just stated as found in *Robert's Case* is in harmony with the great weight of authority in this country; and the mandate must therefore be

Appeal sustained;
Case remanded to the court below for decree in accordance with this opinion.

LITTLEFIELD'S CASE.

York. Opinion April 1, 1927.

In workmen's compensation cases where transportation is furnished by the employer as an incident of employment, an injury suffered by an employee while going or coming in the vehicle furnished by the employer arises out of and is within the course of the employment.

On appeal. Petition of Margaret A. Littlefield as dependent widow of George W. Littlefield who was fatally injured while being conveyed with a fellow workman to his work under an arrangement made by the employer. Compensation was awarded and respondents appealed. Appeal dismissed. Decree below affirmed.

The case appears in the opinion.

Harold H. Bourne, for petitioner.

Leon V. Walker, and Verrill, Hale, Booth & Ives, for respondents.

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

PHILBROOK, J. George W. Littlefield, the deceased husband of the petitioner, on September 3, 1925 was employed as a carpenter by Randall J. Grant. Mr. Grant had contracts for building at different places and among others he had a contract for work to be performed at Kennebunk Beach. When Mr. Littlefield entered the employment of Mr. Grant it was agreed between them that Mr. Grant would be responsible for the transportation of Mr. Littlefield from Kennebunk Village, where Mr. Littlefield lived, to the point at Kennebunk Beach where the work was being performed. Usually Mr. Littlefield rode to the work at Kennebunk Beach in a truck owned and driven by Mr. Grant. On the morning of September 3, 1925, Mr. Grant was obliged to go in another direction and was unable to transport Mr. Littlefield to the beach in his own automobile, so Mr. Grant arranged for Mr. Littlefield to ride to the work with Frank

Kinslow, a fellow workman who was engaged on the same job and who went from Kennebunk Village to Kennebunk Beach in his own automobile. When Mr. Kinslow had proceeded about half way to the point of destination he left his automobile at a garage to have some repairs made and he and Mr. Littlefield continued on their way to Kennebunk Beach in an automobile secured by Mr. Kinslow from the owner of the garage and driven by a young man who was working at the garage. The party had proceeded but a short distance when the automobile was overturned and Mr. Littlefield was thrown out, receiving injuries which resulted in his death that day. Concerning these facts, there seems to be no dispute.

The widow filed her petition with the Industrial Accident Commission, and the employer, together with the insurance carrier, filed an answer alleging that the injuries and death of George W. Littlefield were not due to an accident arising out of and in the course of his employment.

The precise question of law involved in this case has not been passed upon by this court, although it has been considered in a multitude of cases both in the British and American courts.

In *Roberts' Case*, 124 Maine 129, it was held as a generally accepted rule that injuries received by an employee in going to and from his work on a public street or in a public conveyance are not received in the course of his employment unless his means of conveyance is furnished by the employer. In the instant case, Littlefield received his injuries on the public street, but not in a public conveyance. His means of conveyance was furnished by the employer under contract or agreement for transportation as above stated.

This brings the case directly within the provisions of law which apply to accidental injuries received while the employee is going to and returning from his work in a means of conveyance furnished by the employer under agreement with the employee. In the early British cases, and in the later cases in the same jurisdiction, there is a wide difference of views; and in fact, in a very late case, *St. Helen's Colliery Co. vs. Hewetson*, A. C. 59, decided in 1924, the House of Lords overruled certain former decisions upon the subject, notably the case of *Cremins vs. Guiest, Keene & Metalfold*, 1 K. B. 469, from which latter case American courts evidently received much light in deciding earlier cases in this country. The respondents in the case at bar urge us to follow the *St. Helen's case* as being based upon better logic and

reason, but we cannot ignore the great weight of authority in the courts of this country relative to this question.

It is now generally held that where transportation is furnished by an employer as an incident of the employment, an injury suffered by the employee while going or coming in the vehicle furnished by the employer and under his control. arises out of and is within the course of the employment. Some of the leading cases which establish this dictrine are: *Dominguez vs. Pendoia*, (Cal.) 188 Pac. 1025; *Swanson vs. Latham*, 92 Conn. 87, 101 Atl. 492; *Harrison vs. Central Construction Corporation*, (Md.) 108 Atl. 874; *Donovan's Case*, 217 Mass. 76, 104 N. E. 431; *London Indemnity Co. vs. District Court*, 141 Minn. 348, 170 N. W. 218; *Littler vs. Fuller Co.*, 223 N. Y. 369, 119 N. E. 554; *Hackley Co. vs. Industrial Commission*, 165 Wis. 586, L. R. A. 1918A 277, 162 N. W. 921.

In the *Harrison case*, supra, the court declares that when an injury occurs before the beginning or after the termination of the work there are two general rules applicable to the question as to whether it arises out of and in the course of the employment. The first is, that the employee while on his way to work is not in the course of his employment. The second is, that when a workman is employed to work at a certain place, and as a part of his contract of employment there is an agreement that his employer shall furnish him free transportation to or from his work, the period of service continues during the time of transportation, and if an injury occurs during the course of transportation it is held to have arisen out of and in the course of the employment.

In the *Swanson case*, supra, it was held that when the contract with carpenters required them to work outside of their place of residence and the employer agreed, as a part of the contract for work at a place other than their residence, that he would convey them to and from their work in an automobile provided by him, that an injury resulting while they were being transported to their work arises out of and in the course of the employment.

In the *Littler case*, supra, where bricklayers employed to build a house two miles from a railroad station refused to remain on the job unless furnished with free transportation back and forth, and the employer hired a truck to transport them which went into a ditch while returning to the station at night, and injured the employee, it was held that the injury arose out of and in the course of the employment.

And the court said that the day's work began when the employee entered the automobile truck in the morning and ended when he left it in the evening, and further said that the rule was well established that in such cases compensation should be awarded.

In the *Dominguez case,* supra, the employee of a contractor engaged in constructing a municipal water reservoir, who was injured while he went from his home to the reservoir in an automobile truck furnished by the employer for that purpose and was driven by another employee, was entitled to compensation upon the ground that where transportation is furnished by an employer as an incident of the employment to convey an employee to and from the place of employment, and injury was suffered by the employee going and coming in the vehicle so furnished by the employer, and under the control of the employer, arises out of and in the course of the employment.

A multitude of cases might be cited in support of this rule and in harmony with the great weight of authority, although cases may be found where courts have reached a different result.

In the instant case, although Mr. Littlefield ordinarily rode in the automobile furnished and driven by Mr. Grant, or by his son, yet at the time of this particular accident he was riding in a car owned and driven by a fellow workman, Mr. Kinslow. But the riding with Mr. Kinslow was at the request of Mr. Grant, and in furtherance of Mr. Grant's agreement to convey Mr. Littlefield to and from his work. The further fact that Mr. Kinslow left his own automobile at a garage and took another conveyance and another driver was only part and parcel of the original attempt to transport Mr. Littlefield to his work and we cannot conceive that the ownership of the second automobile affects the question in this case. If Mr. Kinslow's automobile had entirely broken down when it had transported them only a short distance, and he was obliged to resort to another conveyance or another automobile, yet the conveyance would all be a part of the original undertaking to transport Mr. Littlefield to his work.

Under the facts in the case, and the weight of authority as above referred to, we hold that Mr. Littlefield received an accidental injury, which resulted in death, and that the injury arose out of and in the course of his employment.

The mandate therefore will be

Appeal dismissed;
Decree below affirmed.

STATE

vs.

ROBERT S. THOMES.

Cumberland. Opinion April 2, 1927.

In an indictment for larceny the property should be described with sufficient particularity to enable the court to see that it is the subject of larceny; to inform the accused of what he is charged with taking and to protect him from being again put in jeopardy for the same offense.

The property should be described with reasonable certainty or the reason for not doing so should be stated.

A description of money is incomplete without a statement of its value and without some further identifying particulars, unless excuse is offered for lack of them.

Entirely aside from the matter of description a definite allegation of value is necessary, in this state, in order to determine the grade of the offense.

An indictment for larceny in which several articles are described and the aggregate value of the articles is stated, may be good.

An indictment in which any one article is properly described and the value of that article stated, may be good.

An indictment good in part and bad in part will stand against the attack of a general demurrer.

An indefinite description of property may suffice if the indictment states the reason for the lack of particularity.

But an indictment for larceny must contain a sufficient description of at least one article to satisfy the rules above stated and the allegation of value must definitely relate to the article so described.

On exceptions. Respondent was indicted under section I, chapter 122 of the Revised Statutes. A general demurrer was interposed reserving the right to plead anew, alleging that the property was not sufficiently described. The demurrer was overruled and respondent excepted. Exceptions sustained.

The case appears in the opinion.

Ralph M. Ingalls, County Attorney, and Franz U. Burkett, Assistant County Attorney, for the State.

William H. Gulliver and William B. Mahoney, for respondent.

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

PATTANGALL, J. Indictment for larceny under section 1, chapter 122 R. S. General demurrer. Right to plead anew reserved. Demurrer overruled. Exceptions taken.

Demurrer is based on the failure to sufficiently describe the property alleged to have been the subject of larceny. That portion of the indictment reads:

Sundry gold, silver, nickel and copper coins, national bank bills, United States treasury notes and certificates and Federal Reserve notes, checks, bills of exchange and other security for money and things of great value all of the aggregate value of one Thousand Dollars.

In an indictment for larceny the property should be described with sufficient particularity to enable the court to see that it is the subject of larceny; to inform the accused of what he is charged with taking and to protect him from being again put in jeopardy for the same offense.

Very great particularity is not required. But the articles should be described with reasonable certainty, such certainty as will enable the trial court to determine whether the evidence offered in support of the indictment relates to the same property on which the indictment was founded. If for any reason this cannot be done, the reason for not doing it should be stated in the indictment. *State v. Dawes*, 75 Maine, 51.

The grand jury may transfer to the indictment such a description as the witnesses can furnish, and allege that further particulars are to them unknown. 3 *Bishop New Crim. Pro. Second Edition*, 1673. The indictment should describe the property with reasonable certainty and if a sufficiently certain description cannot be given, because unknown, that fact should be alleged in the indictment. 11 R. C. L. 56. The usual allegation excusing a complete description is, "a more particular description of which is to your jurors unknown."

If in an indictment charging the larceny of several distinct articles or groups of articles, any one article or group is described with sufficient certainty, an insufficient description of the other articles will not vitiate the indictment. *Commonwealth v. Eastman*, 2 *Gray*, 76.

An indictment is good in which several articles of property, each

described properly, have been valued in the aggregate, instead of separately. *State v. Hood*, 51 Maine, 363; *State v. Gerrish*, 78 Maine, 20.

If this indictment contains a charge of the larceny of any properly described property the demurrer was properly overruled, otherwise not.

Aside from the various kinds of money enumerated in the indictment, the property described divides into the following groups: "checks," "bills of exchange," "other security for money," "things of great value."

No separate allegation of value attaches to any one of these groups. It is not necessary to allege such separate value, provided the group is sufficiently described otherwise but such an allegation is often useful as an assistance in identifying a group or an article and becomes a part of the description thereof.

"One promissory note of the value of three hundred dollars" was held good in *Com.* v. *Brettum*, 100 Mass. 206. Bishop quotes this case but adds "the phrase, 'sundry promissory notes' adding their collective value was adjudged to be too indefinite." 3 *Bishop New Crim. Pro. Second Edition*, 1692. But "divers promissory notes of the amount and value of $5000," was held good in *Com.* v. *Butts*, 124 Mass. 449, when accompanied by the allegation "a more particular description of which is to your jurors unknown," and, with a like excuse for sufficient particularity, "Divers promissory notes, payable to bearer, current as money in said Commonwealth of the amount and value of $80" was sufficient in *Com.* v. *Gallagher*, 126 Mass. 54. Also under similar circumstances, the court in *Com.* v. *Green*, 122 Mass. 333 upheld the description "Divers promissory notes of the amount and value of $87."

The difference between these allegations and that quoted by Bishop apparently being that they were supplemented by the allegation of want of accurate knowledge on the party of the grand jury.

"Sundry bank bills current within said Commonwealth, amounting to the sum of $210", without any allegation excusing the lack of definiteness was held good in *Com.* v. *Stebbins*, 8 Gray, 492. But this case stands by itself and rests upon no authority other than the mere dictum of *Larned* v. *Commonwealth*, 12 Met. 245.

The present indictment contains no allegation of lack of information on the part of the grand jury. If an indictment in which the

stolen property is described as "sundry promissory notes," giving the collective value is insufficient, without the averment of lack of more particular knowledge, it would seem to clearly follow that the descriptions, "checks," "bills of exchange," "security for money," "things of great value," as alleged in this indictment cannot be upheld.

There remains to be considered "sundry gold, silver, nickel and copper coins, national bank bills, United States Treasury notes and certificates and Federal Reserve notes." No value of these various kinds of money is stated. The aggregate value of all of the property declared on is said to be $1000. The value of the money may be said to be $1000.00 less the combined values of the "checks," "bills of exchange," "security for money," and "things of great value."

In *State* v. *McClung*, 35 W. Va. 280, the court said: "One pair of pantaloons and other goods and chattels, all of the value of $24.00 is bad—because it specifies only one of the things taken and alleges that other goods and chattels were stolen, without specifying them and gives a value of $24.00 to all of them together."

The value of the alleged stolen money is not given in this indictment, nor is there any method of arriving at that value by computation. It might well be stated as $1000. minus X—the unknown quantity standing for the value of the remaining property.

Money has been variously described in indictments for larceny. In *Com. v. O'Connell*, 12 Allen, 451: "A quantity of bank bills, current within this Commonwealth, amounting to $150", was held good, as was the description "copper coins to the value of two dollars and ninety-five cents" in *Com. v. Gallagher*, 16 Gray, 240. But in each of these cases the statement of value aided the description. In the instant case, to an indefinite description of the stolen money is added an indefinite value.

A description of money is incomplete without a statement of its value, and without some further identifying particulars, unless excuse is offered for lack of them. An allegation of simply so many dollars, or so many dollars in money without further description or reason for the omission is too indefinite. 2 *Bishop's New Crim. Pro.* 703.

And entirely aside from the matter of description a definite allegation of value is necessary, in this state, as a matter of determining

the degree of offense charged. Value may not be proved as alleged but the allegation must appear.

An indictment for larceny in which several articles are properly described and the aggregate value of the articles stated, may be good. An indictment in which any one article is properly described and the value of that article stated, may be good. An indictment good in part and bad in part will stand against the attack of a general demurrer, provided that the good and the bad can be separated. An indefinite description of property may be sufficient if the indictment states the reason for the lack of particularity.

But an indictment must contain a sufficient description of at least one article of property to satisfy the rules above stated and the allegation of value must definitely relate to the article or articles so described.

This indictment does not measure up to these requirements.

Exceptions sustained.

KATHERINE M. BENNER, In Equity.

vs.

CHARLES E. LUNT.

Penobscot. Opinion April 5, 1927.

Agreements relative to matters and proceedings in the probate courts are valid and enforcible contracts.

In the case at bar the agreement to withdraw his contest of the will, in consideration of money to be paid him by plaintiff, is not denied, and proof that it was reduced to writing and signed by or for the defendant is not required, for it is alleged in the bill and admitted in the answer.

Even if this were not so, and the promise to abandon the contest were in parole only, it has been repeatedly held in courts where the precise point has been raised that specific performance of the oral promise will be enforced.

On appeal. A bill in equity to enforce specific performance of a

contract between an heir at law and the executrix of a will, whereby the heir agreed no longer to contest the probate of a will, in return for a cash consideration. Upon hearing, the bill was sustained with costs, respondent ordered to accept the amount named in the contract in full and final settlement of the contest on the probate of the will, and enjoined from further prosecution of such contest. Respondent appealed.

Appeal dismissed. Decree below affirmed with costs.

The case is sufficiently stated in the opinion.

Ryder & Simpson, for complainant.

P. A. Smith, for respondent.

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

BARNES, J. Prior to bringing this bill in equity, plaintiff had offered for probate the will of Carrie S. Pond, by the terms of which there was bequeathed and devised to her all of the real and personal estate of the decedent.

The defendant, sole heir at law and next of kin of the testatrix, seasonably contested the probate of the will, and filed and perfected his appeal from the decree of the probate court.

Before hearing on the appeal, negotiations were had between plaintiff and defendant, which resulted in an agreement on the part of the defendant, for a consideration, to abandon his contest of the probate of the will. Shortly thereafter defendant repudiated his agreement, and this bill was brought to enforce specific performance of the agreement and for injunction against him from further prosecuting his appeal.

The agreement was made on the second day of April, 1926, and in her bill plaintiff alleges that the consideration was to be $1750.00. She further says that on the sixth day of the same month defendant refused to accept the money, which she then offered him, and which she has thence hitherto continually stood ready to pay; that defendant, disregarding his agreement with her, is prosecuting his appeal in the supreme court of probate, and she asks for decree as above.

By his answer defendant admits all allegations of the bill, but contends, "that on April 3rd, 1926, being the next day and after said agreement as alleged in the bill was entered into, he gave notice that

he repudiated said agreement, said notice then and there given to the attorney for the plaintiff, that no injury either in law or in equity was then and there done, or could have been done, to the plaintiff by said act of the defendant, and that said notice was given before any payment or tender of payment was made by plaintiff to defendant in performance of said agreement, and therefore defendant says that, in view of the alleged facts, relief does not lie for plaintiff as prayed for in the bill."

Hearing was had and a decree made that defendant should accept the money promised him in settlement of his contest of the will, and for injunction, and from this decree defendant appealed.

The agreement to withdraw his contest of the will, in consideration of money to be paid him by plaintiff, is not denied, and proof that it was reduced to writing and signed by or for the defendant is not required, for it is alleged in the bill and admitted in the answer. *Douglas* v. *Snow*, 77 Me., 91.

Even if this were not so, and the promise to abandon the contest were in parole only, it has been repeatedly held in courts where the precise point has been raised that specific performance of the oral promise will be enforced. Typical cases are *Bellows* v. *Sowles*, 57 Vt., 164; *Bartlett* v. *Slater*, 182 Mass., 208; *Emerson* v. *Slater*, 22 How. 28.

The contest here hinges on two main questions, namely, the jurisdiction of the court in equity, and whether the agreement not to contest the will is a valid and enforcible contract.

It is urged that jurisdiction is wanting because the bill does not assert absence of "a plain, complete remedy at law"; but omission of this, the jurisdictional clause, is not a defect. *Goodwin* v. *Smith*, 89 Me., 506, Equity Rule IV.

It is further urged that because she does not in her bill "allege facts which clearly show that the plaintiff will suffer substantial and irreparable injury which cannot be adequately remedied at law," this court may not assume jurisdiction. But, from facts in the answer, and from the probate appeal, made one of the exhibits in the case, we learn that if resort can be had to a court of law only, the plaintiff will be put to expense for services of counsel and attendance of witnesses in establishing the will against some or all of the allegations of irregularity and fraud set up in the probate appeal, and, in addi-

tion, we take judicial knowledge of the fact that the outcome of such litigation is never certain.

Plaintiff is the sole beneficiary under the will, so that even if the will is sustained, after contest, she will suffer the loss of all expense of preparation and conduct of the contest, except what are known as legal costs. Hence it is apparent that if her only recourse be to an action at law for damages, she will not be accorded a complete and adequate remedy, but will suffer irreparable loss.

As stated in 21 C. J., 54, "When a legal remedy is available but would afford only partial protection of plaintiff's entire right, or would not entirely adjust the rights of the parties, such remedy is incomplete and inadequate, and for that reason equity will interfere."

Jurisdiction assumed, we proceed to note that courts of equity in modern times have interposed to prevent the violation of agreements relative to matters and proceedings in the probate courts. The citation of innumerable cases to this effect would be but surplusage. Suffice it to state that in Massachusetts, in the cases *Leach* v. *Fobes*, 11 Gray, 506, *Blount* v. *Wheeler*, 199 Mass., 330, *Ellis* v. *Hunt*, 228 Mass., 39, and *Collins* v. *Collins*, 212 Mass., 131, the doctrine that contracts made as to the disposition of property, bequeathed or devised under a will, between legatees, heirs at law and others having a pecuniary interest therein, are recognized as valid and enforcible in equity.

We approve the ruling in *Bright* v. *Chapman*, 105 Me., 62, *McAlpine* v. *McAlpine*, 116 Me., 321, and, following the same line of reasoning a step farther, as expressed in leading opinions of courts of last resort where practically the very question here involved has been maturely considered, we hold that the case at bar, affecting as it does proceedings in probate, is properly brought in equity.

Nay more, compromises are favored in equity, and where a contract, arising in compromise of a claim, has been entered into but not fully executed, where the negotiations are between adults, and all is fair, open and above-board, its provisions may be enforced, and, if the case is a proper one for the exercise of equity jurisdiction, relief may be had in equity by way of specific performance.

This is in accord with the broad principle of equity that what has been agreed to be done shall be considered as done, the court treating the creditor as if he had acted conscientiously and accepted in

satisfaction what he had agreed to accept and what it is his own fault that he had not received. See *Burton* v. *Landon*, 66 Vt., 361; *Boston & Maine R. R.* v. *Union Mut. Fire Ins. Co.*, 83 Vt., 554; *Cook* v. *Richardson*, 178 Mass., 125; *Chicora Fertilizer Co.* v. *Dunan*, 91 Md., 144; 50 L. R. A., 405, *Very* v. *Levy*, 30 How., 345.

The above rule has been applied in practically all courts of the country in what are known as family adjustments of rights to property of a deceased ancestor. "The agreement set out in the bill is of a nature which is entitled to the highest favor at the hands of a court of equity. It is the result of a family compromise of a controversy which had arisen between the heir at law and the devisee of a testator concerning his sanity and free agency at the time of making his last will. Such contracts are not against public policy.

On the contrary, as they contribute to the peace and harmony of families and to the prevention of litigation, they will be supported in equity without inquiry into the adequacy of the consideration on which they are founded."

Leach v. *Fobes*, 11 Gray, 506, and cases cited, 15 Ann. Cas., 300.

Lastly, defendant's agreement not further to contest the probate of the will is a valid contract. "The fact that some of the heirs had filed a bill to set aside the will, and that they reasonably believed they had a right to have it set aside, which right they gave up by the contract in question, constitutes a valid consideration for such a contract. The giving up of a contest to a will, begun in good faith or intended in good faith, is a sufficient consideration for a promise to pay money or convey property."

Cole v. *Cole*, (1920) 292 Ill., 154, 38 A. L. R., 719 "Courts should, so far as they can do so legally and properly, support agreements which have for their object the amicable settlement of doubtful rights by parties; the consideration for such agreements is not only valuable but highly meritorious."

Weed v. *Terry*, 2 Doug. (Mich.) 344; *Leach* v. *Fobes*, 11 Gray, 506; *Seaman* v. *Colley*, 178 Mass., 478; *Blount* v. *Wheeler*, 199 Mass., 330; *Silver* v. *Graves*, 210 Mass., 26; In re Garcelon, 104 Cal., 570, 32 L. R. A., 595; *Grochowski* v. *Grochowski*, 77 Neb., 506, 13 L. R. A. (N. S.) 484, note, citing *Richer* v. *Izer*, 95 Md., 451, 52 A. 592; *Barrett* v. *Carden*, 65 Vt., 431, 26 A. 530; *Gaither* v. *Bland*, 7 Ky., L. R. 518; *Brandenburger* v. *Puller*, (Mo.) 181 S. W., 1141; *Hansbarger* v. *Hansbarger*, (Mich.) 172 N. W., 577.

The decree below for specific performance is in accord with principle, sustained by reason, and in like cases has been enforced in the courts of our sister states. "If the remedy in equity is seen to be fuller or more appropriate, if better adapted in view of the ingredients of the controversy to effectuate justice as between the litigants, and put an end to disputes about the subject of contention, the power over the case ought not to be questioned upon partial views or theories.

It may be safely assumed that a court of equity is as competent to deal with causes as a court of common law, and that the interests of parties will be as carefully guarded by a judge sitting in chancery as they would be if the same judge were sitting on the law side. Where the question is strictly jurisdictional, and where the proof is specifically suited to the arbitrament of a jury, and also in those cases which are susceptible of being fully and justly disposed of in a court of law, and which inveterate usage has assigned to that jurisdiction, we may find reason enough in principle and convenience for adhering to the established course.

But where, as in this state, the same judges hold both courts, there can be no reason for great nicety.

The great purpose is to terminate the whole controversy and reach justice through means the most appropriate. And when the principles of law by which the ordinary courts are guided give rights, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate, it is in general admitted that a court of equity may act.

Wallace v. *Harris*, 32 Mich., 380.

Blount v. *Wheeler*, 199 Mass., 330.

Chandler v. *Pomeroy*, 143 U. S., 318.

Accordingly the entry will be:

Appeal dismissed.

Decree affirmed, with costs.

RIPLEY'S CASE.

Oxford. Opinion April 5, 1927.

The period of three hundred weeks specified in Sections 15 and 16 of the Workmen's Compensation Act limits the time during which incapacity is compensable, but is not a limitation of the time for filing petitions.

While an approved agreement unlimited as to time and providing for the maximum compensation for total incapacity caused by an accidental injury remains in force, res adjudicata is a good defense to an original petition asking compensation for the same injury. If the defense of res adjudicata is not pleaded it is waived.

If a workman asks compensation for an accidental injury more than two years after its occurrence, and it appears that the injury for which compensation is claimed, is identical, with or a resultant of an injury specified in an approved agreement filed within said two years period, the remedy is not barred by the limitation of section 39.

On appeal. The petitioner received a compensable injury to his right hand on August 20, 1919, resulting in blood poisoning. An agreement for compensation was approved by the Commissioner of Labor September 11, 1919, under which the petitioner was paid compensation for total incapacity to January 22, 1920. On May 3, 1926, Mr. Ripley filed an orignal petition asking for determination of permanent impairment to the usefulness of his right thumb, his right hand, and his right arm. Upon this petition a hearing was held and the petitioner's right hand was found to have been permanently impaired to the extent of thirty-three and one third per cent and compensation was awarded accordingly and an appeal taken. Appeal denied. Decree affirmed.

The case fully appears in the opinion.

Alton C. Wheeler, for petitioner.

Robert Payson, for respondents.

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

DEASY, J. Workmen's Compensation Case. The statutory reference are to Act of 1919 Chap. 238.

On August 20, 1919 the petitioner an employee of the Paris Manufacturing Co. suffered an industrial accident.

An agreement for compensation, approved by the Commissioner of Labor on Sept. 11, 1919, described the injury as "blood poisoning." The agreement provided for compensation at $7.82 per week for an indefinite period beginning Aug. 30. The petitioners average weekly wage was $13.04. The weekly compensation was the maximum authorized by the statute then in force. $134.24 was paid. Upon payment of the last installment, a receipt in full was given the insurance carrier by the petitioner, "subject to review and approval by the Industrial Accident Commission."

The receipt was not approved. Lacking approval it did not purport to be, and under the law was not binding. Sec. 41.

Nothing further was paid or done for more than six years. On May 3, 1926, Mr. Ripley filed an original petition to have determined the extent of permanent impairment of his "right thumb, right hand and right arm" due to the same accident. Upon this petition a hearing was held by the Commission.

The petitioner's right hand was found to have been permanently impaired to the extent of thirty-three and one-third per cent. By decree dated Aug. 21, 1926 compensation was awarded accordingly, subject however to a deduction of the amount paid in 1919.

In defense it is contended that the petition was filed more than 300 weeks after the injury. Only incapacity existing within 300 weeks is compensable.

But the 300 week period is not a limitation of the time for filing petitions. This defense is not well founded.

The respondents further plead the limitation prescribed by Sec. 39 which reads as follows: "An employee's claim for compensation under the act shall be barred unless an agreement or petition, as provided in section 30, shall be filed within two years after the occurrence of the injury."

The petitioner answers that the limitation does not apply because an agreement as provided in section 30 *was* filed within two years after the occurrence of the injury to wit, the agreement approved Sept. 11, 1919.

The respondents rejoin that the approved agreement of September 11, 1919 did not relate to the impairment of the petitioner's hand

for which he now claims compensation, but to "blood poisoning," a distinct injury.

The petitioner contends that the impairment of the hand, for which he now asks compensation, is identical with, or a resultant of the "blood poisoning" specified in the agreement, and that therefore the case is within the exception to the limitation. *Ryan's Case* 123 Me. 529.

The defendant's counsel relies upon the fact that the hand is not "mentioned" in the agreement, and that no connection between the two injuries can be discovered by inspection of the papers. This is not decisive. There is enough in the case to justify the conclusion that the impairment of the petitioners' hand was the result of the blood poisoning described in the agreement of 1919. The petition is not barred by Sec. 39.

Another defense is indicated by the facts. When an agreement is made, approved and in force respecting a given injury no original petition is necessary, or appropriate. *Gauthier's Case* 120 Me. 73. If compensation is sought for another injury an agreement or petition must be filed within two years, otherwise it is barred. But respecting the same injury no original petition to the Industrial Accident Commission is contemplated.

The approved agreement has the effect of a judgment. Sec. 35. The remedy for a party having such a judgment is to present it to a Court of Equity and obtain a "suitable process" to enforce it. Sec. 35.

The petitioner's agreement of 1919 was unlimited as to time. It was good for 300 weeks unless sooner lawfully terminated.

The attempted settlement, being unapproved, had no effect. No termination is shown.

The agreement provides for compensation at the maximum rate authorized by law at the time. Incapacity did not need to be presumed (Sec. 16) or proved. Sec. 15. Total incapacity was admitted by the agreement. So long as the agreement remained unterminated a petition alleging loss or permanent impairment of member was superfluous.

Having one judgment unterminated the petitioner is not entitled to another for the same injury. For this reason and not because of any limitation, if this defense had been pleaded, it would have barred the petition.

If the pending petition had been filed in two weeks instead of six years after the attempted settlement the then existing agreement

having the force of a judgment for the same compensation for the same injury would have constituted a complete defence. It is none the less so after six years.

But this defence not having been pleaded is waived. Sec. 32. *Brodin's Case* 124 Me. 162; *Clark's Case* 125 Me. 410.

Several cases are cited in the Briefs. Counsel stress *Lemelin's Case* 123 Me. 478. In that case the agreement was for a limited period of presumed incapacity. After the termination of such period a petition was brought under Sec. 16 for actual incapacity. The opinion says truly that for such petitions the statute imposes no limitation. This case differs widely from the pending case.

Foster's Case 123 Me. 29; Petition for compensation for presumed incapacity causing permanent impairment. Prior agreement shown providing compensation for the same presumed incapacity arising from same injury. Held, res adjudicata. So in pending case: Petition same as in Foster's Case. Prior agreement shown unlimited in time, never terminated, covering maximum compensation for total incapacity. Res adjudicata would have been good answer. *Spencer's Case* 123 Me. 46 and *Collins' Case* 123 Me. 74 confirm Foster's Case.

Ryan's Case 123 Me. 527: This case holds that when a petition is filed after two years it is not barred by the limitation of Sec. 39 if the injury described is identical with or a resultant of an injury specified in an approved agreement filed within two years. In the pending case the impairment of hand reasonably appears to have been the result of the blood poisoning specified in the agreement of 1919.

Milton's Case 122 Me. 437: A petition to determine degree of present disability under an open end agreement. This form of petition is not expressly authorized by statute, but is clearly authorized by necessary implication. It is held not subject to limitation.

After the last payment made in 1919 and notwithstanding the attempted settlement, the petitioner could have obtained from a Court of Equity an execution or other enforcement process.

Whether after a settlement intended to be final followed by an unexplained delay of six years this remedy is still open is a question that we are not now required to consider.

Appeal denied.
Decree affirmed.

STATE

vs.

ISRAEL E. RUDMAN.

Penobscot. Opinion April 8, 1927.

A person charged with a criminal offense is entitled to have the accusation against him set out formally, fully and precisely, and the rules of criminal pleading require that the State negative the exception of the statute.

The precise words of the statute need not be followed, but an equivalent must be used which excludes with the same certainty the exception contained in the Act.

In the instant case the exception in this statute, "unless the same was done as necessary for the preservation of the mother's life," the word "same" refers to the unlawful overt act prohibited, which is the administration of any medicine, etc., or the use of any instrument or other means.

Good faith on the part of the abortionist is not alone a defense. The statute is intended to be an express and absolute prohibition against abortion or attempted procurement of miscarriage except when necessary to save the mother's life.

The conjunction "as" is to be construed as "because" or "since" or "it being the case that."

Under the statute the burden is upon the State to prove beyond a reasonable doubt that the woman is pregnant with child. Absolute certainty is never exacted. The fact of pregnancy may be established by circumstantial evidence.

Upon the evidence in this case it cannot be said that a verdict based thereon cannot be allowed to stand.

The hypothetical question propounded by the State was predicated upon facts and circumstances already in evidence which fairly tended to prove the assumed fact of pregnancy.

On exceptions by respondent. Respondent was indicted for attempting to procure a miscarriage under P. L. 1921, chapter 153, and convicted by a jury. Exceptions were entered to the admission of evidence; to the refusal to direct a verdict of acquittal; and the overruling of a motion in arrest of judgment. Exceptions overruled. Judgment for the State.

The case is sufficiently stated in the opinion.

Artemus Weatherbee, County Attorney, for the State.

William R. Pattangall and Abraham Rudman, for the respondent.

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

STURGIS, J. The respondent was convicted of attempted abortion in violation of P. L. 1921, Chap. 153. Exception was taken to the admission of a hypothetical question propounded by the State, as also to the refusal of the presiding Judge to direct a verdict for the respondent. After verdict of guilty, the respondent seasonably filed a motion in arrest of judgment which was overruled and further exception reserved.

In view of the issues raised by the exceptions and in argument of counsel, we find it necessary to depart from the order in which the exceptions were reserved and direct our consideration first to the questions raised by the motion in arrest of judgment. Chap. 153, P. L. 1921, amending Sec. 9, Chap. 126, of the Revised Statutes, provides: "Whoever administers to any woman pregnant with child, whether such child is quick or not, any medicine, drug or other substance, or uses any instrument or other means, unless the same was done as necessary for the preservation of the mother's life, shall be punished, if done with intent to destroy such child and thereby it was destroyed before birth, by imprisonment for not more than five years or by fine not exceeding one thousand dollars; but if done with intent to procure the miscarriage of such woman, by imprisonment for less than one year, and by fine not exceeding one thousand dollars, and any person consenting and aiding or assisting shall be liable to like punishment."

The substantial averments of the indictment under which the respondment was convicted are that on the 14th day of February, 1925, he "feloniously did use a certain instrument, a more particular description being to said grand jurors unknown, in and upon the body of one Jennie Gilbert, a woman then and there pregnant with child, by then and there forcing and thrusting said instrument into the the body and womb of the said Jennie Gilbert, it not being necessary for the preservation of the life of said Jennie Gilbert to use said instrument as aforesaid."

The grounds in arrest stated in the motion are that the indictment is insufficient in that (1) it does not allege that the miscarriage therein referred to was not necessary to preserve the life of the woman, but alleges "it not being necessary for the preservation of the life of the said Jennie Gilbert to use said instrument as aforesaid"; (2) it does allege "it not being necessary for the preservation of the life of said Jennie Gilbert", whereas the statutory language is, "unless the same was done *as necessary* for the preservation of the mother's life."

A person charged with a criminal offense is entitled to have the accusation against him set out formally, fully and precisely, and the rules of criminal pleading require that the State negative the exceptions of the statute. *State* v. *Webber*, 125 Me., 319; *State* v. *Keene*, 34 Me., 500; *United States* v. *Cook*, 17 Wall. (84 U. S.), 168. And while the precise words of the statute need not be followed, and equivalent must be used which excludes with the same certainty the exceptions contained in the Act. Bishop on Statutory Crimes, 755; 1 C. J., 322, and cases cited. The sufficiency of the State's negative averment in the indictment before us is the issue raised by the motion in arrest.

The language of the statute is somewhat unusual in context and its grammatical relations, and, so far as a careful examination discloses, varies in important details from similar statutes of the other states except Illinois. The exception in our statute is written, "unless the same was done as necessary for the preservation of the mother's life." To what does "same" refer? The unlawful or overt act prohibited in the administration of medicine etc., or the "use of any instrument or other means." The evil intent essential to the crime charged is stated at the end of the Section to be, "if done with intent to procure the miscarriage of such woman." The offense is complete when an overt act is done with the intent defined by the statute, unless the act falls within the exception. Context and phraseology convince us that the phrase "unless the same was done" finds its antecedent in the unlawful acts enumerated rather than in the evil intent which must concur.

The cases cited by counsel for the respondent as opposed to this view are based on statutes of other states in which the exceptions expressly or by clear implication relate to the necessity of procuring the miscarriage, rather than to the means used to that end. In *State* v. *Stevenson*, 68 Vermont, 529, the conclusion that the necessity of

procuring a miscarriage must be negatived is based on Sec. 4247, R. L. 1880, of that State, in which the exception, "unless the same is necessary to preserve her life", clearly relates to the procurement of a miscarriage rather than to the particular act which was done in the attempt to accomplish it. *Willey* v. *State*, 46 Ind., 363, and *Bassett* v. *State*, 41 Ind., 303, supporting a similar rule, are controlled by statutes substantially similar to that of Vermont. The same is true of *State* v. *Meek*, 70 Mo., 355, and *Hatchard* v. *State*, 79 Wisconsin, 357.

These decisions from courts of last resort in states whose statutes are different from those of our own cannot control the construction of Chap. 153, P. L. 1921. The legislative intent as there expressed furnishes the only rule and guide. We are convinced that the first ground of arrest advanced by the respondent is untenable.

In support of the second ground of arrest, the argument is advanced that under this statutory exception necessity in fact for the preservation of the mother's life need not be established. Counsel in the brief say that good faith is a defense, and that a proper construction of the words of the statute leave the question open as to whether or not the person who operated considered it necessary when done. We are not prepared to subscribe to such an interpretation of this Act. The history, purpose and need of criminal legislation prohibiting this offense militates against such a doctrine. The language of the Act itself falls short, we think, of indicating a legislative intent to thus open the bars raised against this crime. Abortion and attempts to procure a miscarriage are common offenses and by no means confined to the members of the medical profession. Court records evidence such practices among laymen of both sexes, and the application of this statute cannot be viewed from the physician's standpoint alone.

It is well known that occasion arises where in the exercise of proper surgical advice and care it becomes necessary, in order to save the mother's life, to remove the unborn foetus. To such highly honorable and proper acts, in accord with the highest ethics of the medical profession, the dictates of humanity, and all legal precepts, the statute has and can have no application. But to the destruction of unborn life for reasons, whatever they may be, other than necessity to save the mother's life, the law is intended, we believe, to be an express and absolute prohibition.

In the plain meaning of the words of the statute our conclusion is verified. An accepted definition of the conjunctive "as" is "because," "since," "it being the case that." Webster's New Int. Dictionary. If substitution be made and the statute read "unless the same was done 'because' (or) 'since it was' (or) 'it being the case that it was' necessary," no ambiguity remains and the legislative intent is clear.

It is stated in text that it is always a valid defense to a charge of abortion that the procurement was necessary in order to save the mother's life or the life of her unborn child; and while this is generally true by virtue of exceptions contained in the statutes, it is true even though the statute makes no express exception as to such necessity. 1 Corpus Juris, 317, citing *Com.* v. *Sholes*, 13 Allen (Mass.), 554, 558. To this statement we find no exception. On the other hand, in an exhaustive examination of legislative and judicial expressions of other states, we are unable to find, except in the states of Virginia and West Virginia, precedent for the doctrine that "good faith" alone is a defense. A survey of the available revisions and session laws of other states discloses, that while in some states abortion upon the advice of one or more consulting physicians is by statute excepted from the general penal statute prohibiting the crime, in none except those of Virginia and West Virginia, as noted, is the belief of necessity or "good faith" of the abortionist alone sufficient defense. In a majority of the states necessity in fact for the preservation of the mother's life is the only exception justifying the act. The statutes of other states cannot control this Court in its construction of the language of Chap. 153. The trend and weight of legislative thought in other states, however, is instructive.

We are of opinion that the language of our Act compels the conclusion that the only exception to criminal responsibility for abortion, or attempted procurement of miscarriage, is necessity in fact of the preservation of the mother's life. With this view of the proper construction of this statute, we see no insufficiency in the negative averments of the indictment under which the respondent was convicted. It is drawn in strict conformity to the form provided in Whitehouse's Criminal Procedure, 62. This text on procedure and forms, particularly applicable to criminal practice in this State, has now for years received the approval of Bench and Bar of this State. Indictments containing negative averments of the exceptions of the

statute in conformity to the form prescribed by Mr. Whitehouse, and substantially in accord with this indictment under consideration, have repeatedly passed under the scrutiny of able practitioners and the Judges of this Court, without the questions here presented being raised. This precedent, and long time acquiescence in its use, is not decisive, but it is entitled to great weight.

So far as we can discover, the statute of Illinois alone conforms in its excepting clause to that of Maine. In the abortion statute of that state the excepting clause reads, "unless the same were done as necessary for the preservation of the mother's life." In *Beasley* v. *The People*, 89 Ill., 571, the indictment charged that by means of a certain instrument the respondent produced an abortion on the deceased, "it not being then and there necessary to cause such miscarriage for the preservation of" her life. In another count the respondent was charged with administering a noxious and abortifacient drug with intent to produce a miscarriage, and the negative averment was, "it not being then and there necessary to administer said noxious and abortifacient drug for the preservation of the life" of the deceased. Recognizing the general rule that it is necessary to negative the exceptions of the statute, but that the precise words of the statute need not be employed, that Court holds that the negative averments of the indictment are sufficient.

For the reasons stated the exceptions to the overruling of the motion in arrest of judgment cannot be sustained.

Under the statute the burden is upon the State to prove beyond a reasonable doubt that the woman is pregnant with child. Whether such child is quick or not is immaterial. Absolute certainty in the proof of pregnancy, however, is never exacted. It may be established by circumstantial evidence. 1 R. C. L., 77.

In *State* v. *Stafford*, 145 Iowa, 285, the woman had been indulging in sexual intercourse. She missed her menses on Dec. 25th and 26th, 1908, and in January became convinced that she was pregnant, and informed the accused. A drug was procured and taken, resulting in her serious illness on Jan. 20, 1909. During the first week of February following she discharged what resembled a blood clot. With no history of prior ill health or other explanation of the suspension of her menstrual flow, such evidence was held sufficient proof of pregnancy to support a verdict, even though two physicians expressed the opinion that at so early a period it could not be known with cer-

tainty that she was pregnant without microscopic examination or the discovery of the ovum.

This Iowa case presents facts strikingly similar to those appearing in this record. The young woman, Jennie Gilbert, had a normal menstrual period and flow during the first days of January, 1925. Some few days later she had sexual relations with a young man boarding in the house where she was employed as a domestic. Acts of intercourse occurred several times during the middle of the month. In the last days of January she testifies that she felt weak and had no appetite for food. Although previously regular in her menses, she had no menstrual flow in February. On the 12th of February she went to the office of the respondent, a practicing physician, and stated to him that she thought she was pregnant. She says he examined her and said she was pregnant, and made an appointment for an operation. The following Saturday, accompanied by the young man charged with responsibility for her alleged condition, she went again to the respondent's office, and after the payment by the boy of $50 as charged by the doctor, an operation was performed.

She describes the instruments used and asserts that she suffered much pain. In accordance with the directions of the respondent, as she says, she returned to her home, remained in bed for two days, returning to the doctor's office again on the following Tuesday. At that time, she testifies, he removed clots and fleshy matter from her person. She says she was given a prescription, and at a later call was given a second prescription. About a week later she was taken seriously ill and removed to the Eastern Maine General Hospital, and an abdominal operation was performed. The operating surgeon, Dr. E. B. Sanger, testifies that he found adhesions of the uterus, ovaries, fallopian tubes and intestines, with enlargement and inflammation of and a small tear in the uterus. The surgeon testifies that the conditions found in the girl were in his opinion due to some acute inflammation, including in all probability a previous dilation of the womb.

Dr. Sanger was asked the following questions:

Q. Assuming it to be a fact that a girl 17 years of age who had been regular in her menstrual periods menstruated along the first of January, the 3rd or 4th, and whose menstrual periods usually continued for four or five days, had sexual intercourse within four or five days after the cessation of that menstrual period and then later had

sexual intercourse one or more times and she felt weak, did not have appetite for food, did not feel in her normal condition, and had not menstruated again by the 10th of February—would that in your mind indicate or not indicate pregnancy?

A. It might and it might not.

Q. Would it be a symptom of pregnancy?

A. Yes sir.

The respondent in cross examination questioned Dr. Sanger as to the possibility of tubercular peritonitis being the cause of the adhesions, but the doctor eliminated this theory from consideration by the statement that no evidence of such condition was found. The presence of veneral disease advanced by the respondent was as fully removed by the negative report of the pathologist.

Upon the history of the sexual relations of this girl in the light of the date of her last menstrual period, physicians called by the State and the respondent both expressed doubt as to the possibility of determining pregnancy with accuracy at the time the respondent is alleged to have operated.

A further review of the testimony as it appears in the record does not appear to be necessary. Absolute certainty of the pregnancy of the girl is not and could not be established. The circumstances, however, we think, are sufficient for the jury to find beyond a reasonable doubt that it existed. No explanation or reasonable cause for the suspension of the girl's February menses appears. If the jury believed her statement, and they evidently did, the discharge of clots and fleshy matter some few days after the alleged operation gives strength to the claim of pregnancy. Her statement to the doctor, if true, that she thought she was pregnant is of some weight. In *State* v. *Alcorn*, 7 Idaho, 599, 607, it is held that the fact the respondent used a probe is a corroborating circumstance to be considered.

We cannot say that the evidence offered by the State to establish the pregnancy of the woman, Jennie Gilbert, is so defective or weak that a verdict based upon it could not be allowed to stand. The other elements of the offense were sufficiently proven, we think, and an instruction to the jury directing a verdict for the respondent was properly refused.

After the witness, Jennie Gilbert, had completed her testimony, and Dr. E. B. Sanger, the surgeon, had testified in answer to the hypothetical question, that the facts and conditions therein assumed

would be a symptom of pregnancy, the following question was propounded to him by the State:

Q. Assuming that Jennie Gilbert was pregnant upon the 14th day of February, from your examination of her would you say that an operation to relieve pregnancy were necessary?

Objection was made on the ground that the State had no right to assume the fact of pregnancy, the colloquy in the record indicating that the ground of the objection was that there was no evidence to support this assumption. The exception is pressed before this Court upon that ground. Objection to the form of the question, raised in argument here for the first time and not stated at the trial of the cause, cannot be considered. *Heal* v. *Fertilizer Works*, 124 Me., 143. The admission of the question was not error. There was already in evidence, in the testimony of the girl and Dr. E. B. Sanger, statements of facts and circumstances which fairly tended to prove the fact of pregnancy assumed. Evidence which fairly tends to prove the facts assumed is sufficient. *Heal* v. *Fertilizer Works*, supra; *Powers* v. *Mitchell*, 77 Me., 369; Greenleaf on Evidence (16 Ed.), Vol. 1, p. 561.

A careful reading and consideration of the record of this case convinces us that the respondent attempted to procure the miscarriage of the girl. His exceptions present no meritorious defense. The entry is,

Exceptions overruled.
Judgment for the State.

MARTIN BROWN, Pro Ami

vs.

EDWARD E. RHOADES, ET AL.

Cumberland. Opinion April 13, 1927.

Want of definite allegations essential to a cause of action render a pleading subject to demurrer.

It is sufficient as against general demurrer, however, that a cause of action can be reasonably inferred from the language used, and if to any extent on any reasonable theory the declaration presents facts sufficient to justify a recovery it will be sustained.

It is not the duty of proprietors of public amusements to warn patrons of obvious and known risks peculiar to the use of an amusement device to which the patrons voluntarily subject themselves.

Acts of a person put in peril by the negligence of another, and injured in an instinctive effort to escape from that peril under the stress of fright, are not the proximate cause of the injury, provided the acts of the injured party were justified as an exercise of ordinary care and prudence.

In the instant case the defendants owed the plaintiff, who was their invitee, an affirmative duty of using reasonable care, not only to see that the premises to which he was invited were in a reasonably safe condition, but also to take due precautions to guard him from dangers arising out of instrumentalities under their control, which duty is imposed by law and it can neither be enlarged nor diminished by averments of duty set out in the declaration. Such averments are conclusions of law only and may be ignored as surplusage if erroneous.

The plaintiff assumed the risk only of dangers the existence of which he knew, or of which he ought to have known in the exercise of that degree of care which ordinarily prudent children of his age and intelligence under like circumstances are accustomed to use. His affirmative allegation of due care on his part is sufficient averment of his freedom from contributory negligence and assumption of risks which were obvious.

In the instant case upon the undisputed facts alleged or admitted by the general demurrer, different inferences may fairly be drawn and fair minded men may reasonably arrive at different conclusions. Absence of negligence cannot, therefore, be predicated thereon as a matter of law.

On report. An action to recover for personal injuries sustained by plaintiff, a minor, while sliding down a chute owned and operated by defendants at Old Orchard Beach, alleging negligence. Defendants filed a general demurrer and by agreement the cause was reported with the stipulation that if the declaration and amendments thereto were sufficient the demurrer to be overruled and defendants allowed to plead over without costs; otherwise the demurrer to be sustained and judgment for defendants without costs. Demurrer overruled. Defendant given leave to plead over.

The case fully appears in the opinion.

Hinckley & Hinckley, for plaintiff.

Strout & Strout, for defendants.

SITTING: WILSON, C. J., PHILBROOK, DUNN, STURGIS, BASSETT, JJ., MORRILL, A.R.J.

STURGIS, J. Action on the case to recover for personal injuries. The defendants filed a general demurrer, and by agreement the case is reported to the Law Court for determination of the sufficiency of the plaintiff's declaration.

The merits of the plaintiff's claim are not in issue. By interposing a general demurrer the defendants admit all facts well pleaded, and the only issue is whether in the language used the plaintiff has stated a legal cause of action. *Chickering* v. *Power Co.*, 118 Me., 414.

While it is a general rule of pleading that want of definite allegations essential to a cause of action render a pleading subject to demurrer, all that is necessary to sustain the pleadings as against general demurrer is that a cause of action can be reasonably inferred from the language used. A declaration to be bad on general demurrer must be wholly insufficient, and if to any extent on any reasonable theory it presents facts sufficient to justify a recovery it will be sustained. This is the rule, however inartificially the facts may be stated, 21 R. C. L., 519; 31 Cyc., 289.

The plaintiff's declaration in substance alleges that on the 6th day of August, 1923, the defendants were the proprietors of a certain amusement enterprise at Old Orchard, Me.; that upon their general invitation to the public to patronize their enterprise and all devices and forms of amusement therein, the plaintiff, a boy of nine years,

paid the usual fee, entered the building, and while using a "chute" was injured. The chute is described as a "long, steep chute, extending from near the floor to a point near the ceiling," in which the patrons found amusement by going "to the top and sliding to the bottom at great speed." The plaintiff was wearing "sneakers" so called, or rubber soled shoes. Thus equipped he entered the chute and began a slide. It does nor appear whether he was standing or in a sitting or prone position. But however that may have been, it is averred that while sliding down the chute, "becoming frightened at the great speed at which he was proceeding, he suddenly attempted to check his speed by bracing himself with his feet," with the result that "his forward progress was suddenly and violently halted," producing injuries of a serious character to his right leg.

The declaration contains a further averment that the defendants did not have the building properly supervised, had no attendant in the building to supervise children who entered, and were negligent and careless in allowing the plaintiff to enter said chute while wearing said sneakers without informing him of the danger attendant on wearing sneakers and attempting to check his progress in the manner which he adopted. It is also affirmatively alleged that the plaintiff was in the exercise of due care, and it is stated that his injuries were caused "solely through the negligence and carelessness of said defendants in not properly supervising said chute, and in allowing said plaintiff to slide down said chute while wearing said sneakers." It is from these facts thus substantially stated, and by the demurrer admitted, together with inferences fairly to be drawn therefrom, that the sufficiency of the pleadings must be determined.

The defendants were the proprietors of a public exhibition or amusement. The plaintiff was clearly their invitee. The defendants therefore owed him an affirmative duty of using reasonable care, not only to see that the premises to which he was invited were in a reasonably safe condition, but also to take precautions to guard him from dangers arising out of instrumentalities under their control. *Easler* v. *Amusement Co.* 125 Me., 334; *Hoyt* v. *Fair Association,* 121 Me., 461; *Graffam* v. *Saco Grange,* 112 Me., 508; *Thornton* v. *Agricultural Society,* 97 Me., 108. This is the measure of duty which the law imposes from the facts alleged. The averments of duty by the plaintiff can neither diminish nor enlarge it. They are conclusions of law only, and may be ignored as surplusage if erroneous. *Tucker* v. *Ran-*

dall, 2 Mass., 283; *Jones* v. *Dow*, 137 Mass., 121; XII Encyc. of Pleading & Practice, 1028. See also *Hone* v. *Presque Isle Water Co.*, 104 Me., 217; *Boardman* v. *Creighton*, 95 Me., 154.

What are the due precautions to be taken by amusement proprietors upon the facts as stated in this declaration? They must of necessity vary and depend upon the conditions and circumstances of the particular amusement and its use. The kind and extent of precautions which have been held requisite to the exercise of due care by amusement proprietors under varying conditions and circumstances is illustrated in the following cases.

This Court has recently held in *Easler* v. *Amusement Co.*, supra, that due care on the part of the proprietor of a circus demands that protection be furnished or due warning given of the incident dangers to a youthful spectator at a scrub ball game played on the circus grounds by employees.

In *Blanchette* v. *Union Street Railway*, 248 Mass., 407, it is held that due care of the proprietor of an amusement resort required a warning of the dangers incident to the use of a slide or chute leading to the water and used by bathers to slide or dive into the pond below.

In *Brotherton* v. *Manhattan Beach Improvement Co.*, 48 Neb., 563, that Court held that proprietors of a bathing resort, in the exercise of ordinary care, should keep some one on duty to supervise bathers and rescue any apparently in danger.

In *Levinski* v. *Cooper*, 142 S. W., 959 (Tex. Civ. App.), we find the rule that the exercise of due care requires that a reasonably sufficient number of competent attendants be furnished to care for the safety of patrons of a bathing resort.

On the other hand, it is held that it is not the duty of the proprietors of public amusements to warn patrons of obvious and known conditions to which they voluntarily subject themselves. *Sullivan* v. *Ridgeway Construction Co.*, 236 Mass., 75. No warning is necessary of risks peculiar to the use of an amusement device which are obvious and known to the user. *Lumsden* v. *L. A. Thompson Scenic Ry. Co.*, 114 N.Y.S., 421.

Without adopting these conclusions of courts of other jurisdictions, we find in them support for the general rule that the care required must be commensurate with the risk involved, and pertinent illustration of the care which has been deemed requisite under the particular circumstances of each case.

Reverting to the declaration before us, we are of opinion that the description of the "chute" there given, inferentially at least, indicates that the construction of the device and its contemplated use may involve some danger or hazard to the patron seeking amusement upon its surface. The demurrer admits that the person sliding descends at great speed. And without more detail than that it is a long, steep chute in which the usual descent is rapid, some element of risk and danger, we think, may reasonably be anticipated. The adhesive qualities of rubber, and the effect of its application to smooth surfaces as retarding progress, are common knowledge. Proper supervision in person or by attendant of this chute and its users would have undoubtedly disclosed the fact that the plaintiff was shod with rubber soled shoes, and if such discovery had been accompanied by exclusion of the plaintiff from the chute or warning of the dangers attendant upon its use thus shod, would have constituted full and due precaution on the part of the defendants. We cannot say as a matter of law, that failing to use either of these precautions, the defendants were in the exercise of due care.

The contention is made that the plaintiff "assumed the risk," using that expression in a broader sense, and was guilty of contributory negligence. It is urged that the conditions of the chute and the attendant risks of its use, including its use by a person shod with rubber soled shoes which in turn are applied as a brake, was obvious and apparent to any person, young or old. If the plaintiff were an adult, this contention would be of much weight. He was, however, nine years old, with the powers of observation and with the experience and judgment of a boy of those years, and his care and foresight are measured by a different rule. A child of his years is bound only to use that degree of care which ordinarily prudent children of that age and like intelligence are accustomed to use under like circumstances, and he assumed the risk only of dangers the existence of which he knew, or which in the exercise of this degree of care he ought to have known. *Easler* v. *Amusement Co.*, supra; *Chickering* v. *Power Co.*, supra. The plaintiff alleges that he was in the exercise of due care, and inferentially thus avers that he did not know and in the exercise of the care required of a boy of his years and intelligence cannot be held to have known the speed of descent he was to encounter, or the effect of sliding down shod in sneakers and using them to check his speed. This assertion on his part is not refuted by other allegations

of his declaration, and on general demurrer the declaration cannot be held insufficient on the ground of the plaintiff's contributory negligence.

It is further urged that the failure of these defendants to supervise or exclude the plaintiff from the chute under the circumstances was not the proximate cause of his injuries. The defendants admitted the plaintiff to the building and to the chute unsupervised and without warning of attendant dangers. Assuming that such admission to the chute was negligence on the part of the defendants, the plaintiff is entitled to recover for the natural and probable consequences thereof, although the injury in the precise form in which it resulted was not forseen. *Neal* v. *Rendall*, 98 Me., 76. It is sufficient that after the injury it appears to have been a natural and probable consequence of the defendants' negligence. *Marsh* v. *Paper Co.*, 101 Me., p. 489. The natural instinct of self preservation might well prompt a timid person to attempt to check a speedy descent of a long, steep chute. The natural method or means of so doing is to use the feet as a brake. Some resulting injury, we think, might reasonably be apprehended.

Attention is called to the plaintiff's averment that while sliding down the chute he became frightened at the great speed at which he was proceeding, and in effect that as a result of this fright attempted to check his speed. And it is contended that his fright was the proximate cause of his injury. The rule applicable to this contention is that acts of a person put in peril by the negligence of another, and injured in an instinctive effort to escape from that peril under the stress of fright, are not the proximate cause of the injury, provided the acts of the injured party were justified as an exercise of ordinary care and prudence. *Page* v. *Bucksport*, 64 Maine, 51; *Card* v. *Ellsworth*, 65 Maine, 547; *Lund* v. *Tyngsboro*, 11 Cush., 563. Here again the question of the age, experience and intelligence of the plaintiff as compared with that of boys of like age, experience and intelligence under similar circumstances, must be considered; and taking into consideration the natural impulses of any person, adult or minor, under the circumstances outlined in this declaration, we are not prepared to say as a matter of law that the acts of the plaintiff under the stress of fright were unjustified and negligently contributed to his injury.

This declaration, upon the defendants' general demurrer, presents a set of undisputed facts from which, we think, different inferences may fairly be drawn, and upon which fair minded men may reasonably arrive at different conclusions. Such being the case, absence of negligence cannot as a matter of law be predicated thereon.. *Nugent* v. *B. C. & M. R. R.*, 80 Me., 62. The demurrer must be overruled, and in accordance with the terms of the report the defendants given leave to plead over.

Demurrer overruled.
Defendants given leave to plead over.

ADA TURNER

vs.

HENRY E. BURNELL

Cumberland. Opinion April 13, 1927.

The statute, R. S. chapter 87, section 19, authorizing the introduction of equitable defenses in actions at law is in derogation of the common law and must be strictly construed.

The affidavit required must allege, with verification under oath, that the matters pleaded by way of defense are true in fact. A mere statement of belief without asserting knowledge is not sufficient.

In the case at bar the record does not show compliance with the statutory requirements.

On exceptions to denial of motion by defendant to transfer cause from superior to supreme court for Cumberland county, after the introduction of alleged equitable defenses to an action of trover. Exceptions overruled.

The case sufficiently appears in the opinion.

Henry C. Sullivan and Francis W. Sullivan for plaintiff.
James H. Davidson for defendant.

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

BARNES, J. At the trial of an action of trover, in the Superior Court for Cumberland County, the defendant attempted to avail himself of the privilege accorded by Section 19, Chapter 87, R. S., which reads as follows:—

> "In actions at law in the superior courts, equitable defenses and equitable replies to matters of defense, may be pleaded by filing a brief statement thereof supported by affidavit that the matters so pleaded are true in fact. Thereupon the action shall be transferred to the docket of the supreme court for the same county, and be heard and determined in that court."

Pleading the general issue, defendant further filed,
"for a brief statement of special matter of defense to be used under the general issue pleaded, the Defendant further says: That he wishes to avail himself of the equitable defenses which are open to him, under Chapter 87, Sections 18 and 19 R. S. of Maine, 1916.

Defendant will show constructive fraud in the alleged gift from Plaintiff's husband, to Plaintiff.

AFFIDAVIT

And now comes James H. Davidson, Attorney for Henry E. Burnell, Defendant in action No. 6655 of *Turner* vs. *Burnell*, now pending in the Superior Court for the said County, on oath deposes and says, that he wishes to avail himself of the equitable defenses which are open to him under Chapter 87, Sections 18 and 19 of the Revised Statutes of 1916, State of Maine, to wit, that there is a constructive fraud against creditors, with the further supposition to secure an order to set aside and nullify the gift as alleged by the plaintiff, to her, by her husband.

The alleged gift from the husband to the wife is in effect, a constructive fraud. Also, that the alleged gift to the wife carried with it the right to the beneficial ownership of the premises to which the proprietorship was in another (The Usufruct), which again was a constructive fraud on the defendant.

JAMES H. DAVIDSON.

Personally appeared before me, James H. Davidson, and swore that the above statements, by him made, are true to the best of his knowledge and belief.

WILLIAM E. PERLIN,
Notary Public. Seal."

Defendant then moved "that this matter be transferred to the Supreme Judicial Court for the said County."

The motion was denied and exceptions taken, after which trial proceeded, with a verdict for the plaintiff.

The statute authorizing the introduction of equitable defenses in actions at law is in derogation of the common law and must be strictly construed.

When pleadings in defense, in full compliance with the statute, are presented to the judge of any of our superior courts, the jurisdiction of that court over the cases ceases with its transfer to the supreme court. The statute is mandatory, "the action shall be transferred."

In the case at bar our only inquiry is, does the record show compliance with the statutory requirements?

To secure transfer, defendant must plead, by way of brief statement, matters of fact which if established will set up an equitable defense. The mere statement, "Defendant will show constructive fraud in the alleged gift from plaintiff's husband, to Plaintiff," is not such pleading as the statute contemplates.

Further, under the requirements of statute as to the affidavit which must be a part of such pleadings, such affidavit must allege, with verification under oath, that the matters pleaded by way of defense are true in fact.

It would seem that the one making oath should allege that he has knowledge of the matters of fact pleaded.

The mere statement that he believes them to be true, without assertion that he has knowledge upon the point is not sufficient.

Exceptions overruled.

JOHN C. STEWART

vs.

CHARLES L. GRANT

York. Opinion April 19, 1927.

A master's report, while not conclusive, has substantially the weight of a jury verdict but may be rejected in whole or in part unless supported by evidence.

Laches is negligence or omission seasonably to assert a right if such delay works to the disadvantage of another.

The bringing out is not sufficient to relieve a plaintiff from the charge of laches. He must prosecute his action with reasonable diligence.

In the instant case the delay which was permitted from the filing of the bill in 1909 to 1925, when the matter was set down for a hearing, relating to matters occurring twenty years before, and the facts that witnesses had in the meantime died, that defendant had become a feeble old man with failing memory, that during all such time the plaintiff alone had the possession of and access to all documentary evidence of the transaction, constitutes the defense of laches.

On report. A bill in equity to dissolve a partnership and for an accounting, filed in 1909 and not set down for hearing until 1925. Heard by master and reported for final decision. Among other things defendant contended that plaintiff was guilty of laches. Bill dismissed with costs.

The case fully appears in the opinion.

George L. Emery, Homer T. Waterhouse and John C. Stewart, for plaintiff.

E. P. Spinney, for defendant.

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

PATTANGALL, J. Equity. On report. Bill to dissolve partnership and for an accounting. Heard by a master and reported to this court in accordance with the following decree:

> "Special master appointed to take out all testimony relating to the case and the accounts between the parties and report his findings to a single justice who shall, thereupon, by agreement, of the parties, report the case upon the master's finding to the law court for final judgment."

The bill was filed in December, 1909; decree quoted above filed in September, 1922; hearing before master in October, 1925; master's report filed in May, 1926; case came to this court in September, 1926.

The bill is based on the allegations that plaintiff and defendant entered into a partnership in 1877 to carry on a coaching and carrying business, and to do any other business which they might mutually agree to do; that the plaintiff was then engaged in the practice of medicine and that the net income of his practice was to go to the partnership; profits and losses of the partnership to be divided equally between the plaintiff and defendant; that about the year 1888 they ceased to carry on the coaching business and plaintiff ceased to practice medicine; that the plaintiff was to keep and did keep all accounts of the firm; that defendant had retained possession of certain partnership property and not accounted for the same; that the plaintiff and defendant had other partnership transactions which had not been settled and that plaintiff had paid the partnership debts.

The answer denied that a partnership ever existed; admitted certain joint business dealings; denied any joint property in the hands of defendant and any failure to account for any heretofore in his hands; claimed offsetting accounts and invoked the doctrine of laches.

The master found a partnership; did not definitely state the extent of the same nor what transactions it included and found an indebtedness from defendant to plaintiff, including interest from the date of the bill to date of hearing, amounting to $3,224.02.

MASTER'S REPORT

The report of a master is entitled to great weight. While not conclusive it has substantially the weight of a jury verdict and is not to

be set aside or reversed unless the evidence shows it to be clearly wrong. *Paul* v. *Frye,* 80 Maine, 26; *Lynn Shoe Co.* v. *Auburn-Lynn Shoe Co.* 103 Maine, 334; *Johnson* v. *Johnson Bros.* 108 Maine 280; *Nutter et al* v. *Saco Savings Bank,* 109 Maine, 124.

The finding that a partnership was formed between these parties in 1877 on the lines stated in the plaintiff's bill is supported by evidence and must be accepted.

The finding that defendant is indebted to plaintiff as stated above is not supported by definite evidence and cannot be accepted. The only witnesses called were the plaintiff and defendant. Their oral evidence was supplemented by the production, on the part of the plaintiff, of a large number of books of account to which most careful study has been given. An analysis of these exhibits demonstrates the impossibility, at this time, of ascertaining with any degree of certainty that defendant is indebted to the plaintiff in any sum of money, or to state the accounts between them with accuracy.

The partnership, originally formed in the spring of 1877, under the terms of which the net earnings of the plaintiff as a doctor of medicine and the profits of the defendant's stage and coach business were to be combined and equally divided between the parties terminated in 1887. At the close of that year plaintiff ceased to practice medicine. A few months previous defendant had ceased to operate stage coaches. The partners lost $2970. in the coach business, and made a profit of $3914. in the practice of medicine. These accounts definitely appear in the account books of the plaintiff under the respective headings of "Coach Line" and "Medicine."

But, in the meantime, the parties had entered into other enterprises. These various undertakings were all carried on plaintiff's books under ledger headings which are easily recognizable by reference to the testimony. In 1884 and 1885, they conducted a meat market which was closed out at a loss of $1066. after crediting the account $750. for a building which was afterwards remodelled into a double tenement house owned and occupied by the parties jointly.

In 1889 they purchased the standing timber on the Parson's lot and stripped the same, making a profit of $378. The same year they built the York Beach R. R. Trestle at a profit of $345. In 1887 and 1888 they built a railroad bridge across the York river at York Harbor, profit $162. In 1885 they built the York Beach and Harbor road with J. P. Norton, the profit made by this plaintiff and defend-

ant being $732. In 1888, with Henry Evans, they built the Depot road, profit $77. In 1887 they lost $450. in the building of the Brave Boat Harbor bridge.

These embrace all of their joint transactions which could possibly be regarded as partnership matters. Each showed a credit balance excepting the Coach Line account, the Meat Market account and the Brave Boat Harbor bridge account. These three accounts aggregated a loss of $4486. Against this loss should be figured the aggregate profits of the Medicine, Parson's lot, R. R. Trestle, York River R. R. bridge, York Beach road and Depot road, accounts amounting to $5608. The net result was a profit of $1122. of which amount $750. was represented by the building salvaged from the market business and which they still own jointly.

Plaintiff and defendant had a joint interest in a race mare "Nellie Hastings" and apparently made no profit out of this sporting venture. Plaintiff's books show that he expended $339. in this respect and, as was natural and proper, charged the same to personal profit and loss. There is no reason to include this item in the partnership account.

The accounts concerning the building credited from the Meat Market business and made into a tenement, are not capable of even approximate analysis and should not, in any event, be considered here.

The situation shown by the accounts as stated above negatives certain evidence of the plaintiff. He testified that he put $5000. of the money he earned practicing medicine into the partnership business in order to pay its debts. His entire net earnings as a doctor were $3914. Even that amount was not his. On his own testimony it belonged to the firm. He testified that the enterprises in which he and Grant were concerned taken together showed a loss. This is not true, according to the accounts kept by him.

All of the accounts were kept by plaintiff on his own books. The partnership had no books of its own. The firm name of "C. L. Grant & Co." does not appear as a ledger heading on plaintiff's books until 1898, almost ten years after the parties had ceased to do any active business either as partners or jointly. The figures upon which the master evidently based his findings are contained in three ledger accounts headed respectively "John C. Stewart," "C. L. Grant," and from 1898 on, "C. L. Grant & Co." His findings do not agree with the summary of these accounts but are obviously founded upon them.

He did not refer to the separate accounts kept against each joint enterprise, nor was his attention directed to them. They are not mentioned in the oral testimony. They are found in the account books submitted by plaintiff in the form of exhibits.

It may be that the inconsistency between the accounts above referred to and the "Stewart", "Grant" and "C. L. Grant & Co." accounts is susceptible of explanation and reconciliation, but there is nothing in the evidence to indicate it.

It may be that defendant is indebted to the plaintiff, but the evidence submitted fails to sustain the burden in that respect, although it is impossible to assert with any degree of confidence that such is not the case because, of course, even in a profitable business one partner may overdraw to the detriment of the other. Such may have been the case here. But evidence is lacking to establish the fact, if it be a fact.

LACHES

In addition to denying the facts stated in plaintiff's bill defendant, in his answer, invokes the defense of laches. Transactions occurring between the years 1877 and 1889 are made the subject of litigation begun in 1909 and prosecuted in 1925. Such a delay calls for explanation. Equity does not look with favor on the collection of stale demands. Some fair reasons should appear for permitting twenty years to elapse before bringing suit and sixteen years to elapse after suit is brought before hearing is had or equity will not intervene.

The only explanation for the delay is given by the plaintiff in his direct testimony, in which he said:

> "In 1889, I entered into a partnership with J. P. Norton. I had been boarding with Mr. Grant and continued to board with him until 1900. But in 1889 I told him one day that I wanted to have a settlement and he said he was ready to settle at any time. I said, 'Will you come to the office or shall I bring my books up here?' He said, 'I don't want any books. I don't need any. I can settle without any'. 'Well', I said, 'I can't. The only way I can settle is by my books.' He repeated,

> 'I am ready to settle now. Right here'. I said, 'I'm not', and we parted. Two years after that, when I left Mr. Norton, I repeated to him that I wanted to settle with him and find out if I had anything. I wanted to know it, and if I didn't have anything I wanted to know it. And I made a proposition to him to give him a certain amount of money or take a certain amount to settle. In one case he was to pay the debts, in the other I was to pay them. He wouldn't do either. I said, 'I am going to ask you once more to settle and when I ask you again we'll settle.' And we parted."

So far as the evidence shows the parties never spoke to each other after that interview. Eighteen years passed before anything further was done. Plaintiff was in possession of all the written memoranda relating to their affairs. He presented no statements or account to defendant, either then or thereafter. Defendant never saw the accounts until they were offered in evidence at the hearing before the master. In December, 1909, plaintiff's bill was filed. It contained no account. It did not even contain a list of the business transactions which were claimed to be included in the partnership dealings. It gave no definite information to defendant of plaintiff's claim against him. Answer was filed. Ten years later replication was filed and the case stood without action for three more years. Then the decree and stipulation heretofore quoted was filed. Three years more elapsed. Hearing was then ordered. Defendant had become eighty years of age. He had no records of any kind with which to refresh his memory. The record shows that every person who could have been called as a witness by him or for him had either died or disappeared. He had nothing but an obviously failing memory upon which to depend in meeting plaintiff's attack. No explanation is offered by plaintiff for not having more promptly prosecuted his claim after having brought his bill in equity.

Our court, in *Clark* v. *Chase*, 101 Maine, 270, said: "If it appear that by unnecessary delay plaintiff has placed defendant at a substantial disadvantage this court will dismiss his suit."

To the same effect are the rulings in many other cases.

Laches is negligence or omission seasonably to assert a right. It exists when the omission to do so has continued for an unreasonable and unexplained length of time and under circumstances prejudicial to the adverse party. *Leathers* v. *Stewart*, 108 Maine, 101.

If by the laches and delay of the complainant it has become doubtful whether the opposing parties can be in a position to produce evidence necessary to a fair presentation of their case, or if they are deprived of any just advantage which they might have had before the claim became stale and antiquated, the court in equity will deal with the claim as if barred. *Lawrence* v. *Rokes*, 61 Maine, 43.

The bringing suit is not sufficient to relieve the plaintiff from the charge of laches. He must prosecute his action with reasonable diligence. *Streicher* v. *Murray*, 92 P. 36; *Tinsley* v. *Rice*, 31 S. E. 176; *Thomas* v. *Van Meter*, 45 N. E. 405. A long and unexplained delay in the prosecution of a suit amounts to laches. *Taylor* v. *Carroll*, 44 L. R. A. 479. A party is as much open to the charge of laches for failure to prosecute a case diligently as for undue delay in its institution. *U. S.* v. *Fletcher*, 242 Fed. 818; *Sullivan* v. *Portland & Kennebec R. R.* 94 U. S. 811. It has frequently been held that the mere institution of a suit does not of itself relieve from laches. If one fails in the diligent prosecution of his action, the consequences are the same as though no action had been begun. *Johnston* v. *Mining Co.* 148 U. S. 360.

Laches, in legal significance, is not mere delay that works no disadvantage to another. So long as the parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right.

Chase v. *Chase*, 20 R. I. 202, Pomeroy's Equitable Jurisprudence, Vol. 5, sec. 21.

Perhaps no better definition of laches is possible than to say that it is an undue delay working to the disadvantage of another. When a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief. 10 R. C. L. 397.

Under the circumstances of this case, and especially in view of the fact that, on the evidence, it is extremely doubtful that defendant

was ever indebted to the plaintiff, and if such were the case, apparently impossible to fix the exact amount of the debt, we have no hesitation in applying the doctrine laid down in the quoted cases and finding that "plaintiff has, by unnecessary and unexplained delay, placed the defendant at so substantial a disadvantage that his case should be dismissed."

Bill dismissed with costs.
Decree accordingly.

TROTT RALPH KING

vs.

WOLF GROCERY COMPANY

ANNIE A. KING *vs. Same*

Cumberland. Opinion April 19, 1927.

The skidding of a motor vehicle does not of itself prove negligence of the driver, nor the fact alone that the vehicle at the time did not have on skid chains. All the circumstances must be taken into consideration.

Where, however, as in the instant case, a driver of a truck, when the streets were slippery, is driving with the wheels on one side within the tracks of a street railroad, sees a pedestrian standing in the street within four or five feet of his course and at a point where he must make a sharp turn to the right to enter another street, which will bring the rear end of the truck toward the pedestrian and will swing the rear wheels of the truck over the car tracks just as the rear end of the truck is passing the pedestrian, it is a question for a jury as to whether the driver, in so operating the truck under such conditions, in case it skids or slues as the wheels pass out over the car rails and injures the pedestrian, is in the exercise of due care.

On exceptions. Two actions in tort for negligence, one brought by Annie A. King to recover for personal injuries, the other brought by her husband for damages arising out of said personal injuries,

sustained when said Annie A. King was struck by a motor truck owned by the defendant and operated by its agent and servant at the intersection of Middle and Cross streets in Portland on December 12, 1924. At the conclusion of the plaintiff's case on motion of the defendant a non-suit was granted and plaintiff excepted. Exceptions sustained.

The case fully appears in the opinion.

William H. Gulliver, John B. Thomes and William B. Mahoney, for plaintiffs.

Oakes & Skillin, for defendant.

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

WILSON, C. J. Actions to recover for loss of services by the husband and for injuries by the wife. At the close of the plaintiffs' case, the actions being tried together, the defendant moved for a non-suit, which the Court granted. The case is here on plaintiffs' exceptions.

The issue here is whether, taking the evidence most favorably for the plaintiffs, verdicts in their favor could be permitted to stand. *Whittemore* v. *Merrill,* 87 Me., 456; *Marden* v. *Street Railway,* 100 Me., 41, 52.

On the 12th day of December, the plaintiff Annie A. King was crossing Middle Street in the city of Portland on a crosswalk or within the space marked off for pedestrians at the junction of Middle, Free, and Cross Streets. At this point there are two parallel tracks of the street railroad and a spur track turning off to the right into Cross Street which increases the number of rails on the side of the street on which the truck was running. As she stepped from the sidewalk onto the street, she saw the defendant's truck approaching from Monument Square and on the opposite side of the street. Thinking she had a sufficient time to cross before the truck reached the crosswalk, she continued on her way. As the truck neared the crosswalk on Middle Street, it slowed up or stopped to permit other pedestrians to cross who were ahead of Mrs. King, and then started up. Mrs. King stopped some four or five feet from the course the truck was then taking to let it pass. The truck was running with the two wheels, on the side next to Mrs. King, between the street car rails, and as it passed her, it turned sharply to the right to go into

Cross Street. The rear tires on the truck were worn smooth, and there were no skid chains on. The streets were icy and slippery. As the rear wheels of the truck passed over the southerly rails of the car tracks, it began to skid or slue. The tailboard of the truck was down, and extended out beyond the rear of the body of the truck about two feet. In turning to go into Cross Street, it swung the rear end of the truck toward Mrs. King, and as the rear wheels skidded, the tailboard hit her a blow in the side, knocking her down and causing the injuries of which she complains.

The declaration sets forth as the cause of the accident that the defendant's truck was being driven at a very rapid rate of speed in the car tracks of the street railroad, without chains on the rear wheels, and that the defendant's servant carelessly and negligently pulled its forward wheels out of the car tracks, causing it to skid and striking the plaintiff. There is no evidence of rapid driving. The negligence of the defendant if established at all, is by reason of his turning sharply to the right to go into a side street just as he was passing a pedestrian standing in the middle of the street, in plain view, on the space reserved for pedestrians, within four to six feet of his course, if he had continued along Middle Street, with a truck body and a tailboard down and extending out at least two feet beyond the body, with his wheels between steel rails, his rear tires worn smooth and without skid chains on, and with the probability of skidding on a slippery street as the rear wheels passed out and over the car rails.

It is not a case where the rule of *res ipsa loquitur* applies. The mere skidding of a motor vehicle does not of itself prove negligence of the driver. All the circumstances must be taken into consideration. However, from the evidence presented by the plaintiff, including a plan of the locus, and the reasonable deductions therefrom, we think, taking all the evidence most favorably for the plaintiffs, a jury might have found that the streets were slippery, that Mrs. King was in the exercise of due care in stopping four to six feet from the apparent course of the truck, that defendant's servant must have seen her standing there, and that he did not exercise due care in turning the truck sharply to the right just as he passed her to go down Cross Street, which of necessity would swing the rear end of the truck body some distance toward Mrs. King, and that he should have anticipated that the rear wheels of his truck in coming out over the steel rails, with the slippery condition of the street, without any skid chains on,

and with the tires worn smooth, would be likely to skid or slue toward Mrs. King.

If a jury upon such evidence had found that a reasonably prudent man would not have attempted to sharply swing a truck out of car rails under the circumstances, knowing there was a person standing within the range of a very slight skid or slue, we do not think we could say they were clearly wrong. It is a question upon which reasonable, fair-minded men might differ, and was, therefore, a question for the jury. Berry on Automobiles, 5th Ed., Sec., 235; *Gross* v. *Burnside*, 186 Cal., 467; *Schneider* v. *Steindler*, 188 Wis., 129, 133; Huddy on Automobiles, 8th Ed., Sec. 429.

Exceptions sustained.

GEORGE H. STARRETT *vs.* INHABITANTS OF THOMASTON

GEORGE H. STARRETT *vs.* STATE HIGHWAY COMMISSION

Knox. Opinion April 19, 1927.

By the English law, the highway for a distance of 300 feet from the end of the bridge was considered as a part of the bridge, and in this country the highway at the end of the bridge may be considered as connected with the bridge.

As used in a statute providing for the building and rebuilding of bridges, the word "approach" means not only the structure itself but includes its approaches, abutements and bankments.

Where a bridge is raised "by a road commissioner or person authorized," such person may be authorized to act by agency or by operation of law.

In the instant case, the Legislature provides that the State Highway Commission is to superintend and perform the work of building and rebuilding bridges. The town must be presumed to have known of this statutory provision and hence to know that if the work be done it must be done by the State Highway Commission. This makes the State Highway Commission a legal agency which by reasonable interpretation is broad enough to be included within the meaning of the expression "persons authorize."

On report. Two cases involving a claim for damages sustained by petitioner by reason of a change of grade in Main Street in Thomaston, in front of his place of business. The first complaint was filed

against the town of Thomaston under the provisions of R. S. Chap. 24, section 84, and the other complaint was filed against the State Highway Commission under the provisions of P. L. 1923, Chapter 193, known as the Bridge Act. By Agreement both cases were reported to the Law Court. Judgment for plaintiff in the first case and in the second case judgment for the defendant.

The cases are very fully stated in the opinion.

Charles T. Smalley, for petitioner.

Rodney I. Thompson and Frank B. Miller, for the Town of Thomaston.

Raymond Fellows, Attorney General, for the State Highway Commission.

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

PHILBROOK, J. On the twenty-seventh day of July, 1924, the municipal officers of the town of Thomaston presented to the State Highway Commission and to the County Commissioners of Knox county a petition for state and county aid in the building or rebuilding of a bridge over Mill River in that town. In that petition those municipal officers certified that public convenience and necessity required the building or rebuilding of the bridge, that it was located on a main travelled thoroughfare leading from Thomaston to Rockland, and locally known as the Main Street Road. In their petition it was alleged that they were proceeding in accordance with the provisions of Chapter 319 of the Public Laws of 1915, as amended.

The last amendment of said chapter is to be found in Public Laws of 1923, Chapter 193, is commonly known and referred to as the Bridge Act, and was in effect when said petition was presented.

According to that last amendment it is provided that when the municipal officers of any town or city deem that any bridge on any main thoroughfare must be built or rebuilt, they may petition the commissioners of the county in which said bridge is, or may be built or rebuilt, and the State Highway Commission, to meet with them for the purpose of examining into and determining whether public convenience and necessity require the building or rebuilding of said bridge. This petition is sent to the State Highway Commission and upon its receipt said Commission is required to transmit a copy there-

of to the county commissioners of the county in which the proposed work is to be done.

The petitioning municipal officers, together with the county commissioners and the State Highway Commission, then constitute a joint board to determine: (a) whether or not the bridge is or may be built on a main thoroughfare; (b) whether or not public convenience and necessity require the building or rebuilding of said bridge; (c) to determine the type of construction and general dimensions; (d) to determine the estimated cost of construction. The decision of said board, or a majority thereof, upon any matter within its jurisdiction shall be final and conclusive, and the record of its findings upon all preliminary matters shall be prima facie evidence of the truth thereof.

The Bridge Act also provides for action by county commissioners, similar to that taken by municipal officers, when the bridge is to be built on any main thoroughfare in any unorganized township in the county. Concerning this second method of procedure we are not here interested and offer no discussion.

A third method of procedure is prescribed when the bridge is to be built on any state or state-aid highway. In that case, the moving party is the State Highway Commission which is required to notify the municipal officers of the town or city, or the county commissioners having jurisdiction of the roads in any unorganized township in which said bridge is located or may be built or rebuilt, and those three bodies form "a joint board having the same powers and prerogatives as the joint board formed in response to a petition emenating from the municipal officers of a town or city."

In the case at bar, acting upon the petition of the municipal officers as aforesaid, the regular legal steps were taken for the formation of the board, which board at the meeting required by statute, determined: (a) that the proposed bridge "is on a main thoroughfare"; (b) "that public convenience and necessity require the reconstruction of this bridge."

The Bridge Act provides in section four that the State Highway Commission shall have supervision of all construction work done under that act. Consequently, the work of construction upon this bridge was done under the supervision of that Commission.

The floor of the new bridge was constructed slightly higher than the floor of the old bridge, and in order to make convenient access

thereto the highway approaches to the bridge at each end were raised by filling.

The plaintiff owned and occupied land and buildings on the southerly side of the road, of which the bridge formed a part, and about eighty-five or ninety feet easterly from the bank of the stream over which the bridge was built.

The buildings were made of wood, the house being two and one half stories, the upper stories being used for dwelling purposes and the lower one as a place for conducting a general store. The barn was a two story frame building. There was a gasoline filling station in front of the store. In making said approaches to the bridge the filling station was removed, and the tracks of a street railway, located in the street in question, moved nearer to the plaintiff's buildings so that in its new location it partially covered the former location of the filling station. Prior to the moving of the street railway track there was sufficient space for an automobile to stop between that track and the filling station, to obtain gasoline, but after the moving this was impossible.

By reason of all these things the plaintiff claimed that he had sustained damage to his property, and on August 1, 1925, he made application in writing to the municipal officers of the town in which he alleged that the road commissioner of the town, or person or persons authorized, had raised the grade of the street in front of his property and prayed for the assessment of damages so sustained by him. On October 29, of the same year, he was notified by those municipal officers that his application had been duly considered and his damages determined in the sum of three hundred dollars. Being aggrieved by this assessment, on November 3, 1925, he presented a complaint to the Justice of the Supreme Judicial Court next to be holden at Rockland, praying the court to "determine the damages so as aforesaid sustained by him by reason of said change of grade of said street." This complaint was entered at the January term of said court and continued until the April term thereof.

Meanwhile, to wit on January 13, 1926, the plaintiff made application in writing to the State Highway Commission in which he alleged that this Commission had "altered and widened said street, and changed the grade of the same in front of his property" and prayed that the Commission would view his premises and assess the damages occasioned by the construction work done by the Commission. In

this petition the plaintiff declared that his damages amounted to three thousand dollars. No amount of damage was declared in his application to the municipal officers for their assessment of damages.

On January 20, 1926, the plaintiff was notified by the Commission that his application had been "duly received and considered", but it is alleged by the plaintiff that no damages were awarded thereunder.

On January 27, 1926, the plaintiff filed with the Commission his notice of appeal to the Supreme Judicial Court, which appeal was entered at the April term, 1926.

At the April term, therefore, both appeals were on the docket, one against the town and one against the Commission. As appears from the docket entries, which by agreement are made part of the record, certain men were "appointed commissioners to determine the amount of damage, and upon such determination both of the cases to go forward to the Law Court upon agreed statement or report as may be agreed upon by counsel for final determination of the liability of the parties and all questions of law."

The commissioners thus appointed assessed the damages "in either or both cases at three thousand one hundred and fifty dollars. ($3150.00.)"

The certificate of the sitting justice is that "by agreement of parties the above cases are reported to the law court upon so much of the evidence as is legally admissible; the law court to render final judgment therein."

STARRETT *vs.* STATE HIGHWAY COMMISSION

Although the State Highway Commission is the nominal defendant in this case, yet the State of Maine is the actual defendant, since the Commission is simply the administrative arm of the State in matters of this kind. Under section nine of the Bridge Act it is expressly provided that the State shall not be liable to any person or corporation for damages arising from the construction or rebuilding, or improvement of any bridge built or rebuilt under the terms of that act. This language is broad and comprehensive. The Commission claims and the record shows, that all the work done at Mill Brook was done and paid for under the provisions of the Bridge Act, and that whatever change was made in front of the complainant's property was made by the joint board under the authority and provisions of that act, hence no liability against the State.

Under section three of the Bridge Act the State Highway Commission is required to prepare all engineering plans and specifications for materials, construction and workmanship which it considers necessary, not only for the bridge structure, but also for its approaches, and section two provides that the cost of construction shall include not only the complete cost of the bridge proper, but also such embankments, surfacing, and other work as it considers necessary to provide proper, adequate and safe approaches to the bridge. In the case at bar the approach to the bridge on its end toward the complainant's property, a distance of slightly less than one hundred feet, was part of the work of the State Highway Commission, and plainly within the intent of the legislature as part of the duties of that commission under the Bridge Act. Hence the provisions of R. S. Chap. 25, sec. 13, for alteration, widening, changing of grade, laying out and establishing, or discontinuance, of a state or state-aid highway, and assessment of damages by the Commission, have no application to the instant case.

In the complaint against the Commission we hold that there is no liability on the part of the State, or its administrative arm, the State Highway Commission.

STARRETT *vs.* INHABITANTS OF THOMASTON

In this case the complainant instituted his proceeding under R. S. Chap. 24, sec. 84, which provides for assessment of damages sustained by an owner of adjoining land when a way or street is raised or lowered by "a road commissioner or person authorized," which damages, after assessment, are to be paid by the town.

In argument counsel for the defendants frankly admits that the bridge was built under the provisions of the Bridge Act, but advances several contentions to show that the town is not liable in damages to the complainant. We will consider those contentions in the order presented by the defendant's brief.

1. That the record in the case is insufficient and leaves too much for inference; as for instance that the grade was made on a state highway.

In this state, under the provisions of R. S. Chap. 25, sec. 5, ways are classified into three groups: (1) state highways which shall mean a system of connecting main highways throughout the state; (2) state-aid highways which shall mean such highways not included

in the system of state highways as shall be thoroughfares between principal settlements or between settlements and their market or shipping-point and in so far as practicable feeders to the state highways; (3) third class highways which shall mean all other highways not included in the two classes above mentioned. *Bullard vs. Allen*, 124 Maine 251.

R. S. Chap. 25, sec. 5 also requires the State Highway Commission to cause charts and maps to be made showing the location and mileage of all highways of the state and classify the highways of the state into the three general classes which we have just mentioned. Such being the provision of law, is there any officer, commission, municipality or individual who better knows than the State Highway Commission as to whether a bridge is built or to be built on a state or state-aid highway? These questions are self-answering. Moreover, acting for the town, the municipal officers began these proceedings by address to the Highway Commission, in which they allege that the bridge was to be built on "a main traveled thoroughfare". If it were to be built on any other class of way would not the Highway Commission be fully cognizant of that fact, and being so would they be so indifferent to the situation as to stultify themselves by taking action upon the address of the municipal officers in a matter wherein those officers had no power to act? Such a question demands a negative answer. To a reasonable mind there could be no room for doubt that the action of the State Highway Commission determines by irresistible and conclusive inference that the bridge was not to be built upon a way other than that described in the address made to them by the town.

2. That the town had absolutely nothing to do with the construction of the bridge or the filling. Here again we turn to the Bridge Act and find that section four distinctly provides that the Highway Commission shall have supervision of all construction work and no payment shall be made on account of any of said work except by voucher approved by said Highway Commission. To be sure, under section three, when bids for doing the work are requested by the Commission, the town may submit a bid like any other contractor but if it submits the successful bid the town is subject to all requirements prescribed for other contractors, except that no bond need be required of it. In the case at bar it is undoubtedly true that the town had no part in performing the physical work of construction, but the

whole matter was set in motion by the action of the town through its municipal officers, and it ratified that action when it paid its proportion of cost of construction which was determined by the joint board as herein referred to, which payment is shown by the testimony of one of the municipal officers of the town.

3. That the street railway track was moved nearer to the complainant's buildings, but by whose authority the record does not disclose. The complainant does not even suggest that the track was moved to a new location upon his land. If such were the case then he would have his remedy, for land so taken, under other provisions of statute, and against the street railway company which took his land. But if the track was once legally located within the limits of the street, and its location was changed, still keeping within street limits, this complainant has no remedy for damages by reason of such change, *Parsons vs. Waterville & Oakland Street Railway*, 101 Main, 173. The rights of the complainant or the liability of the town for damages are questions not affected by what was done in the instant case, so long as the track was still within street limits, and it is therefore immaterial as to the authority by which the track was moved, and being so it was unnecessary to aver the authority by which they were moved.

4. How much of the fill was a portion of the bridge work, or, to use the words of counsel for the town, "what is a bridge?" In the other case we briefly discussed the question of approaches being a part of the bridge structure under the Bridge Act, and repetition of what we there said is not necessary. But apart from that discussion it is proper to call attention to some authorities as to what is included under the term "bridge".

By the English law the highway three hundred feet from each end of a bridge was considered as a part of the bridge for the purposes of repair, and in this country the highway at the end of a bridge may be considered as connected with the bridge. *Titcomb vs. Fitchburg Railroad Co.*, 94 Mass. 254.

As used in a statute providing for the repair of bridges by county commissioners, the word "bridge" means not only the structure itself but includes its approaches, as well as its abutments, bankments and railways; *The Driftwood Valley Turnpike Co. vs. County Commissioners*, 72 Indiana, 226. In that case the statute required the county commissioners to cause all bridges therein to be kept in repair and

the question arose whether the approaches to such bridges were to be deemed parts of the same. The court said that upon that point there could be little or no doubt and answered the question in the affirmative.

Approaches to a bridge are whatever is necessary to connect the bridge with the public roads or streets, either at the end thereof, or to make such roads or streets conform to the grade of the bridge. *Township Committee of Kearney vs. Ballantine et als,* 23 Atl. 821; 54 N. J. Law 194.

Approaches to a bridge are the ways at the ends of it, which are a part of the bridge itself. By the common law the duty to keep a bridge in repair carried with it the duty to keep in repair, as a part of the bridge, the highway at each end of it, for a space of three hundred feet. This limit of space has not been adopted in Massachusetts but the highways at the ends of a bridge have been recognized as, and called, the approaches to it in several decisions: *Commonwealth vs. Deerfield,* 6 Allen, 449; *Titcomb, vs. Fitchburg Railroad,* 12 Allen, 259; *Rouse vs. Somerville,* 130, Mass. 361.

The term "bridge" includes not only the structure spanning the chasm over which it is erected but also includes the approaches by which access to the bridge is obtained, such approaches being as much a part of the appendages to the bridge as the bridge itself. Words and Phrases vol. I, p. 871 and numerous cases there cited.

In the instant case the way was a way at the end of a bridge and under the Massachusetts rule, which we adopt, may be called the approach to the bridge and hence included in the term "bridge."

5. That in the record there is no reason given why the Highway Commission failed to give damages, whether it was a jurisdictional question or otherwise. This contention may be considered as answered by what has been said in the previous case against that Commission.

6 That the award made by the municipal officers was wholly illegal and of no effect because under R. S. Chap. 24, sec. 84, no damages may be awarded unless the street was raised "by a road Commissioner or person authorized." A person may be authorized to act for another by reason of agency, or by reason of operation of law. Here the town set in motion a proceeding which resulted in raising a way. The proceeding was one in which the legislature had pre-

scribed certain conditions as to how and by whom the work should be done.

The town must be presumed to have known the law and hence to know that the work, if done, must be done by the State Highway Commission. Not by a "person" to be sure, but by a legal agency which by reasonable interpretation is broad enough to be included within the meaning of a "person authorized." Here again it must not be overlooked that the town ratified the proceeding by payment of its share of the cost of construction of the bridge. We cannot concede that there is effective merit in this contention.

Hence we hold that although the work was done by virtue of the provisions of the Bridge Act, yet the petition for and award of damages were properly presented under the provisions of R. S. Chap. 24, sec. 84 and that the legal liability for damages rests upon the town.

As the case stands before us we are to pass upon the question of legal liability and not upon questions of fact regarding the amount of liability. That amount was determined by a tribunal sought for by the town, in its appeal to the Supreme Court, and to the personnel of which the town agreed.

IN STARRETT *vs.* STATE HIGHWAY COMMISSION,

Judgment for defendant.

IN STARRETT *vs.* INHABITANTS OF THOMASTON,

Judgment for plaintiff in accordance with the amount awarded by the commissioners appointed by the Supreme Court.

MERRILL'S CASE

Lincoln. Opinion April 21, 1927.

Section thirteen of the Workmen's Compensation Act applies when the employee dies as a result of the injuries leaving no dependents at the time of the injury.

In its amended form, section ten of the act authorizes the Industrial Accident Commission to enlarge the thirty day period therein mentioned when in its discretion the nature of the injury or the process of recovery require it, even though the services are rendered during the last sickness of the injured employee.

In the instant case section thirteen of the Workmen's Compensation Act does not apply.

On appeal. Petition of Bertha B. Merrill, dependent widow of Kiah B. Merrill, to fix the amount to be allowed for medical, surgical and hospital services rendered to her husband while living and during his last sickness. The Industrial Accident Commission fixed the amount of such bills and ordered them paid by the employer, and from an affirming decree respondents appealed. Appeal dismissed. Decree below affirmed with taxable costs in behalf of the petitioner.

The case appears in the opinion.

C. R. Tupper, for petitioner.

Robert Payson, for respondents.

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

PHILBROOK, J. This is a workmen's compensation case in which the plaintiff is Bertha B. Merrill, dependent widow of Kiah B. Merrill, and the defendants are the Reed-Cook Marine Construction Company and the Employers Liability Assurance Corporation.

On or about the fifth day of February 1925, Kiah B. Merrill received compensable injuries while in the employ of the Reed-Cook Marine Construction Company. Subsequent to the injuries, the

said Kiah B. Merrill and the respondents entered into an agreement in regard to compensation which was duly approved by the Labor Commissioner on March 11, 1925. On April 8, 1925, Merrill died as a result of said injuries, and under decree of the Industrial Accident Commission, in accordance with the statute in such cases made and provided, the respondents paid compensation to said Bertha B. Merrill in the sum of sixteen dollars per week.

During the period between February 5, 1925 and April 8, 1925, said Kiah B. Merrill received certain medical attention and services in the total sum of $102.50.

On the eighteenth day of December 1925, the dependent widow filed with the Industrial Accident Commission a petition to fix the amount to be allowed for said medical, surgical and hospital services rendered to her husband while living, declaring that because of the injury to her husband these medical services were needed and furnished and that said services and charges are reasonable. On the thirteenth day of January 1926, the respondents filed answer. Omitting such parts of the answer as are not material to the issue here, it may be stated that the contentions raised by the defendants are as follows:

(a). That the medical services, payment for which was asked, were rendered between the dates of February 5, 1925, and April 8, 1925, which period constituted the period of Kiah B. Merrill's last sickness.

(b). That the only provision in the Workmen's Compensation Act for payment of medical expenses for last sickness is found in section thirteen of said act, as now amended, which section only operates in cases where no dependency exists either in law or in fact.

(c). That when dependency exists, either in law or in fact, as in this case, there is no provision for the payment of medical expenses for the last sickness.

(d). That section ten of the compensation act does not cover cases of death, and therefore cannot be invoked to compel payment of medical expenses for the last sickness.

This answer raises question of law. There is no contest as to the amount of any of the doctors' bills. An agreed statement between the parties was made and submitted to the Industrial Accident Commission. Without quoting the agreement in full, the essential parts are that Kiah B. Merrill received a personal injury by accident aris-

ing out of and in the course of his employment for the defendant construction company on February 5, 1925; that Mr. Merrill died as a result of his injury on April 8, 1925, leaving as dependent, within the terms of the Workmen's Compensation Act, a widow, Bertha B. Merrill, who is now receiving compensation; that during the period from February 5, 1925, he received the medical treatment, which the plaintiff now seeks to have paid for in the matter under consideration.

The Industrial Accident Commission, in rendering its decree ordering payment for the medical services, held that section thirteen of the Workmen's Compensation Act referred only to those cases where the injured party died as a result of the injury leaving no dependents at the time of the injury, and hence that section did not enter into the consideration of the case by the Commission.

The Commission further held that the only other section of the act which provides what employers must pay in regard to medical aid is section ten of the act. This section reads as follows:

"During the first thirty days after the accident, the employer shall promptly furnish reasonable medical, surgical and hospital services, nursing and medicines and mechanical surgical aids when they are needed. The amount of such medical, surgical, and hospital services, nursing, medicines and mechanical surgical aids shall not exceed one hundred dollars unless a longer period or a greater sum is allowed by the commission, which in their discretion, they may allow when the nature of the injury or the process of recovery requires it. In case incapacity does not begin at the time of the accident, the thirty day period shall commence at the time said incapacity begins. Whenever the employer and the employee are unable to agree upon the amount to be allowed for such medical, surgical and hospital services, nursing, medicines and mechanical surgical aid, the amount shall be fixed by the commission upon petition of either party setting forth the facts. In case of emergency or other justifiable cause the employee shall have the right to select a physician other than the one provided by the employer, and the reasonable cost of his services shall be paid by the employer subject to the approval of the Industrial Accident Commission. Such approval shall be granted only when the commission finds that there was such emergency or justifiable cause and in all cases, that the services were adequate and necessary and the charges reasonable."

In accordance with the agreed statement last above referred to, and by virtue of the terms of section thirteen of the Compensation Act, we agree with the Commission that this section does not entitle the dependent plaintiff for the bills herein under consideration. It remains only for us to determine whether such recovery may be had under section ten.

In reaching its conclusion the Commission, after admitting the inapplicability of section thirteen, said

"Where then shall we look for guidance if not to the only other section of the Act which tells us what employers must pay in regard to medical aid, to wit, Sec. 10?

This section, amended, broadened, and liberalized in 1919, was designed to cover all cases not otherwise provided for."

This section has just been quoted in full. Before its amendment it read thus: "During the first two weeks after the injury the employer shall furnish reasonable medical and hospital services, and medicines when they are needed, but the amount of the charge for such services and medicines shall not exceed the sum of thirty dollars, unless in case of major surgical operations being required, and the employer and employee being unable to agree upon the same, the amount to be allowed for such medical services or medicines shall be fixed by the Commission upon petition by either party setting forth the facts." By comparison of the original section with the amendment thereof it will be seen that the latter made these changes:

(a). The time was enlarged from two weeks to thirty days;

(b). The word "injury" was changed to "accident."

(c). The employer was obliged to "promptly" furnish "surgical" services, "nursing," also "mechanical surgical aids," and enlarged the sum to be paid from thirty dollars to one hundred. These may be regarded quite properly as verbal changes.

But a more important addition made by the amendment is found in the words, "unless a longer period or a greater sum is allowed by the Commission which, in their discretion, they may allow when the nature of the injury or the process of recovery requires it."

Further additions are made by the amendment but they do not affect the present controversy.

As above indicated, certain facts are beyond controversy, namely, that Mr. Merrill died as the result of the injuries, that the period of time between the date of the injuries, February 5, 1925, and the date

of the death, April 8, 1925, both dates included, was sixty-two days; that the medical services in controversy were rendered during those days; which days constituted Mr. Merrill's "last sickness." *Huse* v. *Brown*, 8 Maine, 167. "The sickness which is terminated by the death of a patient in his last sickness."

The respondents urge that the words "last sickness" do not appear in section ten but appear only in section thirteen, and hence allege that the meaning of this expression is the crux of the case.

Section thirteen contains four elements: (a) death as the result of injury; (b) no known dependents at the time of the injury; (c) employer to pay reasonable expenses of last sickness and burial; (d) expenses so paid to be deducted from any compensation found to be due to persons who, within one year after death, appear before the Commission and prove their right to compensation. Reduced to its lowest terms, the legislature insured ministration to the injured, and Christian burial, without charge upon his estate, if any he should leave, in case of no dependents, but in event of compensation on account of dependency later established the employer is to be credited with amounts so paid for "last sickness and burial."

So far as this controversy is concerned, section ten contains three important elements; (a) prompt furnishing by the employer of medical, surgical and hospital services, nursing and medicines, and mechanical surgical aids when they are needed, to a certain amount and for a certain time; (b) in the discretion of the Commission the amount and time may be enlarged when the nature of the injury or the process of recovery requires it; (c) when the interested parties are unable to agree upon the amount, and by fair deduction the legislature also intended the length of time, the Commission may settle the controversy.

While section thirteen provides certain obligations upon the employer and granted him certain rights of credit accruing to him because of expenses of "last sickness and burial" which must be or have been paid, yet it does not follow that this section is peculiarly exclusive of other provisions of the act. Nor does it attempt to declare that, because those things are furnished which must be furnished under section ten, such furnishing or payment of just charges therefor are affected by the fact that the injured employee chances to die instead of recovering.

In short, "last sickness and burial" expenses are affected by the existence or non-existence of dependents, while section ten demands furnishing of and payment for the things therein named without regard to whether the patient lives or dies, or furnished in a case which proves to be a "last sickness" case.

It is our opinion that section ten is applicable to the instant case; that the Commission exercised sound discretion; and that their finding and order must be sustained.

Appeal dismissed;
Decree below affirmed with taxable costs in behalf of the petitioner.

JOHN A. GAFFEY

vs.

FORGIONE & ROMANO CO.

Cumberland. Opinion May 4, 1927.

It is the general rule that where a bailment for mutual benefit of both bailor and bailee is one of hire, there is imposed on the bailor in the absence of special contract or representation an obligation that the thing or property hired for use shall be reasonably fit for the use or capable of the use known to be intended.

There are exceptions to this rule, and among those exceptions it is settled law that in case of a lease or bailment of a known or designated chattel which the bailee has seen or has had the opportunity to observe, the law does not imply a warranty or reasonable fitness or capacity of the chattel.

There is no implied warranty arising from a contract of letting that the thing let is fit for the use intended, where the selection is made by the lessee.

On report. An action to recover for the rental of a heater plant at a fixed rental. Defendant relied upon an implied warranty that the heater plant was reasonably fit for the purpose for which it was hired. The case was referred and the referee's report made, and by

agreement reported to the Law Court. Judgment for the plaintiff in the sum of $860 with interest from July 31, 1923.

The case sufficiently appears in the opinion.

Cook, Hutchinson, Pierce & Connell, for plaintiff.

Harry C. Wilbur, for defendant.

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

PHILBROOK, J. The plaintiff seeks to recover for the rental of a heater plant which he leased to the defendant corporation for such time as it should be absent from the owner's premises, which in fact was a period of fifty-three days in the months of May, June and July 1923, at an agreed rental of fifteen dollars per day, amounting in all to $795. The account annexed also contains items for a stack and hood, parts of the heater plant, alleged and proved to have been missing from the outfit upon its return. These articles are valued at $85, making a total of $860. Demand for payment was made on July 31, 1923, and this date is used as one from which interest should be reckoned if the plaintiff is to obtain judgment.

The case was sent to a referee who made extensive findings of fact and who made an alternative report wherein the determination of the rights of the parties involve certain rulings of law, namely:

(a). Did the statement of the plaintiff made when the plant was hired amount in law to an express warranty that the machine was reasonably fit for the purpose for which it was hired? If it did, there was a breach of such warranty.

(b). Did the defendant's counsel, during the examination of the plaintiff, make a statement which constituted waiver of the defendant's rights growing out of the breach of an express warranty? If there was an express warranty, and the same was not waived, judgment should be given to the defendant, since there was a breach of such express warranty.

(c). Did the plaintiff impliedly warrant the machine to be reasonably fit for the purpose for which it was hired? If such implied warranty existed, then, says the referee, judgment should be for the defendant, since there was a breach of such implied warranty.

The case is made up of the declaration, account annexed, the pleadings and the report of the referee. When this alternative report was

made, the presiding justice being of opinion that questions of law were involved of sufficient importance and doubt to justify the same, sent the case to this court on report.

From the referee's report, it appears that the defendant corporation was about to lay some asphalt in connection with its contract for work upon the State Pier at Portland, and not being provided with sufficient apparatus for doing the work, sent one Golden, its construction superintendent, to Massachusetts to procure a heater plant for its use while laying the hot asphalt. It also appears that apparatus such as this was far from plentiful, and difficult to obtain, not more than three or four such pieces of apparatus suitable for the work being known to be in existence within practical reach at that time. Two were applied for, and could not be obtained; a third was so situated that the obtaining of it seemed impracticable. One was owned by the plaintiff and was in his possession at his yard in Medford, Mass. That had been used by the plaintiff in connection with road work and similar work for eight or ten years but at the time of Mr. Golden's visit had not been used for about a year.

Whether any statement made by the plaintiff when the apparatus was hired amounted to an express warranty calls for no discussion. No claim of such warranty is made in defendant's pleading and, according to the report of the referee, during the hearing before that tribunal, the defendant's counsel volunteered the statement that the defendant was not relying upon express warranty.

The real question is whether there was an implied warranty. It is a general rule, which seems to be well established by the authorities, that where a bailment for mutual benefit of a bailor and a bailee is one of hire, there is imposed on the bailor, in the absence of special contract or representation, an obligation that the thing or property hired for use shall be reasonably fit for the use or capable of the use known to be intended, that is, that it shall possess the quality usually belonging to things of that kind when used for the same purpose. 6 C. J. 1117, and cases there cited.

But there are exceptions to this rule equally well sustained by reliable authorities.

In case of a lease or bailment of a known or designated chattel, which the bailee has seen or has had the opportunity of inspecting, the law does not imply a warranty of reasonable fitness or capability of the chattel. Note to *Hoisting Engine Sales Company* v. *Hart*,

31 A. L. R. at page 544, and many cases there cited. There is no implied warranty arising from a contract of letting, that the thing let is fit for the use intended where the selection is made by the lessee. *Briggs* v. *Hunton*, 87 Maine, 145.

The case at bar distinctly falls within the above exception. There is no implied warranty. Demand of payment was made July 31, 1923, and the mandate will be,

Judgment for the plaintiff in the sum of $860.00 with interest upon that amount from July 31, 1923.

So ordered.

STATE

vs.

SMITH BUDGE

Penobscot. Opinion May 10, 1927.

Misadventure is no excuse only as to offenses that are malum in se. In an ac malum prohibitum misadventure may excuse. If, however, the unlawful act was the proximate cause of the accident, misadventure will not be present, or if it can be said to be present, will not excuse.

Intoxication was always malum in se. So driving an automobile while intoxicated involves an offense that is malum in se; not so, driving while merely under the influence of liquor, but not intoxicated according to the ordinary use of that term.

In the instant case the instruction of the court imposed a burden on the respondent that the law does not require. The burden is on the State to show death was due to either a reckless disregard of rights of others, or if it resulted while in performance of an unlawful act and involuntary, that the unlawful act was malum in se, or if malum prohibitum, that it was the proximate cause of the homicide.

Whether the unlawful act contributed to the accident, or the respondent was intoxicated are both questions of fact for the jury.

On exceptions. The respondent was indicted for manslaughter for having caused the death of Andrew Bickford at Lincoln on May

9th., 1925, by hitting him with his automobile while driving in the built-up portion of the town more than fifteen miles an hour. He was found guilty by a jury and sentenced to not less than three nor more than six years in prison.

Exceptions were taken by respondent to certain instructions given in the charge. Exceptions sustained.

The case appears fully in the opinion.

Artemus Weatherbee, County Attorney, for the State.

William R. Pattangall and Benjamin W. Blanchard, for the respondent.

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

WILSON, C. J. The respondent was indicted for the crime of manslaughter by reason of having caused the death of one Andrew Bickford by the improper operation of an automobile on the public highway.

On the evening of May 8th, 1925, several young men from the town of Lincoln attended a dance in the town of Howland, returning to their homes sometime after midnight in automobiles. The respondent with two friends and his fiancee, who lived near Howland, went to the dance and returned in the respondent's car. The deceased and a friend by name, Gleason, went to Howland in one automobile, and returned in another belonging to a young man living near the scene of the accident.

Bickford and Gleason lived beyond the home of the friend with whom they returned, and after arriving at his home left the automobile and started to walk along the road to their homes or boarding places. After leaving the automobile, as they entered the travelled way or shortly thereafter—there being no sidewalk or footpath beside the road at this point for pedestrians—Bickford was struck by the respondent's car and killed.

In his charge, the presiding justice correctly instructed the jury as to the essential elements of criminal negligence; and as to the law governing the operation of motor vehicles on the highways, both as to speed and their operation by any person under the influence of intoxicating liquor; but failed to instruct them as to the rules of law applicable to involuntary homicide resulting while a respondent was

engaged in some unlawful act, except as he defined what is termed in law misadventure.

In the course of his charge, after explaining to the jury the legal limit of speed in the built-up portions of a town, and in the open country, as established by the Legislature, and as to operating automobiles on the highways while intoxicated or under the influence of liquor, the presiding justice then gave the following instruction which is the ground of the respondent's exception:

"In order for you to acquit him of the charge of manslaughter by misadventure, you must find as a fact that he was not violating any one of those three rules of law at the time of the accident. That is a fact for you to determine. If he was doing an unlawful act at the time of the accident, then the principles of homicide by misadventure do not apply. If he was not doing an unlawful act, but was doing it in a criminally negligent manner such as I have explained to you under the principles of criminal negligence, then he would be guilty. If he was not performing a lawful act in a criminally negligent manner at the time of the accident, and was not violating any law at that time, then he was innocent, and your verdict should be not guilty."

We think the exception must be sustained. Not only was the instruction erroneous, but was couched in language that, under the circumstances of the case and in the light of other parts of the charge, might well tend to mislead the jury as to the essential elements of the offense necessary to be proved by the state, and thereby the respondent was aggrieved. *State* v. *Gallant*, 124 Me., 135.

The only inference the jury could have drawn from the instruction was that, if the respondent was engaged in an unlawful act at the time of the homicide, they must find him guilty. Not only was the respondent aggrieved in this respect, but the instruction put upon him a burden which the law does not impose. To acquit of manslaughter on the ground of misadventure, a jury is not obliged to find as a fact that a respondent was not at the time of the homicide engaged in doing an unlawful act. If that was a controlling fact, no more is required than that the jury should have a reasonable doubt. The burden is not on a respondent to prove the homicide occurred by misadventure, but on the state to show it was either due to a reckless disregard of the safety of others, or that, if it resulted while in the performance of an unlawful act and involuntary, the unlawful

act was *malum in se*, or, if *malum prohibitum*, that it was at least the proximate cause of the homicide. *Com.* v. *Deitrick Applt*, 218 Pa., St., 36; *State* v. *McDaniel*, 68 So. Car., 304; *State* v. *Matheson*, 130 Iowa, 440; *State* v. *Cross*, 42 W. Va., 253.

It is urged, however, that the erroneous instruction was harmless because of other correct instructions. It is true there were in the beginning of the charge correct instructions as to the definition of criminal negligence and the burden of proof, but the same erroneous premise permeated the entire charge: that only misadventure renders a homicide excusable, and that there can be no misadventure when an unlawful act is present. The effect of all of which was virtually a direction to bring in a verdict of guilty, as it was admitted that the respondent was at least violating the law as to speed in the part of the town of Lincoln where the accident occurred.

At another point in the charge, the presiding justice, referring to misadventure, instructed the jury that to excuse the taking of human life under such circumstances or under such principles as had been explained, "there must be a concurrence of misfortune or misadventure in the performance of a lawful act, the exercise of due care and no intention to do harm. *The absence of any one of these will involve guilt*". The italics are ours to emphasize the impression that must have been left on the minds of the jury by the instruction excepted to, as to the effect of an unlawful act.

Homicides are either felonies, as murder or manslaughter, or excusable or justifiable. A homicide is justifiable if in self-defense, or by order of Court. It is excusable when unintentional and the result of accident or misadventure. A definition of misadventure is frequently found in the books, it is true, in the language given to the jury by the Court below, viz: a homicide occurring without negligence and while in the performance of a lawful act, a definition which has come down from the days of Hale and Blackstone; but as applied by them and their contemporaries the lawful act by reason of which misadventure would not excuse an involuntary homicide must be *malum in se*. Homicide committed while engaged in an act, *malum prohibitum*, might still be excused if the result of misadventure, the unlawful act not being the proximate cause of the homicide. Foster's Crown Laws, p. 259; Hale P. C. 39; *State* v. *Horton*, 139 N. Car. 588; *People* v. *Barnes*, 182 Mich., 179.

Bishop in his work on Criminal Law, vol. 1, sec. 331, says: "In these cases of unintended evil result, the intent whence the act accidentally sprang must probably be, if specific, to do a thing which is *malum in se* and not merely *malum prohibitum.* Thus Archibald says: 'When a man in the execution of one act by misfortune or chance and not designedly does another act for which, if he had wilfully committed it, he would be liable to be punished—in that case if the act he was doing were lawful or merely *malum prohibitum* he shall not be punished for the act arising from misfortune or chance, but if *malum in se,* it is otherwise' ". *State* v. *Horton, supra; Potter* v. *State,* 162 Ind., 213; *Dixon Applt.,* v. *State,* 104 Miss., 410; *State* v. *Rawlings,* 191 N. Car. 265; *Com.* v. *Adams,* 114 Mass., 323.

In the last cited case the Court said: "It is true that one in the pursuit of an unlawful act may sometimes be punished for another act done without design and by mistake, if the act done was one for which he could have been punished if done wilfully. But the act to be unlawful in this sense must be an act bad in itself, and done with an evil intent; and the law has always made the distinction, that if the act the party was doing was merely *malum prohibitum,* he shall not be punishable for the act arising from misfortune or mistake, but if *malum in se,* it is otherwise."

The same rule is laid down in *State* v. *Horton supra* with a fuller discussion of its history and application.

There is more or less seeming confusion in the cases owing to some being brought under statutes expressly declaring homicides resulting while committing a misdemeanor to be manslaughter, thus abolishing any distinction between *malum in se* and *malum prohibitum.* A statute of this nature exists in very many of the states, but where no such statute, as in this state, we think the rule is, that where involuntary homicide happens while engaged in an unlawful act, if the unlawful act is *malum in se,* misadventure does not excuse, and the offense is manslaughter; or if *malum prohibitum,* and the unlawful act is shown to be the proximate cause of the homicide, especially if the statute prohibiting was for the purpose of safeguarding human life or safety, misadventure will not excuse; otherwise, if no reckless conduct and the unlawful act in no way contributed to the injuries, as where a person driving an automobile seventeen or even twenty miles per hour, when the statutory limit was only fifteen miles per

hour, no other element of negligence being present, and the deceased unexpectedly stepped in front of the automobile without warning, and at a point in a street where pedestrians might not be expected to cross, and it could not be found that the excess of the legal limit of speed at which the automobile was being driven in any way contributed to the accident,—though the contributory negligence of the deceased is no defense in a criminal prosecution,—a homicide under such conditions can not be held to be more than a mere accident or misadventure. *Dunville* v. *State,* 188 Ind., 373, 379; *People* v. *Barnes, supra,* pp. 197-9. Whether or not the unlawful act contributed to or was the proximate cause of the homicide is always a question for the jury.

In the instant case the jury should also have been instructed as to the distinction, and its effect upon the respondent's guilt, as between driving while intoxicated, and driving while merely under the influence of liquor. In the first case, being intoxicated in the public streets was always an evil thing and prejudicial by its very nature to the interests of society as tending to breaches of the peace, as was *malum in se, People* v. *Townshend,* 214 Mich., 267; *State* v. *Brown,* 38 Kan., 390, 397. Hence driving a motor car while intoxicated must be also deemed to be an offense *per se,* and a homicide resulting thereby is not excusable on the ground of misadventure; but use of the streets while somewhat, or in the language of the statute, "at all" under the influence of liquor, but not intoxicated in the ordinary meaning of that term, was never regarded as a wrongful act until prohibited by statute, and hence is only *malum prohibitum,* and a homicide resulting under such conditions may be excusable on the ground of misadventure, in case the violation of the statute in no way contributed in the homicide. Whether or not the driver was in fact intoxicated is also a question for the jury. *State* v. *Kendall,* 200 Ia., 483, 489; *Cannon* v. *State* (Fla.) 107 So. 360.

The general instruction, therefore, that in order to acquit of manslaughter, it must be found as a fact that the respondent was not engaged in an unlawful act, could not fail to prejudice the respondent, unless, as it is now urged, no verdict but that of guilty could have been arrived at under correct instructions.

But we do not think in a case of this importance this Court should so hold, even though it may feel that such a verdict was justified by

the evidence. By reason of the stress laid upon the importance of the doctrine of misadventure in the instructions of the presiding justice and the effects of an unlawful act, the jury may not have passed upon the real issues in determining the respondent's guilt, viz: whether he was conducting himself in such a reckless manner with such utter disregard of the safety of others as to be guilty of criminal negligence; or if engaged in an unlawful act and *malum prohibitum*, as it is admitted he was in respect to the speed at which he was driving, or if he was driving his car while under the influence of liquor,—if not intoxicated within the meaning of the statute,—whether the unlawful act was proximate cause of the homicide. *Com.* v. *Guillemette*, 243 Mass., 346; *State* v. *Goldstone*, 144 Minn., 405; *People* v. *Glasebrook* 320 Ill., 567; *State* v. *McIvor*, 31 Del., 123; *State* v. *Disalvo*, 121, Atl. (Del.) 661; *Crisp* v. *State* (Ala.) 109 So 287; *Dunville* v. *State supra; Jackson* v. *State*, 101 Ohio St., 152; *People* v. *Barnes*, 182 Mich., 179; *People* v. *Townshend, supra*; *Com.* v. *Deitrick, supra.*

In the latter case the Court said: "While we agree with the suggestion of the learned counsel for the Commonwealth that courts will not be astute to sustain technical objections in the trial of such cases when substantial justice has been accorded the defendant, it, however, has never been held that when clear error appears in the instructions to the jury upon the vital and controlling defenses set up, the appellate court can judicially say no harm was done the defendant."

And as the Court said in *People* v. *Gerdvine*, 210 N. Y., 184, 187; "An error which prevents proper consideration by the jury of the only question relied upon by the defendant is substantial not technical, and we have no right to disregard it, although we may approve of the verdict."

Nor was the error cured by any additional instructions given after exceptions to the objectionable portion of the charge were taken. The added instructions given, in no way clarified the situation. They were merely confirmatory of the instructions already given as to whether Bickford came to his death "in some unjustifiable manner as I have already tried to explain to you."

Exceptions sustained.

STATE

vs.

ROBERT S. THOMES

Cumberland. Opinion May 16, 1927.

In an indictment for embezzlement in a count brought under section 10, chapter 122, R. S., the language "Certain property, to wit; the sum of one thousand nine hundred fifty-seven dollars," does not constitute a sufficient description. Under this section the description must be as particular as in an indictment for larceny.

Such description however, in a count based on section 8, of chapter 122, is sufficient, as section 8 is modified by section 9, of the same chapter.

On general demurrer if any count in an indictment is good, the demurrer must be overruled.

On exceptions. Respondent was indicted for embezzlement and a general demurrer was filed, which was overruled, and exceptions taken by respondent. Exceptions overruled. Respondent to plead anew.

The case fully appears in the opinion.

Ralph M. Ingalls, County Attorney, for the State.

William H. Gulliver and William B. Mahoney, for the respondent.

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

PATTANGALL, J. Indictment for embezzlement. General demurrer. Demurrer overruled. Exceptions taken. Right to plead anew reserved.

Indictment contains forty-two counts. Fourteen distinct acts of embezzlement are charged, each under three counts. A consideration of the first three counts covers the case, the remaining counts

being repetitions of these three so far as legal form is concerned. The demurrer, being general, cannot be sustained if any one of the counts is sufficient.

The three counts must be considered separately.

First Count. Based on section 10, chapter 122 R. S. This count appears to contain all of the necessary averments with the exception of a sufficient description of the property involved. This description is confined to the words, "Certain property, to wit, the sum of of one thousand nine hundred fifty-seven dollars." Such a description would be sufficient to satisfy an indictment brought under section 8, modified, as that section is, by the provisions of section 9 (a proposition discussed fully later on), but insufficient in an indictment under section 10.

Under this section property should be described with the particularity required in an indictment for larceny. 9 R. C. L. 1290. An averment of the embezzlement of a certain amount of money in dollars and cents is insufficient. *Moore* v. *United States*, 160 U. S. 275. The necessity of describing the property with the same clearness and precision as in larceny flows from the idea that embezzlement is rather a species of larceny than an offense of a distinct nature. *State* v. *Thompson*, 42 Ark. 517. Embezzlement was not an offense at common law. It is purely a statutory crime. It partakes of the nature of larceny but differs from the latter in that the original taking in embezzlement is lawful or with the consent of the owner, whereas, in larceny the felonious intent existed at the time of taking. 3 Words and Phrases, Second series, 20. It has often been stated that embezzlement is larceny committed by a certain class of persons, without a trespass. *Commonwealth* v. *Parker*, 165 Mass. 539. The rule of pleading, concerning description of property in indictments under statutes such as section 10, is the same as in indictments charging larceny.

In an indictment for larceny, the descriptive allegation so many dollars, or so many dollars in money, is bad. Bishops New Criminal Procedure, Volume 2, Section 73. An indictment for stealing money is not sufficient if it states only the aggregate amount stolen without specification of the number, kind or denomination of the pieces unless the insufficient averment is cured by an allegation of lack of knowledge of these details on the part of the grand jury. *Common-*

wealth v. *Sawtelle,* 11 Cush. 144; *People* v. *Hunt,* 251 Ill. 446; *Merwin* v. *People,* 12 Am. Rep. 314.

This count follows the form prescribed in Whitehouse and Hills Criminal Procedure, a form applicable, so far as the descriptive portion is concerned, to indictments brought under section 8 as modified by section 9, but insufficient in an indictment under section 10, although erroneously applied thereto.

The first count in the indictment and those which follow it in form are defective and to these counts the demurrer should have been sustained.

Second Count. Based on section 8, chapter 122 R. S. All of the required elements of an indictment charging the taking and secreting property with intent to embezzle or fraudulently convert the same, are fairly and fully set forth in this count. It answers every demand of the statute and contains the additional allegations held necessary by our court.

In *State* v. *Stevenson* 91 Maine, 107, the requisites of such an indictment were stated to be that there should be set forth (1) Fiduciary relation, (2) Fraudulent conversion, (3) Larceny in apt phrase.

The last requirement is stated too broadly. One element in larceny is the original felonious taking. Such an averment in an indictment for embezzlement would be obviously objectionable, as such a taking would negative the necessary proposition of fiduciary relation, but with that limitation the rule may be accepted. Good authority demands that an indictment for embezzlement should conclude with the averment, "did feloniously, take, steal and carry away." *Commonwealth* v. *Pratt,* 132 Mass. 246. This was, without doubt, the averment which the court had in mind, in its use of the words "larceny in apt phrase."

The fiduciary relation must be declared. It is the basis of the charge. It was omitted in the indictment discussed in *State* v. *Cates,* 99 Maine, 68, and the indictment held good on demurrer. But the demurrer was argued on other grounds and this particular defect was not called to the attention of the court. Had it been the ruling would have been otherwise as the court recognized the need of such an averment in distinct and specific language in the closing paragraph of the opinion, altho the fact that the indictment did not contain it was overlooked.

The count under consideration contains every necessary allegation. The property involved is described as "certain money to the amount of one thousand nine hundred fifty-seven dollars." Such a description would be insufficient under section 10. It is sufficient under section 8 because of the modification of that section by section 9, which provides that, in the class and kind of embezzlements described in section 8, "it is sufficient to allege generally * * * * money to a certain amount."

Similar provisions are found in the statutes of nearly all of the states and have been so construed. *Commonwealth* v. *Bennett,* 118 Mass. 452; *Jackson* v. *State,* 76 Ga. 551; *State* v. *Glaze,* 177 Iowa 457; *Butler* v. *State,* 81 S. W. 743; *Walker* v. *State,* 23 So. 149; *State* v. *Quackenbush,* 108 N. W. 953.

Respondent urges that the phrase "lawful money of the United States" is a necessary part of the description. In cases under statutes similar to this it has been invariably held otherwise. *Watson* v. *State,* 64 Ga. 61; *State* v. *Noland,* 111 Mo. 473; *Mills* v. *State,* 53 Neb. 263; *Edelhoff* v. *State,* 5 Wyo. 19.

It is objected that there is no allegation that the embezzlement took place without the "knowledge" of the owner. No such allegation is necessary. The words of the statute are "without his consent." The indictment follows the statute.

It is argued that altho the plain allegation appears that the property in question consisted of "certain money to the amount of one thousand nine hundred and fifty-seven dollars", the indictment is bad because it refers to the property as "said money and property." There is no confusion there. The precise property taken with intent to embezzle is definitely and sufficiently described. Money is property. The words, in the sense in which they are used and in view of the context, are synonymous. There was no necessity to use both of them. But no legal fault arises by their use. Demurrer does not lie to the second count, nor to those which follow it in form.

Third Count. Also based on section 8 and differing from the second count in that it charges the actual embezzlement of the property described instead of the taking with intent to embezzle.

These two counts could have properly been combined. *State* v. *Cates,* 99 Maine, 68. But it is not improper to separate them. Like the second count, the third count must be construed in the light of

the modifying provisions of section 9. So considered, all of the necessary allegations appear. The description of the property is "certain property and money of great value, to wit, of the value of one thousand nine hundred and fifty seven dollars." It is objected that this description is indefinite and ambiguous because it combines "money" and "property."

Any possible ambiguity is removed by the words which follow those quoted above; "did feloniously embezzle and fraudulently convert the same (meaning said sum of one thousand nine hundred and fifty-seven dollars) to his own use", and by the conclusion, "said money, said sum of one thousand nine hundred fifty seven dollars, feloniously did take, steal and carry away." There is no ambiguity when the count is taken as a whole. No demurrer lies to it nor to those following it in form.

Demurrer sustained as to the first count and those following its form. The remaining counts being adjudged good the entry should be,

Exceptions overruled.
Respondent may plead anew.

STATE

vs.

ERNEST L. SMALL.

Cumberland. Opinion May 18, 1927.

A municipal by-law requiring the removal of the snow from sidewalks within a limited time after it ceases to fall is an exercise of the police powers, and, if not clearly unreasonable in its requirements, violates no provision of the constitution.

The burden is on the objecting party to overcome the presumption of the reasonableness of a municipal by-law, and if it does not appear on its face, evidence must be produced to show that it is clearly unreasonable in its operation.

No evidence being furnished in the case at bar as to actual conditions, the only question is whether in a city the size of Portland, a by-law requiring the removal of snow from sidewalks in the daytime within three hours after it ceases to fall is clearly unreasonable.

The time limit for removal in the by-laws of this nature is a matter resting in the sound judgment of the municipal legislative body, and the Courts will not interfere, unless the limit on its face or from evidence of the local conditions is clearly unreasonable.

On report. A complaint against respondent alleging failure to comply with the requirements of an ordinance passed by the City of Portland relative to the removal of snow from footways and sidewalks. Respondent was found guilty in the Municipal Court of Portland and appealed to the Superior Court, and the cause was reported to the Law Court on an agreed statement of facts. Judgment for the State.

The case fully appears in the opinion.

H. C. Wilbur, for the State.

Leo Gardner Shesong, for respondent.

SITTING: WILSON, C. J., PHILBROOK, DUNN, STURGIS, BASSETT, JJ., MORRILL, A.R.J.

WILSON, C. J. A complaint under an ordinance of the city of Portland requiring owners, tenants, or occupants of property abutting on streets where there are footways or sidewalks to remove the snow from the sidewalk in front of their premises within a limited time after it ceases to fall. The ordinance reads as follows:

"Sec. 1. The owner, tenant, occupant or any person having the care of any building or lot of land bordering on any street, lane, court, square or public place within the city where there is any footway or sidewalk shall after the ceasing to fall of any snow, if in the daytime, within three hours, and, if in the night-time before ten o'clock of the forenoon succeeding, cause such snow to be removed from such footway or sidewalk."

For failure to comply, a penalty is provided of a fine of not less than two nor more than ten dollars, and an additional sum of not less than one not more than ten dollars for every hour the snow shall be permitted to remain on such footway or sidewalk beyond the limit fixed for its removal.

The respondent pleaded not guilty and the case was reported to this court on an agreed statement with a stipulation in substance, that if the ordinance is within the police powers vested in the city of Portland and is reasonable, valid, and a constitutional exercise thereof, judgment is to be entered for the state.

While there is a conflict among the authorities as to whether such municipal by-laws are valid, the weight of authority sustains them as a proper exercise of the police powers. *In Re Goddard*, 16 Pick., 504; *Clinton* v. *Welch*, 166 Mass., 133; *Carthage* v. *Frederick* 122 N. Y., 268; *Kenyon* v. *Fidler*, 28 R. I., 164; *City of Helena* v. *Kent*, 32 Mont., 279; *City of Lincoln* v. *Janesch* 63 Neb., 707; *Flynn* v. *Canton Co.*, 40 Md., 312; *Reinken* v. *Fuehring*, 130 Ind., 382; *State* v. *McMahon*, 76 Conn., 97; *No. Pac. Ry.* v. *Adams Co.*, 78 Wash., 53; 51 L. R. A. (N. S.) 276 Note; Dillon Mun. Corp. vol., 2, sec. 713.

It is true that such burdens have some attributes in common with taxes for the general repair of streets, and the cases holding such by-laws invalid to be decided on the ground that the burdens thus imposed are not equally apportioned, *State* v. *Jackman* 69 N. H., 319:

McGuire v. *Dis. of Col.*, 24 App. Cases D. C. 22; *Gridley* v. *Bloomington*, 88 Ill., 554.

The more generally accepted rule, however, treats such municipal by-laws as police regulations. *In re Goddard supra*, and cases above cited. Even if viewed as a form of taxation, it must be of the nature of local assessments, which by eminent authorities are also held to be an exercise of the police powers, *Reinken* v. *Fuehring supra*, p. 384; Cooley on Taxation 2nd Ed. pp. 588, 647; Cooley's Cons. Law 6 Ed., p. 726; Tiedman Mun. Corp., sec. 259 p. 500; or at least are not governed by the same constitutional limitations as taxes for general purposes, Ill. *Cen. R. R. Co.* v. *Decatur*, 147 U. S., 190; 29 C. J., 742 note 43.

The only question, therefore, for the consideration of the Court under the agreed statement is whether the by-law in question is a reasonable exercise of such powers. While a different rule prevails as to legislative acts, *State* v. *Phillips*, 107 Me., 249, the power of the Court to declare a municipal by-law, enacted under general authority, invalid, if unreasonable, is unquestioned, *Welch* v. *Swasey*, 193 Mass., 365, 376; *St. Louis* v. *Theatre Co.*, 202 Mo., 690, 699; 6. R. C. L., 244. "It is a power, however, to be cautiously exercised", *Com.* v. *Robertson*, 5 Cush., 438. When doubt exists, it should be resolved in favor of the validity of the by-law. *In re* McCoy, 10 Cal. App. 116.

As a general rule, there is a presumption in favor of the reasonableness of a municipal by-law, and the burden is on the objecting party to overcome this presumption. If it does not appear on its face, the objecting party must produce evidence to show that it is in fact unreasonable in its operation. 19 R. C. L., 808; *Laurel Hill Cem.* v. *San Fran.* 216 U. S., 358; *Greensboro* v. *Ehrenreich* 80 Ala., 579; *State* v. *Trenton*, 53 N. J. L. 132; *Iowa City* v. *Glassman*, 155 Ia., 671; *Chicago, etc. R. R. Co.* v. *Carlinville*, 200 Ill., 314; *City of Chicago* v. *Shaw Livery Co.*, 258 Ill., 409; *Ex rel Knoblauch* v. *Warden*, 216 N. Y., 154, 162. Ann. Cases, 1916 B 502 note.

The agreed statement in the case at bar contains nothing but the by-law itself bearing on this point. It, therefore, becomes a question of whether upon its face it is unreasonable. The chief ground relied upon by the respondent is the shortness of time allowed for the removal of snow when it ceases to fall in the daytime. Three

hours for such removal may work a hardship under some conditions, as in case of laborers or clerks living in suburban districts and whose hours and place of employment take them some distance from home during the daytime, while ordinarily in the compact of a city it would not be unreasonable.

The time limit for removal in by-laws of this nature, however, is a matter resting in the sound judgment of the legislative body of the municipality. The Court will not interfere simply because in its judgment a longer time should be allowed, unless the time fixed is so short that, on its face, or upon facts shown in evidence, it appears to be clearly unreasonable. As between three hours and four hours or even five hours, which have been held reasonable limits, *Kenyon* v. *Fidler supra, Clinton* v. *Welch supra,* we can not say, as a question of law, that the line between reasonableness and unreasonableness has been passed.

It might be even a greater hardship to require non-resident owners of undeveloped property in the suburban districts of a city, abutting on footways or sidewalks, or owners residing in other parts of a city from such undeveloped property to remove the snow from the sidewalk in front of such premises within the time fixed; or in case non-resident owners failed, to require adjoining resident owners in sparsely settled districts to comply at all.

A by-law, general in its scope, may be reasonable when applied to one state of facts and unreasonable when applied to circumstances of a different character, *Nicoulin* v. *Lowery,* 49 N. J. L., 391, 394; *Penn. R. R. Co.,* v. *Jersey City,* 47 N. J. L., 286.

This Court, however, can not take judicial cognizance of the condition of the streets of a city, or the extent to which abutting land is developed in any section, or the public necessities at any given place on a given street, *St. Louis* v. *Theatre Co. supra.*

Under certain conditions in a city of the size of Portland, such a by-law as the one here involved may be a reasonable regulation. It can not be said without evidence of conditions that, by reason of its general application, it, of necessity, works unreasonable hardships and is, therefore, invalid.

Under the stipulations of the parties, judgment must be entered for the state.

Judgment for the State.

STATE

vs.

CHARLES W. GUPTILL

York. Opinion May 21, 1927.

Where self-defense is the issue, evidence of some overt act indicating the deceased was the aggressor and the respondent had reasonable grounds of belief that he was in imminent danger must be shown as a basis for the introduction of threats by the deceased, in order to render the exclusion of such evidence reversible error.

All conversation between a respondent and the deceased at the time of the homicide and leading up to it, whether of threats or otherwise, indicating ill will between them, is admissible as a part of the res gestae.

The unqualified exclusion of conversation in the case at bar of an altercation between the respondent and the deceased just prior to the homicide and which according to the respondent continued up to the moment of the shooting, where the only issue was as to who was the aggressor was prejudicial error.

Even though the Appellate Court may feel that the result might have been no different, it can not regard as harmless an erroneous ruling that may have withheld from the jury evidence bearing upon the only issue relied upon in his defense by a respondent on trial for his life and say as a matter of law that the evidence, if admitted, might not have formed a basis for a reasonable doubt in the minds of the jury.

On exceptions. The respondent was indicted for murder for shooting Fay C. Tibbetts on January 22, 1925, at Berwick. During the trial certain testimony as to threats made by the deceased toward the respondent was excluded, the defense being self-defense, and respondent excepted.

Exception sustained.

The case sufficiently appears in the opinion.

Raymond Fellows, Attorney General, and Perley H. Ford, County Attorney, for the State.

William F. Mathews and Sidney F. Stevens, for respondent.

SITTING: WILSON, C. J., PHILBROOK, DUNN, DEASY, STURGIS, BASSETT, PATTANGALL, JJ., MORRILL, A.R.J.
MORRILL, A.R.J., concurring in the result.

WILSON, C. J. The respondent was indicted for killing one Fay C. Tibbetts on January 22nd, 1925 by shooting him with a revolver. During the course of the trial offers of proof of threats by the deceased toward the respondent were made, but excluded. The case is before this Court on exceptions to the exclusion of this testimony.

During the year previous to the homicide, the respondent had worked for the deceased on his farm as a laborer. According to the testimony of the respondent, though denied by the wife, there had grown up an improper intimacy between himself and the wife of the deceased, conclusive evidence of which came to the knowledge of the deceased about the first of December, 1924, which resulted in the immediate discharge of the respondent from his employment.

Following his discharge the state claimed that the respondent worked in New Hampshire, but on January 20th, under circumstances indicating some unusual purpose in mind, returned to the house of his grandfather in the village of Berwick in this state, where he made his home when not away at work.

On the morning of January 22nd, he left his grandfather's house about eight o'clock taking a revolver belonging to his uncle and with the understanding that he was to meet his grandfather somewhere in the village and accompany him into the woods for the day to cut wood, which would take him past the Tibbett's home.

Instead of meeting his grandfather he stopped at two places one of them a barn in which he remained, evidently to pass away the time, until nearly ten o'clock when he started on foot along the road leading past the Tibbett's home. He knew the daily custom of the deceased leaving his home about half past eight o'clock to bring milk into the village. On this morning for some reason the deceased was delayed in leaving his home, and did not start until about ten o'clock.

According to the state's contention, as the respondent finally made his way along the road in the direction of the Tibbetts' house he turned into a wood road and after leaving the main road for about two hundred feet concealed himself in the wood until the deceased in his team came along, when the respondent came out, and either from

the rear fired at the unsuspecting driver three times, two of the shots taking effect, or the deceased upon seeing the respondent come out of the woods, stopped his team, and while stopped there, the respondent drew his revolver and shot him.

At the time of the shooting the father of the deceased in a team accompanied by two other sons was approaching the scene of the shooting approximately half a mile away. After the shots, the horses of the deceased started to run, whereupon the respondent ran after them, and as he ran alongside, put his revolver in the body of the cart or pung, seized one of the reins which drew the horses outside of the traveled road where they finally stopped just as the father of the deceased came up.

The respondent at the time admitted the shooting to the father and brothers and later told an officer that they had an altercation over a woman, and at another interview that he shot him to get even with him; but so far as the record shows, until he took the stand in his defense never stated or claimed that he had any apprehension of bodily harm from the deceased by reason of any threats or of any assault attempted upon him by the deceased at the time of the shooting.

Three exceptions only to the admission of testimony were perfected, two of which relate to alleged threats made by the deceased against the respondent and another to the conversation between the deceased and respondent at the time of his discharge, the purpose of which according to the respondent's counsel was to show that the respondent was in fear of the deceased.

The first exception was to the exclusion in cross-examination of the grandfather of the respondent by his own counsel of evidence of alleged threats by the deceased against the respondent, which it was not claimed at the time were ever communicated to the respondent; nor does it appear from the record that the Court at this time was informed that the claim was later to be made that the deceased was the aggressor when the shooting occurred, or that they were offered in corroboration of other communicated threats later to be proved. Wharton's Criminal Ev. (10th Ed.) Vol. II p. 1712-13, Sec. 912; Underhill's Crim. Ev. (3rd Ed.) Sec. 506. Under the circumstances disclosed by the record they were, therefore, properly excluded.

While the conversation between the deceased and the respondent

at the time of his discharge was offered after the defense had opened and presumably outlined to the Court and jury, the record does not disclose the nature of the evidence, whether of threats of bodily harm or merely expressions of natural resentment at the discovery of the alleged intimacy between the respondent and the wife of the deceased; and though in the proper order it might have been admissible, it is unnecessary to pass on it, as we think the third exception must be sustained.

The respondent himself finally took the stand in his own behalf, and related his story of what occurred on the morning of January 22nd. According to his testimony he was desirous of avoiding a meeting with the deceased because of the talk which occurred when he was discharged; that he knew the hour when the deceased customarily came to the village with his milk, namely about 8:30; that when in passing down the road about 10 o'clock upon seeing the deceased approaching in the distance on his team, he entered the wood road, thinking he had not been seen, or at least recognized by the deceased; that when opposite the wood road, the deceased stopped his team and followed the respondent's tracks in the snow to where he was concealed in the woods, where a verbal altercation took place. Counsel then offered respondent's testimony as to the nature of the altercation as showing the relations existing between the parties at the time, which was excluded. Respondent further testified that the deceased went back to his team, the respondent following behind; and after the deceased had mounted his seat on the team preparatory to starting, the respondent standing beside the team, the deceased then, according to the respondent, called him some name—at this point the respondent was interrupted by his own counsel with an instruction that their conversation was excluded, though at this time it was clearly admissible—and stooped over, as the respondent thought to pick up the reins; instead, he presented a revolver and fired at the respondent, whereupon the respondent drew his revolver and fired at the deceased with the results above stated.

That the story of the respondent is contradicted by other witnesses and presents some improbabilities may be true; but whatever occurred from the time of their meeting on the morning of the shooting, wherever it took place, whether in the road, as the state claims, or in the woods, as claimed by the respondent, is a part of the *res gestae*

as having a direct bearing on who was the aggressor, the only disputed issue in the case. Evidence on either side as to what conversation took place at this meeting should have been admitted as throwing light upon the acts of either. *People* v. *Taylor*, 177 N. Y., 237; Bish. Crim. Pro. Vol. I, 1084-85. *State* v. *Pike*, 65 Me., 111, 114; *State* v. *Forsythe*, 89 Mo., 667, 672; *State* v. *Elvins*, 101 Mo., 243, 246; *State* v. *Walker*, 77 Me., 488.

As the Alabama Court expressed it in the case of *Collins* v. *State*, 138 Ala., 57, 61: "In proving the homicide it was competent to show in connection with the killing all the attendant circumstances; who were present, what was said and done, and every other fact connected with the transaction and so related to form a part of the *res gestae*. So, too, any chain of facts or circumstances continuous in their nature leading up to and eventuating in the homicide. It may be said generally that all parts of one continuous transaction though not shown to have any immediate connection with the offense—the culmination of all the circumstances and facts proximate to the consummation of the crime which tend to shed light on the main inquiry—are admissible."

So far as the respondent's story of what took place at this meeting is entitled to weight, he has the undoubted right to have all admissible facts passed on by the jury. What credence shall be given to it is for the jury.

It may be that the result would have been no different; but without complete knowledge of the nature of the evidence other than alleged threats were made by the deceased just prior to the shooting, this Court can not say that the entire conversation which took place on this morning may not form a basis for a reasonable doubt in the minds of the jury as to who was the aggressor, especially in the light of the resentment the deceased may instinctively have felt if the respondent's account of the reason for his discharge was believed, upon finding the respondent on his way toward the home he had dishonored and in hiding until the husband had passed on his way for his daily trip to the village.

In any event in the eye of the law the respondent was on trial for his life and is entitled to have his account of all that took place at the eventful meeting between himself and the deceased passed upon by a jury. *State* v. *Walker*, 77 Me., 488, 492

Exception sustained.

LOUISE M. MILLS

vs.

C. EARL RICHARDSON

L. NEIL MILLS

vs.

SAME

Cumberland. Opinion June 4, 1927.

Where facts can be furnished only by witnesses having special opportunity for observation or special training, witnesses are "experts", "skillful or experienced persons", and their testimony is "expert evidence." It is the same as ordinary testimony as to facts.

Witnesses possessing special skill or knowledge may give their opinions on issues on which ordinary men are incapable of drawing conclusions. Such expressions of opinion is called "expert evidence."

Exception to a refusal to direct a verdict for defendant is waived by the prosecution of a motion for a new trial before the presiding justice; not so in case of a general motion before the Law Court.

Where different inferences are deducible from the same facts, it cannot be said that the plaintiff has maintained the proposition on which alone there can be recovery.

In the case at bar a careful examination of all the evidence in the light of expert testimony of both kinds clearly shows that there were conditions resulting from childbirth, which could, as consistently as the douche, and, as time went on with greater consistency have caused the trouble complained of.

While there was evidence from which the jury could conclude there was some injury from the douche, it seems clear that the effect could not have been long continued and that the jury, obviously considering that the douche caused practically all of the conditions, erred in passing a point beyond which the alleged cause could not by a preponderance of evidence be sustained and were led by a misunderstanding of the duty imposed on the plaintiff or by sympathy to overestimate the damage.

On exceptions and motion by defendant. Two actions on the case tried together, one brought by a wife and the other by her husband, against the proprietor of a hospital, for damages caused by alleged negligence of a nurse in giving to the plaintiff in the first case after childbirth a douche. Verdicts of $2000 for the wife and $500 for the husband were returned. Defendant excepted to a refusal to direct a verdict for defendant and to give requested instructions and to instructions given, and also filed a general motion. Exceptions overruled. Motion overruled if plaintiff remits, otherwise new trial granted.

The case is fully stated in the opinion.

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

Pattangall, Locke & Perkins, for defendant.

SITTING: PHILBROOK, DEASY, STURGIS, BASSETT, JJ., MORRILL, A.R.J.

BASSETT, J. Two actions on the case tried together and brought by the plaintiff, Louise M. Mills, and her husband against the defendant as the proprietor of a hospital for damages caused by the alleged negligence of a nurse in giving Mrs. Mills after childbirth a douche, which, either because it contained an excessive amount of bichloride of mercury or because it was too hot, burned her body. Pleas, the general issue. Verdicts for Mrs. Mills $2000 and Mr. Mills $500.

The case comes up to this Court on exceptions to the refusal of the presiding justice to grant the motion of the defendant, made at the close of the evidence, to direct a verdict for the defendant; on exceptions to the refusal of the presiding justice to give instructions as to the kind of evidence necessary to prove the alleged negligence and its causing the results complained of, and to the instructions given concerning such evidence; and on general motion.

Exceptions:

First. Refusal to direct a verdict for defendant.

These cases have been tried once before with verdicts for the plaintiffs, which were set aside upon general motion (125 Me. 12). It

does not appear from the record that in the court below the question was raised whether the case presented below was substantially the same as it was before with no material change, no material strengthening, and on that ground a verdict for the defendants should have been ordered. The question therefore before us is "a demurrer to the evidence", as it appears in the record of this case, and whether upon such evidence a verdict for the plaintiff could be sustained. *Dyer* vs. *C. C. Power and Light Co.* 119 Me. 224.

The decision stated (125 Me. 15) that at the previous trial it was burning by an excessive amount of bichloride of mercury, which Mrs. Mills said caused the injuries sustained by her. That cause of burning the presiding justice eliminated by his charge and submitted only the question whether she was burned by a douche administered at too high a temperature. No exception was taken by the plaintiffs to this elimination, which was equivalent to ordering a verdict for the defendant on that alleged cause of injury.

But differing and agreeing in details, as the testimony did, as to how the douche was administered, its temperature, the immediate effects on Mrs. Mills, what was then done, the discharge on the next day of the nurse, a young girl of 18 who had entered training six months before, the admitted expression of regret by the defendant, the subsequent events, there was evidence from which the jury, if they believed it, could conclude that the douche was too hot and Mrs. Mills received thereby some injury. The exception is not sustained.

Second. Refusal to instruct and the instructions given.

The defendant requested the instruction that the plaintiff must prove (1) That the nurse was negligent. (2) That her want of skill and care caused the injury of which the plaintiff complains by expert testimony.

The Court refused and instructed as follows:

"I do not think I can give you that instruction as a general rule, altho in this case the testimony bearing upon the question must come from the experts largely and the nurse, because the results that follow from injuries of that kind perhaps can be shown only by medical testimony, until you hear the testimony of the parties themselves, as to what they experienced and what has been observed. These facts you can take into consideration and the testimony as to the

facts, and weigh the same, if you believe them, as to whether they resulted from a certain kind of treatment. The ordinary layman might not be able to furnish any testimony on that point and it may come of necessity from physicians, men of experience, who have studied these matters, men who are the only ones to assist you or guide you or furnish you any basis for consideration of anything of this kind. But in so far as any evidence of a layman is introduced from which you can draw a reasonable conclusion that any of the ills and conditions, of which Mrs. Mills complained, were facts which existed, that they can be inferred from the testimony of Mrs. Mills or her mother, you would be entitled to give credence or weight, and, if you find that the injury she suffered from, came from that, give it weight. As to whether the injuries she suffered would follow the douche, I cannot give you the general instruction that you can only find that the injury must be shown by expert testimony alone. Of course that must necessarily be the chief source from which that kind of testimony must come." We think the exceptions cannot be sustained.

The facts in any case may be in part or largely of the kind which can be furnished only by witnesses who have had special opportunity for observation or special training or special skill in observing and obtaining them. Such witnesses are experts, "skillful or experienced persons." Their testimony is and is called "expert evidence". It is however the same as ordinary testimony as to facts, but on the particular topic under consideration general experience is not sufficient, special experience is needed.

The question next arises, what inferences or conclusions are to be drawn from the facts. When the nature of the question at issue is such that men of ordinary experience and intelligence may be supposed to be incapable of drawing conclusions from the evidence without the assistance of some one, who has special skill or knowledge in the premises, witnesses possessing such skill and knowledge are permitted to give their opinions. *Conley* vs. *Gas Light Company*, 99 Me. 60. Such expression of opinion is called "expert evidence" and is the kind of evidence usually meant by the use of that phrase. But such testimony "is only an expression of opinion and is received upon the theory that their special learning and skill may render their opinion of service to the jury." *Johnson* vs. *Gas Light Company*, 125 Me. 89.

Upon expert evidence of the second kind court and jury may be more or may be less dependent according to the nature of the case. "In many cases expert evidence tho' all tending one way is not conclusive upon the court and jury but the latter as men of affairs may draw their own inferences from the facts and accept or reject the statement of experts. But such cases are where the subject under discussion is on the border line between the domain of general and expert knowledge, as for instance where the value of land is involved or where the value of professional services are in dispute. There the mode of reaching conclusions from the facts when stated is not so different from the inferences of common knowledge that expert testimony can be anything more than a mere guide. But when the case involves the highly specialized art of treating an eye for cataract or for the mysterious and dread disease of glaucoma with respect to which a layman can have no knowledge at all the court and jury must be dependent on expert evidence. There can be no other guide and when want of skill or attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury." *Erving* vs. *Goode*, 78 Fed. 442.

The requested instruction would limit the proof of both issues, negligence and its cause of the injuries to "expert testimony". What kind, expert testimony as to fact or expert opinion as to conclusions to be drawn from facts? We think that both kinds must have been meant, but that proof of either issue could not properly be limited to such evidence.

There were a great many facts requiring proof of expert testimony of the first kind. The douche followed childbirth and was to be applied to the interior of the body. The structure of the interior, its condition after childbirth, before and after the douche, the susceptibility to injury by burning of the interior as compared with exterior parts, the normal conditions following childbirth, other conditions which may follow and how commonly and with what results, all these facts were to be furnished by experts and from them conclusions to be drawn on each issue.

The issue of negligence did not require expert evidence of both kinds exclusively. The treatment to be given Mrs. Mills was not a matter of "a highly specialized art." It consisted of washing by water, hot but not too hot, containing a proportion of another liquid

and flowing by gravity from a receptacle through a rubber tube with perforated nozzle. It did not require the services of a physician or of a trained nurse. Some of the fluid penetrated the interior, some of it wet the exterior as the tube was withdrawn. The immediate and subsequent sensations of Mrs. Mills, the appearance of the exterior as testified to by Mrs. Mills, and her mother, were evidence, from which the jury could draw conclusions as to the heat of the liquid and its effect, which the exercise of ordinary care and prudence by the nurse could have prevented.

On the issue of the cause of the injuries complained of, whether the conditions, from which Mrs. Mills claimed to suffer immediately, and over an extended period of time, were due to the douche or childbirth, expert evidence of both kinds must of necessity have made a large and important part of the proof increasingly so with the passing of time. But it was not exclusive proof for the testimony of Mrs. Mills and her mother was evidence from which the jury could conclude that there was immediately some burning of the exterior and also of the interior and thereby a line of causation set up, the limit of which in the intervening period was one of the issues.

The jury were correctly instructed as to the sources of the proof and the proper amount of weight to be given to it.

Motion.

An exception to the refusal to direct a verdict for the defendant is waived by the prosecution of a motion for a new trial before the presiding justice, as otherwise the defendant would be seeking the same remedy through two tribunals, getting the benefit of the second if he failed in the first. *State* vs. *Simpson*, 113 Me. 29. The exception is not waived by the prosecution of the general motion before the Law Court. The exception and motion are not inconsistent. They each raise the same question, whether on the evidence *a* verdict can be sustained. The general motion may also, as in this case, raise the further question whether *the* verdict can be sustained.

The former question has been determined by overruling the exception to the refusal to direct a verdict.

As to the second question Mrs. Mills claimed that because of the douche she suffered much pain and discomfort, was at first unable to perform her marital duties, suffered inconvenience, nervous in-

digestion, nervousness, sleeplessness, and these continued for several years. She left the hospital two days after the douche, as she had planned, went to her mother's home in Skowhegan, remained there until she returned to her home in Portland the first of June. She was there examined by a physician in July, was treated by him and at different times by two others. At the first examination a leucorrhoeal discharge at the outlet of the uterus was found. Mrs. Mills claimed that all of her ills was caused by the douche. Mr. Mills made, as stated, on account of his wife's condition after her return home and during the period of about six years, payment for doctors bills amounting to $112 and for household services because of her inability amounting to $200. He claimed to recover for expenditures over the whole period. Yet for these serious and long continuing results of the douche neither he nor his wife made any complaint or said anything to the defendant until a few days before an action would be barred by the statute of limitations.

A careful examination of all the evidence, in the light of the expert testimony of both kinds of all the physicians, clearly shows that there were conditions of the parts, resulting from the childbirth, which could, as consistently as the douche and, as time went on, with greater consistency have caused the conditions and troubles complained of. Where different inferences are deducible from the same facts and are equally consistent with those facts, it cannot be said that the plaintiff has maintained the proposition on which alone there can be recovery. *Mosher* vs. *Smithfield*, 84 Me. 337.

While there was evidence from which the jury could conclude there was some injury from the douche, it seems clear that the effect could not have been long continued, and that the jury obviously having considered that the douche caused practically all of the conditions of which Mrs. Mills complained erred in passing a point beyond which that alleged cause could not by a preponderance of the evidence be sustained. The error may have been due to misunderstanding the duty imposed on the plaintiff or to sympathy which may also have led them to overestimate the damages. We are convinced they are excessive and that Mrs. Mills will be fairly compensated by the sum of five hundred dollars and Mr. Mills by the sum of two hundred dollars.

The entry therefore will be

Motion overruled, if plaintiffs within thirty days from filing of this mandate remit all of the verdicts in excess of $500 and $200 respectively; otherwise motion sustained and new trial granted.

PORTLAND NATIONAL BANK

vs.

HELEN G. BROOKS, ET AL

Cumberland. Opinion June 8, 1927.

An attempted contract to pass a gift after death is null and void, being in violation of the law as to transfer of property by gift as well as the Statute of Wills.

A deposit of funds of A in a bank in the name of A and B with right of survivorship, each with a right to draw said deposit, in the event of the death of A is a part of the estate of A.

In the at bar case the donor retaining the right to use the deposit for her own use during her life prevents a completed gift inter vivos, and to permit the deposit to go to Helen G. Brooks would be in violation of the statute governing the testamentary disposition of property

On appeal. A bill of interpleader to determine title to a deposit in plaintiff bank standing at the time of the death of the depositor, Mary G. Wilson, in her name and that of defendant, Helen G. Brooks and payable to "either or the survivor." Upon a hearing it was decreed that the deposit should be paid to Helen G. Brooks and the administrator of the estate of Mary G. Wilson, took an appeal. Appeal sustained. Decree below reversed and the case remanded for disposition in accordance with the opinion.

The case fully appears in the opinion.

Sydney B. Larrabee, for plaintiff.

Charles J. Nichols, for administrator of estate of Mary G. Wilson, appellant.

Lauren M. Sanborn, for Helen G. Brooks, appellee.

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

BARNES, J. In this Bill of Interpleader, brought by the bank, and before this court on appeal from the decree of a single justice, the parties concerned financially are Helen G. Brooks, sole sister and heir at law of Mary G. Wilson, deceased, intestate, and Harry H. Wilson, widower and administrator of the estate of said Mary G. Wilson.

At the decease of the intestate, the bank held a deposit to the credit of Mary G. Wilson and Helen G. Brooks, above-named, "payable to either or the survivor," and later, after hearing, the justice decreed that the deposit, less costs in this action to be taxed for the bank, should be paid to Helen G. Brooks.

From this decree the administrator appealed. The learned justice who issued the decree gave no expression of his reasoning or of the facts upon which he founded the decree, and his decision, in view of the law of this state as recently reviewed and expounded in Garland Applt. from Decree of Judge of Probate, Garland Applt., 126 Me. 84, seems clearly erroneous.

The facts, briefly stated, are as follows.

The deposit in question was instituted many years ago while Mary G. Wilson was a resident of Portland, in this state.

In the early spring of 1925, Mrs. Wilson was living in Newark, New Jersey, and Mrs. Brooks, in Wollaston, in Massachusetts.

Mrs. Wilson was suffering from a malignant disease, and upon the invitation of Mrs. Brooks was taken to the home of the latter, to receive treatment from a Boston physician, her husband remaining in New Jersey, where his business was located.

At the request of Mrs. Wilson the bank mailed to her an order that the name of her deposit be changed to the form recited above, and such order, duly signed, was received by the bank shortly after June 25, 1925, by it accepted and acted upon.

Two withdrawals from the deposit were made during the illness of Mrs. Wilson, the latter on August 6, 1925, and on the 17th of that month Mrs. Wilson died.

The testimony shows that the expense of nurses, physician and funeral were paid by the husband; that he gave Mrs. Brooks a sum of money, "to secure help with the housework", and that he gave to the family a costly present, "for their hospitality."

There is no evidence that Mrs. Brooks gave consideration to her sister for the deposited funds.

There can be no doubt that the laws of Maine govern interpretation of the obligation of the bank and the rights of the claimants of the deposit. The depositor requested a modification of the contract of deposit; the bank stipulated certain conditions; depositor tendered assent in writing and the bank confirmed the change, at Portland, in this state. Such a contract is a Maine contract. *Bell* vs. *Packard*, 69 Me. 110; *Holt* vs. *Knowlton*, 86 Me., 459; *Emerson Co.* v. *Proctor*, 97 Me., 364.

Under the law of this state, as expressed in Garland, Applt., supra, the complainant bank is to pay to the estate of Mary G. Wilson the balance of the deposit, with interest to date of such payment computed at the rate paid by the bank on similar accounts; but by virtue of P. L., 1923, chap. 144, sec. 25, the bank can not be compelled to account for any sums paid to Helen G. Brooks before demand made upon the bank in behalf of the estate of Mary G. Wilson.

Decree reversed, except as to costs and reasonable counsel fees to the plaintiff, and without costs to either defendant; costs and counsel fees of the plaintiff to be fixed by the Court below.

Case remanded for decree in accordance with this opinion.

FRED L. EDWARDS

vs.

JOHN C. GOODALL

Oxford. Opinion June 9, 1927.

A judgment, an indivisible part of which rests solely and merely upon hearsay, cannot legally be sustained.

In case of a judgment in a jury waived case in an action at law, error in the admission of evidence is not a ground for reversal, if there is sufficient legal evidence to support the judgment, since it will be presumed, if nothing appears to the contrary, that the judge disregarded incompetent evidence. Not so where the trial of an action at law is by jury, as such error may be a ground for reversal.

In the instant case the judgment is not separable into parts. Hearsay, and nothing else, received against objection, is to an appreciable extent the sole support of a single complete thing. In other words, the competent evidence fails to extend to the entire judgment. Where such evidence fails, the judgment which must stand or fall in toto, is not legally sustained.

On exceptions by defendant. An action in assumpsit to recover damages which plaintiff alleges he suffered by reason of the refusal of defendant to receive and pay for certain pine lumber bargained and sold to him by plaintiff at an agreed price, which plaintiff eventually was obliged to sell at a less price. The action was tried by the presiding justice without the intervention of a jury. During the trial five exceptions were taken by defendant, one of which was to the admission of alleged hearsay evidence, which alone was considered by the court. Judgment for $2,413.26 was awarded to plaintiff. Exception sustained.

The case fully appears in the opinion.

Henry H. Hastings, for plaintiff.

Alton C. Wheeler, for defendant.

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

DUNN, J. This action was tried without the intervention of a jury. R. S. chap. 82, sec. 53.

In the declaration it was alleged that the plaintiff was unpaid for piling lumber which he had previously bargained and sold to the defendant, and that, when the defendant later refused to receive delivery of certain of the lumber, the plaintiff incurred loss in consequence of the sale and delivery of the refused lumber to another buyer for a less price.

Judgment was for the plaintiff, the award being general in the sum of $2,413.26.

In the course of the trial five exceptions were saved for the defendant, and these have been argued.

One exception makes the point that the judgment as an entirety has no sufficient support in legal evidence inasmuch as an indivisible part of the whole judgment rests merely upon hearsay. That exception has merit.

An important question at the trial was what amount of lumber the plaintiff had delivered to the new purchaser, load by load, by way of the railroad.

Concerning some of the loads, there is to show the number of board feet each contained only the scale or survey bills sent by the buyer to the seller, which bills were admitted into the evidence subject to objection.

These scale bills were as distinctly hearsay as was the receipted bill in the Minnesota case of Conrad v. St. Paul, 153 N. W. 256, which did not prove amount nor value.

In any case tried by the court without a jury, in difference from where the trial of an action at law is by jury, error in the admission of evidence is not a ground for reversal, if there is sufficient legal evidence to support the judgment, since it will be presumed, if nothing appears to the contrary, that the judge disregarded incompetent evidence, 38 Cyc, 1939; *Hunt* v. *Higman,* (Iowa) 30 N. W. 769; *Victoria Company* v. *Haws,* (Utah) 27 Pac. 695. Our own cases of *Chabot* v. *Chabot,* 109 Maine 403, *Investment Company* v. *Palmer,* 113 Maine 395, and *Ayer* v. *Harris,* 125 Maine 249, hold the same by inference.

The judgment in this case is not separable into parts. Hearsay, and nothing else, received against objection, is to an appreciable extent the sole support of a single complete thing. In other words, the competent evidence fails to extend to the entire judgment. Where such evidence fails, the judgment, which must stand or fall in toto, is not legally sustained.

The conclusion reached makes it unnecessary to consider the other exceptions.

Let the mandate be,

Exception sustained.

BARBARA REMICK COY, APPL'T.

Kennebec. Opinion June 10, 1927.

To disqualify a witness to a will on the ground of being beneficially interested under the will, it must appear that such interest to be beneficial within the meaning of the statute musl be such an interest as results in appreciable pecuniary gain.

In this case the witness will with other members enjoy greater club comforts which will be a benefit, but not, within the meaning of the statute, a pecuniary benefit.

The chance that the witness may be benefitted by reduction of club dues; the possibility that he may be saved from liability for club debts; the contingency that he may receive a share of accrued income upon the club's dissolution are so remote, uncertain and contingent that they have no present pecuniary value.

On exceptions by appellant. The will of W. B. Waterman was allowed in the probate court for Kennebec County and an appeal to the Supreme Court of Probate was taken by Barbara Remick Cox, sole heir. A hearing was had without the intervention of a jury and the decree below was affirmed and to the decree by the single justice appellant excepted. Exceptions overruled.

The case fully appears in the opinion.

Merrill & Merrill, for appellant.

John E. Nelson and Ralph W. Farris, for appellee.

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

DEASY, J. By the will of the late W. B. Waterman the sum of fifteen thousand dollars was left in trust for the Abnaki Club of Augusta. Of the three witnesses to the will, one, Ralph W. Farris, was a resident member of the Abnaki Club.

The only alleged ground of objection to the probate of the will is that said Ralph W. Farris by reason of his membership in the club was at the time of attestation beneficially interested under the will and not a credible witness.

The clause of the will by reason of which Mr. Farris is alleged to be disqualified as a witness reads thus:—

"I give and bequeath the sum of fifteen thousand dollars to Hiram L. Pishon of Augusta, Maine, as trustee for the Abnaki Club, a voluntary association located at said Augusta, in the County of Kennebec and State of Maine, upon trust, that the said trustee shall pay over the income of said sum to the Treasurer of the said Abnaki Club annually at the end of each calendar year, the said income to be used by the Club as its officers and directors may in their discretion deem advisable; provided that the said Abnaki Club retains its present location on the second floor of the Masonic Temple in said Augusta and in the event that the said Club moves from its present location, disbands or dissolves, then this bequest becomes void as to said Abnaki Club, and I give and bequeath the said sum to my residuary devisees and legatees hereinafter named."

The Abnaki Club is an unincorporated association. Its objects as appears by Section 1 of its by-laws are "the maintenance of suitable rooms for the use of its members in common; the promotion among them of friendly intercourse and such other social purposes as the Club may ordain."

The Club's expenses are paid by dues which are fixed by the by-laws at ten dollars annually for resident and five dollars annually for non-resident members. Membership may be forfeited for non-payment of dues or for misconduct.

Wills are in this State required to be subscribed by "three credible attesting witnesses not beneficially interested under the will." R. S. Chap. 79, Sec. 1. That the term "credible" is to be construed as meaning "competent" has been decided by so many courts and cases

that it is unnecessary to cite any. It is not contended that Mr. Farris is an incompetent witness for any reason other than his interest as a member of the Club. The question is therefore whether Ralph W. Farris by reason of his membership in the Abnaki Club was at the time the will was made, beneficially interested under it.

We do not find that this precise situation,—a bequest to an unincorporated social club witnessed by a member, — has ever been passed upon by any court.

In numerous cases questions somewhat analagous have been considered and decided. We summarize here the pertinent Maine cases and some of the principal authorities in other jurisdictions, first listing those cases wherein witnesses have been held competent.

Witness Held Not Beneficially Interested.

Bequest to a town witnessed by a tax payer of same town.

Piper vs. *Moulton* 72 Me. 155. *Marston et al Petnrs.* 79 Me. 25. *Hitchcock* vs. *Shaw* 160 Mass. 140. *In re Potter's Will* 89 Vt. 361, 95 At. 646.

Bequest to a religious or charitable society, parish or lodge, witnessed by a member.

Warren vs. *Baxter* 48 Me. 193. *Trust Co.* vs. *Bixby* 247 Mass. 449. *Haven* vs. *Hilliard* 23 Pick 10, *Loring* vs. *Park* 7 Gray 42. Re Wills Estate 67 Minn. 335, 69 N. W. 1090. *Quinn* vs. *Shields* 62 Iowa 129, 17 N. W. 440.

Bequest to corporation witnessed by stockholder. *Marston et al Petnrs.* 79 Me. 25. In this case the corporation was one devoted largely to public purposes. In effect and meaning the Court says that a witness is not necessarily incompetent by reason of being a stockholder in a corporation legatee.

Witness Held Beneficially Interested.

Will witnessed by wife of devisee.

Clark et al Applt. 114 Me. 105.

Sullivan vs. *Sullivan,* 106 Mass. 474.

Will witnessed by H. who had a bequest in the will to take effect only if F. predeceased the testatrix. *Castine Church Applt.* 91 Me. 416.

Rules for Determining Whether Interest Beneficial.

Courts have undertaken to establish rules for determining whether an interest derived by a witness under a will is such a beneficial interest as to be disqualifying.

The Vermont Court says in effect that to be disqualifying such interest must be "fixed, certain, vested and pecuniary." *Re Potter's Will* supra.

Our own Court in the same connection uses the words "present, certain, legal, vested and not uncertain or contingent." *Warren* vs. *Baxter* supra., and in another case "a direct and certain pecuniary interest." *Marston et als Petnrs. supra.*

It is undoubtedly true that an interest which is direct, certain, vested and pecuniary is a beneficial interest. But an interest which is indirect, uncertain and contingent may be "beneficial." The interest derived by the wife of a devisee is neither direct nor certain. But she is disqualified. *Clark et als Applt. supra.*

In the Castine Church case supra the interest of H. was uncertain and contingent, but she was held incompetent as a witness.

We think the true principle deducible from all the authorities is that such an interest to be beneficial must be one that will result in an appreciable pecuniary gain to the witness.

"The true test of the interest of a witness is that the witness will either gain or lose financially." *Boyd* vs. *McConnell* (Ill.) 70 N. E. 649.

Witness not disqualified when "the precise interest of such witness cannot be measured or ascertained." *Jones* vs. *Habersham* 63 Ga. 146.

"The witness beneficially interested under the will is one gaining by and under its provisions." *Smalley* vs. *Smalley*, 70 Me. 545.

If an interest under a will is direct, certain, vested and pecuniary it is a "beneficial interest." If however it be indirect, uncertain and contingent it may still be a "beneficial interest" if it has a present appreciable pecuniary value so that the witness may reasonably be said to gain financially because of it.

The tax payer and the society member in the cases above cited received no interest having any present pecuniary value.

On the other hand the wife's interest in her husband's devise, while indirect and uncertain, has an appraisable value.

Indeed, under certain circumstances the statute provides for its appraisal. R. S. Chap. 80, Sec. 19.

A bequest like that in the Castine Church case, supra, while contingent and uncertain yet has an appreciable value. The chances of survivorship create the contingency. Certainty cannot be predicated of human life, but legal expectancy may be.

Apply this test to the case at bar:—

If we assume that Mr. Farris with other Club members will enjoy greater club comforts or luxuries by reason of the bequest, this is not a pecuniary benefit. According to all authorities the statute disqualifies only witnesses who receive pecuniary i. e. property benefits under the will.

The chance that the witness may be benefitted by a reduction of club dues; the possibility that he may be saved from liability for club debts; the contingency that he may receive a share of accrued income upon the club's dissolution are so remote, uncertain and contingent that they have no present pecuniary value. It cannot be reasonably claimed that the bequest results in any financial gain to the witness.

Mr. Farris was not beneficially interested under the will.

Exceptions overruled

BELLE A. DALL

vs.

BANGOR RAILWAY & ELECTRIC COMPANY

Penobscot. Opinion June 15, 1927.

Where the elements of law contained in requested instructions were fully and accurately stated in the charge, the court is not obliged to repeat what has once been substantially and properly covered in the charge.

In this case while it might be possible for the court to have found differently it does not deem it is its duty to invade the province of the jury and set aside their verdict.

On general motion and exceptions by defendant. An action to recover damages for personal injuries sustained by plaintiff resulting from a collision between an electric car of defendant and an automobile in which plaintiff was riding as an invited passenger at Basin Mills in Orono on June 3, 1924. A verdict of $17,000 was rendered for plaintiff and defendant filed a general motion, and also excepted to a refusal to give requested instructions, and to the exclusion of certain testimony. Motion and exceptions overruled.

The case fully appears in the opinion.

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

Ryder & Simpson, for defendant.

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

PHILBROOK, J. This action arises from a collision at intersecting streets between an automobile in which the plaintiff was riding as a passenger and a trolley car operated by the defendant. The jury

returned a verdict in favor of the plaintiff in the sum of $17,000. The case is before us on motion for a new trial and upon exceptions to the refusal of the court to give the jury certain requested instructions.

The negligence which the plaintiff imputes to the defendant, as set forth in the declaration, is that the defendant drove and propelled a certain electric car without any warning by whistle or otherwise at a terrific rate of speed and in such a careless and negligent manner that it came without warning on said automobile in which the plaintiff was riding with such force and violence that it collided with said automobile and dragged it a great distance; also that the defendant was running an electric car at a reckless and high rate of speed and that no gong was rung or whistle was blown and that the accident was caused wholly on account of the negligence of the defendant and was not caused by any fault of the plaintiff.

In addition to other elements, the defendant claimed contributory negligence on the part of the plaintiff in two respects: first, in respect to her failure to remonstrate because of the speed at which the automobile was being driven, in excess of eight miles an hour at an obstructed corner in the compact portion of the village; second, her failure to see or hear the street car and to warn the driver of the automobile.

The Motion. The case was tried with great care and ability on the part of counsel on both sides and with equal care on the part of the presiding justice. The issues of fact upon which negligence of the defendant and contributory negligence on the part of the plaintiff might be based were sharply defined and closely adhered to. Upon the testimony offered upon the one side and the other the jury deliberated and established by its finding the fact of negligence on the part of the defendant and the want of contributory negligence on the part of the plaintiff. In view of the importance of the case, and especially so from the financial standpoint, we have examined the record with great care; and while it might be possible for the court to have found differently, yet we are not persuaded it is our duty to invade the province of the jury and set aside their verdict so far as legal liability of the defendant is concerned.

The Exceptions. In the report, under the heading "Defendant's requested instructions" are to be found twenty-one elements or legal propositions; but when we turn to the bill of exceptions allowed by

the presiding justice, we find those legal propositions reduced to five instructions which the defendant requested the court to give to the jury and which were not given; together with one exception based upon the exclusion of the testimony of the motorman, who was operating the street car, that he was familiar with the rule of law governing a vehicle's right of way over other vehicles coming into the street from the left, for the purpose of showing to the jury that he relied in fact upon having the right of way over such automobile.

The refusal to give the requested instructions was on the usual ground, viz., except so far as they were covered by the charge of the presiding justice as given, which said charge in full was made a part of the bill of exceptions.

The first requested instruction was as follows: "In the present suit for damages the question of contributory negligence is not whether the negligence of the plaintiff or that of the defendant was the more proximate cause of the injury to plaintiff, but it is whether the negligence of the plaintiff contributed to cause the injury in the slightest degree. If plaintiff's negligence did so contribute she cannot recover." Turning to the charge of the presiding justice, we find that the jury was distinctly instructed in the following words: "If the plaintiff is negligent at all and the negligence contributed to the cause of the accident, she cannot recover." While this is not in the exact words of the requested instruction, it fully covers the point raised in this exception.

The second requested instruction was as follows: "The speed at which a street car may properly be run, the kind of control over it and the degree of watchfulness which is imposed upon those in charge must depend to some extent upon the surrounding conditions, such as nearness of the track to the side of the street and to the houses, the likelihood of persons driving out from side streets and whether the streets are so located that persons driving from them can see or learn of the approach of street cars in season, with due care, to avoid collision. The defendant and its servants, including Mr. Messer (the motorman) had a right to assume that all such persons would themselves be in the exercise of ordinary care." Again turning to the charge of the presiding justice, we find that he instructed the jury in practically the identical words of the requested instruction, only omitting the statement as to the proposition that the motorman

had a right to assume that other persons would use due care, but that element was made plain in other parts of the charge so that the defendant availed nothing by this exception.

The third requested instruction was as follows: "The law does not require a higher degree of care of a motorman operating street cars than is required of other users of the public streets." This relates to the degree of care which obtains in all negligence actions and was fully covered in the charge of the presiding justice.

The fourth requested instruction was as follows: "If you find that the plaintiff was inattentive in not earlier observing the approach of the street car and warning the driver of the automobile, it is no answer to say that the plaintiff was justified in her inattention by the fact that no electric train was due there at that time. For the defendant had a right to run cars when it chose, and it was the duty of the plaintiff to exercise some care and look out for them. She could not be entirely inattentive." This requested instruction relates to the degree of care which the plaintiff should exercise to the end that there may be no contributory negligence on her part which would become the proximate cause of the accident. This element was very carefully and fully covered in various ways by the charge of the presiding justice and the exception is not availing.

The fifth requested instruction was as follows: "The legal duty of the plaintiff under the circumstances of this case, to listen, watch and act to prevent the collision that occurred in this case, was not less clear and imperative than was that of the driver of the automobile." This instruction also relates to the element of contributory negligence on the part of the plaintiff. Here again the presiding justice called attention in his charge to the duty of the driver of the automobile and the duty of the passenger or guest in the automobile; and the attention of the jury was called to the fact that while the negligence of the driver of the automobile cannot be imputed to the plaintiff, yet, the plaintiff riding in the automobile as a guest on the front seat owes a certain duty. And the duty which the passenger thus owed was again clearly described and set forth by the presiding justice. This exception also does not avail.

The sixth exception relates to the exclusion of the testimony of the motorman, Mr. Harry E. Messer, who was operating the car at the time of the collision. The direct examination of this witness by

counsel for the defendant discloses the following questions and answers and colloquy between court and counsel:

"Q. Did you know that you had the right of way?

ATTORNEY THOMPSON: I object to that, if your honor please, what he knows.

ATTORNEY SIMPSON: Q. Were you familiar with the rule of law giving vehicles the right of way over other vehicles coming into the street from your left?

ATTORNEY THOMPSON: I object to that question, for that is not the law, as I understand it, that has been conceded by the court.

THE COURT: That is a question of law for the court rather than for the witness, I think.

ATTORNEY SIMPSON: Q. If that is your understanding of the law—

ATTORNEY THOMPSON: Well, I object to that.

ATTORNEY SIMPSON: I think I can show what his understanding was.

THE COURT: I think I shall have to exclude that."

Although the testimony was excluded, the presiding justice distinctly instructed the jury "that in this case the street railway car had the right of way. * * * * moreover, both the defendant and the plaintiff have a right to assume that the other will observe the rules of law of the road, although, as I have just indicated, that does not excuse them from the exercise of that care which an ordinarily prudent person would exercise under the same circumstances." Under this instruction, we feel that the exception as to the exclusion of the testimony of Mr. Messer does not avail the defendant.

Damages. This element in the case presents grounds for serious contemplation. As we have already seen, the verdict was in the sum of $17,000. Even in these later days when verdicts larger than formerly are returned, we have given considerable attention to the question of excessive damages, as claimed by the defendant; and in some cases sustained large verdicts, and in some cases reduced the same by ordering a remittitur. In the present case, the plaintiff at the time of the accident was a young woman twenty-five years of age, unmarried, and was employed in an office where she operated a typewriter and a calculating machine and did other work of a similar

nature. The testimony appears to show that her expenses incidental to hospital treatment, medical treatment, surgical treatment and nursing for a long period amounted to a possible $1,500. Her wages at the time of the accident were $90 a month, and during the period of two years her loss in that respect was more than $2,000. These two elements alone would reduce her $17,000 verdict to $13,500. One of the physicians testified that she has some permanent impairment of the right shoulder, that he could not say whether the condition of her back would clear up or not, that her right arm will always have a disability, that she will never be able to raise her arm normally, that she might at some time be able to operate a typewriter and might be able to use a calculator if it were at the proper height but whether she could lift the lever back and forth continuously all day and raise her arm out straight, the physician was uncertain. The physician called by the defendant testified he found a certain injury to the right shoulder girdle, that there was a loss of function of 35% to 40% in her ability to lift the right arm at a right angle, that there was a fracture of the transvere process of the third and fourth dorsal vertebra, that he believed she could do typewriting and use an adding and calculating machine and that he thought her condition was not liable to be permanent.

The record does not disclose that she had anybody dependent upon her for support as occurs in many cases where injuries are suffered by a married man. On the other hand, with advancing years, it does not appear that she had other sources of assistance in support, so that her case like all others, must depend upon the peculiar facts which it contains. If she had been uninjured and could have continued work at the rate of about $1,000 a year, she could have earned in seventeen years the full amount of this verdict. She would then not have reached middle life, nor any necessary impairment of her power to labor. Within proper limits, it is the function of the jury to fix damages as well as to determine questions of liability based upon the facts in the case. Where the jury have manifestly erred in their result, it becomes the duty of the court to exercise its power of interference. In the present case, while the amount assessed by the jury is large, yet, taking into account the expenses which she had already incurred, her earning capacity at the time of the accident, her probable earning capacity as affected by the acci-

dent, and the other elements to which we have already alluded, we are not inclined to disturb the verdict on account of its size.

The mandate will therefore be,

Motion and exceptions overruled.

EMMA H. ROGERS, Appellant,

In the matter of the proposed will and codicil thereto of Lydia M. Deering.

Sagadahoc. Opinion June 24, 1927.

A codicil duly executed and a valid testamentary act operates as a republication of the will to which it refers, and the two are to be regarded as one instrument speaking from the date of the codicil.

If the codicil fail of probate the validity of the will is in issue.

In the instant case both the will and codicil are offered for probate. The burden is upon the proponents, therefore, to establish in the first instance that the codicil is a valid testamentary instrument, and failing so to do to prove the validity of the will.

The conclusion reached is that the weight of the evidence establishes that at the time the codicil was made, February 24, 1922, and at the time the will was made, February 16, 1922, the testatrix did not possess testamentary capacity, and therefore neither instrument is valid.

On appeal from a decree of Judge of Probate disallowing the will and codicil thereto of Lydia M. Deering. The case was reported to the Law Court with a reservation limiting the issue to one of testamentary capacity. Appeal dismissed. Decree of Probate Court affirmed.

The case very fully appears in the opinion.

Frank A. Morey and Edward W. Bridgham, for appellant.

Pattangall, Locke & Perkins and Walter S. Glidden, for appellees.

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

STURGIS, J. An appeal from decree of Judge of Probate, disapproving and disallowing instruments purporting to be the last will and a codicil thereto of Lydia M. Deering, late of Bath, deceased, the ground of disallowance being that the testatrix at the time the instruments were executed was not of sound mind as required by R. S., Chap. 79, Sec. 1.

The probate decree having been vacated by the appeal, the case was heard on new proofs and arguments in the Supreme Court of Probate, and there dismissed on the ground that the execution of the instruments in question was procured by undue influence. On exceptions, this Court, in Rogers Appellant, 123 Maine, 459, held that the appellate decree was error, and the case then stood on the docket of the Supreme Court of Probate as an original appeal, the question of undue influence, upon the record as then made, decided.

Upon rehearing, further evidence was offered for and against the probate of the purported testamentary instruments, and by assent of the parties the case is now reported to the Law Court, with a reservation limiting the issue to one of testamentary capacity.

Precedent sanctions the report of this case. Chandler Will Case, 102 Maine, 72. It comes to us in the form of a transcript of evidence of approximately 1400 pages, accompanied by numerous exhibits. From this record, by the terms of the report, final decision of the question reserved is to be made upon the facts found in the legally competent and admissible evidence in the record submitted.

Lydia M. Deering died at Bath December 18, 1922, aged 84 years. On the 16th of February, 1922, ten months before her death, Mrs. Deering executed a will by which, after making bequests of $1,000 to each of her two sons, Harry G. Deering and Carroll A. Deering, she bequeathed the balance of her estate, amounting approximately to $40,000, to her daughter, Emma H. Rogers, naming Mrs. Rogers as executrix without bond. Eight days later Mrs. Deering executed a waiver of the provisions of the will of her husband, Gardiner G. Deering, who had died testate in October, 1921, and having thus increased her share in her husband's estate from $2,000, the amount

of his bequest to her, to approximately $130,000,—a widow's third in this State,—Mrs. Deering immediately made a codicil to her will of February 16th by which she bequeathed the property thus acquired from her husband's estate in equal shares to her three children, Harry, Carroll and Emma.

Under our statute, R. S., Chap. 79, Sec. 1, as amended, the only standard of testamentary capacity is whether or not the testator, or, as in this case, the testatrix, was of sound mind at the times the alleged will and codicil were respectively executed; that is, did she at those particular times possess such soundness of mind as in the contemplation of the law enabled her to make a will or codicil, not the particular instruments in controversy. The question in each case is, had the testator or testatrix capacity to make a will? If of sound mind, he or she can make any will however complicated. If of unsound mind, no testamentary instrument however simple can be deemed a valid will. *Chandler Will Case*, 102 Maine, 72. *Delafield* v. *Parish*, 25 N. Y., 97.

In determining whether the mind of the maker of a will was a "sound mind" and therefore a "disposing mind", this Court, in *Hall* v. *Perry*, 87 Maine, at page 572, says: "A 'disposing mind' involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds; and a disposing memory exists when one can recall the general nature, condition and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes, his bounty. He must have active memory enough to bring to his mind the nature and particulars of the business to be transacted, and mental power enough to appreciate them and act with some sense and judgment in regard to them. He must have sufficient capacity to comprehend the condition of his property, his relations to the persons who were or should have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive, at least, their obvious relations to each other, and be able to form some rational judgment in relation

to them." If the mind of the testatrix, Lydia M. Deering, meets these tests, she was of sound mind as required by the statute. If she did not possess these qualities of mind, she was not even in the weakest class of sound minds, but was a person of unsound mind.

The crucial question to be determined is the mental capacity of the testatrix at the respective times the two instruments offered for probate were executed. And as bearing upon this question, the testimony of the witnesses to the instruments, as well as that of other persons then present, has been supplemented by the bringing in of relatives, friends and neighbors, who recount from their recollection incidents, facts and conditions which they observed. The attending physician states his observations, and finally psychiatrists state their opinions with definition and classification of the testatrix' mental condition from a medical standpoint. It is not possible within the limits of this opinion to make a detailed analysis of all the evidence, nor by extended quotation to compare the relative values of conflicting evidence upon points in issue. And while we have examined and carefully considered the entire record and accompanying exhibits, we can but summarize in the statement of our findings and conclusions.

In early life Mrs. Deering was the usual prudent New England housewife, cooking, sewing, and performing all the usual household tasks which the average woman in similar circumstances found to do. She was a frail, slight woman, but active and industrious. Not a deeply religious woman, she nevertheless was a regular attendant at church, and for a time a member of the choir. Her social activities were not many, but she joined and participated in meetings of social organizations to which she belonged, travelled with her husband for short visits to Boston, New York and Washington, joined in luncheon parties at near-by inns and resorts, and called upon her neighbors and friends who in turn were frequent visitors in her home. In short, she was a normal, average woman.

In 1905 Mrs. Deering, being then about sixty-seven years of age, had become afflicted with a nervous trouble. She was inclined to be melancholy and in apparent mental distress, silently weeping without apparent or stated cause. Her condition was such that her husband engaged the services of a masseuse, and followed this treatment by sending her to a sanitarium in Melrose for a period of eleven weeks.

The history of her condition for the following years is not complete in the record, but from the testimony of those who came in contact with her it is apparent that her melancholy condition continued, her tendency to weep without apparent cause increased, and her physical well-being gradually grew less. About 1914 her husband sent her to Malden for a few weeks for Christian Science treatment, and it was not long after her return from there that a regular and permanent attendant was engaged as her constant companion. Weighing with care the testimony of the various witnesses, we are convinced that by 1918 Mrs. Deering had ceased to take an active part in the conduct or management of her household. With failing eyesight, she no longer read. She had laid aside finally her sewing and knitting. She had become averse to taking baths. At times she was reluctant to go to her meals, and only consented after much persuasion. Against her protest she was taken to ride by her husband in the automobile. Her time was spent generally in passive inactivity, sitting alone in her chair, except as she was coaxed to the piazza, taken to ride by her husband, or visited by family or friends. She had discontinued attendance upon church many years before. Her social activities, simple as they had been, had altogether been discontinued. At the time of the world war she was only slightly interested in the fact of its existence, its circumstances or its results. She did recognize relatives and friends, and occasionally entered into brief but intelligent conversation with them.

Her physical and mental deterioration progressively continued and increased during the next two years. All witnesses are in substantial accord that she continued to spend her days in inactivity with increased melancholy, weeping and wringing of hands. And while her replies are stated to have been responsive, it is evident that questions propounded to her were simple and her answers hardly more than simple assent or negation. She retained some memory with ability to recognize relatives, and call to mind old acquaintances when their identity was made known to her. In the fall of 1920 Mrs. Deering fell and fractured her hip. For weeks she was confined to the bed, but in the following spring recovered sufficiently to be about the house, moving with the aid of crutches or a cane and with the assistance of her attendant. Adding this unfortunate physical

injury and only partial recovery to the decline of the preceding years, Mrs. Deering was undoubtedly for her remaining days practically in a helpless physical condition.

It is difficult for witnesses to fix dates, and equally difficult in a judicial review of evidence to determine with precision the exact order of events, but in the testimony and inferences fairly to be drawn therefrom we find that at this period of her life Mrs. Deering was not only seriously crippled by her injury but also increasingly weakened in her mental capacity. She no longer expressed voluntary thought or desire in matters of household management. Her attendant was not only a constant companion, assisting her as she moved about, but also dressed and undressed her, and gave her baths as in the past, including the simple service of washing her face and hands. She was treated by her husband and attendant as incapable of self judgment or volition. She was not consulted in household affairs, and her wishes given little if any consideration. Her melancholy and depression were more constant, and her memory was becoming more impaired. In the midst of substantial prosperity which had come to her husband in his later years, poverty and want were her constant worry.

In October, 1921, her husband, Gardiner G. Deering, died. It is not clear how fully and completely Mrs. Deering realized the nature of his illness and the incidents of his passing. It does appear that she mourned his loss. And while she was in a state of mind in which illusions of her husband's continued existence mingled with a realization that he no longer lived, she had not reached a state of mental weakness which left her entirely insensible to the natural instincts of grief.

She and her husband had been living in the family homestead with a housekeeper and Mrs. Deering's attendant. After Mr. Deering's death, Mrs. Rogers, the only daughter, who lived near by, assumed direction and supervision of her mother's home and business affairs. She caused her name to be added to Mrs. Deering's deposits in the banks, and paid the bills of the house by her check drawn upon her mother's accounts. She wrote her mother's name in endorsement of such checks as came payable to the latter. Joining with her brothers, she discharged one of the servants and arranged that the other should act both as housekeeper and attendant for Mrs. Deering.

The automobile was sold and the chaffeur discharged. There is no evidence to indicate that the surrender of her household management by Mrs. Deering in her husband's lifetime, or the supervision of it by her daughter after his death, was the result of request upon her part. The inference is strong that it arose from a recognition by her husband and children, who knew her best, of her mental and physical inability to longer act in these matters.

Her family after her husband's death consisted of three sons, Frank, Harry and Carroll, and the daughter, Emma Rogers. The sons continued the shipbuilding business founded by Mr. Deering, and all were on terms of closest love and affection with their mother. Each had married, and their children were frequent callers upon the grandmother. Apparently, with the exception of Mrs. Frank Deering, the wives of these sons enjoyed her love and confidence. For reasons which are unimportant, Mrs. Frank Deering was *persona non grata* in the Deering family circle; and while this situation in no way minimized Mrs. Deering's affection for her son Frank, his children, because of their mother, were not in as high favor with their grandmother as were the other grandchildren of the family.

In February, 1922, Frank Deering, the eldest son, died, after a comparatively short illness. His funeral was February 15th. On the day following, through arrangements made by the daughter, Mrs. Rogers, and without the knowledge of the sons, Harry and Carroll, Mrs. Deering made a will. She had previously in 1916 made a will by which her entire estate was given to her four children. This will was in the possession of Mrs. Rogers. Mr. Bridgham, local attorney, who had acted for Mrs. Rogers' husband in various matters, was called on the phone by Mrs. Rogers and summoned to the Deering homestead. He came in the early afternoon, and his statement of what followed is substantially that he was practically a stranger to Mrs. Deering, having met her only once before. He had been informed by Mrs. Rogers that a will was to be drafted, and after greeting Mrs. Deering asked her if she wanted to make a will or change her will. He says she indicated assent but her exact words are not given. He states that he then asked her where she wanted her property to go, and her answer was "that she wanted Carroll and Harry to have a thousand dollars each and the rest to go to Emma." He asked her if she wanted Emma to act as executrix, and she an-

swered yes. She assented in like manner to his question as to exempting Mrs. Rogers from giving sureties. He states that he was alone in the room with Mrs. Deering; that he wrote out the will, read it to Mrs. Deering, and inquired if it was her will and if she desired Mrs. Lermond and Miss Morse to join with him as witnesses, and received an affirmative reply. The witnesses were summoned and the instrument was signed and delivered to Mrs. Rogers, the daughter. He says that while there he asked if Mrs. Deering had made a previous will to which she made no reply, but Mrs. Rogers answered in the affirmative and produced the former will of 1919. Mr. Bridgham adds that he asked Mrs. Deering before the will was written out whether she wished to remember Frank's children and was answered in the negative. He says no mention of Frank's death was made. The other witnesses to the will, Mrs. Lermond and Miss Morse, substantiate Mr. Bridgham's statement of his conversations with Mrs. Deering, but add nothing to his account of her acts and utterances at that time.

The sons, Harry and Carroll, were not present when this will was made. The evidence leads us to conclude that they had no knowledge of its existence until some few days after it had been made, and had no information in advance that such action was to be taken by their mother. The will was deposited in her own vault by Mrs. Rogers and kept in her possession thereafter, and there is no credible evidence that the fact of its existence or its contents were ever thereafter mentioned by Mrs. Deering.

It is urged by the proponents that this will, bequeathing substantially the entire estate of Mrs. Deering to her daughter, Mrs. Rogers, was made in accord with a long cherished plan and with a definite purpose. Mrs. Rogers testifies that after her father's death and the reading of his will, which, giving only $2,000 to Mrs. Deering, divided his estate equally among his four children, she and Mrs. Deering learned for the first time that years before Mr. Deering had given to each of the boys substantial stock holdings in the G. G. Deering Company, a shipbuilding enterprise in which he and his sons were engaged. Frank and Harry received 308 shares each, and Carroll 208. Mrs. Deering received 16, but Mrs. Rogers had none. She says that her mother was much disturbed because the father had failed to include her in his stock distribution and felt that an injus-

tice had been done her. Her testimony is that her mother voluntarily in the late fall of 1921, or early winter of 1922, criticised the injustice of her late husband's distribution of the stock and of her own initiative suggested a gift of her entire property to the daughter. And Mrs. Rogers says that the making of this will on February 16th was at the request of her mother for the reasons and with the object stated. In corroboration of this explanation Mrs. Deering's housekeeper and attendant, Mellie Lermond, takes the stand and asserts that Mrs. Deering told her of the injustice which had been done the daughter and her desire to make amends therefor. The testimony of the witness, Mellie Lermond, indicates extreme bias and prejudice; it abounds in surmise and conjecture; and we are constrained to conclude that Mrs. Lermond has permitted her imagination, and impressions gained from reflection or discussion, to stand in many instances in the place of knowledge and truth.

Mrs. Rogers' statement of her mother's affirmative, voluntary discussion and consideration of the inequality of the daughter's share in her father's property does not accord with the condition of mind which the previous history of Mrs. Deering discloses. Reason compels the conclusion that at most Mrs. Deering acquiesced in any comments, suggestions or proposals advanced by the daughter. Mrs. Rogers is a deeply interested witness. Under this instrument she takes, to the exclusion of her living brothers, and the children of her deceased brother Frank, substantially the entire property of which her mother was possessed. It is upon her statement, corroborated only by the doubtful statement of Mellie Lermond, that the claim that the provisions of this will were in accord with previous purposes must rest, and her statement does not stand unrefuted. Her brother, Harry Deering, testifies that instead of the fact of the distribution of stock to the boys by the father being a matter of new knowledge after Mrs. Deering's death, in fact their entry into the business and their father's distribution of stock to them was at the time it occurred well known by all members of the family; and if we believe him, who is without marked interest in the sustaining of this will, the theory of cherished purpose advanced by Mrs. Rogers fails.

The testimony of the scriviner discloses that Mrs. Deering stated to whom she wanted her property to go, and excluded from her bounty the children of her son Frank. On the surface and standing alone,

these acts and statements would indicate that Mrs. Deering knew who were entitled to share in her bounty and made disposition of her estate accordingly; but in the light of her previous condition, her absolute dependency upon her husband in his lifetime, and after his death upon her daughter, the fact that she had not engaged in the simplest transaction of business for some time prior thereto except upon the suggestion and under the direction of others, that she had sunk into a state of passive acquiescence in the supervision and management of all her affairs, and exhibited resistance only in childish reluctance to the doing of the ordinary things of life,—"grave doubts remain unremoved" as to whether what she said and did on that 16th of February were the results of the exercise of the functions of a sound mind or in fact passive acquiescence in suggestions already made by others. This will signed by Mrs. Deering on February 16th was not delivered to her, but without disclosed request or suggestion on her part was handed to the daughter, Mrs. Rogers, who in the course of her testimony states that she placed it in her safety vault and kept it there until she produced it eight days later when the codicil which we are to consider was drawn and executed. The sons of the testatrix, Harry and Carroll Deering, say that while they learned later of the execution of the will, they were neither informed of nor did they make any inquiry as to its contents. It does not appear that Mrs. Deering afterwards had the instrument in her possession or at any time mentioned or discussed its execution, contents or effect.

It is evident, however, that the son, Harry Deering, was otherwise interested in his mother's testamentary affairs. He learned upon conference with an attorney that under the statute, R.S., Chap. 80, Sec. 13, Mrs. Deering could waive the provisions of her husband's will and take a third interest in his estate. The will of Mr. Deering bequeathed $2,000 to his widow, and divided the residue of his estate, amounting approximately to $400,000, equally among his four children, Frank, Harry, Carroll and Emma. As already appears Frank had died, and his children by right of representation were beneficiaries under the Gardiner Deering will in common with the then surviving sons and daughter.

Harry Deering testifies that a few days after February 16th he called on his mother and suggested to her that she waive her husband's will and take under the statute. He says she acquiesced in

his suggestion, although he admits that up to that time she had never indicated the slightest objection or criticism of the provisions of her husband's will of which she had knowledge.

Mrs. Rogers, the daughter, says that her brother Harry discussed the waiver of the father's will with her, and on February 24, 1922, she went to her deposit box and brought the will which her mother had made eight days before to the house, and again summoned Mr. Bridgham to act as scriviner of a new instrument. He came up that afternoon, and states that he found on his arrival Mrs. Deering, the daughter Mrs. Rogers, the housekeeper Mrs. Lermond, and the same neighbor Miss Moore who had acted as witness to the will of February 16th. Harry Deering came in shortly. Mr. Bridgham's testimony is:

"Q. What was said in regard to the business which it was desired that you should transact, prior to Harry arriving?

A. There was nothing mentioned until Harry arrived.

Q. Did you ask Mrs. Lydia Deering what she wanted of you?

A. No, I simply shook hands with her, said 'how do you do'.

Q. You knew that the business you had come on was for her, Emma had said that to you?

A. Yes, said her mother wanted to do some legal business.

Q. Did you ask her what she wanted of you?

A. Didn't make any talk except say 'how do you do' until Harry arrived.

Q. She didn't signify in any way what she wanted done?

A. I don't think she did.

Q. Now when Harry arrived he passed you a paper which was a waiver of the provisions of Gardiner Deering's will?

A. Yes.

Q. Harry said to you that his mother wanted to sign a waiver, didn't he?

A. Yes.

Q. She didn't say so?

A. No.

Q. Was that the first knowledge you had of the waiver, of her desire to sign, that came after Harry arrived and made his statement to you?

A. That is correct.

Q. Then you asked Mrs. Deering if she did want to sign it?
A. I did.
Q. She said yes?
A. Yes.
Q. Did she say anything further in regard to the waiver or matters concerning the waiver excepting to answer your question when you asked her if she wanted to sign it, say yes?
A. Yes, I explained to her what the waiver was and I think she said yes or something like that.
Q. Do you recall her saying anything except yes—I mean do you recall her making any statement concerning the waiver any further than to assent when you explained to her about it?
A. I don't recall any."

And again the scriviner testifies:

"Q. Now after the waiver was signed did Mrs. Deering say anything in regard to the property that she would receive, the additional property that she would receive by reason of the waiver?
A. She did not.
Q. Did she indicate in any way that she understood that she would receive any other property by reason of the waiver?
A. She said nothing in regard to it; she said nothing at that time.
Q. Well, did she ever?
A. She did when it came to the codicil, when I mentioned that.
Q. Yes, she made a disposal of it in the codicil, told you how to dispose of it. But after she signed the waiver you told her 'this gives you more under your husband's will than you had before' didn't you?
A. I did.
Q. And she said yes.
A. I did.
Q. And she said yes?
A. She said 'yes, I know it."

In direct examination Mr. Bridgham says that after Mrs. Deering had signed the waiver he asked her if she wanted to add a codicil to her will and she said that she did. He says that he asked her how she wanted to dispose of the property, and she said she wanted to give it to Carroll, Harry and Emma, and to his inquiry as to whether she wanted to divide it equally among them she said yes. He states that he asked if she wanted to leave any of the property to the grand-

children and she said no. He said he called her attention to the fact that her son Frank was now dead and asked her if she wanted to leave his children any of the property and quotes her as saying "No, I don't want to give them anything because they have enough" or "they have had enough." He advised that the children of Frank Deering be mentioned by name in the provision excluding them from the benefits of the will,—asked their names, and the three were named by Mrs. Deering and the fourth by some one in the room.

In cross-examination Mr. Bridgham gives this significant testimony:

"Q. And there was nothing in either conversation where she advanced a single suggestion of her own, was there?

A. I don't know as she suggested anything unless I asked her in regard to the business.

Q. Well, you have gone over the conversation fully, I don't want to rehearse it all again, but did she make any suggestion of her own on her own initiative that you recollect?

A. Not that I remember.

Q. Now was there any idea of any kind concerning any subject that she made the initial suggestion concerning?

A. I don't know of anything she mentioned before I asked her the question."

Mr. Bridgham made inquiry as to what provision had been made for Mrs. Deering in Mr. Deering's will and he says she made no reply, but the daughter, Mrs. Rogers, or the son, Harry Deering, informed him that a bequest of $2,000 was contained in that will.

The codicil was written out in pencil, read to Mrs. Deering with the inquiry if it was as she wanted it, to which she replied "it was". Mr. Bridgham then copied the document on the typewriter. It was signed by Mrs. Deering and witnessed by Mr. Bridgham, the attendant Mrs. Lermond, and Miss Morse, all of whom had acted as witnesses to Mrs. Deering's will on February 16th. As it was being attached to the will of February 16th which Mrs. Rogers had produced, Mrs. Deering asked what was being done, and upon being informed said, "Stick it on good and solid."

In so far as the record discloses, Mr. Bridgham's testimony accurately portrays the circumstances attending the execution of this codicil. Those present at the time who testify add nothing of mater-

ial importance to his statements. We have no doubt that the part Mrs. Deering took in this transaction was neither more nor less than the statements of Mr. Bridgham indicate. She acquiesced in suggestions made, but of her own initiative expressed no wishes. There is no convincing evidence that she grasped or comprehended the real effect of the waiver she signed whereby she diverted more than $130,000 from the channels in which her husband's will directed his property to pass,—an acquisition of wealth of which she had no need, and which with the concurring execution of the codicil was primarily a benefit to the son and daughter who counselled and arranged the transaction. We are unable to find in the incidents attending the execution of this waiver and codicil, including all evidence in the record bearing upon previous discussions between Mrs. Deering and her son Harry and daughter Emma, fact or inference fairly to be drawn which convincingly indicates that Mrs. Deering comprehended and held in her memory when she executed this codicil the nature, condition, and extent of the property of which she was making disposition.

Upon inquiry she did remember the names of three of her grandchildren; she excluded her son Frank's children from her bounty; she stated to whom she wanted her property to go; and she assented to the formal questions asked by the scriviner. Standing alone these acts and utterances are consistent with and indicative of testamentary capacity; but considered in the light of her previous and subsequent mental condition, and the active influences of her children which prompted and brought about the execution of the instrument, the probative value of these facts loses weight and fails to overcome the evidence of unsound mind lying elsewhere in the record. The incidents attending the execution of this codicil but depict a continuation of the mental deterioration which had already taken place in this testatrix.

Mrs. Deering lived until the following December. Her mental failure slowly but progressively increased. She did attend a directors' meeting in April, 1922, as claimed by the proponents, but her son Carroll's testimony shows clearly that in casting a prepared ballot at that meeting she exercised no faculties of memory, reason or judgment, but only passively acquiesced in a pre-arranged program. The incident, we think, is without material significance. Sometime

before July, 1922, she transferred her bank accounts to her daughter Emma, and at some time gave the latter corporate stocks of the value of $33,000 which she had received under the waiver of her husband's will. It is unnecessary to discuss these transfers further than to say that the testimony relating to them leaves little doubt that they were the result of the importunities of the daughter, Mrs. Rogers; and as in the sale of bank stock in the preceding January to the daughter's husband, Mrs. Deering in her acquiescence to the suggestions made to her gave no affirmative indication of the exercise of reason or judgment. If memory was there, it submitted passively to suggestions advanced.

In *Marsh* v. *Tyrrell*, 2 Flagg, 122, Sir John Nicholl said: "It is a great but not uncommon error to suppose that, because a person can understand a question put to him, and can give a rational answer to such question, he is of perfect sound mind, and is capable of making a will for any purpose whatever; whereas the rule of law, and it is the rule of common sense, is far otherwise: the competency of the mind must be judged of by the nature of the act to be done, from a consideration of all the circumstances of the case."

And in the Marquis of Winchester case, 6 R, 23 a, it is said: "By law it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions; but he ought to have a disposing memory, so that he is able to make a disposition of his lands with understanding and reason, and that is such a memory which the law calls sound and perfect memory."

Turning to the testimony of the medical experts, we find that in medical nomenclature and classification the medical expert for the contestants states as his opinion that Mrs. Deering was at the times in question suffering from senile dementia. On the other hand, the proponents offer expert opinion in denial of this conclusion which classifies the mental affliction of the testatrix as "involution melancholia". Without including in this opinion a discussion of the highly technical distinctions adduced in this conflict of opinion, it must be said, upon the facts as we find them in the record the opinions of both experts are consistent only with the conclusion that marked mental deterioration had taken place in Mrs. Deering and negative a finding that she was of sound mind when she signed the two instruments offered for probate.

The sole issue before us is testamentary capacity. The question of undue influence cannot be here considered. That question was passed upon by this Court in Rogers, Appellant, supra, on a substantially similar but nevertheless different record, and in this report is excluded by stipulations limiting the issue. In that opinion, however, this Court said: "Undue and improper influence presupposes testamentary capacity. Were there no capacity, there could be no will, and the question of whether or not there was influence would be an idle one. The strength of the person's will, in connection with other facts, may be material in relation to whether an exerted influence became operative, but total incapacity negatives the very suggestion of influence." With a finding of no undue influence, that case was remanded with the question of testamentary capacity undecided.

Evidence which would properly be considered in a determination of the question of undue influence appears with frequency in the pages of this record and in our discussion of the facts. We have not, however, considered it from that view point, but have weighed its materiality and probative value as bearing upon the voluntary, sound functioning of the testatrix' mind. A mind, acting of its own volition, forming its own judgments, exercising its own reasoning powers, and drawing its own conclusions, may be far different from a mind prompted by suggestion, directed by influence, or dominated by persuasion. In the latter, acquiescence may be mistaken for volition, repetition for memory, or assent for comprehension, and close scrutiny and searching care must be exercised that unsoundness does not remain undetected.

It is well said that the will of an aged person ought to be regarded with great tenderness when it appears not to have been procured by fraudulent acts. It is an equally sound and just rule that "a tender regard for the aged requires not only that their intelligent dispositions be upheld, but that their unintelligent ones, or wills not really their own, should be set aside."

In *Baker* v. *Butt*, 2 Moore, P. C., 317, Parke, B, said: "In a court of probate, where the *onus probandi* most undoubtedly lies upon the party propounding the will, if the conscience of the Judge, upon a careful and accurate consideration of all the evidence, on both sides, is not judicially satisfied that the paper in question

does contain the last will and testament of the deceased, the court is bound to pronounce its opinion, that the instrument is not entitled to probate."

In *Crowningshield* v. *Crowningshield*, 2 Gray (Mass.), 524, this rule is recognized, and it is there stated that a large proportion of wills are made when the mind is to some extent enfeebled by sickness or old age, and it is for this reason that the execution of the will and the proof of its execution are invested with solemnity; and it is held, "if, upon the whole evidence, it is left uncertain whether the testator was of sound mind or not, then it is left uncertain whether there was under the statute a person capable of making the will, and the will cannot be proved."

In *Delafield* v. *Parish*, 25 N. Y., 9, in the course of the opinion that Court adopts the rule above quoted from *Baker* v. *Butt*, and states that, "It is not the duty of the Court to strain after probate, nor in any case to grant it, where grave doubts remain unremoved and great difficulties oppose themselves to so doing."

Without adopting these statements of the rule, this Court is in accord to the extent that it holds that the burden of proof is upon the party propounding the will to establish its validity by a fair preponderance of the weight of the evidence. *Hall* v. *Perry*, 87 Maine, 569; *Robinson* v. *Adams*, 62 Maine, 369.

In the instant case both the will of February 16, 1922, and the codicil of February 24, 1922, are offered for probate. A codicil, if duly executed and a valid testamentary act, operates as a republication of the will to which it refers, and the two are to be regarded as one instrument, speaking from the date of the codicil. *Langdon* v. *Pickering*, 19 Maine, 214. If the codicil fail of probate, however, the validity of the will is in issue. The burden, therefore, is upon these proponents to establish, in the first instance, that the codicil is a valid testamentary instrument, and failing so to do, to prove the validity of the will.

Applying the rule of *onus probandi* of this Court to the facts found in the record, our final determination is that the weight of the evidence does not establish that Lydia M. Deering possessed testamentary capacity when on February 24, 1922, she made a codicil to her will, nor when on the previous February 16th she made the will itself, and that neither instrument is valid.

Appeal dismissed. Decree of Probate Court that the instrument purporting to be the last will and testament, dated February 16, 1922, of Lydia M. Deering, late of Bath, in the County of Sagadahoc, deceased, and the codicil thereto, dated February 24, 1922, be disallowed, affirmed; ordered that the costs be charged against and paid out of the estate of Lydia M. Deering by her personal representative and charged in his account with said estate. Case remanded to the court below for further proceedings in accordance with this opinion.

NELLIE R. HENDERSON

vs.

CHESTER ROBBINS

Penobscot. Opinion June 29, 1927.

In the case of a tenancy for years, that is, for any fixed and definite term, no agreement to the contrary and no waiver appearing, a tenant must remove his buildings or other removable fixtures before the termination of his tenancy.

The tenant's continued possession after such termination may, with other circumstances, prove waiver of the land owner's rights, but does not ipso facto extend the tenant's privilege of removing fixtures.

If the duration of the tenancy is uncertain, the tenant is allowed a reasonable time after the termination of his tenancy to remove his fixtures.

If the tenant fail to effect the removal within the permitted time, no waiver being shown, the fixtures become a part of the real estate of the land owner, not upon any theory of abandonment, but by reason of breach of an implied condition of the tenancy.

In the instant case the jury were abundantly justified in finding that the time and opportunity given to the defendant were sufficient.

On general motion for a new trial. An action of trespass de bonis to recover the value of doors and windows removed from a building which each party claimed as chattel property. A verdict was rend-

ered for plaintiff and defendant filed a general motion. Motion overruled.

The case fully appears in the opinion.

Stanley Needham, for plaintiff.

B. W. Blanchard, for defendant.

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

DEASY, J. Action of trespass de bonis for the removal of the doors and windows from a building claimed by each of the parties as chattel property. Title to the site was and is in the City of Oldtown. Verdict for plaintiff. Defendant brings case forward on general motion.

In 1926 the building in question was owned by Striar & Co. who occupied the land as tenants at will. On March 24, 1926 the City served upon its said tenants a statutory notice to quit. The tenancy became fully terminated on May 1 being the date specified in the notice. On May 26 Striar & Co. for a consideration, gave to the defendant, Chester Robbins, a bill of sale of the building. It was not renewed either by Striar & Co. or by Robbins. On July 31 the City sold and conveyed the building to the plaintiff, Nellie R. Henderson. On the same day the defendant without the plaintiff's consent took out and removed the doors and windows. Thereupon this suit was brought.

We are concerned, not with mere chattels of a tenant, not with irremovable fixtures, but only with removable fixtures i. e. those that may be removed without substantial injury to the freehold. It is not disputed that the building in question was of this character.

In the case of a tenancy for years i. e. for any fixed and definite term, no agreement to the contrary and no waiver appearing, a tenant must remove his buildings or other fixtures before the termination of his tenancy. This is the rule of law established in a number of jurisdictions (26 C. J. 705) including Maine. *Stockwell* vs. *Marks* 17 Me. 455, *Davis* vs. *Buffum* 51 Me. 162, *Water Power Co.* vs. *Electric Co.* 96 Me. 117.

Other courts hold that the right of removal continues as long as the tenant remains in possession, at all events, if with the land owners'

acquiescence. 26 C. J. 705. In this State the tenant's continued possession may, with other circumstances, tend to prove a waiver of the landowner's rights, but does not ipso facto extend the tenant's privilege of removing fixtures.

If the duration of the tenancy is uncertain the tenant is allowed a reasonable time, after the termination of his tenancy, to remove his fixtures. *Sullivan* vs. *Carberry*, 67 Me. 532, 26 C. J. 707. Ewell on Fixtures 293.

If he fail to effect the removal, within the permitted time, no waiver being shown, the fixtures become a part of the real estate of the land owner. *Davis* vs. *Buffum* Supra, 26 C. J. 706 and cases cited.

The defendant's tenancy terminated on May 1, 1926, the date specified in the notice to quit. The City does not contend that his right to remove the building then ceased. It concedes that he was still entitled to a reasonable time to move it. On June 22 formal permission for this purpose was given to the defendant. On July 1 he was in writing notified by the City to remove the building forthwith. On July 31, the notice not having been complied with, the City sold the building as a chattel to the plaintiff.

The jury were abundantly justified in finding that the time and opportunity given to the defendant were sufficient, that on July 31 the right of removal had expired, that the building with its doors and windows had become the property of the City and that the sale to the plaintiff, on that date, gave her title to it.

The learned counsel for the defendant stresses the point that his client did not actually intend to abandon his building. He argues that intent is of the essence of abandonment. All this is true, but not decisive. Authorities generally agree that, without regard to the tenant's actual intent, fixtures which he owns, if not by him removed, become at some time a part of the lessor's realty.

If, as some cases hold, this is based upon the theory of abandonment, intent to abandon is conclusively presumed from failure to remove fixtures within the time legally authorized. But we deem the better and more logical theory to be that the tenant forfeits his fixtures by reason of his breach of an implied condition of his tenancy.

Motion overruled.

GRINDELL'S CASE

Hancock. Opinion June 29, 1927.

Under chapter 25, R. S., the state highway commission is not an agent of the town through which a state aid highway happens to be located, but a state board acting for and in behalf of the state.

Chapter 154 P. L. 1917 and chapter 25, R. S. are in pari materia and must be construed together. By express terms of chapter 154, highways designated under it by the towns become state aid highways. Once so designated they fall in the same class as those designated under chapter 25, R. S.

Without specific provision in chapter 154 making the state highway commission the joint agent of both the towns and the state, the state highway commission must be presumed to act in the same capacity under chapter 154 P. L. 1927 as under chapter 25, R. S.

In the instant case the deceased was in the employ of the state in the work of constructing the highway.

On appeal from a decree affirming an award of compensation to Cassie Grindell as dependent widow of Thomas W. Grindell, who, while at work in constructing a state highway in Ellsworth, received fatal injuries by the collapsing of a gravel bank. The question involved was as to whether the deceased was in the employ of the State, or in the employ of both the State and the City of Ellsworth. Upon a hearing the Industrial Accident Commission found that the deceased at the time of the accident was in the employ of the State Highway Commission of the State of Maine and not in the employ of the City of Ellsworth and awarded compensation to be paid by the State, and an appeal was taken. Appeal dismissed with costs. Decree below affirmed.

The case appears in the opinion.

Petitioner was without counsel.

Franklin Fisher, for State Highway Commission.

D. E. Hurley, for the City of Ellsworth.

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

WILSON, C. J. During the year 1926, the city of Ellsworth and the towns of Orland and Bucksport appropriated certain sums for the construction of a state aid highway leading through said city and towns, under the provisions of section 1 of chapter 154 P. L. 1917. The State of Maine, through the state highway commission, set apart a certain sum from the funds appropriated to the construction of state aid highways in compliance with the provisions of section 2 of said act and section 20 of chapter 25 R. S.

The state highway commission then proceeded to construct the highway designated in the vote of said city and towns, and while engaged in the work within the limits of the city of Ellsworth the petitioner's husband received injuries arising out of and in the course of his employment, which resulted in his death.

As to these facts, and that the wife of the deceased and the petitioner in these proceedings is his sole dependent, there is no dispute. The only issue raised here is: was the deceased, at the time he received the injuries, in the employ of the state or in the joint employ of the state and the city of Ellsworth.

The associate legal member of the Industrial Accident Commission found that the employee was in the employ of the state and ordered it to pay compensation to the petitioner. From the decree based on the award the state appealed.

The claim set forth in the answer filed by the state is that the state and the city of Ellsworth were in partnership in the construction of this highway. Upon this issue, which is the only one raised by the answer upon which any dispute arises, the appeal clearly can not be sustained. There is no provision of any statute under which it is suggested that either the state or any city or town, even if they so desired, is expressly authorized to enter into a partnership in the construction of state aid highways. It would require legislation in clear terms to authorize such an unusual relation between the state and one of its towns.

The construction of highways is a governmental function, a part of the sovereign powers of the state. It may impose this duty upon any of the political subdivisions of the state as it did prior to the pas-

sage of the State Highway Act in 1913, or it may perform the duty itself.

Under the State Highway Act, now chapter 25 R. S., a state highway commission was created which designated all state and state aid highways; and which either lets out by contract the work of construction, or if no bids are accepted, does all the work of construction, the expense of all state aid highways being paid out of a "joint fund" in part contributed by the towns and in part by the state. By this act, the state has taken over the work of construction, and maintaining all state and state aid highways. Secs. 6, 7, 8, 9, 17, 24, chap. 25 R. S.

By the terms of secs. 6, 7, and 10 of chap. 25, the full authority to make all contracts, hire all labor and purchase all materials for the construction of such ways is clearly vested in the state highway commission, acting for the state. While the expense of constructing and of maintaining state aid highways under the State Highway Act is to be paid from a joint fund to which towns contribute, the state highway commission is not an agent of the town in which state aid highway happens to be located, but a state board acting for and on behalf of the state.

It would certainly be a strained construction that would render towns contributing to the joint state aid highway funds under chapter 25 jointly liable with the state under the Workmen's Compensation Act for any injuries occurring during the construction of state aid highways under the provisions of chapter 25, unless the work of construction was being performed by the town under a contract.

If the Act of 1917, chapter 154, stood alone, it might not be entirely clear as to who was to do the work of construction, whether the several towns under the supervision of the state highway commission or the commission itself. The act, however, and chapter 25 R. S. relating to state highways are clearly *in pari materia*, Black on Interpretation of Laws, sec. 86, and must be construed together as a part of a general plan for the improvement of our highways to be constructed and maintained under the direction and control of the state highway commission. While it permits three towns by joining together to designate a highway running through the three towns, if fifteen miles in length, as a state aid highway, which under chapter 25 R. S. can be designated only by

the highway commission, in other respects the money to be appropriated by the towns and the aid to be granted by the state, except in case a town shall increase its appropriation to some multiple of the minimum sum it may appropriate, is determined by Chapter 25 R. S. By the express terms of chapter 154, such highways become state aid highways. Once designated by the towns they fall in the same class of state aid highways as those designated under chapter 25 R. S.

The funds once appropriated under chapter 154, though designated as a "joint fund", as in case of all state aid highway funds under chapter 25 R. S. is disbursed in the same manner as the joint funds provided for the construction of state aid highways under that chapter. Without specific provision in chapter 154 making the state highway commission the joint agent of both the towns and state in constructing such state aid highways and defining their joint responsibilities, we think it must be presumed that it was the legislative intent that the state highway commission should act in the same capacity under this act as under chapter 25 R. S., viz: in behalf of the state.

Appeal dismissed with costs.
Decree below affirmed.

ALICE W. SHALIT *vs.* ANNIE R. SHALIT

Cumberland. Opinion June 29, 1927.

In an action for alienation of affections brought by a wife against her husband's mother the burden is upon the plainliff to show that the mother maliciously alienated the son's affections. Malice is not presumed, but must be proved, and may be by evidence of wrongful and unjustifiable conduct, prompted by hostile, wicked or malicious intent.

Newly discovered evidence relating to damages merely, if conforming in other respects to legal requirements, may be made the basis of a new trial either unqualifiedly or as to damages only.

In the case at bar the jury were justified in finding that all the elements necessary to maintain the action were proved.

The newly discovered evidence tends to show that the plaintiff misrepresented her physical condition, simulated disability and grossly exaggerated her illness. All this, strictly speaking, affects damages only. But her testimony undoubtedly permeated the whole case. Its inevitable tendency was to excite sympathy and create prejudice. The interests of justice require that a new trial be granted unqualifiedly and not merely as to damages.

On general motion, and also on motion for new trial on newly discovered evidence. An action for alienation of affections brought by plaintiff against her husband's mother. A verdict of $7,000 was rendered by a jury in favor of the plaintiff, and the motions for a new trial were filed by defendant. Motion for new trial on the ground of newly discovered evidence sustained. New trial granted.

The case appears in the opinion.

Hinckley & Hinckley, for plaintiff.

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

SITTING: PHILBROOK, DUNN, DEASY, BARNES, BASSETT, PATTANGALL, JJ.

DEASY, J. The wife of Harold M. Shalit brings this suit against his mother. In her writ the plaintiff declares that the defendant did "by arts, enticements and inducements alienate the affections of the said Harold M. Shalit from her, said plaintiff." The jury returned a verdict in favor of the plaintiff for seven thousand dollars. The case comes to this Court on two motions, one general and the other grounded on newly discovered evidence.

The record is voluminous. Not to speak of depositions, letters and documents the oral evidence taken out before the jury filled 735 pages. Much of it is sharply conflicting. Such material facts as are unquestioned may be summarized thus:

Harold M. Shalit of Portland, married Alice White of Boston on July 3rd 1923. Soon after their marriage they established their home in the Marlborough apartment house at Portland, owned by the defendant. For a time the wife's relations with her husband and his mother were harmonious. The elder Mrs. Shalit treated the son's wife kindly and generously. Harold was dependent upon his mother. She paid him fifty dollars per week. This was largely a gratuity, though he performed some service for her in looking after the apartment house. Later the family life became unpleasant. The unpleasantness seems to have culminated when Mrs. White, the plaintiff's mother, came to Portland to visit her daughter. After some troubles unnecessary to describe in detail Harold employed an officer to order Mrs. White to leave the premises. She left and on January 3rd, 1924, plaintiff went back to her former home in Boston. From that time on the plaintiff lived with her parents in Massachusetts, while her husband continued to reside in Portland. On June 15th, 1924, in Boston, the plaintiff gave birth to a child. The defendant provided three hundred and fifty dollars for expense of confinement. For some period, both before and after this, the husband paid his wife an allowance of at least twenty-five dollars per week. For a time the payment of this allowance was suspended. Harold says that by the suspension he hoped to induce his wife to return to Portland. At the instance of the plaintiff or her father Harold was indicted and arrested in Boston for non-support. Proceedings to compel support were also instituted in the Probate Courts of Maine and Massachusetts. Later the instant suit was brought against the mother. The plaintiff has always had custody of the child. Shortly

after the child's birth it was given over to a Mrs. Casey to keep and care for. The husband made unsuccessful efforts to find and see it. Omitting many details, the above are the salient undisputed facts.

Much of the other testimony is conflicting. According to the plaintiff's evidence the six months of family life which began harmoniously and gaily, later on became intolerable to her by reason of the indifference and cruelty of her husband. He assaulted her, she says, and caused not her mother alone but herself to be evicted. She relates many incidents, some of trivial character and others more important, tending to show that her husband was under the complete control of his mother, the defendant, and that her influence brought about the estrangement and separation.

The law applicable to this phase of the case is well settled. The burden is upon the plaintiff to show that the mother maliciously alienated the son's affections from his wife. Malice is not presumed. It must be proved, but it may be shown by proof of wrongful and unjustifiable conduct.

The mother may in good faith, influenced by maternal solicitude for her son's happiness and peace of mind, advise him in his conjugal relations. Even if it appear that the parent's advice, arguments or persuasions caused the plaintiff to lose the consortium, i. e., the society, affection and aid of her husband, there is no legal remedy unless it be shown that the parent acted with hostile, wicked or malicious intent. If loss so caused and such intent appear an action lies. *Oakman* v. *Belden*, 94 Maine 280; *Wilson* v. *Wilson*, 115 Maine 341; *Multer* v. *Knibbs*, 193 Mass. 556; *Woodhouse* v. *Woodhouse*, (Vt.) 130 Atl. 758; *Thomas* v. *Lang*, (Wash.) 238 Pac. 625; *Roberts* v. *Cohen*, (Ore.) 206 Pac. 293; *Porter* v. *Porter*, (Mo.) 258 S. W., 76; 30 C. J., 119; 13 R. C. L., 1471.

Applying these legal principles to the facts as above summarized we think that the verdict is not against law nor manifestly against the weight of evidence. The jury saw and heard the plaintiff and her witnesses and were not bound to dis-believe their testimony, though much of it was flatly contradicted. From the plaintiff's testimony, if believed, they were justified in returning a verdict for her. The defendant does not in her motion allege that the verdict is excessive.

Newly Discovered Evidence.

The defendant offers, relying upon it as newly discovered, the testimony of Dr. John T. Williams. The significance of the Doctor's evidence appears from the following outline:

The plaintiff testified that at the time of her child's birth she was badly injured internally; that thereafter she was in a poor state of health, unable to nurse her baby, and that by advice of her physician she put the child out to be nursed and cared for.

Upon a new trial Dr. Williams will testify, so it appears from his deposition, that he was the plaintiff's attending physician at childbirth and saw her at frequent intervals while she was in the maternity hospital and twice afterwards; that there was nothing unusual, no complications in the case; that she was able to nurse the child and that "the patient had taken the baby off the breast against my advice and put it out to board."

In order that newly discovered evidence may warrant a new trial these things must appear:

> 1. That the new evidence is not merely cumulative. There is observable a recent tendency to qualify this requirement. See also R. S., Chap. 94, Sec. 4, relating to petitions for review. But Dr. Williams' testimony is not cumulative.
>
> 2. It must "seem to the Court probable that on a new trial with the additional evidence the result would be changed." *Drew* v. *Shannon,* 105 Maine 562.

Besides that of Dr. Williams the defendant presents as newly discovered the evidence of Julius Langsdorf. It is unnecessary to speak of this testimony further than to say that if heard by a jury it would probably not change the result.

But Dr. Williams' testimony, if believed, would in all likelihood affect a jury verdict, at all events, as to the amount of the verdict. It would probably change the result.

> 3. That the moving party is not chargeable with want of due diligence in failing to discover the new testimony earlier and have it at the first trial.

The story of the plaintiff told on the stand first disclosed the materiality and importance of Dr. Williams' evidence. Nothing in the

pleadings forewarned the defendant that it would be needed. The Doctor was beyond the Court's jurisdiction. After the plaintiff had given her testimony it was apparently not practicable to produce Dr. Williams' evidence at the trial.

> 4. But if material evidence be newly discovered during trial and is not presently available a litigant must move for a postponement or continuance if he would seek a second trial by reason of such evidence.

A party having during a trial knowledge of material evidence which he is unable to produce cannot, unless ordered by the Court, have one trial without such evidence and later have another trial with it. This would be to give one of the litigants two days in Court and confine the other to the traditional one day. Among many authorities thus holding we cite the following: *Garage Co.* v. *Powell,* (Vt.) 123 At. 200; *Marsh* v. *Surety Co.,* (Iowa) 193 N. W., 563; *Peterson* v. *Clay,* (Tex.) 225 S. W., 1112; *McCants* v. *Thompson,* (Okla.) (115 Pac. 600); *Clark* v. *Railways Co.,* 192 Ill. Ap. 358; *Learned* v. *Transit Co.,* 49 Cal. Ap., 436 (193 Pac. 591); 20 R. C. L., 291.

But this principle though well established does not apply to the pending case. At the time of trial the defendant did not know what testimony the Doctor would give. The new evidence had not then been discovered. The defendant knew only that having been the plaintiff's attending physician Dr. Williams would be able to either corroborate or contradict the plaintiff's evidence respecting her injury and physical condition. She had no ground for making the affidavit required by S. J. Court Rule No. 15. In failing to move for a continuance or postponement she was chargeable with no want of diligence.

"The ready answer to this (claim that motion for continuance should be made) is that the defendant was not in possession of any information as to what Connery and the others would testify to upon which to have based an affidavit for continuance." *Cahill* v. *Stone Co.,* (Cal.) 138 Pac. 716. See *Keister* v. *Rankin,* 54 N. Y. S., 274; *Realty Corp.* v. *Bank,* 104 N. Y. S., 959.

> 5. That the newly discovered evidence is not merely impeaching in its effect. Authorities thus holding are so numerous that it is unnecessary to cite any.

Some Courts, including our own, have said that newly discovered evidence that "contradicts" an opposing party or witness cannot be made the basis of a new trial. *White* v. *Andrews,* 119 Maine 414; *Bridgham* v. *Hinds,* 120 Maine 452; *Lowry* v. *R'y Co.,* 68 Fed. 829; *Scott* v. *McLennan,* (Mo.) 242 S. W. 143; *Railroad Co.* v. *Roberts,* (Ky.) 228 S. W. 684; 20 R. C. L., 294-5.

But it is apparent that in such cases the word "contradict" is employed not in the usual sense of "deny" or "dispute", but rather as meaning "discredit."

Not to speak of cases in other jurisdictions, this Court has several times granted new trials by reason of newly discovered evidence which denies or disputes and in that ordinary sense contradicts that of the prevailing party. *Stackpole* v. *Perkins,* 85 Maine 298; *Parsons* v. *Railway,* 96 Maine 508; *Drew* v. *Shannon,* supra; *White* v. *Andrews,* supra; *Bridgham* v. *Hinds,* supra; *Rodman Co.* v. *Kostis,* 121 Maine 90.

The true test is that if the effect of the contradiction is only to impeach or discredit an opposing party or witness in respect to his testimony a new trial will not for that reason be granted.

If the new evidence "is of an impeaching character in the sense of affecting credibility only as distinguished from having probative force by showing a different state of facts", it is not sufficient to justify a further trial. *New Amsterdam Co.* v. *Beardsley,* 205 N. Y. S., 775. See to same effect *Joslin* v. *Rhodes,* (R. I.) 122 At. 779; *Smith* v. *Smith,* 51 Wis. 665 (8 N. W., 868); *Blackburn* v. *Crowder,* (Ind.) 10 N. E., 934; *Murray* v. *Weber,* 92 Iowa, 747 (60 N. W., 492); *Sherman* v. *Collingwood,* 221 Mass., 8; 29 Cyc., 920.

If the evidence contradicted is immaterial the only legitimate purpose of its contradiction is to impeach the witness and discredit his testimony upon other and material matters. There can be no new trial based upon such newly discovered contradictory evidence. But if the testimony relates to a material issue a new trial will not be denied merely because its contradiction tends to impeach or discredit a witness.

"We base our conclusion (that a new trial should be granted) upon the fact that the false or mistaken testimony was not upon a collateral matter." *Laskofsky* v. *Collieries Co.,* 167 N. Y. S., 228.

"Though the newly discovered evidence impeaches and contradicts", a new trial may be granted "where it tends to prove facts material to one of the issues in the case." *Huggins* v. *Carey*, (Tex.) 194 S. W., 136.

Is the plaintiff's contradicted and the Doctor's contradicting testimony in this case material? The material elements to be proved in this class of cases are:

(a) Loss or alienation of the husband's affections.
(b) Influence of the defendant producing such loss or alienation.
(c) Defendant's malice.
(d) Damages.

Upon issues (b) and (c) Dr. Williams' testimony has no possible bearing. It does not relate in any degree to the defendant's acts, words or motives.

Does the Doctor's testimony relate to (a), the loss or alienation of the husband's affections? The plaintiff points out certain conduct of her husband while she, badly injured at childbirth, was so debilitated that she was unable to nurse their child and had to put it out to be nursed and cared for. Such conduct, it is said, shows that the husband's affection had been turned to indifference or something worse.

This reasoning would be sound if the husband had been informed of his wife's injury and debility, whether real or feigned. But the case is barren of evidence showing that he had such knowledge or information. The husband and wife lived in different cities and States. They did not meet. Of 72 written exhibits in the case one only is a letter from the plaintiff to her husband, before the separation and that contains no reference to any injury or debility. The state of the husband's affections cannot be tested by conditions of which he had no knowledge or means of knowledge.

But Dr. Williams' testimony, while not pertinent as to any other issue, does have a material bearing upon damages. If a wife is injured and ill she has more need of her husband's companionship, sympathy and support. If deprived of these her loss is greater. *Hardwick* v. *Hardwick*, (Iowa) 6 N. W. 639.

Authorities differ very widely as to whether a new trial will in any event be granted when the newly discovered evidence is germane only to the issue of damages. Some answer this question in the

negative. 20 R. C. L., 293. Others, that a new trial will be decreed but only if in the light of the old evidence plus the new the verdict would be manifestly erroneous. *St. Joseph Co.* v. *Railroad Co.*, (Mo.) 50 S. W., 85; *Whipple* v. *Railroad Co.*, (R. I.) 35 At. 305.

In our opinion neither of these theories is sound. In other cases wherein the newly discovered evidence has related only to damages new trials have been granted solely upon that issue. *Geer* v. *Railway Co.*, (R. I.) 67 At. 449; *Thornton* v. *Railway Co.*, (R. I.) 67 At. 451. See *Southard* v. *Railroad Co.*, 112 Maine 227. (Not quite in point as liability was not questioned).

But there are other cases wherein motions for new trial have been unqualifiedly sustained notwithstanding the newly discovered evidence touched simply the issue of damages. *Chaet* v. *Goldberg*, 110 N. Y. S., 817; *Lowry* v. *Traction Co.* (Ind.) 124 N. E. 409; *Railroad Co.* v. *Fogelsong*, (Col.) 94 Pac. 356; *Coon* v. *District*, (Neb.) 155 N. W. 799.

Logically Dr. Williams' testimony is pertinent only to the amount of damages. Upon damages, at all events, the defendant has reason to ask for a new trial. Should a new trial be limited to this issue, as was done in *Southard* v. *Railroad Co.*, supra?

Dr. Williams' testimony, if relied upon, tends to show that the plaintiff misrepresented her physical condition, simulated disability and grossly exaggerated her illness. All this strictly speaking affects damages only. But her testimony undoubtedly permeated the whole case. Its inevitable tendency was to excite sympathy and create prejudice.

In determining whether a new trial shall be granted on the ground of newly discovered evidence Courts, while keeping within well established legal limits, endeavor to do what the interest of truth and justice require. *Barrett* v. *Railroad Co.*, 45 N. Y. 628.

In the present case we think the interests of justice require that a new trial be granted unqualifiedly and not merely as to damages.

Motion for new trial on the ground of newly discovered evidence sustained; New Trial Granted.

CENTRAL MAINE POWER COMPANY

vs.

FLORA ROLLINS, ET ALS.

Piscataquis. Opinion July 9, 1927.

Adverse possession which will ripen into title must be under a claim of right. The possession of the disseizor must be hostile or adverse in its character, importing a denial of the owner's title in the property claimed.

Retention of a deed by the grantee is prima facie evidence of its delivery and acceptance, but this presumption is rebuttable, and may be overcome by evidence of dissent.

In the case at bar the evidence justifies a finding by the jury that the defendants and their privies in occupation gained title by adverse possession to that part of lot I, range 9, lying north of the Sebec River, and it is a farm.

The jury were further warranted in finding that the defendants, during more than twenty years without interruption, used the land in lot I south of the river as farmers ordinarily use their wood lots, and it belonged to the farm.

The defendants are not barred by estoppel from setting up title by adverse possession. Admission of privies in occupation in recognition of the owner's title made in a deposition taken in litigation foreign to the instant cause and in which neither the plaintiff nor its privies are parties do not effect an estoppel.

The facts in evidence do not warrant a reversal of the verdict on the ground of equitable estoppel arising from a failure of the defendants to appraise the plaintiff's predecessor in record title of the adverse possession claimed.

On general motion and exceptions by plaintiff. A real action to determine the title to certain real estate in the town of Sebec. Demandant relied for its title upon recorded deeds. Defendants in possession claimed title by adverse possession. A verdict for defendants was rendered and plaintiff filed a general motion for a new trial, and excepted to the admission of certain testimony and to a refusal

to give requested instruction. Motion overruled. Exceptions overruled.

The case fully appears in the opinion.

C. W. & H M. Hayes, Hudson & Hudson, and William B. Skelton, for plaintiff.

Elias Smith and E. P. Spinney, for defendants.

SITTING: PHILBROOK, DEASY, STURGIS, BASSETT, JJ., MORRILL, A.R.J.

STURGIS, J. Real action to recover possession of that part of Lot 1, Range 9, in the town of Sebec which lies south of the Sebec river, together with certain shore rights on the north side of the stream. The verdict was for the defendants, and the case is before this Court on general motion and exceptions to the admission of evidence and the refusal of the presiding Justice to give requested instructions.

The demandant introduced deeds establishing a chain of record title through mesne conveyances originating in a deed from the heirs of Edson L. Oak, dated May 30, 1904, and concluding with a deed, dated January 1, 1921, from the Penobscot Bay Electric Co. to the plaintiff corporation. In reliance on the rule stated in *Stetson* v. *Grant,* 102 Maine, 222, that the legal presumption is that by a deed of conveyance of land, duly executed and recorded, title passes, the grantor has sufficient seizin to enable him to convey, and the seizin and title are coextensive, the plaintiff rested.

The defendants rely on adverse possession. They present witnesses who testify that in 1838 George Rollins, a veteran of the war of 1812, settled on Lot 1, Range 9. The lot lies on the north and south sides of the Sebec river, and within its limits the stream falls sharply in its course creating falls or rips, which with the passage of time and advent of new demands for hydro-electric power have become of substantial value. On the north side of the river George Rollins cleared the forest, turned the woodland into fields and pastures, built a log cabin and later a frame dwelling, and with his family established and carried on a small farm. His son, Joel Rollins, lived at home, and with the father carried on the place until the latter's death in 1876.

Joel Rollins married and with his family continued to occupy on the north side of the stream as had his father before him. The clearing of the woodland was continued and the fields extended. The buildings were enlarged and new ones erected. The livestock was increased, and farming was carried on on a more extensive scale. Fences and stone walls were kept up, and the land to the north shore of the Sebec river was kept enclosed. There is abundant evidence that the occupation of the defendants and their privies on the north side of the river comported with the requirements of the statute.

R. S., Chap. 110, Sec. 10, provides: "To constitute a disseizin, or such exclusive and adverse possession of lands as to bar or limit the right of the true owner thereof to recover them, such lands need not be surrounded with fences or rendered inaccessible by water; but it is sufficient, if the possession, occupation and improvement are open, notorious and comporting with the ordinary management of a farm; although that part of the same which composes the woodland belonging to such farm and used therewith as a woodlot, is not so enclosed." The last clause of this statute has been construed by this Court as applying to woodland occupied and used as such in connection with land or a farm which a disseizor was also occupying and using adversely. The statute provides what shall be deemed sufficient evidence of adverse possession of lands used as a farm, and "extends the constructive disseizin or adverse character of the possession to that part of the land or farm which is 'part of the same' and used therewith as a woodlot." *Adams* v. *Clapp*, 87 Maine, 316. See also *Webber* v. *Barker*, 121 Maine, 259.

The defendants claim that their adverse possession and resulting title extended to and included all of lot 1 which lies across and south of the river. Upon the stand the defendants and their witnesses concur in the assertion that for more than fifty years all of the lot on the south side of the river has been claimed as a part of the farm on the north side and used in connection with it as a woodlot. Supported by the testimony of neighbors, they show that it was from this land that they obtained their firewood, procured logs to be sawed into lumber for repairs, cut and sold pulp and firewood, obtained material for fences, and at times cut wood for their charcoal pits. They assert a regular and continuous cutting, extending over the entire lot, begun in early times and continued up to the present.

They show with little contradiction that the boundaries of this woodlot, except as identical with town or range lines, have been for years marked by spotted trees, spots of ancient origin renewed from time to time. That this occupation and use of the south lot extended for a period of more than twenty years without interruption is clear. That it was contemperaneous with the adverse possession and use of the farm lying immediately to the north is equally clear. As was said in *Holden* v. *Page*, 118 Maine, 242, upon closely similar facts, "the jury were authorized to find that the (defendants) during more than twenty years without interruption used it as farmers ordinarily use their wood lots."

It is elementary law, however, that adverse possession which will ripen into title must be under a claim of right. Not every unlawful entry into lands of another will work a disseizin, and dispossession is not necessarily disseizin. "To make a disseizin the possession taken by the disseizor must be hostile or adverse in its character, importing a denial of the owner's title in the property claimed, otherwise however open, notorious, constant and long continued it may be, the owner's action will not be barred." *Worcester* v. *Lord*, 56 Maine, 265, 269. This rule, we think, applies to disseizin of a woodlot under the statute.

Invoking this rule, the demandant offers as admissions, testimony given by Joel Rollins in a deposition taken August 22, 1903, in litigation foreign to the instant case, in which Mr. Rollins stated that he and his father before him had occupied Lot 1, Range 9, lying north of the Sebec river, under a claim of ownership. In the deposition, in answer to an interrogatory as to the location of the southerly bound of the land which he claimed to own, Mr. Rollins stated the south bound to be "the river". This statement, it is urged, refutes the defendants' assertion of adverse occupation of the lot south of the river. The defendant, Flora Rollins, however, explains this admission. She says that the litigation out of which the taking of the deposition arose was a suit by Joel Rollins and his brother Amos against one Edward C. Mooers, who had cut growth on the north side of the river, and that at the time the deposition was taken Joel Rollins was advised by his counsel that the pending action involved only land lying north of the river, and that in his deposition Mr. Rollins should confine himself to that tract without mention of his claim

to the woodlot across the stream. We cannot say that this explanation was not sufficient to overcome in the minds of the jury the effect of the deponent's statement.

Again it appears that Edson L. Oak, of Garland, in his life-time held the record title to the lands in controversy. In February, 1904, his heirs made and executed a quitclaim deed to Joel W. and Amos Rollins in which they purported to convey to the grantees all their "right, title and interest in and to all that part of the east half of Lot one, Range nine, in the town of Sebec which lies north of the Sebec river." Included in this conveyance was the following: "Excepting and reserving to said grantors, their heirs and assigns, the right to build and attach a dam at such point on the north shore of said river as said grantors, their heirs or assigns, may hereafter elect, and all right of flowage, and the right to put a penstock or canal on the north side of said river, and the right to pass and repass on said shore to build and maintain said dam, penstock or canal, and the right to cross said land at some suitable place, doing as little damage to the grantees, their heirs and assigns, as may be, and the right to take all such gravel from the bank as may be necessary to use in building said dam."

The execution of this deed undoubtedly grew out of the litigation between the Rollins brothers and one Edward C. Mooers. Its exact connection with that suit, however, is not clear. John M. Oak, speaking for the Oak heirs, denies connection with the Mooers suit, and says that no money was received as consideration for the deed. And while it does appear elsewhere in the evidence that the Oak heirs, in 1903 or '04, were seeking to oust the Rollins family from Lot 1, there is insufficient evidence to justify a conclusion that this deed was made for the purpose of adjusting any matter in which the Oak heirs were interested. Flora Rollins testifies that the attorney acting for the Rollins brothers advised that as a part of the settlement of the Mooers suit he would obtain a deed of the land then claimed by the Rollins brothers by adverse possession, and that sometime in 1904 the attorney delivered to her an envelope which, when she opened it in her own home, was found to contain a quitclaim deed from the Oak heirs. She asserts most insistently that she read the deed to her husband and brother, the former being ill and the latter

of weak mentality and nearly blind, and that on discovery that it included only the land north of the river both refused to accept the deed. She says she so informed the attorney, and the record supports her further statement that the instrument was never entered for record in the registry of deeds. Her testimony as to the non-acceptance of the deed is corroborated by her sons and daughters.

The deed was not returned to the makers but remained with the Rollins family until produced at this trial. The demandant insists that this retention of the deed by the grantees named therein is conclusive evidence of its acceptance, and that the defendants as privies in title with Joseph and Amos Rollins are now estopped to deny the binding effect of the exceptions or reservations set out in the conveyance or to assert a claim of ownership beyond the boundaries and extent of the land described. The question of acceptance of the deed is one of fact for the jury to determine. Retention of a deed by the grantee for a long period is evidence of acceptance, but the presumption arising therefrom is not conclusive; it may be rebutted by satisfactory evidence to the contrary. This rule is further discussed with supporting authorities in our consideration of the second exception reserved by the demandant.

Finally, as proof of the acceptance of the Oak deed and recognition of the title of the true owner, the demandant introduced an indenture by which on August 1, 1906, Joel W. Rollins and Amos Rollins leased to the American Thread Company certain shore and flowage rights on the north shore of the Sebec river, and in the lease it was stipulated that the rights demised should not "interfere with the rights reserved in the deed given to said lessors by John M. Oak and others, dated February 26, A. D. 1904." The defendants' witnesses testified, however, that the lease was drawn by the lessees, and neither of the lessors were informed or knew that the instrument contained the reference to the Oak deed and its reservations.

The issue of acceptance of the deed of the Oak heirs and recognition of their title was one of fact. It was sharply drawn and the evidence was conflicting. The verdict indicates that the jury found that the defendants hold both the farm on the north side of the river and the woodlot across the stream under title acquired by adverse possession and not under the Oak deed. We do not think this conclusion is so clearly wrong as to require reversal by this Court. It

follows that a discussion of the effect of the deed and its recital is unnecessary.

The demandant, however, contends that even if the essential elements of adverse possession by the defendants and their privies are established, the doctrine of estoppel bars them from setting up title thus acquired. It first insists that it is a privy in title with the Oak heirs, and that they were so interested in the litigation between the Rollins brothers and Edward C. Mooers that the statement of Joel Rollins that his claim of adverse possession extended south only to "the river" estops his privies in occupation, the defendants, from now asserting claim to lands south of the river. As already noted, there is no evidence warranting a finding that the Oak heirs were parties to the litigation in which the deposition was given. Not being parties, the admission does not operate as an estoppel in favor of their successors in title. *Parsons* v. *Copeland*, 33 Maine, 370; 10 R. C. L., 702.

As a second ground of estoppel, the demandant advances the argument that if the defendants and their privies gained title to the disputed lands and water rights by adverse possession and were holding under that title in 1904, they had full knowledge of the purchase by the Sebec Power Company of these properties from the Oak heirs, and knowingly, without making known their claim of title, suffered that corporation to purchase the lands and water rights under an erroneous opinion of title. If these facts are established an equitable estoppel exists. *Martin* v *Maine Central R. R. Co.*, 83 Maine, 105. The evidence offered by the defendants controverting the demandant's proof upon this issue, if believed, justified a rejection of this claim of estoppel. The verdict cannot be reversed upon this ground.

We have thus far considered the demandant's record title and the defendant's claim of title by adverse possession. There remains upon the motion only the demandant's claim of title by its own adverse possession.. It attempts to prove adverse possession of the lands in question by its predecessors and privies in title for more than twenty years, and says that it has thus acquired ownership regardless of its record title. On the brief it says that it has fulfilled the requirements of R. S., Chap. 110, Sec. 18, relating to the acquisition of wild lands in incorporated towns. It is unnecessary to quote

the statute. It is quite sufficient, we think, to quote the words of this Court in *Holden* v. *Page*, 118 Maine, 245: "Wild land has been defined as 'land in a wilderness state, not used in connection with improved estates'. When land is contiguous to improved and cultivated land and commonly used therewith for fuel, fencing, repairs or pasturing, it no longer has the character of wild land." The land in controversy is not wild land within the purview of the statute. Nor do the facts proven by the demandant establish its adverse possession. The evident rejection of this claim by the jury was fully warranted.

Upon the finding of the jury that the defendants were the owners of the lands on the north and south banks of the Sebec river included within the limits of Lot 1, Range 9, the verdict was proper. As riparian owners the title of the defendants extended to and included the bed of the stream with all water rights appertaining. *Wilson & Son* v. *Harrisburg*, 107 Maine, 207; *Pierson* v. *Rolfe*, 71 Maine, 385.

Exceptions:

The first exception is to the admission of the testimony of Flora Rollins given in explanation of the statement of her husband, Joel Rollins, in his deposition taken in the suit against Edward C. Mooers. The demandant again urges that this admission operates as an estoppel and is not open to explanation. Again, as upon the motion, we must state that the record fails to establish that the demandant or its predecessors in title were parties to the litigation in which the deposition was taken, and upon the authorities already cited no estoppel exists. Unless there be an estoppel to deny an admission it is always open to explanation. This rule applies to admissions by a predecessor in title. *State* v. *Morin*, 102 Maine, 290; *Hatch* v. *Brown*, 63 Maine, 410, 419; *Parks* v. *Mosher*, 71 Maine, 304. See 22 Corpus Juris, 503, and cases cited.

The exception taken to the refusal of the presiding Justice to instruct the jury as requested is without merit. Upon an assumption that the jury should find that the deed to the Rollins brothers from the Oak heirs of February 26, 1904, was delivered to the Rollins brothers as a part of a then existing controversy, the requested in-

struction concluded with the statement, "I instruct you that the deed as a matter of law would be accepted unless within a reasonable time the guarantee therein tendered said deed back to the grantors, or one of them, or their attorney." Authorities do not support this instruction. In *Lake* v. *Weaver*, 76 New Jersey Eq., 280, cited in support of the requested instruction, it is held that the acceptance of a deed will be inferred when after delivery it remains in the possession of the grantee for a long period of years, *nothing to the contrary appearing.* Retention of a deed by the grantee is prima facie evidence of its delivery and acceptance, but this presumption is rebuttable and may be overcome by evidence of dissent. 9 R.C.L., 999; Devlin on Deeds, Vol. 1, Sec. 285 et seq. The refusal of the presiding Judge to give the instruction as requested was not error.

Motion overruled.
Exceptions overruled.

SMITH, FITZMAURICE CO.

vs.

M. S. HARRIS

Aroostook. Opinion August 3, 1927

In an action for goods sold and delivered, where the goods are ordered to be shipped later, a delivery and acceptance must be shown.

Where there is no acceptance, the vendor's remedy is a special action for breach of implied contract to accept.

Where in pursuance of a contract to sell the seller delivers the goods to a common carrier, whether named by the buyer or not, for transmission to the buyer, the seller in the absence of any evidence to the contrary is presumed to have unconditionally appropriated the goods to the contract and such delivery will be presumed to be a delivery to the buyer and title passes; but such appropriation is authorized only by the vendor's compliance with the contract in kind, quality and amount.

In the instant case the defendant was under no obligation to reply to plaintiff's letter of September 20, whether it be construed as meaning that plaintiff could and would ship 16 dozen only and inquired if defendant would accept, i. e., an offer to make a new contract for 16 dozen, or as meaning that plaintiff was about to ship more than the order and would do so unless immediately advised by wire not so to ship, i. e., a notice of an intention not to comply with the order unless notified to comply.

The plaintiff did not comply with the order, the defendant rightfully refused to accept, title did not pass and the action cannot be maintained.

On general motion by defendant. An action of assumpsit for goods sold and delivered. Defendant contended that there had not been an acceptance by him of the goods. Verdict for the plaintiff for the full amount claimed and defendant filed a general motion for a new trial. Motion for a new trial granted.

The case fully appears in the opinion.
J. Frederic Burns, for plaintiff.
Herbert T. Powers, for defendant.

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

BASSETT, J. Action of indebitatus assumpsit with account annexed. The account is

"1920 September 16th. To 16 dozen men's fleece union suits sold to you at your request @ $24.00	$384.00
To interest since due and demanded	137.24
	$521.24"

Writ dated September 4, 1926. Verdict for the plaintiffs for $521.24. The case comes up on general motion.

In March, 1920, the defendant at his store in Van Buren gave the plaintiffs' traveling salesman an order for 12 dozen union suits at $24 per dozen to be shipped to the defendant sometime in the Fall from the factory of the manufacturers in Amsterdam, N. Y. f. o. b. there.

On September 16, 1920, the salesman from his employers' office in Boston wrote the defendant that he had an order on file for 12 dozen union suits but that the mill that season had packed the goods in 16 dozen cases and said "If for any reason you do not want these goods advise us by wire as we cannot afford to take back any goods once they are shipped.' The defendant received the letter on September 18, and on the same day wrote to the plaintiffs that he had that day wired "Cannot accept now. Will let you hear from me later." The plaintiffs received this letter September 24th, but did not receive the telegram. Whether or not the telegram was sent was controverted.

On September 20 the plaintiffs notified the manufacturers to ship to the defendant at Van Buren the 16 dozens and shipment was made accordingly on that day. On September 24 the plaintiffs replied to the defendant's letter of September 18 that having requested in their

letter of the 16th a reply by wire and having waited a reasonable time and not having heard by the 20th, they had ordered the goods shipped from the manufacturers and insisted on payment of all the goods.

The defendant refused to take the goods from the station on their arrival in Van Buren, and they remained in the possession of the carrier.

The plaintiffs wrote on November 11, 1920, requesting payment to which the defendant replied on November 20 that he could not under any circumstances accept the shipment.

In 1921 suit was brought by N. T. Stevens, an attorney in Van Buren, the writ being entered at the November term 1921 of the Supreme Judicial Court and at the November term, 1922, entry of neither party was made. On June 14, 1922, the attorney and defendant agreed that the goods should be taken from the depot to the defendant's store, the freight, storage and court expenses equally divided between the parties and the defendant to pay $10.50 per dozen if he accepted them. The defendant paid the freight, storage and court expenses amounting to $133.40. The case was hauled to his store, deposited on the sidewalk and opened. The defendant found them, as he testified and there was corroborative evidence, of inferior quality, badly woven and discolored. He called Mr. Stevens to examine them and refused to accept. The goods were placed in the basement of the store, where they remained until 1925, and were then hauled away to a dump.

The account annexed is for goods "sold" which word might mean "bargained and sold" or "sold and delivered." Account annexed is used as a substitute for the common counts for goods bargained and sold or sold and delivered. *Dudley v. Paper Company*, 90 Me. 260; *Kelsey* v. *Irving*, 118 Me. 310. The declaration in this case is good for either kind of action. But the case was tried below and argued before the Law Court on the theory that it was an action for goods sold and delivered, the plaintiffs claiming that the goods had been accepted by the defendant. Unless there were acceptance so that an action to recover the price of goods sold and delivered could be maintained, an action for goods bargained and sold could not be, since this is a case where goods were ordered and later shipped to the one giving the order. In such case, if the goods are not de-

livered and accepted, the vendor's remedy is a special action for breach of the implied contract to receive and accept. *Greenleaf* v. *Gallagher*, 93 Me. 549; *Bixler* v. *Wright*, 116 Me. 133; *Chase* v. *Doyle*, 121 Me. 204.

We therefore consider the action on pleading and proof as for goods sold and delivered.

The case is governed by the common law. The Uniform Sales Act was enacted in Maine in 1923.

It is well settled law both in England and the United States that where in pursuance of a contract to sell the seller delivers the goods to a carrier, whether named by the buyer, *State* v. *Intoxicating Liquors*, 98 Me. 464, or not, for the purpose of transmission to the buyer, the seller, in the absence of any evidence to the contrary, is presumed to have unconditionally appropriated the goods to the contract and such delivery will be presumed to be a delivery to the buyer and title passes. "The Sales Act in so expressly providing is merely stating what was well settled law." Williston on Sales, Second Edition, sec. 278.

"In order for the property to pass however the seller must have acted in conformity with the authority given him by the buyer. If therefore the goods which he sends are not of the kind or quality ordered, the property will not pass. * * * For the same reason the property will not pass if the goods are too many." Williston on Sales, Supra; *Hart* v. *Mills*, 15 M. & W. 85, 71 Rev. Rep. 578 (1846), 4 dozen wine ordered, 8 shipped; *Cunliffe* v. *Harrison*, 6 Exch. 903, 86 Rev. Rep. 543 (1851) 10 hogsheads claret ordered, 15 shipped; *Levy* v. *Green*, 8 E. & B. 575, 112 Rev. Rep. 699 (1857), the additional articles were crockery of a perfectly distinguishable pattern, (the opinions of Lord Campbell C. J. and Wightman J. were upheld on appeal in Exchequer Chamber, 1 El. & El. 969, 117 Rev. Rep. 552); *Huddleston* v. *Bernstein* 148 Ark., 1 (1921), 228 S. W. 208, $89 of paint ordered, $99.50 shipped; *Rommel* v. *Wingate* 103 Mass. 327 (1869) 375 tons coal ordered, 392 shipped; *Dormer* v. *Thompson*, 2 Hill 137 (1841) 250 barrels ordered, 260 shipped, (the judgment was reversed in 6 Hill 108); *Lamborn* v. *Suggerman Bros.* 240 N. Y. 118 (1925), 147 N. E. 607, 38 A.L.R. 1540, 1200 boxes apples ordered, 1770 shipped; *Myercord* v. *P. H. Butler Co.* 79 Pa. Super. Ct. 473 (1922) 200 window advertising signs ordered, 297 shipped; *Perry* v. *Mt. Hope*

Coal Co., 16 R. I. 318 (1888), 15 Atl. 87, 30–40 tons scrap iron ordered, 53 17-20 tons shipped; *Barton* v. *Kane*, 17 Wis. 37 (1863), 84 Am. Dec. 728, 5000 cigars ordered, 5625 shipped.

This court has not passed upon the question of delivery to a common carrier. It has upon a contract to deliver personal property sold to be delivered to a certain person at a certain place and held that the presumption of acceptance by the vendee on proof of delivery to such person and place does not apply "when the amount of property claimed to be delivered is largely in excess of that bought or contracted for." *Mercier* v. *Murchie's Sons Co.* 112 Me. 72. The words "largely in excess" were properly used in that case because the contract was for "about 500 thousand feet" of lumber and it was contended that the amount delivered was within the agreement. But in none of the authorities cited is any distinction of the amount of excess made and we make no such distinction. In this case, as in the cases cited, the amount of the order was definitely fixed We rest the decision in this case therefore, as it was in the cases cited, squarely upon the principle of compliance with the terms of the contract.

"The vendor has the duty to comply with his order in kind, quality and amount. He does not comply with his contract by the tender or delivery of either more or less than the exact quantity contracted for or by sending the goods mixed with other goods. As a general rule the buyer is entitled to refuse the whole of the goods tendered, if they exceed the quantity agreed and the vendor has no right to insist upon the buyer's acceptance of all or upon the buyer's selecting out of a larger quantity delivered." Benjamin on Sales, Seventh Edition, sec. 689; 23 R. C. L. 1420.

Compliance with the contract authorizes appropriation of the goods to the contract by delivery to the carrier. Non compliance does not. In this case there was non compliance.

Was the duty of the plaintiffs to comply affected by their letter of September 16 and their not receiving the reply by wire requested? We do not think so. The letter stated "if for any reason you do not want these goods." The letter might be construed to mean that the plaintiffs could and would ship only a 16 dozen lot, and to inquire if the defendant wanted them. It can be construed, and

we think better so, as inquiring if the defendant wanted the excess four dozen.

With the first construction the letter is an express proposal for a new contract. Baron Parke in *Cunliffe* v. *Harrison* supra holds that a delivery of more than the contract quantity is itself a proposal for a new contract, "The delivery of more than the 10 (the number ordered) is a proposal for a new contract." The defendant here was under no legal obligation to inform the plaintiffs of acceptance or rejection of such proposal.

With the second construction the letter was notice that the plaintiffs were about to ship more than the order and would do so if the defendant did not immediately advise by wire not so to ship, in other words a notice of an intention not to comply with the contract unless they were notified by the defendant to comply. The defendant was under no legal obligation to give such notice.

In either view of the meaning of the letter therefore the defendant was under no legal obligation to reply to it. It becomes immaterial whether the defendant did or did not wire as requested.

The defendant had the right to refuse to accept the goods. The evidence is clear that he did so. The plaintiffs knew he did. The traveling salesman so testified and that, when he went to Van Buren in 1922 to see if he could adjust the matter and failed to do so, the goods as far as he knew were still at the station.

The defendant hauled the goods to his store under the arrangement, stated above, with Mr. Stevens as the plaintiffs' attorney. But the defendant's carrying out the agreement was conditioned on his acceptance of the goods. He examined them and refused to accept. There was therefore no sufficient delivery and acceptance under the new arrangement. It is immaterial therefore whether or not the attorney had authority to make such arrangement, which authority was denied by the plaintiffs.

In order to maintain this action it was necessary for the plaintiffs to prove delivery and acceptance. They did not do so. A new trial therefore should be granted.

Motion sustained.

FRANK S. SAWYER

vs.

CALAIS NATIONAL BANK

Washington. Opinon August 17, 1927.

The court has power, at any time before final judgment, to amend, enlarge or vacate entries erroneously, improvidently or falsely made.

When an erroneous judgment has been vacated by the court, parties are restored to their original position.

In this case, plaintiff had attached real estate. An entry of "neither party" was made, under a misunderstanding. At the same term of court, when the true facts became known, the court ordered the entry stricken off. The case was restored to the docket and proceeded to final judgment. Held that the original attachment was in no way affected, no rights having been acquired in the meantime.

Title gained by plaintiff by legally conducted sale based on the attachment is good.

On report. A real action involving the question as to whether a real estate attachment was affected by reason of the action in which the attachment was made being entered "neither party" which entry afterwards for cause shown was stricken off and the case restored to the docket, no rights in the property having been acquired in the mean time. Attachment held valid.

The case fully appears in the opinion.

Maxwell & Conquest and Gray & Sawyer, for plaintiff.

R. J. McGarrigle and H. J. Dudley, for defendant.

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

PATTANGALL, J. Real action. On report. Plaintiff's title rests upon an attachment of the demanded premises, made November 5, 1921, on a writ in which John C. McFaul and Charles H. Gay were plaintiffs and J. Herbert Hanson, defendant. Final judgment was rendered for the plaintiffs on October 24, 1923. The real estate was sold at sheriff's sale, to McFaul and Gay, on December 20, 1923 and conveyed by them to plaintiff on January 20, 1927.

Defendant claims title through the same J. Herbert Hanson under a mortgage of the premises given by him to Calais Savings Bank on March 28, 1922, which mortgage was assigned by Calais Savings Bank to defendant on July 31, 1923. Later defendant began foreclosure proceedings which have been completed.

The attachment antedated the mortgage but defendant claims that the attachment was dissolved by reason of certain matters which occurred in connection with the case of McFaul et al. vs. Hanson, while that case was pending. This suit was on a promissory note, to which there was, apparently, no defense. It was entered at the May term 1922, of the Supreme Judicial Court for Washington County. The attorney for the present defendant entered his appearance for the defendant Hanson and the case was continued to the October term. When the docket was called at that term defendant's attorney stated, in open court, that the case had been settled, whereupon, attorney for McFaul and Gay said "If counsel says that the case is settled, it may be entered neither party" adding that he would "take it up with his clients later."

The entry was made. Investigation proved that the case had not been settled. During the term, the matter was called to the attention of the presiding justice who ordered the entry stricken off. The case was continued and, at a later term, defaulted by agreement.

Defendant claims that this entry of neither party, tentatively agreed to by the attorney for the then plaintiffs, and based upon a misstatement of fact by the then defendant's counsel, although stricken off at the same term by order of the court, and notwithstanding that no innocent person had, in the meantime, acquired any interest in the property, vacated the attachment and made the mortgage which it afterwards purchased from the Calais Savings Bank, a first lien on the property. We cannot agree with this contention.

No question can be raised as to the power of the court, at any time before final judgment, to "amend, enlarge or vacate entries erroneously, improvidently or falsely made. Mistakes may be corrected and false or fraudulent entries rectified and made to conform to the truth. Until the rendition of a final valid judgment all actions whether on the docket of the existing or a former term are regarded as within the jurisdiction and control of the court." *Myers* v. *Levenseller*, 117 Maine, 82.

"It was certainly within the power of the court to vacate the judgment if satisfied that it had been entered erroneously." *Hersey* vs. *Weeman*, 120 Maine, 262.

Neither the authority of the court to strike off the entry of neither party and restore the case to the docket nor the propriety of its action in doing so, is open to argument.

The situation is not at all like that in *Berry* vs. *Railway*, 89 Maine, 552, where the entry, neither party, no further action for the same cause, was made after consultation and agreement between the parties with a full understanding of the facts and with no suggestion of fraud or mistake. That case stands for the simple proposition that parties may dispose of cases by agreement, fairly and understandingly made, and that the court has no power to interfere with such agreements.

The precise point at issue, however, whether or not when an erroneous judgment has been vacated or revised by the court, plaintiff is restored to his original position so far as his attachment is concerned, assuming, of course, that no rights have, in the meantime, been acquired by others, has not been passed upon in this state. But there is sufficient authority for that conclusion and it would seem to naturally follow the logic of *Myer* vs. *Levenseller*, supra.

In *Hubbell* vs. *Kingman*, 52 Conn., 17, the court held that a judgment of nonsuit, afterwards set aside at the same term did not vacate an attachment. In this case the court said; "Why should an erroneous or mistaken judgment which is set aside at the same term of court, the case having been subsequently prosecuted to a final judgment in favor of the plaintiff, deprive him of the security obtained by his attachment? The analogies of law are against it and so are justice and equity." In *Gunnison* vs. *Abbott*, 73 N. H., 592, the court speaking through Chief Justice Parsons, said, "The power of

the court to vacate and revise an erroneous judgment might be of little use if such action did not restore the plaintiff to the position which he occupied before the error was committed. Legally speaking a judgment so reversed has now no existence. It is as if it had never been rendered. It would be an anomaly in law if a judgment found to be void and of no effect and under which no rights could be claimed, should still be valid and effectual to destroy plaintiff's attachment."

"The setting aside of an order vacating a judgment restores all the liens originally attached to the judgment except as to rights acquired in the meantime. *King* vs. *Harris*, 34 N. Y., 330.

"When an attachment suit has been dismissed but the order of dismissal is subsequently vacated, the attachment lien will not be lost." *Jaffray* vs. *Company*, 119 Mo. 117.

Defendant relied upon *Brown* vs. *Harris*, 52 *Am. Dec.*, 535, (Iowa), decided in 1850, which held that a judgment of nonsuit vacated an attachment, even though a motion in behalf of the plaintiff to set aside the judgment and order a new trial was sustained. This case has met with unfavorable comment not only in its own state, in *Danforth et al.* vs. *Carter et al*, 4 Iowa, 239, (1856), but in *Jaffray* vs. *Company* supra, and in *Dollings* vs. *Pollock*, 7 So. 904 (Ala.). It could hardly be received as authority in this case, if for no better reason, than because at the time the decision was rendered, by the provisions of Iowa R. S. 324, section 4, the procedure required that under the circumstances recited, new process must issue, new service must be had, new return made and the case entered in court exactly as though it were an original suit.

The court was, in substance, permitting a new action to be brought. A very different proposition from that presented here.

The plaintiff in the present case had no intention of abandoning his suit or his attachment. The entry was made by mistake and a mistake induced by the erroneous statement of opposing counsel. Furthermore, the entry was conditional. Plaintiff assented to it provisionally. The entry was made tentatively, on the assurance by defendant's attorney that the case had been settled. Plaintiffs' counsel reserved the right to lay the matter before his clients. When he did so the mistake was discovered. It was rectified. The entry was stricken from the docket. It was as though it had never been

made. No rights in the property had been acquired, in the meantime, the parties were restored to their original status. To hold otherwise would be to invoke a rule which would not only prevent adequate correction of errors honestly made but would open a wide door to fraud. Plaintiff has shown good title. The writ contained a claim for damages which is now waived and need not be considered.

Judgment accordingly.

ETHEL M. MCCOLLISTER

vs.

LILLIAN MCCOLLISTER

Androscoggin. Opinion August 22, 1927.

A parent is liable for any wrongful alienation of the affections of a married child but only when the parent's conduct is malicious.

It is incumbent on the plaintiff to prove malice on the part of the defendant.

Liability attaches only when the parent interferes with hostile, wicked or malicious intent or simply because she does not wish the marriage relation to continue longer.

The law has always recognized a broad distinction between the permitted attitude of parents toward their married children, in connection with their domestic difficulties and the attitude which may be taken by strangers under like circumstances.

It is not every interference between husband and wife nor every participation in their disagreements which renders a parent liable in damages.

A mother may advise a son in good faith and for his good, to leave his wife, if she believes that further continuance of the marriage relation tends to injure his health or destroy his peace of mind. She may persuade her son. She may use proper arguments. Whether the motive is proper or improper is always to be considered. If she acts in good faith, for the son's good, on reasonable grounds of belief, she is not liable.

This case does not meet these standards. It is bare of evidence of malice or improper motives on the part of the defendant. The jury erred in its findings.

On general motion for new trial. An action for alienation of husband's affections brought by plaintiff against her husband's mother. The general issue was pleaded and the jury rendered a verdict of $2,708.33 for the plaintiff, and the defendant filed a general motion for a new trial. Motion sustained.

The case fully appears in the opinion.

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

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

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

PATTANGALL, J. Action on the case by wife for the alienation of the affections of her husband by his mother. The plaintiff obtained a verdict. The case comes before this Court on motion in the usual form.

The plaintiff, then a divorcee, twenty-eight years of age, and the mother of a son, married the son of the defendant, at Portland, November 17, 1919. He was a widower, his wife having died in the spring of the same year. He was then thirty-six years old and also had a son, some five years older than that of the plaintiff.

For about a year after the marriage the parties thereto resided in Boston, then returned to Maine and made their home in Mexico, where the husband was employed in the paper mills, until May 1923.

The defendant, with her husband, who deceased in October 1926, lived in Mechanic Falls. Plaintiff and defendant met but once prior to the marriage but after that event visited each other frequently and were apparently on good terms during, at least, six years subsequent to that time.

In the winter of 1923, the husband of the plaintiff developed a cough, which was attributed to matters connected with his employment and which became the subject of anxiety to the defendant and to her husband, who was a physician.

Plaintiff had expressed a desire for a country home. Her husband's health seemed to demand a change of employment. Defendant was anxious that her son should be near her in her old age. And by agreement with all concerned Dr. McCollister purchased a home for

the use of his son and family, located within about a mile of his own home, plaintiff and her husband moved there and continued to reside there until they separated in March 1926. Since the separation the husband has made his home with his mother.

Plaintiff claims that defendant interfered unwarrantedly in her domestic affairs and if not the immediate cause of the separation, actively prevented a reconciliation between her husband and herself. Defendant claims that the separation was caused by the unfortunate disposition of the plaintiff, by her unreasonable jealousy and constant fault finding. There is evidence tending to show that a contributing cause if not the controlling one was the attitude of the husband himself, who appears in the case in a most unfavorable light and there was more or less trouble on account of the two boys.

The case was submitted to a jury under presumably proper instructions. No exceptions are presented here. No error of law is made the subject of complaint. The issues involved were purely matters of fact. Under such circumstances this court is loath to disturb the verdict. It needs no citation of authorities to support the proposition that the findings of a jury on an issue of fact should not be overturned provided that any reasonable justification for those findings can be found in the evidence. We do not find such justification here.

Prior to 1913 no suit would lie, in this state, in favor of a wife for the alienation of her husband's affections, against any defendant, under any circumstances. Such actions were declared to be not only without authority in common law but against public policy. *Doe* v. *Roe*, 82 Me. 503. *Morgan* v. *Martin*, 92 Me. 190.

In 1913, the statute under which such actions are authorized was enacted. It reads—"whoever being a female person more than eighteen years of age, debauches and carnally knows, carries on criminal conversation with, alienates the affections of, the husband of any married woman or by arts, enticements and inducements deprives any married woman, of the aid, comfort and society of her husband shall be liable, etc."

It seems probable that the legislature had in mind, in enacting this law, an entirely different situation than that presented by this case but the language used, when given its full legal effect, obliged the court to construe it as embracing similar cases to this. Our

court, however, has construed it strictly, as being in derogation of common law. *Farrell* v. *Farrell,* 118 Me. 441; *Howard* v. *Howard,* 120 Me. 479. Prior to the passage of this law in suits brought against parents for alienation, this court held the plaintiff within certain strict limitations which are not enlarged by the statute.

Presumably there is a legitimate field for actions brought under this statute and for actions based on charges of alienation generally but the nature of the claims so asserted is such that such suits furnish a most convenient weapon for extortion and the right to bring them is a constant temptation to the unscrupulous. Every such case should be subjected, therefore, to the most careful scrutiny not only by jurors but by the appellate court. Especially is this true in cases in which parents are defendants.

The common disagreements which arise among the members of a family; the frank criticism of each indulged in by the others; words, spoken in haste and in the freedom of confidential family intercourse, taken out of their original setting, and reproduced in solemn testimony in a court room, magnified and distorted by bias, prejudice and interest, may be made to appear to carry inferences never originally understood or intended.

The law has always recognized a broad distinction between the permitted attitude of parents toward their married children, in connection with their domestic difficulties and the attitude which may be taken under like circumstances by strangers.

It is not every interference between husband and wife nor every participation in their disagreements which renders a parent liable for damages.

A parent is liable for any wrongful alienation of the affections of a married child but only when the parents conduct is malicious. 30 C. J. 1127.

The rule is so laid down in this state in *Oakman* v. *Belden,* 94 Me 280, and in *Wilson* v. *Wilson,* 115 Me. 341. It is incumbent on the plaintiff in such cases to prove malice on the part of the defendant.

In the latter case the court quotes with approval *Hossfield* v. *Hossfield,* 188 Fed. Rep. 61, in which it was held that if the jury found that the separation was brought about by the mother, the question was, "Did the mother act from malice or from proper parental regard?"

The former case held erroneous an instruction that if the separation "was the result of the active interference of the parents or if the wife would have gone back if it had not been for their interference, either by threats, persuasion or arguments—they have done him a wrong and he is entitled to compensation for that wrong." The appellate court holding that the instruction was too broad in that it did not distinguish legitimate action from malicious action, in these respects, on the part of parents.

This opinion adopts the doctrine laid down by Chancellor Kent in *Hucheson* v. *Peck*, 5 Johns 196 "A father's home is always open to his children. Whether they be married or single, it is still to them a refuge from evil and a consolation in distress. Natural affection establishes and consecrates this asylum. It should require more proof to sustain this action against a father than against a stranger. It ought to appear either that he detained his daughter against her will or that he enticed her away from her husband from improper motives. But as unworthy motives are not to be presumed they ought to be positively proved or necessarily deduced from facts and circumstances."

In *Oakes* v. *Belden*, supra, the court said: "It is universally conceded that a parent stands on different grounds from a stranger. Though the wife has gone out from the parental home and joined her husband 'for better, for worse' and though she owes to him marital allegiance and he possesses the first right to her affection and comfort and society, it is nevertheless true that the parental relation is not ended nor has parental affection and duty ended.—She may properly leave her husband. In such case to whom shall she fly except to her parents? And from whom shall she seek advice except from them? And such advice may, we think, be enforced by reasonable arguments.—A parent may advise his daughter, in good faith and for her good, to leave her husband, if he believes that the further continuance of the marriage relation tends to injure her health or to destroy her piece of mind so that she would be justified in leaving him. A parent may in such case persuade his daughter. He may use proper and reasonable arguments drawn, it may be, from his greater knowledge and wider experience. Whether the motive was proper or improper is always to be considered. It may turn out that the parent acted upon mistaken premises, or upon false

information, or his advice and his interference may have been unfortunate, still, if he acts in good faith, for the daughter's good, upon reasonable grounds of belief, he is not liable to the husband."

The liability attaches only when the parent interferes "with hostile, wicked or malicious intent or simply because he does not wish the marriage relation to continue longer."

The present case falls far short of measuring up to the standards set by these authorities. The defendant is a widow, seventy years of age. She may have been deceived by her son as to the real cause of his domestic troubles. She may have failed to take an impartial view of the differences which arose between him and his wife. She may have unwisely interfered in his behalf. He may have been entirely unworthy of her love and confidence. But the case is bare of any evidence that she was, in any way, actuated by malice or improper motives in anything that she did or said or in any attitude that she assumed. The jury manifestly erred in its finding.

Motion sustained.

STATE

vs.

IRVING MOREY, WALTER A. LORD AND FRANK PIKE

Oxford. Opinion August 22, 1927.

A conviction may be had on the uncorroborated evidence of an accomplice, but such testimony shall be received with great caution and discrimination. But the credibility of the witness is for the jury and they may convict on his testimony alone if it convinces beyond a reasonable doubt.

If a person causes a crime to be committed through the instrumentality of an innocent agent, he is the principal of the crime although not present at the time and place of the offense.

Falsehood on the part of respondents and their supporting witness may properly be regarded as strong evidence of guilt.

Newly discovered evidence, clearly within the rule may not, and in this case, does not, carry sufficient weight to warrant submission of the case to another jury.

The real question raised by these appeals is, whether or not justice demands a different result and therefore, requires a new trial.

The instant case does not present that situation. No innocent man has been wronged by the findings of the jury nor by the refusal of the presiding justice to grant the motions appealed from.

On general motion and motion for new trial on newly discovered evidence. The respondents were indicted for larceny and were tried by a jury resulting in an acquittal for Morey, and a conviction of Lord and Pike. The convicted respondents filed a general motion for a new trial addressed to the presiding justice which was denied and an appeal taken. They then filed a motion for a new trial on newly discovered evidence addressed to the presiding justice which also was denied and an appeal taken. Appeals dismissed.

The case fully appears in the opinion.

William J. Flanagan, County Attorney, for the State.

Alton C. Wheeler and E. Walker Abbott, for Walter Lord.

Harry Manser and Wilfred G. Conary, for Frank Pike.

Matthew McCarthy, for Irving Morey.

SITTING: PHILBROOK, DUNN, DEASY, STURGIS, PATTANGALL, JJ.

PATTANGALL, J. The above named respondents were indicted and tried, jointly, on a charge of grand larceny. Morey, who testified for the state, was acquitted. Lord and Pike were convicted. Motions, in the usual form, to set aside the verdict, were filed on behalf of both convicted men and on denial of the same, appeals to this court were taken. Later, additional motions were filed, asking for a new trial on grounds of newly discovered evidence. These motions were also denied and appealed from. All of these appeals are considered together.

Statement of Case.

The subject of the alleged larceny was a thoroughbred Hereford steer, three years old, valued, in the indictment, at $120, the property of one Watson and said to have been stolen by these respondents from the Warren pasture, so-called, in the town of Waterford. The larceny was alleged to have occurred on Sept. 1, 1925.

Lord and his son-in-law Pike were residents of Waterford, occupying a farm distant about a mile and a half from the Warren pasture. They had carried on, jointly, since 1924, a somewhat extensive cattle buying, slaughtering and meat selling business. Morey was a laboring man and small farmer. From April 1924 to April 1925 he lived at Lord's and was employed by Lord and Pike regularly in their business and as an assistant in the farm work. After leaving their regular employ he moved to a small farm of his own, distant about a mile, but continued to butcher for them, at irregular times as his services were required.

Sometime in August 1925, the steer in question was stolen from the Warren pasture, brought to the Lord place and slaughtered there, Morey and Pike doing the actual killing, Lord being present and rendering some assistance in connection with the work. The carcass was divided between Lord and Pike and the meat sold by them. Morey testified that he was paid $10 for his part of the work, each of the others paying him $5. The other respondents testified that they paid him $30 each and that the $60 constituted the purchase price of the steer. Morey testified that, after a conference with Lord, he and Pike went from the Lord place direct to the Warren pasture, roped the steer and brought it to the slaughter house. The other respondents testified that Morey, alone, brought the steer to them, represented it as his own, and that they did not know where he procured it. They all agreed that it reached Lord's late in the afternoon, not earlier than four o'clock.

On August 16th, Irving Green, who was in charge of the cattle in the Warren pasture, missed the steer from the herd and thinking that the animal had strayed into the neighboring woods, searched for him, without success. He searched again, with the same result, about September 1; notified Mr. Watson of the situation and again searched in November. Mr. Watson then advertised the loss of the steer for three weeks, in the Norway Advertiser.

At some time prior to August 1926, Morey became jealous of attentions shown by Lord to Mrs. Morey and during that month reported to Watson that he and Pike had taken the steer from the pasture and that Lord and Pike had slaughtered and sold the animal. Whereupon Watson placed a claim with an attorney against Lord and Pike, for the value of the steer. The claim was paid, Lord, Pike and Morey, contributing $40 each. The indictment was brought some two months later.

General Motion.

At the trial which followed Morey testified that at some time during the early part of August 1925 he was called to the Lord place to do some butchering, that after a conference in which Lord, Pike and himself joined, he, with Pike and under Pike's direction, proceeded to the Warren pasture and returned with the steer; that he and Pike killed the animal in Lord's presence; that Lord brought the water to wash up after the butchering was over and that after the job was completed Lord and Pike each gave him $5. He said that his usual price for dressing a steer was one dollar, that he asked what the additional money was for and the reply was, "for helping get this steer and keeping still about it." He also testified that, at Lord's direction, he put the head and feet in a bag and that on a later date Lord informed him as to how and where he had secreted them.

Morey denied having had any guilty knowledge at the time of the larceny of the steer from the pasture. He said that his suspicions were not aroused that there was anything wrong about the transaction until he was paid the money as stated. Presumably the jury accepted this testimony at its full face value otherwise their verdict of acquittal in his case would be inexplicable.

He testified to Pike's direct participation in the theft. And the jury were justified, if they accepted his version of the matter as the truth, in finding not only that Pike was guilty but that Lord, while not an actual participant in the crime, planned it, directed it, arranged with Pike and Morey as to what was to be done and adopted the acts of Pike and Morey as his own, profiting by them equally with Pike. The jury found that Morey was not guilty. If so he was the innocent agent of Lord and Pike, who were engaged in a joint criminal enterprise.

If a person causes a crime to be committed through the instrumentality of an innocent agent, he is the principal in the crime although he was not present at the time and place of the offense. *State* v. *Shurtleff*, 18 Me. 371. *U. S.* v. *Gooding*, 12 Wheat. 469. *State* v. *Soper*, 16 Me. 298.

There was sufficient in Morey's evidence to warrant the verdict. He was, to be sure, an accomplice and his evidence was without direct corroboration. He also admitted that his purpose in finally making known the facts was to revenge himself upon Lord for interference in his domestic affairs. But the jurors were the judges of his credibility.

The testimony of an accomplice is received, though with great caution and discrimination. His credibility is a question for the jury and they may convict on his testimony without corroboration, if sufficient to satisfy them beyond a reasonable doubt. *Sinclair* v. *Jackson*, 47 Me. 105.

The testimony of Morey was attacked from every angle. It was admitted that the steer was slaughtered at Lord's and the meat divided between Lord and Pike and sold by them. But it was claimed that the transaction was an entirely legitimate proceeding; that Morey brought the steer to Lord's and sold it to them; that they bought it in good faith, believing it to be his and paid him a fair price for it; that later, they contributed $80 toward paying Watson's claim, because they recognized a civil liability on their part and were only able to get $40 from Morey on account of his poverty.

The jury may, very properly, have been influenced, in its verdict, by certain features of the defense set up by Lord and Pike. Its very nature and character may have added to rather than substracted from the weight of Morey's testimony. The indictment charged the larceny as having occurred on September 1. The evidence adduced by the state in rebuttal, entirely aside from any statement of Morey's, was sufficient to justify a finding beyond a reasonable doubt that it actually occurred two weeks prior to that time. But the defense was built around the date in the indictment.

Frank Pike testified that he never bought anything of Morey excepting on Sept. 1. Roy Lord testified to the steer being brought to the slaughter house on Sept. 1. Walter A. Lord swore to the same date. Then followed a mass of testimony as to just what occurred

on that particular day, all carefully and painstakingly related and the date positively fixed by reference to other events of more or less importance. An alibi was prepared for Pike and it was shown by credible and obviously truthful testimony that on Sept. 1, he was not where he could have accompanied Morey to the Watson pasture. When it transpired that the steer was stolen prior to August 16th this elaborate defense was entirely destroyed. The alibi evidence became immaterial and the transparent falsehood of the detailed stories as to what happened between Lord, Pike and Morey at the Lord farm in the late afternoon of Sept. 1st, became apparent. A less carefully manufactured defense might have impressed the jury. The cornerstone of the structure reared by the respondents rested on the date alleged in the indictment. When that prop was removed the whole structure, ingeniously erected, fell.

A careful examination of the evidence adduced at the trial reveals no error on the part of the jury in searching out the truth from the mass of contradictory evidence submitted, much of which was immaterial and a large part of which was obviously false.

Newly Discovered Evidence.

This evidence consists first, of testimony tending to show the unlikelihood, if not the impossibility of Morey having followed the route described by him in leading the steer from the Warren pasture to Lord's, and second, of the testimony of Mr. & Mrs. Kittredge that in the late summer or early fall of 1925, Morey, travelling alone, led a steer, similar in appearance to the stolen animal, by Kittredge's farm on a road leading toward Lord's. If this were true and if the steer so led were the one in question, Morey's testimony was false and the state's case fails.

As to the first proposition the evidence is not convincing. It is not demonstrated that it was impossible or even improbable that Pike and Morey followed the route testified to by the latter. In fact it was the sort of route that, inconvenient as it apparently was, would appeal to men engaged in an unlawful enterprise and was doubtless selected by Pike who was in charge of the expedition.

The second proposition is more difficult. The testimony of Mr. and Mrs. Kittredge, fairly coming within the rule as to what constitutes newly discovered evidence, at first glance seems of great

importance. But reasonably careful analysis reveals its weakness. There is no doubt but that, at some time, in the summer of 1925, Morey led a steer by Kittredge's farm to the Lord place, stopping to rest at Kittredge's at noon. The important questions at issue are the date of the event and the identity of the animal.

On May 16, 1925, Frank Pike bought a steer of Frank Stone of Sweden which was delivered to Morey who led it to Lord's. On the journey he necessarily passed the Kittredge farm. He stopped there at noon. By a coincidence merely, the price of this steer was $60.

Kittredge testified that Morey never stopped at his home with a steer but once. In October 1926, he fixed the date as early in the summer. From the Kittredge farm to the Lord farm is a walk of from ten to thirty minutes, dependent upon which road is followed. By all of the testimony in the case, Morey arrived at Lord's with the stolen steer not earlier than four in the afternoon. The day that he rested at the Kittredge place he left for Lord's at about noon. Kittredge testified that Morey told him that he had brought the steer from Sweden. Assuming the good faith of Mr. and Mrs. Kittredge (and there is no reason to doubt it) they are now mistaken as to the date and are confusing one occurrence with the other. Mr. Kittredge's first statement concerning the date was apparently correct.

We do not regard it as probable that the additional evidence would change the result of the case were it again submitted to a jury. Nor do we think that justice requires a different result. A study of the whole case, the old evidence and the new, forces the conclusion that no innocent man was wronged either by the findings of the jury or by the refusal of the presiding justice to grant either of the motions filed by the respondents.

Appeals dismissed.

JAMES COTE, Petitioner for Habeas Corpus

vs.

HENRY F. CUMMINGS, Sheriff

Kennebec. Opinion August 23, 1927.

In the case of a commitment it is the judgment of the court which authorizes detention. The mittimus is the evidence of the officer's authority. The important question on habeas corpus is, is the prisoner in the custody where the judgment commanded him to be put and not how he was taken into custody. The writ will not be granted unless the real and substantial merits of the case demand it. It will not be granted for defects in form nor can it be used as a substitute for a writ of error.

A so-called "split sentence" viz: where the penalty of fine and imprisonment as provided by statute is imposed and the imprisonment part is suspended and the fine part enforced, is illegal.

The statutory authority for the suspension of the imposition or of the execution of a sentence or for a stay of execution is the Probation Act and R. S. Chap. 136, Sec 27 as amended by P. L. 1917, chap. 156, sec. 3, which give no express or implied authority to divide an imposed sentence.

There is no discretionary power, aside from those statutes, inherent in our courts which have jurisdiction of a crime to divide the plain mandate of a statutory sentence.

In the instant case the petitioner's imprisonment was lawful if the judgment on October 20 was lawful, otherwise not; the defects or omissions in the mittimus not being material.

The judgment of August 31 was unlawful, first, because the powers as to sentences, conferred by the Probation Act, R. S. chap. 137, secs. 12, 13 and 14, were for judicial consideration at the time the sentence was imposed on July 1. When sentence had been imposed and the session ended, as it was, the only power left for the judge on August 31, when the appeal was withdrawn, was the statutory power to order compliance with the sentence which had been imposed; second, because the court had no power to impose sentence and suspend the execution of part of it.

The court was without jurisdiction on October 20 to order the petitioner to appear before it and to serve the two months and to issue mittimus therefor, hence the commitment of the petitioner was unlawful.

On exceptions by petitioner. On July 1, 1925, the petitioner was found guilty in the Municipal Court of Waterville of illegal possession of intoxicating liquor with intent to sell and sentenced to pay a fine of $500 and to two months imprisonment, and an appeal was taken to the Superior Court. On August 31 the petitioner withdrew his appeal, paid the fine and, the jail sentence being suspended, was placed on probation for one year. On October 20 he was ordered to appear before the court and found guilty of having violated the probation regulations and was ordered to serve the two months. Mittimus was issued, and he was committed. He applied for writ of habeas corpus which was issued. At the hearing upon the writ the sitting justice ruled that the imprisonment was lawful and petitioner excepted. Counsel for defendant admitted and urged upon the court that a split sentence, so-called, is unauthorized and illegal. Exceptions sustained. Petitioner discharged.

The case very fully appears in the opinion.

F. Harold Dubord, for petitioner.

Frank E. Southard, County Attorney, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DUNN, STURGIS, BASSETT, JJ., MORRILL, A.R.J.

BASSETT, J. A writ of habeas corpus was issued upon the petition of James Cote. At the hearing upon the writ the sitting justice for the purpose of bringing the case before the Law Court ruled that the petitioner was legally imprisoned. The case is here upon exceptions to that ruling.

The petitioner was imprisoned in the Kennebec County Jail on a mittimus issued by the judge of the Waterville Municipal Court. The mittimus, petition for the writ, writ, return and docket entries of the court below constitute the record before us.

The mittimus sets forth that the petitioner was arrested and brought before the Waterville Municipal Court July 1, 1925 on a warrant issued by that court on the charge of illegal possession of intoxicating liquor with intent to sell, was found guilty and sentenced to pay a fine of $500 and costs and be imprisoned two months in jail and in default of payment of fine and costs to six months ad-

ditional imprisonment; the petitioner appealed to the September term of the Superior Court of Kennebec County and recognized with sureties; on August 31 the petitioner appeared before the Municipal Court, withdrew his appeal, paid the fine and costs and, the jail sentence being suspended, was placed on probation for one year upon his agreement to keep his premises free from all suspicion of liquor traffic; on October 18 he violated his probation regulations; on October 20 was ordered to appear before the court, appeared on the same day, was found to have violated the probation regulations, was ordered to serve the two months in jail and the mittimus was issued, dated October 19, and the petitioner was committed on the same day as the hearing.

On that same day he applied for the writ; on the following day hearing was had upon the petition, the writ was issued and hearing had thereon.

The petitioner advances nine reasons why his imprisonment is unlawful, the first three because of defects in the mittimus—first, that the mittimus contains no order to arrest the petitioner, second, that it does not command the jailer to receive the petitioner, the blank at that point for the name of the person not having been filled out; third, the mittimus alleges a breach of the probation regulations on October 20 but the mittimus is dated October 19.

These reasons do not avail the petitioner. "It is the judgment of the court which authorizes detention. The mittimus is the evidence of the officer's authority. The judgment is the real thing. The precept is not. The important question on habeas corpus is, is the prisoner in the custody where the judgment commanded him to be put and not how he was taken into custody. The writ of habeas corpus will not be granted unless the real and substantial merits of the case demand it. The writ will not be granted for defects in matters of form only; nor can it be used as a substitute for a writ of error." *Wallace* v. *White*, 115 Me. 513, 521.

As to the first reason, the petitioner appeared in court October 20 in response to the order of the court. Could the judge legally have ordered that the petitioner be arrested and brought before him for judgment? If he could not acquire jurisdiction by process, he could not by consent of the petitioner. *Commonwealth* v. *Mahoney*, 145 Mass. 205. If he did not have jurisdiction, the judgment

was invalid. We therefore come back to "the real thing," the judgment. But the petitioner was in court and the court proceeded to commit. The mittimus follows the record of the court. It need not contain an order for arrest so far as these proceedings are concerned.

As to the second reason—the defect is of form only. A mittimus in perfect form would order both the officer to convey and deliver the person into the custody of the keeper of the jail and the keeper of the jail to receive and keep custody of the person. The mittimus contained the first order and the second order except that the name was left blank. That is sufficient so far as these proceedings are concerned.

As to the third reason—this is a defect in form only. But the mittimus states that the violation of probation regulations was on October 18 not on October 20 as stated in the reasons. The finding of guilt was on October 20. Consequently the violation was stated in the mittimus to be on the day before, not on the day after its date.

We therefore go straight to the judgment of the court on October 20, that the petitioner serve the two months of the sentence in jail, to determine whether it was a legal judgment. If it was, the petitioner should not be discharged. If it was not, he should be. We think it was not.

The Waterville Municipal Court like the Skowhegan Municipal Court in *Tuttle* v. *Lang*, 100 Me. 123, and the Bangor Municipal Court in *Perro* v. *State*, 113 Me. 493 has regular terms for civil business but not for criminal. "Said Court may be adjourned from time to time but shall be considered in constant session for the cognizance of criminal actions." Private and Special Laws 1897, Chap. 225 as amended by Private and Special Laws 1909, Chap. 17.

It was held in *Tuttle* v. *Lang*, supra, that, if upon trial of a criminal charge within the jurisdiction of such courts the respondent is found or plead guilty, it becomes the duty of the judge to impose sentence at that session and, when that is done, the cause is determined, the judge's judicial duty is at an end and nothing remains but to carry the judgment into effect. If to do this a commitment is necessary, he should issue a mittimus at or before the end of the session at which the conviction was had. A period of twenty-four hours is given by statute in which to take an appeal. If it is not taken before

the close of the session, the mittimus should issue. If, after the issue and within the twenty-four hours, an appeal be taken, the mittimus should be recalled by the judge that the appeal may be perfected. But if no appeal is taken, then after sentence and the end of the session all jurisdiction of the cause and person ceases.

If an appeal is taken, then upon such taking and filing the appeal bond the jurisdiction of the judge is at an end and he has no further jurisdiction of the cause, unless the appeal be withdrawn as and in the manner authorized by statute; *State* v. *Houlehan*, 109 Me. 281.

In the instant case sentence was imposed and appeal taken at the session on July 1.

Although it does not appear whether or not on August '31 all the requirements of the Statute for the withdrawal of an appeal (Rev. Stats. 1916, Chap. 134, Sec. 19) were strictly complied with, as *State* v. *Houlehan* held they should be, we assume, that in this case, as the court assumed in that case, there was such compliance and that the appeal was properly withdrawn.

If the appellant withdraws his appeal the statute (Section 19) provides as follows: "Whereupon he shall be ordered to comply with said sentence." In *State* v. *Houlehan* (supra) it was held "his (magistrate's) only authority was to order compliance with the sentence already imposed.—The judge of the municipal court has no power after the imposition of the sentence save in strict accordance with statute in matters of appeal."

The judge did not order such compliance but, upon payment by the petitioner of the fine and costs, suspended the imprisonment and placed him on probation for a year.

The judge had no power to do this. First, because the powers as to sentences conferred by the Probation Act, Rev. Stats. 1916, Chap. 137, Sec. 12, 13, 14, were for judicial consideration at the time the sentence was imposed on July 1. When the sentence had been imposed and the session ended, as it was ended in this case, the time for such consideration had passed and the only power left for the judge on August 31, when the appeal was withdrawn, was the statutory power to order compliance with the sentence which had been imposed.

That such was the only power of the court was one of the further reasons advanced by the petitioner why his imprisonment was unlawful.

The court could not order the petitioner to be placed on probation and when it permitted him to go on such probation, he was in legal effect permitted to go at large and the court surrendered all further control over the cause and person. *Tuttle* v. *Lang* supra.

Second, because the court had no power to impose sentence and suspend the execution of part of it. This was another of the petitioner's reasons.

While the decision in this case might be rested on the first reason alone, it can be on the second also. It should be, because this case presents the important question of what has come to be called "split" sentence in such manner that its legality can be determined. A "split" sentence is one, where the penalty of fine and imprisonment, as provided by statute, is imposed and the imprisonment part is suspended and the fine part enforced. This is commonly approved by the respondent and is often suggested by counsel. The practice has shown a tendency to increase in cases of violation of the Prohibitory Law. It has been done by municipal courts and courts of general jurisdiction. The question should be settled.

In *State* vs. *Sturgis* 110 Me. 96 (1912) the defendant was on conviction for liquor nuisance sentenced to pay a fine and to imprisonment "the imprisonment part of the penalty to be cancelled on payment of the fine" and defendant's giving a recognizance to keep the peace and not to violate the liquor laws. The statutory penalty for maintaining a nuisance was fine and imprisonment and in default of payment additional imprisonment. The Revised Statutes provided (Chap. 136, Sec. 1) that where the statute provides for punishment "by imprisonment and fine or by imprisonment or fine or by fine and in addition thereto imprisonment" the sentence may be "to either or both." The decision held that, while the court could have sentenced to either fine or imprisonment, the sentence in its first part must be construed as an actual imposition of the sentence, authorized by statute, and if the additional words were to be construed, and that seemed to be the meaning intended, as a condition stipulated by the court, which the defendant could at his option perform and relieve himself from the imprisonment part the court had no power so to stipulate. The opinion laid down "some principles applicable to judgments and sentences in criminal cases," and said, "The authorities draw a clear distinction between the suspen-

sion of the imposition of a sentence and the indefinite suspension or remission of its enforcement. There is a conflict of authority as to the power of the court after a conviction to indefinitely postpone the imposition of the punishment therefor prescribed by law, but however the courts may differ as to such power, it is well established that the court cannot, after judgment in a criminal case is rendered and the sentence pronounced, indefinitely postpone the execution of that sentence, or commute the punishment and release the prisoner therefrom in whole or in part." These last words "in part" are to be noted.

That the court meant this could not be done without statutory authority appears from its final summary, (p. 104) "The citation of authorities need not be multiplied for they are in substantial harmony in holding that where the court has pronounced the sentence of the law against one convicted of a criminal offence, it then has no power (unless so authorized by statute) to make any order, the effect of which would be to indefinitely suspend the execution of that sentence."

In examining other authorities where suspension of part and not the whole of a statutory sentence is in question, the distinction, noted in the preceding decision, between imposing sentence and enforcing it when imposed, should be borne in mind.

In 8 R. C. L. Sec. 255, P. 251, it is stated "For the same reason that one cannot be twice punished, it has been held, that it is not within the power of the court to suspend a sentence in part and to impose it in part; that is the sentence must be imposed in full or suspended in full." Reference is made to 8 Ann Cas. p. 388 where the same principle is laid down and reference made to two cases. *Com.* v. *Keeper of Workhouse* 6 Pa. Super, Ct. 420 and *People* v. *Felker* 61 Mich 110, 27 N. W. 869.

In the former, a habeas corpus case in which the writ had been issued, where the penalty for the crime was fine and imprisonment the court ordered that imprisonment be "suspended for the present during good behavior" and, the fine having been paid, imposed two terms later imprisonment. The court said "It is to be presumed that the court in making said order acted within the limits of lawful authority. If it did the order was to all intents and purposes a sentence of the defendant—What we do now decide specifically

is that an order—which suspends sentence as to a part of the penalty prescribed by law for an offense and imposes a pecuniary penalty upon the defendant, where fine and imprisonment constitutes the penalty affixed to the crime, is to all intents and purposes a legal sentence compliance with the terms of which renders it illegal for the court to alter or reform the sentence after the time at which trial, conviction and the said partial sentence occurred and that any sentence subsequent thereto is illegal and void."

In the latter case where the penalty was fine and imprisonment and the respondent was sentenced to pay a fine but the imprisonment part was "deferred until the opening of the next succeeding term," the respondent paid the fine and appeared at the next term of court when he was ordered to be imprisoned. On writ of error the judgment was reversed. The court said "The court may in the exercise of a reasonable discretion suspend sentence for a reasonable time to enable the court to inform itself of such matters as will enable it to impose a just and proper sentence—but the sentence of judgment when pronounced must embrace the whole measure of the punishment imposed. The judgment last pronounced is not a correction or alteration of the determination of the court when it pronounced the last judgment. It is a further judgment which the court then announced its intention of pronouncing."

These two cases actually decide that a sentence cannot by suspension of part of it or by deferring imposition of part of it be imposed in full at different times. The former case held that the dividing did not make the part imposed invalid; the latter case says nothing on this point. On the authority of these cases the judgment of October 20 in the instant case would be invalid.

There are cases not of suspension of the execution of an imposed sentence but of imposition of less than the full statutory penalty. Such sentences are, as stated in the note 55 A. S. R. 264, held clearly not warranted but whether the action of the court is a mere erroneous exercise of jurisdiction and therefore voidable or is beyond and without its jurisdiction and therefore void is a question upon which the authorities are divided.

In some cases it has been held that where the punishment is not of a different kind from the statute and it is a question of sufficiency in the kind prescribed by the statute, the accused cannot claim to be

prejudiced and so is not entitled to an appeal nor is such sentence ground for discharge on habeas corpus, 16 C. J. p. 1311.

Under the rule in the courts of the United States that a judgment in a criminal case must conform strictly to the statute and any variance from its provisions, either in the character or extent of the punishment, renders the judgment absolutely void as to the unauthorized portion, when such excess is separable and may be dealt with without disturbing the valid portion of the sentence, the person serving the valid part has been refused a discharge on habeas corpus. *U. S.* vs. *Pridgeon* 153 U. S. 48; 55 A. R. 266.

We do not find any case which holds or suggests any discretionary power in the court to divide the plain mandate of a statutory sentence and such division we find declared to be unwarranted. But we do find cases where, if the court has used such power, the respondent, either because of a doctrine that he cannot complain if he has not been prejudiced or because of principles applicable in habeas corpus, does not obtain relief from what would otherwise be a valid part of the sentence.

The statutory authority in this state for the suspension of the imposition or execution of a sentence or for a stay of execution is the Probation Act of 1909 (Rev. Stats. 1916, Chap. 137, Secs. 12, 13 14) and Rev. Stats. 1916, Chap. 136, Sec. 27 as amended by the Public Laws of 1917, Chap. 156, Sec. 3. Of the Probation Act the Court said in *Welch* v. *State*, 120 Me. 294, 298, "The broad powers as to sentence inhering in a court of general jurisdiction were not diminished or curtailed by the passing of the Probation Act of 1909. That act did not take from but added to the authority of the court. * * * Its employment was not rendered compulsory but discretionary." What limitations upon the authority of a court of general jurisdiction to postpone the imposition of a sentence, or to suspend sentence, or to stay execution of sentence, now exist, if any, we find it unnecessary to decide and express no opinion thereon.

The word used throughout the sections above noted is "sentence." There is no language which expressly or impliedly would authorize any other meaning to "sentence" than the entire sentence or, in the words of the court in *State* v. *Sturgis*, supra "the sentence of the law." There was therefore no express or implied authority under those statutes to split the sentence.

Is there any discretionary power aside from those statutes inherent in our courts which have jurisdiction of a crime? That question is to be answered in the light of legislative action concerning it.

The Revised Statutes of 1840, Chap. 168, Sec. 4, provided "whenever it is provided that an offense shall be punished by imprisonment and a fine, the court may sentence to either of these punishments without the other or both."

This became in the revision of 1857, Chap. 135, Sec. 1 "When it is provided that he shall be punished by imprisonment and fine or by imprisonment or fine, he may be sentenced to either or both."

This provision remained unchanged until 1893.

Meanwhile during the preceding decade penalties for various violations of the Prohibitory Law had been changed from fine "or" imprisonment to fine "and" imprisonment and in three instances, single sale, Public Laws 1887 Chap. 140, Sec. 5, drinking house and tippling shop, Public Laws of 1891, Chap. 132, Sec. 3 and search and seizure Idem Sec. 4, the penalties were amended to read fine "and in addition thereto" imprisonment.

In 1893 Public Laws Chap. 248, the discretionary provision of Sec. 1 of Chap. 135 of the Revised Statutes of 1883 was amended by inserting the words "fine and in addition thereto imprisonment," so that the provision then read "When it is provided that he shall be punished by imprisonment and fine or imprisonment or fine or by fine and in addition thereto imprisonment he may be sentenced to either or both." This provision remained unchanged until 1917.

Meanwhile after 1893 certain of the penalties were changed to make by their terms imprisonment mandatory.

On the one hand, therefore, the Legislature by amending and increasing specific penalties seemed to intend to make the penalties for violation of the liquor law uniformally fine and imprisonment and imprisonment mandatory, yet on the other hand it continued to leave to the discretion of the court whether it should be fine or imprisonment. The legislature not only did not restrict such discretion but in 1893 as above noted, enlarged it to cover penalties where words of distinctly mandatory meaning had been provided.

But the Legislature of 1917 made its intention indisputably clear for, by Chapter 291 of the Public Laws of that year entitled "An act to amend Chapter 127 of the Revised Statutes to make plain the

penalties imposed under certain sections thereof," by Section 6 it made the penalty for violation of Section 27 of Chapter 127 relating to illegal possession with intent to sell, which was the case before the Waterville Municipal Court, "Whoever violates this section shall be fined not less than one hundred dollars nor more than five hundred dollars, and in addition thereto be imprisoned for not less than two months nor more than six months and in default of payment of said fine and costs, he shall be imprisoned six months additional."

And it made the penalty the same by Section 1 for traveling liquor peddlers and solicitors, by Section 3 for single sales, by section 4 for common sellers and by section 7 for search and seizure. By section 2 for illegal transportation it made the penalty fine and imprisonment for all persons, removing the prior exception of employees and agents of transportation and express companies. And in the case of common nuisances, the penalty which until Chapter 231 of the Public Laws of 1909 had been fine "or" imprisonment and by that act was made fine "and" imprisonment, was by Chapter 155 of the Public Laws of 1917 made a fine of not less than two hundred dollars nor more than one thousand dollars "and in addition thereto" imprisonment of not less than two months nor more than one year and in default of payment of fine not less than sixty days nor more than one year additional.

And further by Chapter 156 of the Public Laws of 1917 the provision in Section 1 of Chapter 135 (supra), Chapter 137 of the Revision of 1916, which gave discretion to the court was repealed.

The power to suspend sentence under the provisions of the Probation Act is for probation purposes under that act. But there have been cases within the knowledge of the court where sentences have been "split" and the imprisonment part suspended without reference to or considering the Probation Act.

To decide that our courts have discretionary power to suspend the enforcement of part of the clear and explicit terms of the penalties above noted would, in the light of the legislation which has been examined, be judicial legislation in effect repealing Chapter 156 of the Laws of 1917, the act which repealed discretion, and amending the various penalties to read "or" instead of "and" and "in addition thereto."

That the use of such discretionary power is not likely to be questioned or may often with difficulty be questioned, as is sometimes suggested, has no appeal to the judicial mind and conscience, which consider only whether the power lawfully exists.

Whether our courts shall be given the power to divide a sentence, suspend in part and enforce in part, is a matter for the Legislature alone to determine. We do not think they possess such power now.

The judgment of the Municipal Court on August 31 was therefore for the second reason unlawful. The imprisonment part of the sentence of July 1 could not, as has been stated above, be suspended and the petitioner placed on probation. When he was permitted to go on such probation he was in legal effect permitted to go at large. The court then surrendered all further control over the cause and person. *Tuttle* v. *Lang* supra.

Its jurisdiction being ended it had on October 20 no authority to order the petitioner before it, and the order that he serve the two months and issuing the mittimus therefor were without authority. His detention was therefore unlawful.

As this conclusion disposes of the case, it is unnecessary to consider the other reasons advanced by the petitioner.

Exceptions sustained.
Petitioner discharged.

ETHEL M. FISH

vs.

WALTER FISH

Androscoggin. Opinion August 25, 1927

As a general rule in libels for divorce on the ground of gross and confirmed habits of intoxication it must be shown that the habit continued up to the time of filing the libel.

There are however circumstances under which the court is justified in the inference that a confirmed habit will continue, nothing to the contrary appearing, although such inference is not conclusive.

Reformation of habit implies the voluntary action of a sane mind. In the case at bar, the libelee being confined in an asylum for the insane when the libel was filed, going there when his habits in reference to intoxication were proved to exist, it might be impossible for the libelant to prove whether or not the libelee would return to his cups when restored to normality and granted his freedom His last known condition before development of insanity, and consequent incarceration, was characterized by gross and confirmed habits of intoxication.

It is the opinion of the court that in this case, upon principles of justice and law, the exceptions should be sustained with reference to the failure of the presiding justice to properly take into account the inference above referred to, and the libelant should be given further opportunity to be heard.

On exceptions. A libel for divorce on gross and confirmed habits of intoxication. On a hearing the libel was dismissed on the ground that it was not affirmatively shown that the gross and confirmed habits of intoxication continued up to the time of filing the libel. Libelant excepted. Exceptions sustained.

The case appears in the opinion.

Frank T. Powers, for libelant.

No appearance for libelee.

SITTING: PHILBROOK, DUNN, DEASY, BARNES, BASSETT, JJ.

PHILBROOK, J. This is a libel wherein the libelant seeks divorce on the ground of gross and confirmed habits of intoxication from the use of intoxicating liquors, opium, or other drugs, this being the fifth cause for divorce prescribed by our legislature.

The decree in the court below is in the following language: "The Court finds as facts that, for a period during the marriage of the parties and prior and up to 1920, the libelee's habits as to the use of intoxicating liquors became gross and confirmed; that July, 1920, he was committed to the State Hospital at Augusta, and has since remained there continuously to the present. The Court does not find that the offense has been condoned. The Court holds that, as grounds for divorce, gross and confirmed habits of intoxication must continue up to the time of filing the libel, the libel is dismissed."

The libelant seasonably presented a bill of exceptions, which was allowed, and the case is before us upon that bill.

In view of the terms of the decree dismissing the libel, it is contended that our discussion should be strictly confined to the issue as therein stated, viz., must gross and confirmed habits of intoxication continue up to the time of filing the libel in order to entitle the libelant to obtain a decree for divorce on that ground.

But since, in the instant case, we are for the first time required to construe this provision of our statute, we are of opinion that we should go further. Gross and confirmed habits of intoxication, at some time during marital life, having been proved to exist, as in this case, must the libelant, in all cases, by affirmative evidence, prove that those habits existed at the time of filing the libel, or may any assumption or presumption come to the assistance of the libelant in the absence of contradictory evidence offered by the libelee in a contested case.

In the case at bar the bill of exceptions shows that service of the libel was properly made upon the libelee and also upon his guardian appointed by the probate court, which guardian was present in court when the libel was heard, but no opposition to granting the divorce was made.

The statutes of many states, where this cause for divorce is granted by their legislature, have stated it as "habitual drunkenness" or

"habitual intemperance," e. g. Connecticut, Florida, Idaho, and Louisiana; or "habitual intoxication," e. g. Georgia. So far as we have discovered Massachusetts is the only state which uses the same phraseology as that used in Maine, viz.: "gross and confirmed habits of intoxication."

In *Burt* v. *Burt*, 168 Mass. 204, decided in 1897, the husband filed a libel alleging that his wife was guilty of "gross and confirmed drunkenness caused by the voluntary and excessive use of opium or other drugs." At the same time there was heard an appeal by the husband from a decree of the probate court on the petition of the wife for separate support and maintenance, and also a cross libel of the wife charging adultery, cruel and abusive treatment, and failure to provide suitable maintenance. It may be fairly inferred that the contest was vigorous and that each side presented evidence in behalf and in defense of his or her cause. In the court below the sitting justice ordered a decree, nisi, for the husband, dismissed the wife's libel, and her petition for separate support. The wife alleged exceptions.

After discussing certain questions relating to admission of testimony the court stated that the principal question was whether the judge in the court below was justified in entering a decree, nisi, on his findings of fact, which findings were as follows:

"At the time of her marriage the libelee used morphine to some extent, but the use was not gross or confirmed. The libelant knew this before the marriage, as he had prescribed it for her to relieve severe headaches. After her marriage her use of the drug increased, until the habit became confirmed, and to such an extent as to cause her to lie in bed at times until four o'clock in the afternoon. It also caused her to act in a stupid, irrational way, and this for long periods of time. After she left her husband, her use of morphine became less; and from that time up to the filing of this libel, nearly fifteen months, the gross character of its use became modified, or ceased; but she did not entirely abandon its use, and was somewhat under its influence."

In reversing the finding of the lower court the appellate court said; "The decree which was entered, in view of the finding of the libelee's use of the drug after she left her husband, seems to be based upon this construction of the statute, namely, that the libelant would be

entitled to a decree if, at any time after the statute was in force, the libelee was in the condition set forth in the statute, although the gross character of the use of the drug had become modified or had ceased when the libel was brought. We are of the opinion that this view is erroneous. 'Gross and confirmed drunkenness' is a condition, just as what is called in the Pub. Sts. c. 146, sec. 1, 'gross and confirmed habits of intoxication' is a condition. Substantially the same rules apply to both descriptions. Drunkenness cannot fairly be said to be gross and confirmed if, at the time the libel is filed, the character of the use of the intoxicant or drug has ceased for some length of time, so that it may fairly be found that the condition required by the statute no longer exists. The statute does not authorize a divorce on account of the use of a drug, but only for its abuse. The use must be excessive, and must produce a certain result; and this result must exist when the libel is filed." The court, in the opinion from which we have just been quoting, frankly says that it finds no authorities precisely in point.

In *McGraw* v. *McGraw*, 171 Mass., 146, the same court said that it must be shown by competent proof that the gross and confirmed habits of intoxication, which the statute makes a ground for divorce, exist when the libel is filed, and if they then no longer exist a divorce cannot be granted, although it is shown that such habits have existed during the coverture, citing *Burt* v. *Burt*, supra.

In *Gowey* v. *Gowey*, 191 Mass. 72, the court reiterated the opinion that when the libelant depended upon gross and confirmed habits of intoxication, in order to warrant a decree the evidence must be such as to justify a finding that the habit was gross and confirmed, and existed when the libel was filed. This rule was adhered to in *Hammond* v. *Hammond*, 240 Mass. 182, decided in 1921.

In *Allen* v. *Allen*, 73 Conn., 54; 84 Am. St. Rep. 135; 46 Atl. 242; under a statute differing from ours in phraseology, where divorce may be granted for "habitual intemperance," the court went a step further and held that the cause must be "found to exist at the time the decree is made" * * * "at the very time when the divorce is granted."

In *Gourlay* v. *Gourlay*, 16 R. I., 705; 19 Atl. 142, where the statute provides for divorce upon charge of "continued drunkenness," the court said that to sustain this charge "the proof should be sufficiently

clear to convince the court that the respondent's habits of drunkenness were confirmed and continual; in other words, that he had become a drunkard, an habitual drunkard,—the terms meaning the same thing." The court further said that, as used in their statute, the words "continued drunkenness" signify gross and confirmed habits of intoxication. Thus by interpretation the Rhode Island statute is declared to mean the same thing which our statute has set forth in different terms. But it is to be noted that in that case the proof showed that for quite a period of time prior to the filing of the libel the libelee had been entirely free from the use of intoxicating liquor and divorce was denied.

In *McGonegal* v. *McGonegal,* 46 Mich. 66, 8 N. W. 724, where divorce was sought upon ground of "habitual drunkenness," the decree was denied because "the evidence which bears most strongly against defendant is of occurrences which took place several years ago."

In *Smithson* v. *Smithson,* decided by the Mississippi Court in 1917, reported in 74 So., 149, and L. R. A. 1917 D, 361, where divorce was sought upon the alleged cause of "habitual and excessive use of opium, morphine or other like drug," the court held that the habit must be fixed, and must continue until the suit is brought, and that it was error to grant the divorce because it was not shown that the use of the drug was excessive at the time the bill was filed.

In *McMahon* v. *McMahon,* 130 Ala. 338; 54 So. 165, under a statute authorizing divorce "for becoming addicted after marriage to habitual drunkenness" it was held that the habit must be fixed and must continue until the suit is brought.

Although Judge Freeman, in an able note to *Allen* v. *Allen,* supra, found in 84 A. S. R. p. 136, criticizes the conclusions reached in that case, yet we think the weight of authority sustains the view that where a divorce is sought on the ground of gross and confirmed habits of intoxication, from the use of intoxicating liquors, opium, or other drugs, that the habits must continue up to the time of filing the libel. To this extent the decree of the justice in the court below is in harmony with what has become settled law.

Granting that the law just stated, as to continuance of habit, is settled, what shall we say as to proof of such continuance. If the libelee went to parts unknown, some time before the libel was filed,

and nothing could be ascertained as to his habits, or if, as in the case at bar, the libelee was confined in an institution where he could not obtain the means of continuing his habits of intoxication, does justice require that a divorce should be denied because of the utter inability of the libelant to prove, by affirmative evidence, that habits of intoxication on the part of the spouse continued until the time of filing the libel? We think not. *Lex non cogit ad impossibilia.* Even the Massachusetts court, which is most insistent upon the rule that habits of intoxication, as ground of divorce, must continue until the time of filing the libel, yields upon the question of proof under certain circumstances.

In *McCraw* v. *McCraw*, supra, it was proved that the libelee had contracted gross and confirmed habits of intoxication after marriage, and that he had not reformed during the year after the libelant separated from him, and that his habits continued during that year, at the end of which he went to parts unknown. That was some five years before the hearing and he had not been heard from sincethat time and nothing definite was known about him. The court then proceeded to say:

> "Usually a habit which has once become gross and confirmed continues to dominate the individual who has fallen into it. One who has gross and confirmed habits of intoxication may reform himself and become temperate or abstemious, and he may be put under such enforced restraint that his habits are broken up. The ordinary experience of mankind, however, justifies the inference that a confirmed habit will continue, and, especially when such a habit has a natural tendency to weaken the will and lessen the power of self-control, we would infer its continuance, if nothing were shown to the contrary, and the inference would be reasonable. The reasonable probability, according to the results of human experience, that gross and confirmed habits of intoxication shown to exist at a given time will continue, is a fair ground for inference, which while not conclusive, is a proper ground for conclusions in litigated matters."

The report of that case shows that the libelant requested the court below to rule, as a matter of law, that the gross and confirmed habits of intoxication of the libelee, having been proved to exist as long as anything was known about him, are presumed to continue, in the absence of any evidence to the contrary. Refusal to so rule was held to be error, the decree dismissing the libel was set aside and the case stood for trial.

In *Gowey* v. *Gowey*, supra, the same court, referring to *McCraw* v. *McCraw*, sustained and affirmed the doctrine that if a gross and confirmed habit is once shown to exist, the reasonable probability that it will continue to exist, furnishes some ground for an inference which the court may consider in dealing with a litigated matter.

From the report of the instant case we are of the opinion that the learned justice in the court below failed to give full consideration to the inference, that gross and confirmed habits of intoxication having been proved to have once existed during the marital state, was a proper ground for reaching a conclusion favorable to the libelant in the absence of any evidence to the contrary.

Reformation of habits implies the voluntary action of a sane mind. In the case at bar it would be impossible for the libelant to prove that her husband, confined in an asylum for the insane, would or would not return to his cups when restored to normality and granted his freedom. His last known condition, before development of insanity and consequent incarceration, was characterized by gross and confirmed habits of intoxication. As to those habits at the time of filing the libel proof could not be made.

It is our opinion that upon principles of justice and law the exceptions should be sustained and the libelant given another opportunity to be heard.

So ordered.

TUTTLE'S CASE

Waldo. Opinion September 3, 1927.

The work of constructing third class highways in distinction from state and state aid highways is governed by section 4 of chapter 263, P. L. 1919 as amended by chapter 169 P. L. 1925, which expressly provided that when a town has qualified itself to receive funds, the municipal officers shall proceed with the construction of the way.

That it must be constructed according to standards approved by the state highway commission does not make the state highway commission a contracting party with respect to the materials and labor furnished in constructing the highway.

In the instant case, the evidence is plenary that the deceased was in fact employed by the city of Belfast.

On appeal. Petition of the alleged dependant widow of William Tuttle, who was killed in a gravel pit in the city of Belfast while engaged in the construction of a third-class highway. The only question involved was as to whether deceased was in the employ of the city of Belfast or of the State Highway Commission at the time of the accident. Compensation was awarded under section 12 of the Workmen's Compensation Act to be paid by the city of Belfast, and an appeal was taken. Appeal dismissed with costs. Decree below affirmed.

The case appears in the opinion.

Clyde R. Chapman, for petitioner.

Charles S. Taylor, for the city of Belfast.

Franklin Fisher, for the State Highway Commission.

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

WILSON, C. J. The petitioner's husband was killed while engaged in the construction of a third-class highway in the city of Belfast. The associate legal member of the Industrial Accident Commission found that the deceased, when killed, was in the employ of

the city of Belfast, and that his injuries arose out of and in the course of his employment.

The city of Belfast appealed from the decree based on this finding, upon the ground that the deceased was not an employee of the city of Belfast but of the State of Maine.

The appeal can not be sustained. Not only was the deceased in fact hired and paid by the city of Belfast, but the work of construction of the third-class highway in question, so far as the record in the case shows, was properly being done by the city.

The work of construction of third-class highways in distinction from state and state aid highways is governed by section 4 of chapter 263 P. L. 1919 as last amended by chapter 169 P. L. 1925, which expressly provides that when a location of a third-class highway has been approved—assuming, of course, that the town in which it is located is entitled to receive funds from the state for the purpose—the municipal officers shall proceed with the construction of the highway in conformity to the provisions of section 5 of chapter 263 P. L. 1919, as amended, which provides that it must be constructed according to certain standards approved by the state highway commission. Only in case the municipal officers can not agree upon a designation of a third-class road shall the state through its highway commission make such designation and proceed with the construction. Section 4 chapter 169 P. L. 1925.

There is abundant evidence upon which the associate member of the commission may have based his finding that the city of Belfast employed and paid the workmen engaged in the construction of the highway, in connection with which the deceased received his injuries.

The apportionment of the mill tax by and its expenditure under the supervision of the state highway commission in accordance with the provisions of section 3 of chapter 263 P. L. 1919 as amended does not involve the actual construction of such highways by the state; but is entirely consistent with a construction by the town or city in which the way is located subject to the approval of the commission, and the payment directly to the town of its share of the mill tax following the work of construction when it has been approved by the highway commission.

Appeal dismissed with costs.
Decree below affirmed.

STATE *vs.* TIMOTHY WOMBOLT, ET ALS.

Penobscot. Opinion September 3, 1927.

Evidence that a witness in a trial before a traverse jury testified differently before the grand jury is alway admissible.

A bill of exceptions must show affirmatively that the party excepting was aggrieved, and where the exception was to the exclusion of evidence, the bill of exceptions should show what the evidence was which was excluded. It cannot be left to inference.

In the instant case neither respondent could have been prejudiced by the exclusion of the indictment in the other proceedings, as all the facts it was offered to prove were already before the jury.

On exceptions. Respondents were indicted for maintaining a common nuisance and at the trial certain evidence was excluded to which respondents excepted. Exceptions overruled. Judgment for the state.

The case appears in the opinion.

George F. Eaton, County Attorney, for the State.

George E. Thompson and Michael Pilot, for respondents.

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

WILSON, C. J. The respondent Timothy Wombolt and his two sons, William and Leo Wombolt, were jointly indicted at the May Term, 1926 of the Superior Court for Penobscot county for keeping and maintaining a common nuisance. Leo Wombolt pleaded guilty at the May Term, and Timothy and William were tried at the September Term 1926 and found guilty by a jury.

The evidence disclosed that Timothy leased the premises described in the indictment, and kept a restaurant and sold soft beers. There was sufficient evidence to warrant the jury in finding that the two

sons assisted him in running the restaurant. Evidence was also offered by the state of intoxicating liquor purchased of one or the other of the respondents, of men seen in the place under the influence of liquor, and that the father acted as a "watcher" to warn of the coming officers, and of officers finding in the rear of the premises at the end of a path or tracks in the snow, leading from a door of the respondent's restaurant to some steps, and underneath the steps, a milk can and bottles similar to cans and bottles seen in the restaurant and containing alcohol, as well as other evidence by the officers from which the jury was warranted in finding that illegal traffic in intoxicating liquors was also carried on in the premises described in the indictment.

In the course of the trial, a witness, LaHay, employed by the enforcement officers to obtain evidence against the respondents, testified that on one occasion he purchased a drink of one of the respondents, and in January, 1926, he purchased a gallon of alcohol of the respondent William Wombolt.

In defense the respondents introduced in evidence the testimony of a former county attorney that upon the evidence of LaHay and an enforcement officer before the grand jury in May 1926 Leo Wombolt was indicted for a single sale of a gallon of alcohol.

The former county attorney was also inquired of as to whether any evidence of a sale of a gallon of alcohol in January, 1926 was presented before the grand jury at the May Term against William Wombolt and whether any indictment was found at the May Term against William Wombolt for the sale of a gallon of alcohol in January, 1926, which was excluded. Counsel for the defense also called the clerk of courts, who produced an indictment found at the May Term, 1926 charging Leo Wombolt with the sale of a gallon of alcohol in January, 1926, which was excluded.

To the exclusion of the indictment against Leo Wombolt and the evidence of the former county attorney that no evidence was presented to the grand jury or any indictment found against William Wombolt for a sale of a gallon of alcohol in January, 1926 the respondents excepted on the ground that it should have been received to impeach the testimony of LaHay in the case at bar, that in January, 1926, he purchased a gallon of alcohol of William Wombolt.

No doubt, as the Court below ruled, testimony to the effect that LaHay testified differently before the grand jury than before the traverse jury was admissible. But an indictment found, as the one offered in evidence appears to have been, upon the evidence of at least two witnesses, especially in view of the broad provisions of section 22, chapter 127 R. S. has but little probative force to impeach a witness who testified, when first inquired of whom he purchased the liquor: "I think I bought it of A", who was not the person indicted by the grand jury for the sale upon his testimony and that of an officer. However, in view of the admitted testimony of the former county attorney that an indictment was found against Leo Wombolt by the grand jury at the May Term upon the testimony of LaHay and the officer for the sale of a gallon of alcohol by Leo Wombolt to LaHay and the testimony in the case that only one purchase of that quantity was made by LaHay of either of the respondents, it is hardly conceivable that the exclusion of the indictment itself, even if admissible, could have prejudiced the respondents.

Neither does it appear from the bill of exceptions that the respondents were aggrieved by the refusal to permit the former county attorney to answer the questions whether any indictment was found by the grand jury against William Wombolt for a sale of a gallon of alcohol in January, 1926, or whether any evidence was presented to the grand jury of such a sale, as it does nor appear from the bill of exceptions what the witness' answer to such questions would have been. The excepting party must affirmatively show by his bill of exceptions that he was aggrieved by the Court's ruling. It can not be left to inference. *State* v. *Dow*, 122 Me. 448.

Exceptions overruled.
Judgment for the State.

GEORGE A. ROGERS

vs.

FORGIONE & ROMANO COMPANY

Cumberland. Opinion September 8, 1927.

In actions of tort to recover damages for personal injuries it must appear affirmatively that the negligence of the defendant solely caused the injury in order to recover.

Though if the defendant were guilty of negligence, if the plaintiff too were guilty of a negligent act or omission which operated as one of the proximate causes he can not recover.

Negligence and contributory negligence are as a general rule questions of fact for the jury, and when the question involves the weighing and determining of evidence it must be submitted as one of fact to the jury.

In the instant case the court cannot say as a matter of law that there was contributory negligence on the part of the plaintiff, unless it be that any other inference could not reasonably be drawn from the evidence.

If defendant were negligent, which is not now necessary to decide, it is only too plain that had plaintiff been using ordinary care at the time and had not been at fault he would have escaped injury entirely.

On general motion for a new trial. An action of tort to recover damages for personal injuries alleging negligence of defendant and plaintiff's freedom from contributory negligence. A verdict was rendered for plaintiff and defendant filed a general motion. The real issue was one of contributory negligence. Motion sustained. New trial granted.

The case fully appears in the opinion.

William A. Connellan and Elton S. Thompson, for plaintiff.

Israel Bernstein, for defendant.

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

DUNN, J. The plaintiff had the verdict in the personal injury action that he tried against the defendant in the Supreme Judicial Court in Cumberland county at the January term in 1927.

That verdict the defendant is seeking by motion to have this court set aside, not so much it may be said of the chief attitude of the defendant in argument, on the ground of the absence of preponderating evidence of its own negligence, as that of the want of evidence of the plaintiff's freedom from contributory negligence.

In actions of tort to recover damages for personal injuries, a defendant is not liable, unless as between himself and the plaintiff the negligence of the defendant solely caused the accident and harm.

If in the present case the defendant were negligent, and the plaintiff, too, were guilty of a negligent act or omission which operated as one of the proximate causes in the production of the complained-of injury, this would defeat his right of recovery (*Ward* v. *Railroad Co.*, 96 Maine 136), upon the principle that where the combined negligence of the two parties has brought about the unforseen result, the law will not attempt to separate the consequences. (*Lesan* v. *Railroad Co.*, 77 Maine 85.)

Negligence and contributory negligence are as a general rule questions of fact for the jury, and so long as a question remains whether either party has performed his legal duty, or has observed care and caution in requisite degree, and the determination of the question involves the weighing and determining of evidence, the question must be submitted as one of fact to the jury.

The court cannot say as a matter of law that there was contributory negligence on the part of the plaintiff, unless it be that any other inference could not reasonably be drawn from the evidence. *Dougherty* v. *Railroad Co.*, 125 Maine 160.

The story of the case in hand may be briefly told. In June of 1926, in connection with certain sewer construction which the defendant as a contractor was doing between Cash's corner and Rigby, in and for the city of South Portland, a trench was being dug beyond the shoulder of gravel, six or seven feet in width, bordering the macadam on the south side of Main street. On the opposite side of the street there was a similar shoulder of gravel.

Blue clay had been struck, and as dug from the trench it was being carted to a vacant lot upstreet. All the clay was wet, part of it clam-

my, part watery. Some of it seeped from the cart bottoms, some flowed over tailboards, and some slid from the loaded carts onto and became imbedded on the macadamized roadway, whereon travellers in vehicles were being guided.

From time to time the contractor washed and swept and scraped the ooze, but nevertheless more or less mire was always on the road.

The plaintiff had travelled that road, in an automobile, morning and afternoon, going to and returning from his employment, all his days at the Portland Terminal, and for ten days at least had been accustomed to the slime and the slipperiness on the macadam.

On the day of the accident the plaintiff was coming from work, as he had gone to his work, on a motorcycle. He considered the vehicle safe and himself an experienced operator, having driven first and last more than ten thousand miles. The light rainstorm of the morning had made passing on the pavement dangerous, and this the plaintiff knew.

It was mid-afternoon, and traffic was at the peak. When approaching the place in the road opposite the sewer construction, plaintiff saw the mechanical apparatus in operation, and saw the carts each in its turn being loaded and drawn away. If his memory of conditions was not with him, a single glance was enough to give him a full understanding of the indications of danger. And the road on which he was, as he testified, was not the only convenient way to his home.

There were automobiles in front of him, automobiles behind him, and he swore that he did not want to break the line. Plaintiff had been in heavy traffic on busy streets in Portland and kept his position by "straddling,"—by slowing his machine to a rate of speed comparable to that at which a man might walk, and the cycler touch one foot and then the other on the ground, in harmony with the forward movement of the machine.

Yet at this time plaintiff never slackened speed below six miles an hour; whether he might have driven on the gravel on the north side of the macadam was a disputed question; he alone testified that traffic made the shoulder inaccessible to him. But, regardless of the fact about that, he did not straddle, he did not dismount and walk, but continued straight ahead under the circumstances known to him.

Let words that fell from his own lips when he witnessed describe again what in the appreciated situation his acts and their tendency were:

> "I was coming down from Rigby, the road was all clay and nasty, slippery and greasy, I knew what I was going to run into; there was enough mucky substance on that mucky road to cause a motorcycle to skid at six miles an hour. I went down there about six miles an hour. I could have slowed down to three; but I would have had to walk, half walking and half riding, and I didn't put my feet out for want of time. You can keep your machine steady until you get down to about four miles an hour, and then you have to put one foot down. I could have walked by there with my motorcycle (but I didn't). I kept her head on and let her take it; there wasn't much choice of road. I kept within a foot and a half of the north line of that state road."

The motorcycle skidded, and the plaintiff was thrown and injured.

Plaintiff's language suggests no touch of the reflective analysis of forethought and intelligence—that light in the mode of action of prudent men in general which is perhaps indescribable, but none the less unmistakable.

No; the suggestion is that of push and brawn, of the resolve to defy physical laws and overcome them, or at least have disobedience know impunity; the determination to drive the motorcycle through the viscid ooze, no matter what the cost.

If there were negligence on the defendant's part, which point it is not now necessary to decide, but if there were negligence, then it is only too plain that as plaintiff took upon himself the responsibility for going forward, so he must bear the resultant injury. Had he been using ordinary care at the time, had he not been at fault, he would have escaped injury entirely.

The verdict is wrong; it is obviously wrong.

Motion sustained.
New trial granted.

WALLACE J. MORIARTY'S CASE

Androscoggin. Opinion September 9, 1927.

Under the Workmen's Compensation Act "Policemen" are employees of the city or town whose authorization is restricted within the limits of such city or town, whether appointed by elected local officials of such city of town, or appointed by officers appointed by the Governor and Council by virtue of a legislative act creating a commission.

The presumption of the law is against self-murder, and stands unless and until prima facie evidence is adduced by the opposite party.

In this case the finding by the commission that the death of the husband of the petitioner resulted from an accident between which and his employment there was causative connection, had sufficing legal foundation, and so had the finding that the injury was experienced in the course of employment.

On appeal. A petition of Yvonne Moriarty as dependent widow of Wallace J. Moriarty, a policeman of the city of Lewiston, who was found, soon after going on duty, in the toilet of the Maine Central Railroad station with a bullet wound in his neck which two days later proved fatal. Upon a hearing compensation was awarded and an appeal taken from an affirming decree by the city of Lewiston. Appeal dismissed with costs. Decree below affirmed.

The case fully appears in the opinion.

Frank A. Morey, for petitioner.

Frank T. Powers and Fernand Despins, for the City of Lewiston.

Franklin Fisher, for the State of Maine.

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

DUNN, J. An appeal by the city from the decree on the award under the Workmen's Compensation Act (1919 Laws, Chap. 238 as amended) to the widow of the Lewiston policeman whose death resulted from a firearm wound.

The inquiries are: (a) Whether, within the meaning of the workmen's act, the policeman was to be regarded as having been in the employ of the city of Lewiston, at the time the wound was inflicted? (b) If he were such employee, whether the finding of causative connection between his employment and the violent and external means which effected his death, was warranted? (c) Whether there was any competent basis for the decision that the fatal injury occurred in the course of the policeman's employment? The immediate facts were not in controversy.

Wallace J. Moriarty, a special patrolman in Lewiston, was found dying in a toilet room in a railroad station at a terminus of his beat, soon after beginning duty on September 11, 1925.

When found in the toilet, he was sitting on the floor, his back against the fastened door. He had been shot in the left side of his neck. Beside him was his revolver; if any chamber in the revolver were empty does not appear.

The bullet in its course involved the upper part of the man's chest, lanced his windpipe, plowed through the left collar bone, and fractured the first two ribs on Mr. Moriarty's right side. Two days later he died.

The principal duty of police officers, viz., the preservation of the public peace within certain territorial limits, is a matter of public concern, and hence policemen are properly designated as state or public officers.

It is usual for police officers to be appointed by cities and towns, or by designated officials in cities or towns, in virtue of delegation of power by the State; but the power to appoint can be entrusted to any other political agency.

Police officers find their authority in the statute book. In executing authority, policemen are free from control by the appointing power, notwithstanding the municipalities in which they serve are required to pay them.

Were there no more to be noticed, it would be clear that police officers ought not be regarded as bearing a contractual relation to the city or town wherein it is for them to discharge duty.

But in relevancy to this case there is more to be noticed. The Workmen's Compensation Law provides that policemen shall be counted employees. This is the salient provision of the statute:

"Policemen * * * shall be deemed employees within the meaning of this act. If, however, any policeman * * * claims compensation under this act, there shall be deducted from such compensation any sum which such policeman * * * may be entitled to receive from any pension or other benefit fund to which the state or municipal body may contribute." 1919 Laws, Chap. 238, Sec. 1.

A dependent, and the widow in this cause is conclusively presumed to be a dependent, stands in the stead of the dead employee.

It has been argued at the bar, and rightly enough, that the statute puts policemen into two distinct classes: One, that of state policemen, e. g., highway police, who are appointed by a state official, in the general acceptance of that expression, and the range of whose authorization is not restricted to a city or a town; and, second, policemen appointed by other officials, technically styled public officials, but popularly spoken of as municipal or local officials, as mayors, or other city officers, or selectmen in towns.

Further argument is that, as the now deceased policeman was not appointed by officials who themselves had been elected or appointed in and by Lewiston, but was appointed by officers appointed by the Governor with the advice and consent of the Executive Council, the policeman became and was an employee of the State of Maine. The argument falls short of convincing force.

"The police force of the city of Lewiston" is chosen by a legislatively created commission. And the Legislature has decided this were good for Lewiston. P. & S. L. 1917, chap. 37; 1919, chap. 17.

The legislative creation was a new and superseding political agency. Thereby municipal authority in Lewiston was shorn of the police-appointing prerogative. A board of police commissioners was named and organized. The province of the board, as defined by the Legislature, was to establish and appoint the police force of the city of Lewiston, with all the powers that the mayor, the municipal officers, or the city council of Lewiston had at the time of the legislation.

Upon his appointment, it was for the patrolman who now is dead, to take the same constitutionally defined oaths, and to enforce the same laws and preserve the same peace within the same limits, as would have been the case had his appointment been by local officials in Lewiston. And his pay was from the same city treasury.

No one living knows how the revolver was fired that denied Mr. Moriarty the privilege of living out all the days of his life. No direct evidence tended to show that he was guilty of his own death. The circumstantial evidence, together with all inferences which might legitimately be drawn therefrom, was before the Industrial Accident Commission member who sat to try the facts, and the decision of the trier has been recorded.

There are only five things that the printed words on the pages of the record, as those words have been illumined by the arguments of counsel, justify this opinion in saying by way of conclusion.

First, that, within the purview of the compensation act, the death of Wallace J. Moriarty was caused by an accident, was determined by the Industrial Commission member, and the decision of that mixed question of law and fact has been accepted by the city of Lewiston, as final.

Second, it cannot be said as a matter of law that Mr. Moriarty wilfully intended to bring about the injury which caused his death.

Third, love of life is presumed. Men naturally heed the instinct of self-preservation. The presumption of the law is against self-murder. The presumption which prevails that, until the contrary is established, it will be assumed that injury was not self-inflicted, is entitled to probative force. *Westman's Case*, 118 Maine 133. A presumption serves in the place of evidence, until prima facie evidence is adduced by the opposite party. Of suicide the evidence had not proof in the estimate of the commissioner.

Fourth, the finding that the death of the man resulted from an accident, between which and the man's employment there was causative connection, had sufficing legal foundation.

Fifth, and so had the finding that the injury was experienced in the course of employment.

Appeal dismissed with costs.
Decree below affirmed.

EVADNE CAREY

vs.

JAMES MCNAUGHTON, ET AL.

Penobscot. Opinion September 9, 1927.

The finding of a single Justice trying a cause without a jury abundantly justified on the evidence, hence final.

On exceptions. An action of trover to recover the value of an automobile described in the declaration as "a Star Sedan, 1926 model."

The cause was tried by the presiding justice without a jury who found for the plaintiff and defendant excepted. Exceptions overruled.

The case sufficiently appears in the opinion.

Fellows & Fellows, for plaintiff.

Stanley Needham, for defendant.

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

DUNN, J. When this action of trover was on trial, the judge acting in the place of a jury, in the Superior Court in Penobscot county, the issue narrowed as to whether the plaintiff had shown herself the owner, at the time of the alleged conversion, of the title to the automobile which one of the defendants had stored in the public garage of the other, and each defendant in turn had refused to deliver up, though the garage charges, apparently the only claim either defendant had on or against the automobile, were first tendered.

The question at the trial, on the theory of variance between the declaration and the proof, was of the identity of the subject-matter. Plaintiff had declared in the writ that her Star automobile was of the

model of 1926. Defendants claimed that the automobile demanded of them was a Star of 1925.

There was evidence both ways. For the plaintiff, not to speak of other evidence tending to establish her contention, there was testimony by a witness who had dealt in and with the especial make of automobile, that the particular automobile was known to the trade as a 1926 model. For the defendant, testimony that on the block of the engine was the inscription: "Model F 1925."

And there was testimony that the engine model and the automotive model were different things; that though the engine and the automobile both might have been made in the same calendar year, yet the year of the automobile maker, in reference to the model of the vehicle, regularly ended on July 31st.

The judge found for the plaintiff, and the finding was abundantly justified on the evidence.

The finding of the judge settled the facts. In brief, simple terms, then, no question of law being involved, the exception which the defendants have argued is unavailing. *Treat* v. *Gilmore*, 49, Maine 34; *Ayer* v. *Harris*, 125 Maine 249.

Exception overruled.

STATE *vs.* AQUILLA BUSHEY

Kennebec. Opinion September 9, 1927.

Destruction of liquor to prevent its seizure is evidence of guilty intent.

An allegation of the quantity of liquor kept with illegal intent is not necessary in a complaint.

The evidence in this case was sufficient to justify the verdict of guilty.

On exceptions. After conviction of keeping and depositing liquor intended for illegal sale, respondent excepted to a denial to direct a verdict of not guilty, and excepted to a denial of a motion in arrest of

judgment, and also excepted to a portion of the charge. Exceptions overruled. Judgment for the State.

The case appears in the opinion.

Frank E. Southard, County Attorney, for the State.

F. Harold Dubord, for respondent.

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

DEASY, J. The respondent was convicted of keeping and depositing intoxicating liquor intended for illegal sale. Laws of 1923 Chap. 167, Sec. 2. He seasonably filed and here presents three exceptions. One is to the refusal of the presiding justice to direct his acquittal.

Evidence was introduced which the jury were justified in believing, and apparently did believe, tending to prove that on Oct. 9, 1926 officers armed with a warrant, searched the defendant's lunch room in Waterville. They saw on a shelf two glasses "half full of something." When the officers entered, the respondent evidently for the purpose of preventing seizure, "grabbed" the glasses and threw them into a sink containing water. The officers retrieved the glasses. Both smelled strongly of alcohol and one contained a very small quantity of the same. In the lunch room at the time were one drunken man and several others with alcoholic breaths.

Destruction of liquor to prevent its seizure may properly be regarded by a jury as tantamount to a confession. This is true by force of the statute or independently of it. Such destruction supplies evidence of guilty intent which may be lacking when mere possession is shown.

The respondent also excepts to part of the charge, viz: "if *intoxicating* liquor is found or is about to be found and it is destroyed by the person having it in his possession, to prevent its seizure, that that may be considered as evidence that it was intended for illegal sale and was intoxicating." Exception is taken to the word "intoxicating" printed above in italics.

Precision would require the omission of this qualifying word. With its use the statement of law was a trifle too favorable to the respondent. He is not aggrieved.

The respondent further excepts to the overruling of his motion in arrest of judgment. The alleged grounds of such motion are, (a) No allegation in the complaint of the quantity of liquor kept with unlawful intent. Such allegation was not necessary. *Commonwealth vs. Conant* 6 Gray 482. (b) No return on search warrant. If a fact this would not be material in the present case. Moreover the record shows that such return was made.

Exceptions overruled.
Judgment for the State.

BRACKETT'S CASE

Cumberland. September 9, 1927.

Under the Workmen's Compensation Act an injury resulting from accident and which remains latent for more than thirty days may be sufficient ground of "mistake," within the meaning of the word as used in section 20 of the act, for failure to give notice of the accident as required in section 17.

Such notice must, however, be given within a reasonable time after the latent injury becomes apparent if claimant is to receive the benefit of the act.

On appeal. On February 20, 1926, while in the employ of the Cabot Manufacturing Company at Brunswick, claimant received a severe strain in his right groin. He did not for a time consider it serious and gave no notice to his employer within thirty days. On July 27, 1926 he was informed that he had a hernia, and at once reported his condition to his employer. On October 9, 1926, claimant filed a petition for compensation which was awarded and an appeal taken. The question involved was as to whether the failure of claimant to give within thirty days from date of the accident a notice of his injury to his employer barred him from compensation.

Appeal dismissed. Decree below affirmed.

The case sufficiently appears in the opinion.

Ellis L. Aldrich, for claimant.

Eben F. Littlefield and William B. Mahoney, for respondent.

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

DUNN, J., concurring in the result.

PATTANGALL, J. Appeal from decree in favor of claimant under Workmen's Compensation Act.

No question is raised as to the accident, the injury received, or that it arose out of and in the course of employment. The sole issue is whether the failure to give notice of the accident as required by section 17 of the act was due to "mistake" within the meaning of the word as used in section 20.

The Commission so found and its finding, in that respect, involving a conclusion of law, is properly before this court for review.

The facts are not in dispute. Claimant sustained a severe strain, in connection with his work, on February 20, 1926. He suffered more or less temporary pain and was lame and sore for a few days, but in a weeks time all apparent ill effects of the accident had disappeared and he dismissed the matter from his mind. He gave no notice of the accident to his employer during the following thirty days, nor did the employer have knowledge of it.

Four months later, he noticed a slight swelling in his groin, which by July 27 had increased sufficiently to alarm him. He submitted himself to medical examination and was found to be suffering from right inguinal hernia. He referred the injury back to the accident of February 20 and gave immediate notice of accident and injury to his employer. Claim was presented to the Commission and a decree in his favor followed. We think that the decree should be sustained.

Sec. 20 Chap. 50 R. S. 1916, identical with Sec. 20 Chap. 238, P. L. 1919, provides that "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." So far as we are able to find, the compensation act of no other state than Maine, with the exception of Rhode Island, contains an exactly similar section.

The construction to be given the phrase "unforeseen cause" is discussed exhaustively in *Wardwell's Case*, 121 Me. 219 and in *Donahue* v. *Sherman Sons Co.*, 39 R. I. 373. The doctrine of those cases

is adhered to in *Butts' Case* 125 Me. 245, and *Bartlett's Case* 125 Me. 377. But the weight to be given the word "mistake" has not been determined by this court or that of Rhode Island.

The word appears in the remedial section of the Massachusetts act and of the British act, and has been the subject of judicial construction in both jurisdictions.

The Massachusetts act provides that in case of accident notice must be given as soon as practicable and claims for compensation must be filed within six months. Delay is excusable if due to mistake or other reasonable cause. In *Carroll's Case* 225 Mass. 208, the court said "When the immediate result of a personal injury is apparently slight and for that reason the employee elects not to present a claim under this act and later on serious results caused by the injury come into existence, it may well be found that failure to make a claim within six months of the injury was occasioned by mistake."

The British act (1906) sec. 2 provides that "Proceedings shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured and unless the claim for compensation has been made within six months from the occurrence of the accident * * * The want of notice not to have any effect, if such want is occasioned by mistake, absence from the United Kingdom or other reasonable cause."

In *Ellis* v. *Fairfield Ship Building Co. Ltd. VI B. W. C. C.* 317, quoting *Rankine* v. *Alloa Coal Co.* 41 *Sc. L. R.* 306; *Hoare* v. *Arding* 5 *B. W. C. C.* 36, *Egerton* v. *Moore* 5 *B. W. C. C.* 284 as authority, the position of the courts of Great Britain in this respect is summarized in the following language:

"If a man has an accident and honestly believes at the time that nothing serious has happened to him and therefore not conceiving that he has a good claim against his employer, makes no claim, but it afterwards appears that he had made a mistake in fact and really had been injured that may be—I do not say must be, because the question of time might enter into it—reasonable cause for his not making the claim within six months or not giving notice of the accident before he left the employment or, if one likes to use the other word, that his failure to give notice or make a claim, in such circumstances may be occasioned by mistake, in the sense of the statute, for

I think the words are exegetical of each other. It is mistake, absence or reasonable cause, that is to say, reasonable cause is ejusdem generis with mistake." The opinion quotes Lord Chief Justice Buckley as saying—"Let me instance what might be a mistake—assume a person who has sustained an injury which for the time being is latent. He does not know whether it is going to be serious or not. Under those circumstances he may lie under a mistake within the meaning of the act."

In discussing the provisions of section 20, in *Wardwell's Case*, supra, former Chief Justice Cornish said: "The legislature inserted this provision as to excuse for failure to comply with the strict thirty day limit, with a definite purpose and that purpose was to protect the legal rights of parties in meritorious cases when the facts should warrant it. It employed comprehensive and elastic terms to accomplish that purpose and to enable the court to grant relief from hardship and misfortune."

"Mistake," in this connection refers to a mistake of fact and not of law. L. R. A. 1916 A. 91; *McLean's Case* 223 Mass. 342; *Fell's Case* 226 Mass. 382.

"A mistake of fact takes place either when some fact which really exists is unknown or some fact is supposed to exist which really does not exist" *Scott* v. *Ford*, 78 Pac. 742 (Oregon) 3 Words and Phrases, 2nd Series 417.

When notice is excused by reason of the provisions of the remedial section of the statute, notice must be given within a reasonable time after the cause of delay is removed. *Bartlett's Case*, supra, *Carroll's Case*, supra. In the latter case the court said: "There is nothing in the act which provides when a claim must be filed in case it is found that the failure to make it within six months of the occurrence of the injury was occasioned by mistake. Under these circumstances, as a matter of construction of the act, the claim must be filed within a reasonable time after the mistake is discovered." Failure to observe this sound provision of law was fatal to claimant's case, in *Bartlett's Case*, supra, and in *Butts' Case*, supra.

In the light of these various authorities we believe that the correct rule by which the present case is to be measured may be stated as follows: When an accident results in an injury which remains latent for more than thirty days, the only immediate and perceptible result

of the accident being so trivial that the injured person does not regard it as of material consequence and is reasonably justified in reaching that conclusion, he may be excused, on the ground of mistake, within the meaning of the word as used in Sec. 20, for failure to give notice of the accident as required in Section 17, provided that notice is given within a reasonable time after the latent injury becomes apparent.

Such a rule is consistent with the letter and spirit and purpose of the act, is not in conflict with any previous decision of this court and appears to be amply supported by authority.

The present case fully satisfies its requirements.

Appeal dismissed.
Decree below affirmed.

WILLIAM A. BEDFORD *vs.* SAMUEL BERNSTEIN

Cumberland. Opinion September 14, 1927.

After an adjudication of bankruptcy and until the appointment of a trustee, the bankrupt still has legal title to unexempt property as quasi trustee. He cannot transfer or incumber the property, but he may retrieve such of it as is in the hands of others. He may bring actions in respect to it. Such actions enure to the benefit of the trustee in bankruptcy if and when chosen and qualified.

A tender is not a prerequisite to an action to recover property or its value when the defendant has not the power to restore it.

On general motion. An action of trover to recover the value of a used automobile. A verdict of $125.42 was returned and defendant filed a general motion for a new trial. Motion overruled.

The case fully appears in the opinion.

E. A. Turner and H. C. Sullivan, for plaintiff.

Israel Bernstein, for defendant.

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

DEASY, J. The evidence discloses these facts: In November 1924 the plaintiff was adjudicated a bankrupt. In May 1925 an order of "no trustee" was filed (Gen. Ord. XV).

The defendant had previously sold to the plaintiff a used automobile taking a Holmes Note for a part of the consideration. At the date of the adjudication the car was in possession of an officer who had, subject to the defendant's lien, attached it in a suit brought by a third party. No foreclosure was begun by the defendant but, some balance remaining unpaid upon the note, he took possession of the car and "junked it, broke it up." Thereafter on August 6, 1925 the plaintiff made a tender of the sum claimed by him to be due and demanded the car. The defendant refused the tender. Thereupon this action of trover was brought. It resulted in a verdict for $125.42.

The defendant brings the case forward on motion. He contends that after the adjudication, the bankrupt had no title or right to unexempt assets by virtue of which he could maintain any action.

Recent decisive authorities are however opposed to this view. After the adjudication and until the appointment of a trustee the bankrupt still has legal title as quasi trustee. He cannot transfer or incumber the property (7 C. J. 91) but he may retrieve such of it as is in the hands of others. He may bring actions in respect to it. Such actions enure to the benefit of the trustee in bankruptcy if and when chosen and qualified.

"During the interval between the filing of the petition and the election of the trustee the title remains in the bankrupt * * *

The bankrupt's title, before it is suspended by that of the trustee, is sufficient to authorize his institution and maintenance of a suit on any cause of action possessed by him though it may very well be that any sum he recovers will be held by him as trustee for his creditors." 3 R. C. L. 233.

This statement of the law is abundantly supported by *Johnson* vs. *Cullier*, 222 U. S. 538; 56 L. Ed. 306, *Cunningham* vs. *Lexington Trust Co.* (Mass.) 156 N. E. 1, *Christopherson* vs. *Harrington* 118 Minn. 42, 136 N. W. 289, *Rand* vs. *Railway Co.* 186 N. Y. 58, 78 N. E. 574 and many other authorities.

The defendant's counsel relies upon *Rand* vs. *Sage* 94 Minn. 344 as confirming his theory; but the later Minnesota case of *Christopherson* vs. *Harrington* (supra) in effect disaffirms the reasoning of *Rand* vs. *Sage* and states the law as herein held.

It is urged that the tender was insufficient in amount. This is unimportant for the reason that before the demand the defendant had destroyed the car and thus put it out of his power to restore it.

"A tender is not necessary when the recipient has not the power to return the property." *Drummond* vs. *Trickey* 118 Me. 296.

The jury heard the widely divergent testimony relating to damages. We cannot say that the verdict is manifestly excessive. The defendant might have avoided liability by the simple process of foreclosure.

Motion overruled.

MARIE W. NORTH, ET AL.

vs.

MARTHA JEWETT HARRIS, ET. AL.

Kennebec. Opinion September 17, 1927.

There can be no remedy unless there is a cause for relief upon which alone equitable remedial justice is founded, without which the court has no jurisdiction.

In this case the trust having terminated, the plaintiffs have no interest to ask the equity court to construe the will, nor can consent by the defendants confer jurisdiction.

On report. A bill in equity seeking the construction of certain paragraphs in the will of James W. North who died June 7, 1882. Upon a hearing by agreement of the parties the cause was reported to the Law Court for the determination of the rights of the parties

upon so much of the evidence as is admissible, and final judgment thereon. Judgment for the defendants.

The case fully appears in the opinion.

George W. Heselton and Edgar F. Taft, for plaintiffs.

Andrews, Nelson & Gardiner, for Martha Jewett Harris and Carolina N. McGunnigle.

Benedict F. Maher, for Roger North.

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

DUNN, J. Necessarily the first inquiry in this case is, did James W. North by his last will create a trust which is still continuing for the benefit of the plaintiffs, each of whom is the childless widow of a son of the testator? The justice below reserved the case by consent for decision by the full court on the legally admissible evidence.

James W. North died, testate, domiciled at Augusta, on June 7, 1882. His wife was dead already. He was survived by his only three children, namely, George F. North, James W. North, called Junior to distinguish him from his parent, and Horace North. Of the sons, George F. North was the first to die, and his widow and only child died long before the present proceedings were begun. James W. North, Jr., the son whose death next occurred, was outlived by his second wife, who had no children. Of the former marriage of James, Jr., which marriage death dissolved, three children had been born, viz., the three defendants in this cause. Horace North, the son last to die, on April 1, 1926, was survived by his wife, but not by child.

When the testator made his will, in the lifetime of his wife, he left what in convenience may be designated his residuary real estate, as the corpus of a trust which the will created. It is with this trust that the instant suit would have concern.

In the paragraph numbered fourth the will provided that the trust which was to be created should exist for the benefit of the testator's widow during her life.

The next or fifth paragraph devised the residuary realty in trust to the sons, James W. North, Jr., and Horace North, during their

lives and the life of the survivor of them, and provided for the payment of the yearly net income to the testator's widow and the testator's three sons, under the name of the widow and that of each son, for the periods of the several lives of the widow and the sons. It provided, too, that in case a son died the income that would have been for him if living should be for his widow and children during the continuance of the trust estate.

That the trust was to continue throughout the life of the last surviving son is evident from the provisions mentioned and from that of the tenth paragraph for the appointing of a trustee in the apparently contemplated event of the son, named beneficiary only, outliving the sons who were trustees and beneficiaries as well. The pertinent phraseology of the paragraphs, as the case hinges, it would serve no useful purpose to detail.

The question of what would have been the situation had the wife of the testator lived longer than all the sons of the testator is not of consequence because the wife was the first to die.

Language determinative of the testator's intention, as such intention is of moment here, is found in another part of paragraph fifth and in the sixth paragraph of the will.

The fifth paragraph embraced also the contingency of a son dying survived by his wife but "leaving no child or children or issue of a deceased child," and the widow in need of income beyond what the estate of her husband afforded. The provision, so far as it is material to repeat its text, was as follows:

> " * * Leaving a widow needing further support than the deceased son's estate may furnish, she is to be paid such part of the deceased son's share of the net income during her widowhood, if her necessities continue so long, * * ,"

Paragraph sixth was in these words:

> "Sixth, I give and devise to my grandchildren living at the decease of my last surviving son, when the trust estate will end, and to children of deceased grandchildren by right of representation, all of my real estate held in trust as aforesaid, to have and to hold to them and their heirs forever, divested of the trust."

After the death of his wife, the testator made a codicil to his will. The codicil in no way revoked or annulled the will, but created other trusts, one expressly of real estate not included in that which the will created, which later trust, in difference from the earlier trust, made no mention of the wives of the testator's sons. The codicil trust was limited to the time of the death of the son living the longest, when there should be division in fee among the testator's grandchildren. The codicil then republished and ratified the prior will.

Plaintiffs claim that the trust created by the antecedent will did not terminate with the death of the son, Horace North, but should continue throughout the life of each plaintiff, the one of whom, as has been observed before, is the childless widow of Horace North, and the other the childless widow of James W. North, Jr.

The defendants contend that the trust created by the will terminated with the death of the testator's last surviving son.

Were the provision for the widows to be wrested from the paragraph in which it was placed, and read without relation to that paragraph, and to the immediately following and cognate paragraph sixth, it would, to be sure, be quite sustainable that the provision for the widows is continuing.

But, when the several parts are read with relation to each other so as to form one consistent whole, it is as distinct as need validly be that the testator employed his own way of saying this:

> " 'During the continuance of the trust estate,' and 'during her widowhood,' that is to say, while during her widowhood the trust continues, the childless and necessitous widow of any of my sons shall be entitled to a certain part of the income that would have been for her husband had he lived."

There are general principles governing the construction of wills, which principles are designed to ascertain and effectuate the intention of a testator as expressed in his will, viewed in the light of the circumstances attending its execution. But rare indeed are the instances where two wills use exactly the same language to express the dispositive intentions of different testators. Every will may be said to have individuality, to speak purpose in its own verbal collocation, consistently with the established rules of law and public policy. As a usual thing, there are material differences between wills, and like-

wise in the circumstances attending the making of wills, which may be considered in order to arrive at a testator's true intent, and insure a proper execution of his will, or a correct administration of the testamentary trust he created.

So, unless cases cited are in every respect directly in point and agree in every circumstance, judicial construction of other wills except so far as they establish general rules, or mark the importance of adhering to a course of decisions whose authority has established a rule of property on which many titles and estates depend, are not of controlling force in respect to another will. However, the reasoning of the cited cases may beacon the way to interpretation and construction. The case of *Hyde* v. *Wason*, 131 Mass., 450, instanced by defendant's counsel, sufficed such office in the effort of this court to arrive at the present testator's intention.

This is what the plaintiffs took under the testamentary disposition: They took only what the will, harmonizing the separate paragraphs of the instrument and permitting all related parts to stand together, gave them — an equitable vested interest limited by the conjoint limitations of childless widowhood in necessitous circumstances and the death of the testator's last surviving son.

In the course of human events the trust has ended; it ended with the death of Horace North, the last of the testator's sons. And thereupon that which had been the corpus was "divested of the trust."

It has seemed requisite thus to recite and deduce, that there might be outline for the conclusion that, the trust having terminated, the plaintiffs have no interest to ask the equity court to construe the will, nor can consent by the defendants confer jurisdiction.

Decree accordingly.

STATE *vs.* BENJAMIN TURNER

Cumberland. Opinion September 23, 1927.

In order to save his rights with regard to evidence admitted over his objection, the party objecting must state, for the record, at nisi prius, the reasons for his objection. Exceptions taken to the admission of exhibits, because of their appearance, may only be considered by this court, when the exhibits are brought before it as a part of the bill of exceptions, unless they can be accurately reproduced in the record, or a description of them agreed upon by the parties.

The opinion of lay witnesses, on the question of mental capacity, is not received in this state, the sole exception being that of the attesting witnesses to a will.

In this case no error of law appears either in the exclusion or rejection of evidence or in the instructions of the court. Every legal right of the respondent was carefully safeguarded. The trial was conducted with absolute fairness. No appeal on the facts is presented.

On exceptions. Respondent was indicted for murder and by a jury found guilty. The alleged shooting was admitted by the respondent and lack of mental responsibility was the only defense offered. Exceptions were taken by the respondent to the admission and exclusion of testimony and to the refusal to give requested instructions. Exceptions overruled.

The case appears fully in the opinion.

Raymond Fellows, Attorney General, Ralph M. Ingalls, County Attorney, and Franz U. Burkett, Assistant County Attorney, for the State.

Joseph E. F. Connolly and Harry C. Libby, for the respondent.

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

PATTANGALL, J. On exceptions. Respondent was convicted of murder. He now asks that the verdict be set aside and new trial granted because of errors in admitting and excluding evidence and in refusing requested instructions.

1. The first exception relates to the admission of photographs showing wounds in the body of the deceased, and to the refusal to order the photographs withdrawn from the evidence at the close of the case.

The rule that the admission of photographs as evidence is within the discretion of the trial judge, is too well settled to admit argument. Respondent urges that, in the instant case the discretion was abused. We do not agree with that contention.

When these photographs were offered in evidence, counsel for respondent objected, giving no reason for the objection which was overruled. Exception was taken. Such an exception need not be considered here. In order to avail himself of the right to have his objections to the exclusion or admission of evidence reviewed by this court, the party whose objections have been overruled at nisi prius must state, for the record, the grounds for his objection. *McKown* v. *Powers*, 86 Me. 296. No reason for this objection appears to have been stated and none is now stated. Apparently no sound reason could have been stated at the time the evidence was offered, for obviously none existed.

But later, counsel filed a motion to order the photographs excluded from the evidence. This was in the nature of a motion to strike testimony from the record, the progress of the case having affected its admissibility. This motion was denied, exception taken and this exception, properly here for consideration, is seriously urged.

In the first instance, the photographs were admissible as tending to prove the cause of death. At the close of the case the only issue actually in controversy was the sanity of the respondent. Obviously the photographs were of no probative value on that issue. But, notwithstanding the narrowing of the controversy, it was still incumbent upon the state to prove all of the necessary elements of the charge of murder beyond a reasonable doubt.

Evidence could not be ordered stricken from the record simply because it did not bear on the question of sanity. Respondent does not so argue. His position is that the photographs, by reason of the

evidence offered by both state and respondent, had become immaterial, and superfluous and that they were prejudicial.

We cannot say that they were immaterial. They were cumulative. But cumulative evidence may not be regarded, necessarily, as immaterial or superfluous or objectionable.

The emphatic claim of the respondent is that they were prejudicial, in that they were "gruesome and morbid." We are unable to judge of that. They were not produced in this court. They were photographic representations of gunshot wounds. Otherwise than that, we have and can have no knowledge of their character. That they were of a peculiar nature, so that the adjectives applied to them by respondent are appropriate, is a matter resting entirely on the bare assertion of counsel, and, necessarily, purely a matter of opinion. It is urged that they were prejudicial and were introduced for the purpose of inflaming and prejudicing the minds of the jury and that that purpose was accomplished, but it is not conceivable that photographs of gunshot wounds could have affected the judgment of jurors on the issue of respondent's sanity, the only issue which they were actually called upon to decide. To argue otherwise would be to deny the jurors the possession of ordinary intelligence. Respondent's argument on this point presents no reason for ordering a new trial.

2. The second, third and fourth exceptions relate to the exclusion of testimony designed to place before the jury the opinion of a lay witness, as to respondent's sanity.

The witness in question, an employee of the Postal Telegraph Co., living in Portland, was at the scene of the shooting and observed the respondent for two or three minutes, then left the place to communicate with officers, returned and was again in respondent's company for about fifteen minutes. He had never seen respondent before this time and never saw him afterwards.

This court has never received opinion evidence on the part of lay witnesses on the question of mental capacity, with the single exception of the attesting witnesses to a will. The rule is otherwise in most jurisdictions but we agree with the view expressed in *Fayette* v. *Chesterville*, 77 Me. 30, wherein it is said:

"Finally, it is contended that the rule which excludes opinion evidence by witnesses acquainted with the person whose sanity is questioned should be abrogated altogether. We are not prepared to ad-

mit the propriety of so radical a change in the practice of our courts, altho we are aware that many courts are at present inclined that way. Where the issue of sanity or insanity is directly raised and the question is a doubtful one the rule which excludes the opinion of non-professional witnesses works favorably. The popular sentiment upon the subject of insanity differs from the legal standard in most cases."

But the evidence offered would have been rejected in any court. The record does not show that the witness had sufficient opportunity to form any such opinion as would have enabled him to have answered intelligently the questions asked him. If he had been an expert alienist, it would have been no abuse of the wide discretion given the court concerning the reception of expert testimony to have rejected the evidence. We certainly know of no jurisdiction in which the opinion of a lay witness, as to the sanity of a man, whom he has seen less than twenty minutes, would be regarded as admissible. The rejection of this evidence, from any point of view was eminently proper.

3. The fifth and last exception is to the refusal of the court to give the following instructions to the jury:

"When the defense of insanity is relied on, the respondent must prove his mental deficiency by a fair preponderance of evidence but at the close of the case the State must have proven its allegations of premeditation and criminal intent by proof beyond a reasonable doubt, *so that if at the close of the case the evidence relating to insanity raises a reasonable doubt in your minds, of the respondent's responsibility, you will acquit him.* The burden of going forward with the evidence shifts but the burden of final and ultimate proof of the required elements rests where it was in the first place, on the state and in the measure beyond a reasonable doubt."

This, in somewhat ambiguous language, was equivalent to instructing the jury that the sanity of the respondent must be proved beyond a reasonable doubt. Intelligent and thoughtful jurors would have been justified in so regarding it.

The presiding judge had given the jury elaborate and painstaking instructions on the points involved in this request and after receiving it he added:

"I am asked to give certain instructions. I cannot give them in the language requested. I will add to what I have said to you in

regard to the burden of proof. I think I did cover it but that there may be no question in your minds, I will say that the State must make out a case in accordance with the elements of such an offense as my description, all those elements of the offense beyond a reasonable doubt, if those acts were committed by a sane man, sane in accordance with these rules which I have laid down and that requires an intent on his part to these acts. And unless the State makes out such a case as that, such a case would be murder if the person committing the acts were sane and is sane—unless such a case is made out beyond a reasonable doubt—then the respondent is entitled to an acquittal. The burden of proving the mental irresponsibility, the lack of mental responsibility, rests then, if such proof has been made out by the state, upon the respondent. And then if by a fair preponderance of evidence, he shows that, in spite of the fact that what you have in your minds been shown beyond a reasonable doubt, that such a case as I have just described, of murder, has been committed, provided the person were sane who committed it; if he shows, by a fair preponderance of evidence, in spite of that, that he is mentally irresponsible, within the definition that I have given you, if he shows that by a fair preponderance of the evidence, then you must acquit, that is, you must find him not guilty by reason of insanity."

This instruction supplemented previous instructions on this point following the rule laid down in *State* v. *Lawrence*, 57 Me. 574 and affirmed in *State* v. *Parks*, 93 Me. 208.

The trial judge did not err either in refusing the requested instruction or in the statement of the law which he gave.

There is nothing in the record presented to us to even suggest that every legal right of the respondent was not carefully safeguarded, or that the trial of the case was not conducted with absolute fairness and in accord not only with the rules of law but the spirit of justice. No appeal on the facts is presented. No argument is made that the jury reached a wrong conclusion. The bill of exceptions certainly presents no error of law.

Exceptions overruled.
Judgment for the State.

FERRERI'S CASE

York. Opinion September 23, 1927.

A section of highway under actual construction may be considered the employers premises under the Workmen's Compensation law.

Not so when the portion of highway over which travel passes is completed and open for use by the public.

An injury to an employee while on a public highway on his way to his work is not an injury received in the course of his employment, nor one arising out of his employment.

The completion of work on such a section of highway embracing only rounding up the shoulders of the road, building the concrete walls to culverts and placing guard-rails at appropriate points on the way, being such work as may be carried on without occupying the traveled way, brings such way outside of the limits of the employer's premises.

An employee going upon the traveled way, not held to be the premises of his employer, is exposed to the same risk to which any pedestrian in the same position would have been exposed.

The hazards involved in so travelling have no relation to his employment.

On appeal. The petitioner upon an agreed statement of facts was awarded compensation under the Workmen's Compensation Act and from an affirming decree respondents appealed. Appeal sustained.

The case fully appears in the opinion.

Locke, Perkins & Williamson, for petitioner.

William H. Gulliver and William B. Mahoney, for respondents.

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

PATTANGALL, J. Workmen's Compensation Case. Governed by provisions of Chap. 238. P. L. 1919. Appeal from decree awarding compensation.

Facts agreed upon. Petitioner was employed as a laborer by contractors engaged in constructing a highway between York Corner and Cape Neddick, a distance of about three miles. Petitioner lived at a camp owned by employer at a point about midway between the termini of the section of highway under construction. His hours of labor were from 7 A. M. to 6 P. M.

On August 20th the highway, so far as the travelled portion was concerned, had been completed and was opened for public travel. The concrete culvert endwalls, earth shoulders and guard rails were not completed and from August 20 to November 10 the contractors' force was employed in their construction.

On the morning of August 21, petitioner was assigned to assist a carpenter in work on a concrete endwall near Cape Neddick, about a mile and a half from the camp. At 6: 45 A. M. on that day, he and the carpenter whom he was to assist were walking on the northerly side of the highway going toward the place of work. They were overtaken by one of their employers, going in the same direction in an automobile. He stopped his car and invited them to ride. Petitioner started from the northerly side of the highway toward the automobile, when he was struck by another automobile, not owned or operated by his employer, and received certain injuries. It was no part of the contract of hire that the employer should furnish petitioner transportation from the camp to his place of work.

On these facts the Commission found that the accident occurred on the employer's premises and that it arose out of and in the course of petitioner's employment.

We cannot agree with these conclusions.

The findings of the Commission are based on the theory that the entire three miles of highway, in all its parts, extending from York Corner to Cape Neddick constituted the employer's premises.

It might well be that such a section of highway, while under actual construction, could be so considered. But that is not the situation here. At the time of the accident, the portion of the highway over which travel was to pass was completed and had been opened for use by the public. There was no more work to be done upon it. The work that remained to be done under the employer's contract did not require petitioner or his fellow employees going upon the travelled way. They had no duties which called them to go upon it.

They were in the same position, while doing the remaining work in which they would have been had the highway been built the year before and their employer's contract limited to rounding up the shoulders of the road, building concrete endwalls to the culverts and placing guardrails at appropriate points along the way. Such work would have been carried on without occupying the travelled way and without interfering with traffic.

The two lines of work, i. e. the building of a highway over which travel might pass and the work which was to be done after the road was open to travel were not interdependent. They might have been made the subject of separate contracts between the state and this employer or have been awarded to separate contractors.

When the work had reached a point where the travelled portion of the highway was completed, the road opened for public travel and there was no longer necessity for employees to go upon it in the performance of the duty which they owed to their employer, that portion of the highway ceased to be included in the premises of the employer, even if it might be assumed to have been properly so included prior to that time.

Petitioner, then, was injured while on a public highway, on his way to his place of work. His injury was not received in the course of his employment. *Roberts' Case* 124 Me. 129. Nor did the injury arise out of his employment. *Paulaskes' Case* 126 Me. 32.

In going upon the travelled way, as he did and when he did, he was exposed to the same risk to which any pedestrian in the same position would have been exposed. The hazard had no relation to his employment.

"The causative danger must be peculiar to the work, not common to the neighborhood." *Westman's Case* 118 Me. 142.

Appeal sustained.

STATE *vs.* BENJAMIN KOPELOW

Penobscot. Opinion October 1, 1927.

The accused must claim his right to have a speedy trial and make a demand for trial. Such right may be waived by the conduct of the accused.

The whole or any part of an indictment may be nol prossed, even against the objection of respondent, before a jury is empaneled or after verdict, but if entered after verdict, the indictment being sufficient, the verdict will be a bar to further prosecution for the same offense.

During trial on a criminal prosecution a nol pros may not be entered against will of respondent, as he is entitled to a verdict if demanded.

A nol pros does not discharge the respondent finally, nor does it operate as an acquittal, for he may afterwards be again indicted for the same offense.

A motion in arrest of judgment can only be made on account of some intrinsic defect apparent on inspection of the records.

On exceptions. Respondent was convicted of illegal transportation of intoxicating liquor. Exceptions were taken by respondent to a ruling upon amended pleading; to a ruling excluding an exhibit; and to a denial of a motion in arrest of judgment. Other exceptions also were taken by respondent to the procedure alleging that the arrest was not made within a reasonable time after the warrant was issued. Exceptions overruled. Judgment for the State.

The case fully appears in the opinion.

George F. Eaton, County Attorney, for the State.

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

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

PHILBROOK, J. Upon a charge of illegal transportation of intoxicating liquor this case originated in the Bangor Municipal Court, came to the Superior Court for Penobscot County by appeal, and was tried before a jury which returned a verdict of guilty.

From the record it appears that before trial in the Superior Court the presiding justice dictated the following to the stenographer: "Respondent files amended pleadings. State files demurrer. Demurrer sustained. Respondent takes exceptions. Respondent then prays for leave to go to trial on the merits of the case without waiver of his exceptions and this the court permitted him to do and the case will be in order for trial." After verdict the respondent filed a motion in arrest of judgment which was overruled.

Finally a bill of exceptions, five in number, was presented to and allowed by the presiding justice. The stipulation in the bill is that the evidence, motion in arrest of judgment, the docket entries, pleas, demurrers, respondent's exhibit No. 1, notation on the record by the court preceding trial and record of Bangor Municipal Court, are specifically made a part of the exceptions.

EXCEPTION I. This involves the ruling upon the amended pleading filed in the Superior Court at the September term, 1926, and before jury trial was begun.

From the record, and bill of exceptions, as allowed by the justice in the court below, we learn that this same respondent, charged with illegal transportation of a certain quantity of intoxicating liquor, to wit, one gallon can full of alcohol, on May 19, 1926, was arrested on May 24, 1926, and brought before the Bangor Municipal Court, that being the court from which the warrant was issued. The records of that court, specifically made part of the bill of exceptions, show that on said May 24, after arraignment and plea of not guilty, the respondent was admitted to bail, and the case continued to May 31, 1926, for further hearing. Continuances for further hearing were ordered to June 1, to June 8, and continuance final to July 13, on which date, the State having failed to appear and prosecute, the case was dismissed. In the exception now under consideration the respondent alleges that on said July 13, he was "then and there in court ready for his trial as said court was duly convened and in session by the Judge of said court on the bench, that said case was called for trial and the State failed to appear with its prosecution and that said court was then and there a court of competent jurisdiction to hear, conduct and sentence upon the complaint." He also alleges that there was no material necessity for the dismissal of his case to which he was a party, or for which he could be held at fault, and that he

"was entitled to be heard by himself and his counsel or either at his election, and to demand the nature and cause of the accusation, and to be confronted by the witnesses against him, and to have a speedy, public and impartial trial, all of which provisions were denied to him."

But the right of the accused to have a speedy trial may be waived by his own conduct. He must claim his right if he wishes for its protection. *State* v. *Slorah*, 118 Maine, 203. If he does not make a demand for trial, he will not be in a position to demand a discharge because of delay in prosecution. 8 R. C. L. 74.

Granting the fact of his presence in court, "ready for trial," the record is devoid of any evidence that he made any demand for trial or objected to dismissal of the case.

Moreover, it is well settled law in this jurisdiction that the State may enter a *nolle prosequi* to the whole or any part of an indictment, even against the objection of the respondent, before a jury is empaneled or after verdict; and it may be entered at any time pending a plea in abatement, demurrer, or motion in arrest of judgment; but of course if entered after verdict, and the indictment is sufficient, the verdict will be a bar to any new indictment for the same offense. *State* v. *Smith*, 67 Maine, 328; nor do we overlook the equally well settled rule that while trial is going on, the evidence being partially in, if the case is a criminal prosecution, *nolle prosequi* may not be entered against respondent's will since he would have the right to have a verdict rendered if he demands it. *State* v. *M. C. R. R. Co.*, 77 Maine 244. It should be further noted, upon the authority of *State* v. *Nutting*, 39 Maine, 359, and several cases there cited, that a *nolle prosequi* in criminal proceedings is nothing but a declaration on the part of the prosecuting officer that he will not at that time prosecute the suit further. Its effect is to discharge the respondent and permit him to leave the court without entering into a recognizance to appear at any other time; but it does not operate as an acquittal, for he may afterwards be again indicted for the same offense.

On July 27, 1926, another warrant, admittedly against the same respondent and for the same offense charged in the warrant of May 24, 1926, was issued from the Bangor Municipal Court, upon which he was tried, found guilty and sentenced. From this sentence he appealed to the Superior Court then next to be held in September, 1926, and it is upon this appeal that the present case was heard, and

during the trial of which the amended pleading was presented and demurrer offered by the State. The amended pleading was, in effect, a plea in bar and, from what we have already said, the ruling of the court below was correct.

EXCEPTION II. This exception relates to the exclusion of respondent's exhibit one, which was the record of the Bangor Municipal Court relating to the conduct and dismissal of the case of May 24. When the exhibit was offered, in answer to the inquiry by the court as to the purpose for which it was offered, counsel for the respondent said that it was offered to show that the same offense which was charged in the complaint then being tried had been already charged in May of the same year; that the May case was continued from time to time at the request of the State; that the State had final notice to press its claim on July 13th, which it failed to do; that it afterward started this new complaint, the one then being tried, exactly in form as the May complaint; that under the constitution of this state a respondent has a right to a speedy trial, which was denied the respondent in the May case; that such denial was not necessarily one of former jeopardy but a question of right which the respondent had, and that the exhibit was offered "for the purpose of laying a foundation to show by the court procedure later on that this man was denied a right of speedy trial." By the State's demurrer to the amended pleading the identity of the respondent and offense charged in the case on trial was admitted to be the same as that in the May case. Under this exception no claim of former jeopardy was advanced. The analogy of legal principle in exception two with that contained in exception one being practically the same, the discussion of exception one applies to exception two. The respondent was not legally aggrieved by the ruling and this exception avails him nothing.

EXCEPTIONS III AND IV. These relate respectively to the proceedings in the May case, which have already been sufficiently discussed, and to the claim that by the complaint and warrant on trial in the Superior Court the respondent was not arrested within a reasonable time after the warrant was issued. The warrant was dated July 27 and the arrest was on August 3. Surely this was not an instance of unreasonable delay. It does not appear that the respondent was legally aggrieved by any delay in arrest. These two exceptions avail nothing.

EXCEPTION V. This relates to the overruling of the motion in arrest of judgment. The points upon which the respondent relies in support of this exception are: (1) that in his pleading the respondent raised an issue involving a question of fact, to wit, was the respondent denied a speedy trial; to this the State replied by general demurrer, not by replication; it being a question of fact as to whether or not respondent was denied a speedy trial, under all the circumstances of the case, from its beginning, the court erred in ruling the demurrer good as a matter of law; (2) that the court erred in excluding testimony relative to the facts of the former complaint, inasmuch as it had been testified to previously that the former warrant and the present warrant involved the same facts, which under the pleadings the respondent had placed in issue; (3) that the court erred in excluding evidence for the same cause as that stated in (2); (4) that the State's attorney should have replied to the pleading by replication and not by general demurrer, the respondent's pleading involving a question of fact.

It should here be observed that the rule which prevails in this state, as well as at common law, is that a motion in arrest of judgment can only be made on account of some intrinsic defect apparent on inspection of the record. *State* v. *Henry*, 98 Maine, 561.

This respondent was tried upon appeal from the complaint and warrant dated July 27, and not upon the case originating in May. The latter case was concluded before the instant proceeding was instituted. To the complaint and warrant with which this case is concerned, the respondent, after interposing certain legal objections, went to trial on the merits of the case and a verdict of guilty was found against him. After examination of the record and respondent's brief, and applying the rules of law pertinent to a motion in arrest of judgment, we perceive no error in the ruling by the court below denying the motion here being considered. The elements relied upon by the respondent in his motion do not fall within the rules of law governing such motion. *State* v. *Houlehan*, 109 Maine, 281.

Exceptions overruled.
Judgment for the State.

THOMAS M. HOYT *vs.* HARRY EASLER

Aroostook. Opinion October 8, 1927.

Damages for breach of an express contract to deliver a quantity of potatoes cannot be recovered in an action on account annexed for fertilizer sold. The form of action is inappropriate and the measure of damages different.

In the instant case there may be an implied contract to pay in cash for the fertilizer not paid for in potatoes. Damages for breach of such implied contract may be recovered in an action on account annexed for fertilizer sold.

For breach of the express contract to deliver potatoes the damages would not be measured by fertilizer cost, but by the market value of the quantity of potatoes which failed of delivery.

On motion and exceptions by defendant. An action on account annexed to recover the balance of money alleged to be due for fertilizer. Verdict for plaintiff. Defendant filed a general motion for a new trial, and excepted to a refusal to give requested instructions, and also excepted to certain instructions given. Exceptions sustained.

The case is sufficiently stated in the opinion.

Philip D. Phair, for plaintiff.

Ralph K. Wood, for defendant.

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

DEASY, J. Action on account annexed for fertilizer. Verdict for plaintiff. In 1920, the defendant, for an executed consideration, to wit, a quantity of fertilizer supplied at cost for his use, orally agreed to deliver to the plaintiff 1482 barrels of Irish Cobbler potatoes.

The plaintiff contends that the contract was conditional;—that he was to receive 1482 barrels of "Cobblers," "provided he (the defendant) grew them on his land." Per contra, the defendant testifies that the contract was unconditional.

The plaintiff says that he received on the contract only 1066 bbls. The defendant produces testimony tending to prove that he made delivery of the full quantity required by the contract.

This latter issue was submitted to a jury and decided in favor of the plaintiff. The evidence is conflicting and the Court cannot say that the jury's verdict is in this respect clearly wrong.

To more fully detail the contract:—the plaintiff testified that "I agreed to take Irish Cobbler potatoes enough from him at $2.25 a barrel to pay the bill, provided he grew them on his land."

A crop mortgage was given to secure performance of the oral contract. The conditional clause of the mortgage is not the contract relied upon, but is evidence of it. The defendant testified that it stated "practically the entire trade." This clause is as follows:—

"Provided, nevertheless, that this mortgage shall be void, if or heirs, executors or administrators shall pay and deliver to said Grantee, his executors, administrators or assigns out of the field as harvested at any potato house in the village of Presque Isle that the said Thomas M. Hoyt shall designate, between the dates of September 15th and October 15th of the year 1920, fourteen hundred eighty-two (1482) barrels of Irish Cobbler potatoes of good merchantable stock, free from scab, rot, frost and bad bruises, otherwise to remain in full force and virtue."

The number of barrels indicated by dividing the cost of the fertilizer by two and a quarter is slightly less than 1482. The difference is immaterial in this discussion. The words "The grantor" are omitted in first line of clause quoted. The meaning however is plain.

The jury having found, upon sufficient evidence, that the quantity of potatoes delivered was less than 1482 barrels would have been authorized by the evidence to adopt any one of three theories.

(1). That the contract unconditionally required the delivery 1482 barrels, or

(2). That the contract was subject to a condition as testified to by the plaintiff to wit: "Provided he grew them on his land"—, and that he (the defendant) did grow them on his land but failed in part to deliver them.

In either of these cases the defendant violated an express contract to deliver potatoes.

It goes without saying that damages for breach of an express contract to deliver potatoes cannot be recovered in a suit which declares only on a contract to pay for fertilizer.

The form of action is inappropriate. Moreover, (more important than any matter of form) the measure of damages is different.

In one case the measure is the market value of Cobbler potatoes at the time and place agreed upon for delivery. In the other the measure is the market value or agreed price of fertilizer. In this case the agreed price was the cost of the fertilizer to the plaintiff.

(3) But the jury may have found that the defendant agreed to deliver 1482 barrels of potatoes "provided he grew them on his land," that he grew less than that quantity, but delivered all that he grew. If this were so the defendant violated no express contract. His only breach was of an implied contract to pay in money so much of the fertilizer cost as was not paid in potatoes.

If this were the view of the facts adopted by the jury the form of action was appropriate and the verdict justified. The motion cannot be sustained.

EXCEPTIONS.

The defendant requested the following instruction: "If you find that the items for fertilizer set forth in the plaintiff's writ, were to be paid with potatoes and not with money, then the plaintiff is not entitled to recover anything on those items in this form of action."

The presiding justice refused this request and instructed the jury thus:

"If you find the trade to be such as this request would imply, and that the defendant did turn over every Cobbler, meeting the requirements that you have found by the testimony, and that there was still a portion of the fertilizer cost unpaid, that it then became payable in cash."

We think that "the trade that this request would imply" is an unconditional agreement to deliver 1482 barrels of potatoes. At all events the jury was justified in so interpreting it.

If this were the contract and the defendant delivered a smaller quantity, he violated his express contract notwithstanding that the

delivery included all that he grew. In such case the damages would not be measured by the "portion of the fertilizer cost unpaid", but by the market value of the undelivered Cobblers at the time and place agreed upon for delivery. The declaration too was in such case inappropriate.

The agreement to pay in potatoes was properly shown under the general issue.

This plea contradicts the plaintiff's allegation which, in effect, was that the defendant promised to pay in money.

The plaintiff's objection to the form of the plea is not sound. Chitty on Pleading 16th Ed. Pg. 612.

Exceptions sustained.

HARTFORD ACCIDENT AND INDEMNITY COMPANY

vs.

FORREST G. SPOFFORD

York. Opinion October 12, 1927.

Under a conditional sale contract, properly recorded, in which title is expressly reserved in vendor, vendee is not the "owner" of an automobile within the meaning of the statute, nor has the vendee implied authority, by reason of his right of possession and use of the chattel, to procure necessary repairs on same on the credit of the property.

The rights of a vendor under such circumstances are superior to the rights of leinor when a bill for repairs is incurred by vendee without the knowledge or consent of vendor.

Conditional sale vendee occupies a different position in this respect from that of mortgagor.

On report. An action of replevin to recover an automobile from defendant, a deputy sheriff, who attached the automobile in an action

by a garage man seeking to enforce a lien for repairs and materials. The plaintiff claimed title under a conditional sale contract, and the repairs were made and materials furnished without the knowledge or consent of plaintiff. Judgment for plaintiff.

The case fully appears in the opinion.

Reginald H. Harris and Horace E. Eaton, for plaintiff.

Charles T. Read, for defendant.

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

PATTANGALL, J. On report. Agreed statement of facts. An action of replevin in which plaintiff seeks to recover an automobile from defendant, a deputy sheriff, who had attached the same in an action brought by one Valliere to enforce a statutory lien under the provisions of Section 56 and 57 Chap. 96 R. S. as amended by Chap. 171 P. L. 1925.

The repairs on the automobile were made at the request of one Emery who was in possession of the car, under a conditional sale contract which plaintiff held as assignee of the original vendor. The repairs were necessary. The bill for same was reasonable. The statutory provisions for enforcing the lien were all complied with by Valliere. The conditional sale contract was properly recorded by plaintiff and its conditions had not been fulfilled by Emery. Plaintiff had no knowledge of the repairs until after they had been made and neither consented to or directed their making.

The conditional sale contract contained the following provisions: "The lessee agrees to pay the lessor $1419.00 for said chattel, $413.00 on delivery and the balance payable in equal monthly installments of $55.88 each, the first payable one month after date, as stated in the note of the lessee of even date herewith, which is given by the lessee and received by the lessor, not as payment, but as evidence of the amount due hereunder. Provided the lessee makes the payment above specified and carries out his part of this contract, the lessor agrees that it will secure and deliver to the lessee a bill of sale of said chattel, but it is distinctly understood and agreed that until all of the agreements of the lessee have been complied with, the owner-

ship of said chattel shall remain vested in the lessor and this instrument shall constitute a lease of said chattel for the period during which said payments are to be made."

The sole issue in the case is whether under these facts, and in the light of the statute applicable to the case, the lien constitutes a prior claim to that of the plaintiff, evidenced by the conditional sale contract.

The pertinent portion of the statute reads: "Whoever performs labor by himself or his employees in * * * repairing * * * vehicles, by direction or consent of the owner thereof, shall have a lien on such vehicle * * * which takes precedence of all other claims and incumbrances on said vehicle not made to secure a similar lien." At common law, plaintiff would have the superior title. *Small* v. *Robinson*, 69 Me. 427; *Bath Motor Mart* v. *Miller*, 122 Me. 29. The rights of the lienor are enlarged by the statute in certain respects but it is still necessary that the repairs should be made "by direction or consent of the owner."

If judgment is to be for the defendant it must be because of one of two propositions: either that the word "owner," in the meaning of the statute, includes a conditional sale vendee or that by entrusting the vendee with possession and a right to use the autmobile, vendor impliedly clothed vendee with authority to contract for necessary repairs, so that such repairs, if made at the request or direction of vendee were as though made by vendor's request or direction.

As bearing upon the first proposition, defendant argues that a fair construction of the statute compels the finding that the word "owner," as there used, includes mortgagors. This may be correct. Such a construction would not be unreasonable. But that question is not before us. There is no mortgagor in this case. The contract was of conditional sale, not a mortgage. *Piano Co.* v. *Adams*, 114 Me. 390. By its terms, no title passed to the vendee until all payments were completed. Having no title, he could give no mortgage. *Campbell* v. *Atherton Co.* 92 Me. 69; *Delaval Co.* v. *Jones*, 117 Me. 95.

There is a distinct difference between the position of mortgagor and a conditional sale vendee. The former must own the proprety which he mortgages. In common parlance he is denominated the owner. Not so this vendee. He holds possession under an executory contract to purchase. He may have acquired equitable rights

in the property but to speak of him as the owner, not only disregards the correct use of language but negatives the terms of the contract into which he has entered.

Plaintiff was the owner of the automobile. It expressly provided, in its contract, that it should retain title until the automobile was paid for in full and by properly recording the instrument, gave notice of its ownership, to the world. The statute cannot fairly be construed so as to include, in the word "owner", the conditional vendee, under the contract in evidence here.

As to the second proposition: There is authority for it. Irrespective of the cases which appear to sustain the position but are found on more careful examination to rest upon explicit provisions of statute, the doctrine is asserted in *Hammond* v. *Danielson*, 126 Mass. 294; *Howes* v. *Newcomb*, 146 Mass. 76; *Guaranty Security Co.* v. *Brophy*, 243 Mass. 598; *Meyers* v. *Nealy and Auto Co.* (Md.) 30 A.L.R. 1227.

The reasoning of these cases may be summarized as follows: The property was placed in the possession of the vendee, or left in the possession of the mortgagor, to be used by him. Use implies, in the case of a carriage or an automobile, necessary repair, from time to time and inasmuch as such repairs can only, ordinarily, be procured by employing a skilled mechanic, authority to contract for such repairs is impliedly granted by the vendor and the claim for such repairs so impliedly ordered by or, at least, consented to, by him, would subject the property to a valid lien.

The cases above mentioned, with the exception of *Meyers* v. *Nealy and Auto Co.*, which dealt with a statutory lien and a conditional sale contract, involved common law liens and the comparative rights of lienors and mortgagors. But the logic of the cases applies as well to conditional sale vendees as to mortgagors and if accepted as conclusive, is decisive in favor of this defendant, for the statute does not narrow the rights of lienors. On the contrary it enlarges them.

But our court has taken an opposite view of the matter. The earliest of these cases, *Hammond* v. *Danielson*, supra, was decided in February 1879. The identical question came before our court in April of that year, in *Small* v. *Robinson*, supra, and Appleton, C. J. did not agree with the conclusion of the Massachusetts court. *Small* v. *Robinson* was affirmed in *Bath Motor Mart* v. *Miller*, supra, in

1922 and the doctrine of these two cases is the law of this state, so far as common law liens are concerned, on the point in issue.

The Maine cases, in this respect, are supported by the weight of authority.

The subject is very fully discussed and the position of our court upheld in *Shaw* v. *Webb* (Tenn.) 174 S. W. 273 and *Cache Auto Company* v. *Central Garage Company* (Utah) 221 Pac. 862. In the latter case, many decisions are assembled and analyzed with the result that nearly all of the cases which are apparently out of accord with the doctrine of this court, are found to have been inflenced by statutory provisions unlike ours.

It is true that our statute gives precedence to the claim of the lienor over all other claims and encumbrances, excepting similar liens, but on one condition and in one event only, namely, that the claim is based on repairs ordered or consented to by the owner. Unless that condition is complied with no lien attaches.

A conditional sale vendee not being within the meaning of the word "owner" as used in our statute and our court having rejected the theory that the right to possession and use of a chattel carries with it by implication, authority to encumber the property with mechanics liens without the knowledge of the owner, the result, in view of the facts in this case, is obvious.

Judgment for Plaintiff.

W. H. GLOVER COMPANY *vs.* L. B. SMITH

Knox. Opinion October 14, 1927.

Notice of foreclosure of mortgages under section 2, chapter 192, P. L. 1917, must be served upon the record holder of the right of redemption.

Mortgage notes or bonds may be transferred to many different persons and the mortgage lien held as security for all.

By stipulation in a mortgage the mortgagee may be given the right to assign his lien, in trust to secure the mortgage debt.

But in absence of such stipulation a mortgagee out of possession cannot effectually convey his mortgage lien without also transferring the mortgage debt.

Intervention may be claimed as a right when the intervenor will either gain or lose by the direct legal operation and effect of the judgment.

On exceptions. A writ of entry heard by a single justice in vacation upon stipulations. The Federal Land Bank filed a motion to intervene. Motion to intervene was denied and exceptions taken. Judgment for plaintiff was rendered and exceptions taken by defendant and also by The Federal Land Bank. Exceptions overrruled.

The case is fully stated in the opinion.

E. W. Pike, for plaintiff.

Charles T. Smalley, for defendant.

Andrews, Nelson & Gardiner, for The Federal Land Bank, intervenor.

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

DEASY, J. Real Action. The question directly involved is the right of possession of real estate in South Thomaston. The answer depends upon certain deeds, all of which purport to convey the property.

PLAINTIFF'S DEEDS.

(a) Annie V. Smith to Fred A. Thorndike et als (1918) Warranty deed subject to a mortgage given the year before by Annie V. Smith to Blanche Waldron. As hereinafter appears the defendant relies upon this mortgage for his claim of title and right of possession.

(b) Fred A. Thorndike et als to Leonard B. Smith (1920) Warranty deed subject to said mortgage.

(c) Sheriff's deed to W. R. Glover Co. plaintiff (1924) conveying interest of Leonard B. Smith.

The right of redemption from the Sheriff's sale having expired the plaintiff at the time of beginning the suit (1926) held the prima facie title to and right of possession of the premises against everybody except persons lawfully holding under the mortgage to Blanche Waldron above referred to.

The defendant admitting that he had lost through a levy all interest in the equity of redemption, says that, after the levy, he acquired title under the mortgage.

DEFENDANT'S DEEDS.

(a) Annie V. Smith to Blanche Waldron (1917) Mortgage.

(b) Blanche Waldron to Lizzie E. Davis (1919). Assignment of above mortgage.

(c) Lizzie E. Davis began foreclosure (March 1924). As appears below this foreclosure was not effectual.

(d) Lizzie E. Davis to Fred A. Thorndike et als (March 1925). Assignment of above mortgage.

(e) Fred A. Thorndike et als to Leonard B. Smith, the defendant, (June 1925). Warranty deed.

It is clear that if the foreclosure by Lizzie E. Davis had been valid and had, after the lapse of a year, ripened into a title in Thorndike et als, her assignees, their warranty deed would have given to the defendant sole title and right of possession.

But the foreclosure was ineffectual. Lizzie E. Davis undertook to foreclose by serving a notice of foreclosure. (Act of 1917, Chap. 192, Sec. 2).

The notice was served upon Annie V. Smith only and was served after her Warranty deed to Thorndike et als had been recorded. The statute requires the notice to be served upon the record holder of the right of redemption.

Therefore when Thorndike et als in 1925 gave their deed to the defendant they (the grantors) had simply the status of mortagees under an unforeclosed mortgage.

Our court has repeatedly held that such a deed from a mortgagee, who is out of possession, conveys nothing unless the mortgage debt is also transferred to the grantee.

"A deed by a mortgagee, not having made entry and being out of possession conveys no legal title to the land unless accompanied by a transfer of the mortgage indebtedness." *Farnsworth vs. Kimball*, 112 Me. 243.

"The interest (of a mortgagee) in land is inseparable from the debt. It is incident to the debt and cannot be detached from it." *Lunt* vs. *Lunt*, 71 Me. 379. *Wyman* vs. *Porter*, 108 Me. 115.

The case does not show that the mortgagee ever took possession, or that the mortgage debt or any part of it was transferred to the defendant. At this stage the burden was upon the defendant.

The plaintiff by the production of his deed made out a prima facie case of right of possession as against everybody except persons lawfully claiming under the mortgage. The burden of going forward and proving a better right in himself was thus cast upon the defendant.

Under the law as established by the cases above cited and upon the facts, as they are made to appear in this case, the plaintiff is entitled to possession.

The rule, indicated by the above cases, that the mortgage debt, and the mortgage lien securing it are inseparable is not to be taken literally.

It goes without saying that mortgage notes or bonds may be transferred to many different persons and that the mortgage lien will be held as security for all. It should also go without saying that by proper stipulation in a mortgage the mortgagee may be given the

right to assign his lien, including his right of possession, in trust to secure the mortgage debt.

But following the earlier cases we hold that in the absence of such stipulation a mortgagee out of possession cannot effectually convey his mortgage lien without also transferring the mortgage debt.

The presiding justice ruled in accordance with this opinion. The defendant's exceptions cannot be sustained.

After the defendant received his Warranty deed in 1925 he conveyed the property in mortgage to a Federal Land Bank. This corporation filed a motion to intervene, which motion was denied. Exceptions to the denial were reserved.

Intervention may be claimed as a right when the intervenor "will either gain or lose by the direct legal operation and effect of the judgment." 20 R. C. L. 685 and cases cited.

We think that the situation disclosed in this case does not come within this rule. The presiding justice exercised his discretion in denying the motion. No abuse of discretion is apparent.

The plaintiff corporation has the right of possession as against L. B. Smith, but not as against any person or corporation lawfully claiming under the mortgage originally held by Blanche Waldron.

Whether the plaintiff has the right to redeem the property from this mortgage, upon payment of what sum and to whom, and what the rights of the parties are with reference to a second mortgage given by the defendant, and later discharged, are questions which cannot be determined in the present action.

Exceptions overruled.

WILFRED HAMEL'S CASE

Androscoggin. Opinion October 22, 1927.

In a petition for review of agreement or decree under section 36 of the Workmen's Compensation Act, it must appear that the agreement was approved and that the period of compensation was definitely fixed by the agreement or by the decree.

Both the beginning and the date of the end of the period of compensation must be definitely fixed.

On appeal. Petition for review under section 36 of the compensation act. The finding was against the petitioner and an appeal was taken. Appeal dismissed with costs. Decree below affirmed. The case appears in the opinion.

Hinckley, Hinckley & Shesong, for petitioner, insurance carrier.

James H. Carroll, for claimant.

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

PHILBROOK, J. On December 1, 1925, while in the employ of the Columbia Woolen Company, Hamel sustained a compensable injury. On January 7, 1926, the insurance carrier of the company, and Hamel, reached an agreement by the terms of which it was declared that the nature of the accident and injury was traumatic lumbago; that the period of incapacity began on December 2, 1925; that compensation, at the rate of fifteen dollars per week, during the period of temporary total incapacity, beginning December 8, 1925, should be paid to the employee, and that additional compensation should be paid for any subsequent period of incapacity, either total or partial, due to the same injury, in accordance with the Maine Workmen's Compensation Act. This agreement was duly approved by

the Commissioner of Labor, subject to review, as provided by said act, on January 12, 1926.

The insurance carrier, under date of January 4, 1926, filed with the Industrial Accident Commission a so-called "Petition for review of agreement or decree", alleging that since said agreement or decree was made the incapacity for which the employee was being compensated had ended, and praying that compensation being paid in accordance with the award or agreement might be ended. The finding of the Associate Legal Member of the Commission, before whom the case was heard, being adverse to the petitioner, the case came to this court by the statutory appeal from the decree of a justice thereof confirming the finding of the Associate Legal Member of the Commission.

At the outset it should be observed that this petition is not cognizable under the provisions of section thirty-six of the Workmen's Compensation Act, since in fixing a time within which petitions for review shall be filed, that section contemplates two indispensable prerequisites, viz., that the agreement for compensation shall be approved, and that the period of compensation shall be definitely fixed by the agreement or by decree. Both the date of the beginning, and the date of the end of the period of compensation must be definitely fixed. *Milton's Case*, 122 Maine, 437. The review here sought is not of an agreement that definitely fixed the period of compensation but left the period indefinite.

We are therefore of opinion that the ruling of this court in *Wallace's Case*, 123 Maine, 517, may be properly invoked as disposing of the case at bar. In that case the appellants, the insurance carrier, filed a petition for review of an agreement alleging "that the disability had ended, and praying that compensation be ended." Apparently the proceedings in that case, when heard, were precisely like those in the case at bar. This court then said;

> "Appellants sought a review under Sec. 36, of the Act. The commission proceeded thereunder. The agreement in the pending case, however, was an open end agreement. Its point of beginning was fixed, August 13, 1921, but the date of expiration was not fixed. Compensation was to continue 'during disability' not exceeding of course the statutory limitation. This court

has distinctly and recently decided that Section 36, prescribing a petition for review of decrees and agreements, does not apply to agreements in which the period of compensation is not definitely limited. *Milton's Case*, 122 Maine, 437. Under that authority the petition in this case might be dismissed."

By that authority the mandate in the instant case will be

Appeal dismissed with costs.
Decree below affirmed.

DORA ROSENBERG *vs.* CHAPMAN NATIONAL BANK, ET ALS.

NATHAN ROSENBERG *vs.* SAME

(2 cases)

Cumberland. Opinion October 26, 1927.

When a landlord provides an outside stairway or other way for the common use of several tenants he is not, except by reason of a special agreement, under any obligation to remove or otherwise dispose of snow and ice which naturally accumulate upon such way.

If a landlord knows or should know of a concealed defect in such way, which menaces its safety, it is his legal duty to make it known to a tenant.

If a tenement house is provided with a stairway, the common use of which is permitted by the lease to several tenants, the landlord is not under obligation to make such stairway safe, but he is bound to use due care to keep it in a condition as safe structurally as it is in or appears to be in at the beginning of the tenancy.

If, by reason of a defect concealed from the tenant, but known or that should be known to the landlord, or if because of the landlord's failure to exercise due care to keep such stairway as safe structurally as it was or appeared to be at the beginning of the tenancy, ice forms upon such way and is the proximate cause of injury to a tenant, or any member of his household, being in the exercise of due care, the landlord will be held liable.

A landlord may by special contract bind himself to remove or otherwise dispose of or make safe snow and ice which forms or accumulates, naturally or otherwise, without fault on his part.

In the present case wherein the wife of a tenant slipped upon an icy outside common stairway and sustained injuries, held that there was no concealed defect, no change in structural condition after the commencement of the tenancy and no sufficient evidence of any contract beyond that implied from the relation of landlord and tenant.

Plaintiffs own contributory negligence precludes recovery.

On report. Two actions, one by the wife of a tenant for personal injuries sustained by falling down a slippery stairway to a tenement owned by defendants, and the other by the husband, Nathan Rosenberg, to recover for money paid out as a result of the injuries and for other damages, alleging in each case negligence of defendants. Judgment for defendants.

The cases fully appear in the opinion.

Joseph E. F. Connolly, for plaintiffs.

Robinson & Richardson, for defendants.

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

DEASY, J. These are actions to recover damages for injuries proved to have been suffered by the wife of a tenant and alleged to have been caused by a landlord's negligence.

The plaintiffs, Mr. and Mrs. Rosenberg, occupied, under leasehold from the defendants, one of the second floor tenements in a house on Congress Street, Portland. No description of the house is necessary to an understanding of the case except the following: "It is a three-story house. Each story has a back piazza. The roof of the upper piazza which is superimposed upon the others is not and so far as appears has never been provided with a gutter. From the lowest piazza a short stairway leads downward to the back yard."

The defendants, Mr. and Mrs. Gitlin, had held a mortgage upon the premises and had assigned it to the defendant bank as security for a loan. At the request of Mr. Gitlin the bank began foreclosure and took possession of the mortgaged premises leaving Mr. Gitlin in charge to care for the house and collect rents. The latter employed one of the tenants as janitor.

Thus stood the title and possession when Mrs. Rosenberg suffered the accident on account of which this suit is brought.

On March 9th, 1926, while the stairs and stair rail were coated with ice, the plaintiff, Mrs. Rosenberg, her feet clad in slippers, a pail of garbage in one hand and the other grasping the stair rail, started to go down the steps to empty garbage into a large can in the back yard. She slipped and fell. Thus the accident occurred and her undoubtedly grievous injuries were sustained. The accident happened during daylight hours.

The problem presented concerns the duty of a landlord with reference to a way (in this case a stairway) leading across premises of the landlord to his tenement, over which way he has given to several tenants common rights of passage and use.

A landlord, as such, is subject to no obligation to his tenants to remove or otherwise dispose of snow and ice which naturally accumulates upon such stairway. *Woods* v. *Cotton Co.*, 134 Mass. 359; *Watkins* v. *Goodall*, 138 Mass. 536; *Hawkes* v. *Shoe Co.*, 207 Mass. 117; *O'Donoughue* v. *Moors*, 208 Mass. 473; *Bell* v. *Siegal*, 242 Mass. 381.

It goes without saying that he may by contract assume such obligation.

If a landlord knows or should know of a concealed defect in such a stairway, which menaces its safety, it is his legal duty to make it known to his tenant. *Shackford* v. *Coffin*, 95 Maine, 71; *Minor* v. *Sharon*, 112 Mass. 487; 16 R. C. L. 1042.

The further duty which devolves upon a landlord of exercising due and reasonable care does not require him to *make* such stairways safe but to *keep* them in a condition as safe structurally as they are in or appear to be in at the beginning of the tenancy. *Sawyer* v. *McGillicuddy*, 81 Maine 324; *Miller* v. *Hooper*, 119 Maine 528; *Watkins* v. *Goodall*, supra; *Andrews* v. *Williamson*, 193 Mass. 92; *Hannaford* v. *Kinne*, 199 Mass. 64; *Faxon* v. *Butler*, 206 Mass. 500; 16 R. C. L. 1040.

If by reason of a defect concealed from the tenant but known or that should be known to the landlord or if by reason of the landlord's failure to perform his duty as defined in the last preceding paragraph, ice forms upon such passageway and is the proximate cause of injury to a tenant or any member of his family, being in the exercise of due care, the landlord will be held liable.

Turning now from general principles to the case under consideration.

We have seen that no liability on the part of the landlord, as such, arose through the presence of ice upon the stairway. In the absence of special contracts liability can be established only by evidence that ice was the proximate cause of the injury and that it formed or remained upon the steps and rail through the landlord's fault or breach of duty.

The plaintiffs undertake to supply such evidence by proof that there was no gutter to divert from the stairway, water falling upon the piazza roof. In the declaration the plaintiffs say and several times reiterate that "the roof over the piazza was not provided with a gutter or other contrivance to carry away water." Failure to provide such gutter is the negligence upon which the plaintiffs mainly rely.

But this defect, if it be a defect, was not concealed. It was perfectly apparent. The plaintiffs and their witnesses emphasize its obviousness. They say and reiterate that the absence of a gutter advertised itself by icicles which overhung the stairs. Again, if the piazza roof had once been provided with "a gutter or other contrivance" which had during the tenancy been removed or had decayed or broken down so as to fail in the performance of its functions the case might be brought within the rule above stated. But the condition of the piazza roof, including the absence of a gutter, was the same at the date of the accident as at the beginning of the tenancy.

No breach of legal duty devolving upon them as landlords is shown making these defendants liable in this action.

But the plaintiffs say that by express or implied contract the defendants undertook to keep the steps free from slippery ice. The evidence of an express contract is the testimony of Mrs. Rosenberg corroborated in part by her daughter. Mrs. Rosenberg relates a conversation with the defendant Gitlin. This testimony is not convincing. She says that Gitlin promised "to clean the steps and yard." Assuming that he used this language it is highly improbable that either party contemplated the removal of ice from the yard. But the same promise was made as to both yard and stairs, so says Mrs. Rosenberg. She also says "the same thing that Brass (a former landlord) was giving, he (Gitlin) was to give me." But we find no evidence that Brass ever removed or did anything about ice. Gitlin denies that he made such a promise. The plaintiffs' counsel in his

brief, summarizing the testimony, says that the ice had been upon the steps "many weeks" before the accident. This is undoubtedly true. But it does not appear that either of the plaintiffs complained to Gitlin or even asked the janitor who lived in the same building, to remove ice or put ashes upon it. Mr. Rosenberg was the tenant (so states the declaration) but it is not shown that such promise was ever made to or made known to him.

An express contract is not satisfactorily proved. Evidence of an implied contract is quite as meager.

Proof that Gitlin's janitor or prior landlords or their janitors shovelled snow off the steps does not make out a case. *McKeon* v. *Cutter*, 156 Mass. 296; *McLean* v. *Warehouse Co.*, 158 Mass. 472; *Galvin* v. *Beals*, 187 Mass. 253.

Authorities cited on this branch of the case are indecisive or irrelevant.

One of them (*Erickson* v. *Buckley*, 230 Mass. 476) holds landlord liable under an express contract. But no evidence is reported showing what the contract was or how it was proved. In two cases (*Nash* v. *Webber*, 204 Mass. 419, and *Miles* v. *Janvrin*, 196 Mass. 431 and 200 Mass. 514) evidence tending to show existence or application of landlord's alleged express oral contract was held improperly excluded. In two others (*Watkins* v. *Goodall*, 138 Mass. 536, and *Callahan* v. *Dixon*, 210 Mass. 510) a landlord was held liable under the rule above stated, for failing to keep premises in a condition as structurally safe as they were in when the tenancy began.

The defendants urge that even if such contract were proved damages for its breach cannot be recovered in an action of tort for personal injuries. But it is unnecessary to consider this question, for it is clear that there is no preponderating evidence of such contract either express or implied.

But even if the defendants were guilty of negligence as charged in the writ the plaintiffs are clearly barred from recovering by Mrs. Rosenberg's want of due care. She describes the accident in her direct testimony as follows:

"Q. When you got to the edge of the piazza, did you see any ice there?

A. I see the stairs were all slippery and the banister was real slippery.

Q. What did you do?

A. I took that pail in my left hand and with my right hand I took hold; I put my right foot on the first step and took hold of the banister, and it was all ice that step and I fell down."

and in cross-examination:

"Q. You noticed there was snow and ice?

A. It was rough; the ice was very deep, it was full of ice.

Q. You noticed there was snow and ice there before you started down?

A. Sure I noticed it; that's why I held on the banister and tried to go easy."

She also testified that when the accident happened she had slippers on her feet.

The defendant argues that "if it was negligent for the defendant to allow the ice to remain there, it necessarily was equally as negligent for the plaintiff to knowingly use the steps." This is perhaps not intended as a general statement of law. If so intended we think it is not sound. The test of due care is the suppositious course of an ordinarily prudent and careful person under the same circumstances. Under some circumstances of emergency or urgency a model of prudence and care might knowingly use or attempt to use a stairway negligently made or left very slippery. But the evidence in this case discloses no emergency and no urgency.

We think that an ordinarily prudent and careful person bound on an errand no more urgent than that of the plaintiff, observing the icy condition of both steps and rail, might have waited to ask the janitor to make the stairway safely passable, especially if the landlord had promised that the janitor would do so. Failing in this, such person, before using the stairway, would have cleaned the ice off the steps or strewn ashes upon it or melted the ice off the rail, or at all events, before attempting to negotiate the icy steps with a pail in one hand and the other grasping an ice-coated rail would have put on shoes or rubbers.

Recognizing the burden resting upon them, the plaintiffs in their writs declare that "she, said plaintiff, was at all times in the exercise of due care." In no case among those cited by the plaintiffs' learned

counsel has a Court, deciding the facts, held a course as rash as that of Mrs. Rosenberg to be consistent with due care.

In both cases the entry must be

Judgment for defendants.

NINA B. FROST, Adm'r.

vs.

C. W. CONE TAXI AND LIVERY COMPANY

Washington. Opinion November 10, 1927.

This court is confined to the facts stated in a bill of exceptions in rendering its decision.

It will take judicial notice of the fact that the basis of the jurisprudence of the Province of New Brunswick is the common law. To this extent Owen v. Boyle, 15 Me., 147 is overruled.

What the common law or statute law of a foreign state is, if it is contended that the common law differs from our own, must be proved.

While an amendment changing an action from common law to one based on statute, or from one statute to another, introduces a new cause of action, an amendment setting forth the terms of the statute on which an action is based, does not introduce a new cause of action.

An amendment supplying a fatal omission in a declaration does not necessarily introduce a new cause of action. The purpose of amendment is to cure defects.

An amendment, if proper, dates back to date of writ, and the amended writ is not barred by a statute of limitations if the writ was originally brought within the statute.

The declaration in this case being obviously drawn under a Lord Campbell Act and the rights of the parties, as disclosed by the bill of exceptions, being determined by the laws of New Brunswick, the presumption is that the declaration was based on a Lord Campbell Act of New Brunswick, the bill of exceptions disclosing nothing to the contrary.

On exceptions. An action of negligence for personal injuries causing immediate death of plaintiff's intestate, her husband, who was killed August 11, 1925 at Milltown in the Province of New Bruns-

wick, Canada, when run over by an automobile owned by defendant and operated by its servant. Defendant pleaded the general issue and alleged in a brief statement contributory negligence. During the trial plaintiff moved to amend her writ, objection to which was made by defendant, which was denied on the ground that it introduced a new cause of action, and plaintiff excepted. At the conclusion of plaintiff's evidence a motion for a non-suit was granted and plaintiff excepted.

Exceptions sustained.

The case is very fully stated in the opinion.

Locke, Perkins & Williamson, and Curran & Curran, for plaintiff.

Herbert J. Dudley, for defendant.

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

WILSON, C. J. An action for personal injuries resulting in the immediate death of the plaintiff's intestate, and received within the Province of New Brunswick, and alleged to be due solely to the negligence of the defendant's servant.

The declaration as originally drawn was obviously based on what is commonly known as a Lord Campbell Act granting a right of recovery in cases of death without conscious suffering and for the sole benefit of the next of kin,—in this case, of the widow and four minor children. As the statutes of this state have no extra-territorial force, the presumption is that it was based on a New Brunswick statute, if such a statute existed.

During the course of the trial, according to the bill of exceptions, the plaintiff offered proof of a New Brunswick Act granting a right of recovery by the representative of the estate for the benefit of the widow and children, in case of immediate death, which was properly excluded on the ground that the declaration contained no allegation that such a statute existed in the Province of New Brunswick. Subsequently the plaintiff moved to amend her declaration by adding a new count substantially in the form of the original count with an additional allegation setting forth in terms the New Brunswick Act.

Objection was raised to the proposed amendment on the ground that it introduced a new cause of action. The amendment was refused and a non-suit ordered to which ruling the plaintiff excepted. The case is here on the plaintiff's bill of exceptions.

Upon the statement of facts set forth therein, and this Court cannot travel outside the bill of exceptions, we think the amendment should have been allowed. The action clearly was not based on any common law right. No such right existed at common law. Inasmuch as it is a well known historical fact that in 1713 the Province of New Brunswick became subject to Great Britain and was almost entirely settled by immigrants therefrom, augmented at the close of the Revolutionary War by a large number of loyalists from this country, this Court will presume, unless the contrary be shown, that the foundation of the system of jurisprudence in this Province is the English common law, 5 R. C. L. 820; 10 R. C. L. 894, sec. 42; and if it be claimed that it differs from the English law or from our own, the party asserting it must allege and prove it. 5 R. C. L. 821. We think *Owen* v. *Boyle,* 15 Me. 147 may be harmonized with this view and with the other authorities, except in so far as it may be construed to hold that there is no presumption that the common law is the foundation of the jurisprudence of this Province. To this extent, it must be regarded as overruled. Also see *Peabody* v. *Maguire,* 79 Me., 572; *Carpenter* v. *Grand Trunk Ry.* 72 Me., 388; *Scottish Com. Ins. Co.* v. *Plummer,* 70 Me., 540; *Mc Kenzie* v. *Wardwell,* 61 Me., 136.

So far as the bill of exceptions discloses, the rights of the parties being determined by the laws of that Province, it was a case of an action evidently brought under a Lord Campbell Act of the Province of New Brunswick in which counsel neglected to set forth that such a statute existed and its terms. 8 R. C. L. 816. Counsel for defendant urges in this brief that the plaintiff was proceeding under Secs. 9 and 10 of Chap. 92 R. S. and had closed his case on that basis, and upon the point being raised then offered proof of the New Brunswick Act and upon its admission being refused offered the proposed amendment.

The bill of exceptions, however, does not so state and the reasonable inference from its language is that proof of the act was offered in due course of the trial.

It is well settled that an amendment changing an action from one grounded on the common law to one based on a statute introduces a new cause of action. *Anderson* v. *Wetter*, 103 Me., 257; *Union Pac. R. R.* v. *Wyler*, 158 U. S. 285. An amendment changing a cause of action from one statute to another is equally objectionable.

But while there is a conflict and much confusion among the authorities, the weight of authority appears to support the rule that, at least, where the action is based on a Lord Campbell Act of the *locus delicti*, which is not the *locus fori*, an omission to set forth the statute of the *locus delicti* may be cured by an amendment.

The right invaded is the same under both the original and amended declaration. It is only a question of meeting the requirement that the Court will not take judicial notice of the laws of a foreign state, and a matter of proof. *Lustig* v. *N. Y. Etc. Ry. Co.* 20 N. Y. S., 477; *Wingert* v. *Circuit Judge*, 101 Mich., 395; *Louisville and N. R. R. Co.* v. *Pointer's Adm'r.*, 113 Ky., 952; *Nashville Etc. Ry.* v. *Foster*, 78 Tenn., 351; *Texas and N. O. R. R. Co.* v. *Cross*, 60 Tex. Civ. App. 621; *Viscount de Valle Da Costa* v. *So. Pac. Co.*, 176 Fed. R. 843; *Louisville & Nashville R. R. Co.* v. *Greene*, 113 Ohio St., 546 (149 N. E. 876).

If we may assume from the bill of exceptions that the action was originally based on a New Brunswick statute, though not set forth, an amendment setting it forth does not enlarge the cause of action.

It is urged by counsel that as no cause of action is set forth in the original count, an amendment that results in supplying the omission must introduce a new cause of action; but such a rule obviously is not founded in reason and is not the law of this state. *Pullen* v. *Hutchinson*, 25 Me., 249, 252; *McKinnon* v. *Bangor El. Ry.*, 117 Me., 239. The very purpose of an amendment is to cure defects. If without the amendment the action could be maintained, no amendment is necessary.

The defendant also sets forth in its brief another section of the New Brunswick Act, which, it is claimed, has not been complied with and which it contends would prevent plaintiff's recovery. 8 R. C. L. 747, sec. 39. This Court can take notice of only so much of the act as is set forth in the bill of exceptions. If the amendment does not set forth the full context of the Act, the defendant should be per-

mitted to amend its pleadings by setting forth any part of the Act it relies on in defense. We do not pass on this question.

It is no objection that under the New Brunswick Act greater damages may be recovered than are set forth in the writ. A plaintiff is not obliged to claim as damages the full amount permitted to be recovered under such a statute. If her action was originally based on the act, obviously this objection is without force.

Whether the proposed amendment dates back from the beginning of the action to avoid the limitation of such actions under the New Brunswick Act is sufficiently covered by the authorities above cited. We see no good reason why the general rule should not apply; and if the amendment is permissible, it dates back to the beginning of the action and comes within the statute.

Exceptions sustained.

Justice Pattangall having been of counsel did not participate.

NATHAN B. RICHARDS

vs.

ORLANDO W. FOSS, ET ALS., Trustees.

Hancock. Opinion November 10, 1927.

If one recklessly states as of his own knowledge material facts susceptible of knowledge which in fact are not true, even though he may believe them to be true, it may amount to fraud, if the statements were made to induce another person to act upon them, and he acts upon them believing them to be true.

In the case at bar, the jury having specially found that fraud existed at the inception of the indorsement, whether it then also found that the contract of indorsement was repudiated, or that there was a partial failure of consideration because of failure to deliver certain stock as agreed and the damages for such failure equalled or exceeded the amount recoverable in this action, in either case the verdict is not clearly wrong.

On general motion for new trial. An action to recover of defendant as an indorser on a note given to plaintiff by the United States Products Corporation. After a verdict for defendant plaintiff filed a general motion for a new trial. Motion overruled.

The case fully appears in the opinion.

Harry L. Crabtree, for plaintiff.

McKenzie, Perry & Greene, and Edmund J. Walsh, for defendant.

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

WILSON, C. J. An action on the indorsement by the defendant of a promissory note of the United States Products Corporation.

The United States Products Corporation was organized by the plaintiff and his son-in-law to promote the sale of a preparation of ammonia prepared according to a certain formula and under a trade name. The plaintiff had advanced considerable money to the corporation from time to time, and desired to withdraw and be relieved of his financial obligations.

The defendant prior to his indorsement of the corporation note to the plaintiff, which was given in part payment for advances, had worked for the company as salesman for a few months, invested some money in its capital stock, and claimed also to have made some advances to meet its obligations.

At a conference between the plaintiff, his son-in-law, who was then treasurer of the corporation, and the defendant, the defendant agreed to indorse the corporation's note with the son-in-law in part payment for the corporation's obligations to the plaintiff, and, as he says, was induced to do so by the representations of the plaintiff and his son-in-law that the company then owned, fully paid for, the trade name and formula under which its sole produce was being manufactured and sold and an agreement on the part of the plaintiff that he would transfer or cause to be transferred to the defendant sufficient of the common stock of the corporation to give him one-half of the voting stock of the corporation.

The defendant set up under a brief statement and as equitable grounds of defense that his indorsement was obtained by fraud and

misrepresentation, and was conditional upon the plaintiff transferring or causing to be transferred to him sufficient of the common stock to give him one-half of the voting stock then outstanding, which the plaintiff has refused to do.

A question was submitted to the jury by the presiding Justice as to whether the defendant's indorsement was obtained by fraudulent representation in which the plaintiff participated, which question the jury answered in the affirmative. The jury also found a general verdict for the defendant. The case comes up on a motion for a new trial on the usual grounds.

That a representation of ownership of the trade name and formula was made, the plaintiff and his son-in-law both admit; but the plaintiff says it was made in good faith on information furnished him by his son-in-law, and the son-in-law testified that the company had then actually aquired the trade name and formula. Testimony by the attorney, however, who acted in the matter was offered by the defendant, to the effect that the purchase of the formula and the right to the use of the trade name had never been completed. On the contrary, at the time of the trial it had been aquired by other parties. If the jury believed the defendant's witnesses, they were warranted in finding that the representation as to the ownership of the trade name and formula was not true.

It is not necessary to prove that the person making a false statement knew it was false in order to sustain an action for, or a defense of fraud. If one recklessly states as of his own knowledge material facts susceptible of knowledge, which are in fact not true, even though he may believe them to be true, it may amount to fraud, if the statements were made to induce another person to act upon them, and he does act upon them, believing them to be true. *Braley* v. *Powers*, 92 Me., 203; *Goodwin* v. *Fall*, 102 Me., 353; *Litchfield* v. *Hutchinson*, 117 Mass., 195.

It is true that the person to whom they are made is not entitled to relief because he has been mislead, if he might have readily ascertained the truth by the exercises of ordinary care, which is a question for the jury. Ordinarily a president of a corporation, which office the defendant appears to have held at the time of the indorsement, can not complain of misrepresentations as to the assets of his own company. A reasonable inference from the testimony in the case,

however, is, and the jury may have found, that the defendant was elected to that office at the meeting at which the note was signed, and the representation by the plaintiff coupled with the statement of the treasurer of the company may well have satisfied the ordinarily prudent man as to the ownership, inasmuch as the company, to the knowledge of the defendant, had apparently been using without objection from any one the trade name and formula since his connection with the company.

The jury having found that the two principal elements forming the consideration for the indorsement of the note had failed, viz.: the corporate ownership of the formula and trade name, and an equal share of the common stock of the corporation, it then became a question for the jury, under the instructions of the Court, which are not before us and which we must assume were adequate and a correct statement of the law, whether the contract of indorsement had been repudiated by the defendant because of the fraud and misrepresentation or whether the failure to deliver to the defendant a sufficient number of shares to give him ownership of one-half of all the outstanding common stock had resulted in a partial failure of consideration, the damages for which equalled or exceeded the sum it is agreed may be recovered in this action, viz.: one hundred dollars.

In either case, we can not say the verdict of the jury is so clearly wrong as to require it to be set aside.

Motion overruled.

ELLSWORTH COAL COMPANY

vs.

J. P. PARTRIDGE COMPANY, AND TRUSTEE

Hancock. Opinion November 12, 1927.

"30-60 days" in the recital of a contract concerning trade acceptances construed 30 and 60 days, and that one-half in amount of the trade acceptances might be on 30 days and the rest on 60 days.

The law indicates an equality of division when no other manner for dividing is defined.

On general motion. An action on the case for breach of contract, by plaintiff, a corporation, against defendant, a partnership, and Charles Holtz, Trustee, involving the purchase by plaintiff of twelve hundred barrels of flour from defendant. Plaintiff contended that it was to have thirty or sixty days time if necessary for payment, while defendant claimed that plaintiff was to have thirty days for payment on one-half of the amount of the bill and sixty days for payment for the other half, if necessary. Defendant refused to ship the remaining eleven hundred barrels after one hundred barrels had been shipped and paid for on the ground that plaintiff was not to have sixty days for payment and this action was brought. Verdict was for the plaintiff and defendant filed a general motion for a new trial. Motion sustained.

New trial granted.

The case sufficiently appears in the opinion.

D. E. Hurley, for plaintiff.

D. I. Gould, for defendant.

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

DUNN, J. Plaintiff contracted to buy twelve hundred barrels of flour from the defendant, to be paid for on arrival draft with bill

of lading attached, or, at the buyer's option, by what are known as trade acceptances, as installments of the flour should arrive on order at destination. One hundred barrels of flour are to be regarded as having been delivered.

On the jury trial of this action, bottomed on the alleged refusal by the defendant to deliver the remaining eleven hundred barrels, the plaintiff had the verdict.

Whether that verdict manifestly is against the evidence, and therefore ought to be set aside, is presented in the motion filed by the defendant, which motion brings the case here.

The underlying inquiry is not if the written agreement introduced into the evidence by the defendant was then in the same material form as it was when signed by the parties, but whether that signed agreement put in evidence by the plaintiff, of which it was insisted by the plaintiff that the agreement introduced by the defendant originally was counterpart, supports the contention of the plaintiff.

That signed agreement which the plaintiff introduced was free from ambiguity. Concerning the trade acceptances, which the plaintiff had the option of giving, legal construction of the recital of the contract is, that these could have been on 30 and 60 days, and not as the plaintiff now argues, on 30 to 60 days. That arbitrary sign which had been written by hand, between the numerals "30" and "60," in the agreement relied on by the plaintiff, is only too plainly the familiar one for the coordinating conjunction "and."

And the equality of division which the law indicates when no other manner for dividing is defined, imported into the meaning of the contract, that one-half in amount of the trade acceptances might be on 30 days and the rest on 60 days.

If, on the plaintiff's version, the minds of the parties did not so meet, then the minds of the parties did not meet at all.

When the plaintiff ordered that flour be shipped, and on no other terms than sixty-day acceptances, the defendant in ignoring that order breached no contractual duty.

Obviously, the verdict is contrary to the evidence.

Motion sustained.
New trial granted.

ORLANDO W. FOSS, JR.

vs.

NATHAN B. RICHARDS

Hancock. Opinion November 16, 1927

Transitory actions, in general, may be tried in this state whenever personal service can be made on the defendant.

But in actions between non-residents based on a cause of action arising outside the state, where no attachment has been made in this state, the courts are not obliged to entertain jurisdiction. They may, and usually do, on principles of comity, but not as a matter of strict right. It lies within the discretion of the courts whether or not they will entertain such a transaction.

In this case it was within the discretionary power of the court to take or to decline to take jurisdiction in this action and it is a general and well recognized rule that exceptions do not lie to the exercise of judicial discretion unless that discretion has been clearly abused.

On exceptions. Both plaintiff and defendant in this action were non-residents and personal service was made upon defendant while in this state, but the cause of action arose in another state and no property of the defendant was attached in this state. On the first day of the return term defendant appeared specially by counsel and filed a plea of abatement and a motion to dismiss, which was granted and plaintiff excepted. Exceptions overruled.

The case sufficiently appears in the opinion.

MacKenzie, Perry & Greene, and Edmond J. Walsh, for plaintiff.

Harry L. Crabtree, for defendant.

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

PHILBROOK, J. The writ in this case declares that the plaintiff is a resident of Melrose, County of Middlesex and Commonwealth of Massachusetts, and at the date of the writ was commorant of Ellsworth, in the County of Hancock and State of Maine. The defendant is alleged to be a resident of Manchester, County of Hartford, State of Connecticut and at the date of the writ was commorant of Ellsworth aforesaid. The action was in a plea of deceit, wherein it was alleged that the cause of action arose in Boston, Suffolk County, Massachusetts. The writ was dated October 16, 1926, and was served on the same day by a deputy of the sheriff of Hancock County, the return of the officer showing that the attachment was a nominal one, to wit, "a chip" but that the service upon the defendant was made by giving him in hand a separate summons for his appearance at court as within commanded.

The writ was returnable at the April term of the Supreme Court, A. D. 1927, at Ellsworth, and on the first day of said term the defendant filed a motion to dismiss on the ground that both the plaintiff and the defendant were non-residents of the State of Maine, that the cause of action arose outside said state, that the defendant had no goods or estate in said state which were attached upon the writ, and because the writ was served upon the defendant when he was temporarily present in the State of Maine attending court, wherefore, the defendant says that the Supreme Judicial Court of Maine had no jurisdiction over the person of the defendant and prayed that the court would exercise the discretion inherent in it, in such case, and dismiss the action.

The motion to dismiss having been granted, the plaintiff seasonably took exceptions.

In the bill of exceptions allowed by the presiding justice the plaintiff claimed that the court should have taken and retained jurisdiction as a matter of law, and that if the court could legally dismiss such action as a matter of discretion that such dismissal was an abuse of discretion.

Two questions therefore are submitted to us for decision: first, should the court have taken and retained jurisdiction as a matter of law; second, if such jurisdiction should not have been taken and retained as a matter of law, was there any abuse of discretion in dismissing the action.

Examination of the declaration discloses the fact that the cause of action upon which the plaintiff relies is deceit with reference to the ownership of a certain trade name and representations of such alleged ownership which induced the plaintiff to become an endorser upon a negotiable note given by the alleged owner. This is, therefore, a transitory action. It is well settled law that every state has jurisdiction over all persons found within its territorial limits for the purpose of entertaining actions which are transitory in their nature, and that it may maintain jurisdiction of such persons with a right to pursue such jurisdiction to final judgment, in all cases where process is served within the territorial limits of the jurisdiction of the court issuing it. In general, transitory actions may be tried wherever personal service can be made on the defendant. *State v. District Court*, 40 Mont. 359, 106 Pac. 1098, 135 A. S. R. 622.

Our own court adopted this rule in *Alley v. Caspari*, 80 Me. 234, 14 Atl. 12, 6 A. S. R. 178, where it was held that a personal action of a transitory nature might be maintained against a citizen of another state, even if the plaintiff be an alien, if the defendant be personally served with process, either by summons or arrest. In the case just cited, speaking through Mr. Chief Justice Peters, our court said, "the true interpretation of the principle is, that when an alien or nonresident is personally present in any place in the state, however temporarily or transiently in such place, whether abiding, visiting, or traveling at the time, a process duly served upon him will confer complete jurisdiction over his person in our courts."

But the law is equally well settled that in actions between nonresidents based on a cause of action arising outside the state, where no attachment has been made in this state, the courts are not obliged to entertain jurisdiction. They may, and usually do so, on principles of comity, but not as a matter of strict right. In other words, it lies within the discretion of the courts whether or not they will entertain such a transitory action. Dealing with this question of jurisdiction on the equity side of the court it was said in *National Tel. Mfg. Co.* v. *Du Bois*, 165 Mass, 117, 42 N. E. 510, 52 A. S. R. 503, that the courts of equity in that state are not open to the plaintiff as a matter of strict right, but as a matter of comity; and if it appears that complete justice could not be there done, or that the amount involved is small and that the defendant will be subjected

to great and unnecessary expense and inconvenience, and that the investigation required will be surrounded with many and great difficulties, which might all be avoided without especial hardships of the plaintiff, if suit is brought against the defendant in the state where he lives, and where the cause of action arose, and where personal service could be made on him, the court ruled that it should decline to take jurisdiction. This principle is elaborately discussed in *Disconto Gesellschaft* v. *Umbreit,* 127 Wis. 651, 106 N. W. 821, 115 A. S. R. 1063, where there is also a critical note. See also *Eingartner* v. *Illinois Steel Company,* 94 Wis. 70, 59 A. S. R. 859, where both the opinion of the court and the extended note state the law fully and correctly.

It is the opinion of the court that in the instant case the court might have assumed jurisdiction, if it saw fit, but that it was plainly within its rights when it declined to take jurisdiction and dismissed the action.

As to the exception relating to the exercise of judicial discretion, our own court in *Day* vs. *Booth,* 122 Me. 91, stated that "it is a general and well recognized rule that exceptions do not lie to the exercise of judicial discretion unless that discretion has been clearly abused." No such abuse appears in the case at bar, and the mandate in answer to both questions submitted to us for decision will be

Exceptions overruled.

ARMOUR FERTILIZER CO. *vs.* FRANK J. TUTTLE

Penobscot. Opinion November 16, 1927.

Where the obligors of a note jointly and severally contract the creditor may treat the contract as joint or several at his election and may join all in the same action or sue each one separately.

Where an instrument is made payable at a bank, presentment is not necessary in order to charge the person primarily liable.

On exceptions. An action on a promissory note against one of two makers, the note being a joint and several note. The defendant demurred generally contending that an indorser and another maker should have been joined as parties defendant, and further contended that the declaration did not aver that presentment was made according to the tenor of the instrument. The demurrer was overruled and defendant excepted. Exceptions overruled.

The case fully appears in the opinion.

Charles P. Conners, for plaintiff.

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

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

PHILBROOK, J. This is an action on a promissory note payable to the order of H. C. Humphreys, trustee, signed by the defendant and by one Benjamin Bubar, who filed a petition in bankruptcy after he signed the note. The note bears date of May 4, A. D. 1921, according to the declaration in the writ, and was due on October 1, A. D. 1921. After setting forth the date of execution and the date of maturity the declaration alleges that "on the same day" Humphreys endorsed and delivered the note to the plaintiff. Thus it is not ab-

solutely certain whether "the same day" refers to May 4 or October 1, but from the context we feel justified in assuming that the endorsement and delivery were on the earlier date. Bubar and Humphreys were not made parties to the suit.

The writ was dated March 28, A. D. 1925, and made returnable on the first Tuesday of May, A. D. 1925. At the November term, A. D. 1926, several terms having intervened and no pleadings having been filed, the defendant presented a motion asking that, at the discretion of the Court, he might be allowed to plead at that time. During the same November term a general demurrer was filed, joined, and overruled. To this ruling the defendants excepted.

The bill of exceptions is in the following language: "Action on a joint and several note signed by Frank J. Tuttle, the defendant in this suit, and by Benjamin Bubar, 'who has since filed a petition in bankruptcy,' 'payable to the order of one H. C. Humphrey, trustee,' and which, by the pleadings, is now held by Armour Fertilizer Works, who sues Tuttle, the note having been endorsed by said H. C. Humphrey, trustee.

"The date of the note is May 4th, 1921, and was payable 'October 1, after date,' at Corinna Trust Co. Bank, Corinna, Maine, 'with interest at the rate of six percent per annum from October 1, until paid.' The date of the writ is March 28, 1925 (three and one-half years after maturity).

"Plaintiff brought his action against Frank J. Tuttle, declaring on the note as appears by his writ, to the writ and declaration the defendant files a general demurrer; this general demurrer was overruled by the Justice presiding and ordered judgment on the note to issue in favor of the plaintiff."

The defendant also assigned, as special reasons for his exceptions, that:

1. H. C. Humphrey, trustee, was not joined as a party defendant, he having endorsed the note to the holder, thereby becoming as defendant contends so far as the holder is concerned, a joint promissor with the makers.

2. That the declaration fails to aver that presentment was made according to the tenor of the instrument.

3. That the declaration shows a postponement by the holder of his rights to enforce the instrument at maturity.

The declaration, writ, demurrer and joinder are made a part of the exceptions.

For some reason best known to the parties the note on which suit was brought is not made part of the record in the case but the declaration expressly states that it was a joint and several note. The effect of the demurrer filed by the defendant is to admit all matters of fact sufficiently pleaded. But we also observe in the bill of exceptions that the defendant avers that the action was on a joint and several note. Thus by admitting the fact pleaded in the declaration, as well as by the statement in the bill of exceptions, it must be held that the note in suit is a joint and several note. Therefore, the claims made by the defendant in support of his demurrer, pertinent to questions which would arise where a joint note was the subject of suit, are not applicable to the case at bar, and we must consider the questions before us as relating to a suit upon a joint and several note. The note in question, according to the declaration, as we have seen, was dated May 4, A. D. 1921 which was subsequent to the enactment of the so-called Uniform Negotiable Instruments Act which was passed by the Maine Legislature, approved April 7, A. D. 1917 and became effective ninety days after the adjournment of the legislature which passed it. The provisions of the Uniform Negotiable Instruments Act therefore apply in the case at bar.

As holder of the note in question the plaintiff is deemed prima facie to be a holder in due course and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. But the Uniform Negotiable Instruments Act, in case of a joint and several note, does not compel the indorsee to join all parties liable in an action to enforce payment of the note, and hence by section 196 of the Act the rules of the law merchant govern.

Where the obligors of a note jointly and severally contract the creditor may treat the contract as joint or several at his election and may join all in the same action or sue each one separately. 3 R. C. L. 1140, and cases there cited, including *Bangor Bank* v. *Treat*, 6 Maine, 207. Corpus Juris, vol. 8, p. 850, declares the rule in most states to be that an action on a joint and several note may be against any one

of such makers severally, or against them all jointly. In our state this rule was adopted in *Turner* v. *Whitmore,* 63 Maine, 526; *Bangor Bank* v. *Treat,* supra; and *Harwood* v. *Roberts,* 5 Maine, 441.

The second reason advanced by the defendant in support of his exceptions is that the declaration fails to aver that presentment was made according to the tenor of the instrument. Uniform Negotiable Instruments Act, section seventy-five, provides that where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payments has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient. The note in suit was payable at a bank, viz.: Corinna Trust Co. Bank, Corinna, Maine. But section seventy of the Uniform Negotiable Instruments Act provides that presentment for payment is not necessary in order to charge the person primarily liable. The defendant was primarily liable, hence no presentment was necessary and failure to allege presentment does not make the declaration demurrable.

The third reason advanced by the defendant in support of his exceptions is that the declaration shows a postponement by the holder of his rights to enforce the instrument at maturity. This reason must be disposed of by stating that such delay, if there be any which affects the right of the parties, is not a subject of demurrer.

After careful consideration of all questions advanced by the defendant we are of opinion that the mandate must be

Exceptions overruled.

ANTHONY A. GATES *vs.* WILLIAM S. OLIVER

Somerset. Opinion November 17, 1927.

A written instrument under seal recorded, though not acknowledged, conveying title to timber on specified land with the right to cut and remove the same within a certain period, gives a license to cut and remove said timber within said period, which, as between the parties, is not revocable while the contract remains in force.

The word "reserving" as used in a deed construed as "excepting."

In this case the timber having been excepted in the plaintiff's deed, he acquired no title to it except to so much as may remain at the end of twenty years.

On report on agreed statement. An action of trespass quare clausum to recover the value of certain trees cut and removed by defendant from land alleged by plaintiff to be owned by him. The cause was reported on an agreed statement to the Law Court for such decision as the law and facts required. Judgment for the defendant.

The case fully appears in the opinion.

James H. Thorne, for plaintiff.

Butler & Butler, for defendant.

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

DEASY, J. Case reported on Agreed Statement. The plaintiff and defendant claim title to or rights in the same real estate, under deeds from the same grantor, both recorded in the Somerset County Registry of Deeds.

The defendant's deed is dated 1911 and recorded in 1912. The parts of it material in this case are: "The said E. H. G. hereby sells .....all the spruce, fir and hemlock timber" (on the premises described)....."the said (defendant) shall and may

have twenty years in which time to remove the above described timber." This instrument is sealed, but bears no certificate of acknowledgment.

The plaintiff's deed dated 1915 and recorded the same year is one of warranty in the usual form, granting and conveying to him the same land but subject to the following exception: "Reserving however all the lumber now standing on said premises, that has been previously sold, to be removed in twenty years from the date of sale."

In 1926, the defendant entered upon the premises and cut certain timber of the kinds specified in his deed. Thereupon this action of trespass quare clausum was brought.

Counsel for the plaintiff does not contend that the defendant's deed is a mere license to convert a licensor's real property (standing trees) into a licensee's chattels (felled trees). If such claim were made the opinion of this court in *Brown* vs. *Bishop,* 105 Me. 272 would afford a complete answer.

The defendant's deed, more clearly than that construed in the case above cited grants "an interest in the growing timber" and a license to cut and remove it which "could not as between the parties, be revoked, while the contract remained in force." *Brown* vs. *Bishop* supra.

But the plaintiff says that the instant suit is not "between the parties." He claims the superior rights of an innocent purchaser for value.

The clause of the plaintiff's deed above quoted employs the word "reserving" inaccurately. The timber is excepted. Exceptions are existing things excluded from a conveyance. Reservations are new rights created by it.

But notwithstanding this inaccuracy the obvious intent of the parties will be given effect. *Engel* vs. *Ayer,* 85 Me. 454.

The timber of the kinds specified was excepted in the plaintiff's conveyance, and did not pass to him.

He contends that he is an innocent purchaser for value, but he falls down at the very threshold of his contention. Of the timber he is not a purchaser at all, except as to such of it as may remain at the end of the twenty year period.

The defendant owned the trees that he cut. He had a right to enter upon the land to cut and remove them, doing no unnecessary

damage to the land or other growth. We have not considered the so-called validating act of 1927 (Chap. 212). It has no bearing in this case.

Judgment for defendant.

INHABITANTS OF THE TOWN OF DURHAM

vs.

INHABITANTS OF THE TOWN OF LISBON

Androscoggin. Opinion November 19, 1927

The construction of a pauper notice given under the requirements of sec. 35, chap. 29, R. S., is one of law for the court, and a misstatement therein of the parentage of a minor child is very material and vitiates the notice.

In this case the overseers of the defendant town were notified to remove a child whom they had a right to infer from the notice was the legitimate child of the parents named. If they found such child whether legitimate at birth or by later marriage of the parents, his residence was that of the father and upon the evidence in the case, they properly denied liability.

If they found no such child, but an illegitimate child; even though the child of the parties named in the notice, the notice was not sufficient; and *a fortiori* was not sufficient to require the removal of an illegitimate child of the mother named by another person than the one named in the notice as the father.

On exceptions and motions. An action of assumpsit to recover for pauper supplies furnished by plaintiff town to a minor child. The defendant town questioned the sufficiency of the notice given required under sec. 35, chap. 29, R. S., alleging that the child was not a legitimate child of the parents named in the notice, but an illegitimate child. Exceptions were taken by defendant to the introduction of certain evidence, and defendant, after a verdict for plaintiff, filed a general motion, and also a motion for a new trial on newly discovered evidence. The exceptions and the motion for a new trial on newly

discovered evidence were not considered. The general motion sustained.

New trial granted.

The case is fully stated in the opinion.

Frank A. *Morey,* for plaintiff.

L. A. Jack, for defendant.

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

WILSON, C. J. An action to recover for pauper supplies alleged to have been furnished to a child of one Mabel L. Harris, the pauper residence of the child being alleged to be in the defendant town.

The jury returned a verdict for the plaintiff. An exception was taken to the introduction of evidence under the form of notice given to the overseers of the defendant town of any supplies furnished to a child of Mabel L. Harris or that he was the same child described in the notice as Clyde Dorr, Jr. The bill of exceptions, however, is so inadequately framed that this Court will not consider it. *McKown* v. *Powers,* 86 Me., 291.

Following the verdict, a motion for a new trial was filed based on the usual grounds, and also a motion for a new trial on the ground of newly discovered evidence. We think the general motion must be sustained. It is, therefore, unnecessary to consider the motion grounded on the newly discovered evidence or the defendant's diligence in obtaining it, although if the evidence had been presented in competent form at the trial, it might have, under proper instructions, changed the result. *Wellington* v. *Corinna,* 104 Me., 252.

The notice on which the action is based and on which it must stand or fall is as follows:

> To the Overseers of the Poor of the Town of Lisbon, County of Androscoggin in the State of Maine:
>
> GENTLEMEN: You are hereby notified that Clyde Dorr, Jr., child of Clyde Dorr and Mabel (Harris) Dorr, inhabitant of your town, having fallen into distress, and in need of immediate relief in the town of Durham, the same has been furnished by said town

on the account and at the proper charge of the town of Lisbon, where said Clyde Dorr, Jr., has legal settlement: You are requested to remove said Clyde Dorr, Jr., or otherwise provide for him, without delay, and to defray the expense of his support in said Town of Durham. The sums expended for his support up to this date are $35.75.

Dated at Durham, this 29th day of Sept. A. D. 1924.

Yours respectfully,

Howard J. Merrill, } Overseers of the
C. A. Calder, } Poor of Durham.

The alleged pauper being described in the notice as Clyde Dorr, Jr., child of Clyde Dorr and Mabel (Harris) Dorr, the issue is raised at the very threshold of the case whether such notice is sufficient to enable the plaintiff to maintain an action for supplies furnished to an illegitimate child of Mabel L. Harris, even though the identity of the person described in the writ with the one intended in the notice was established by evidence.

The statute, sec. 35, chap. 29 R. S., requires that the overseers of a town in which a pauper has fallen into distress to give notice to the overseer of the poor of the town in which it is claimed the pauper has a settlement, "stating the facts relating to the person chargeable in their town."

No particular form of notice is required. Nor should officers of a town be held to that exactness of statement required in legal pleadings. It must, however, contain the substance of the statutory requirement, which is, that it must state *the facts* relating to the person alleged to have fallen into distress. What facts are necessary to be stated, this Court has not undertaken to enumerate in detail. In *Kennebunkport* v. *Buxton*, 26 Me., 61, 66, the Court said: "The facts relating to the person are those which are important to be known of him as a pauper by the town notified;" and in *Holden* v. *Glenburn*, 63 Me., 579, 580: "What the facts are to be stated are not specified but the object to be accomplished makes it sufficiently clear. The purpose is to lay a foundation for the future action of the overseers." It must at least by name or otherwise sufficiently describe the person or persons alleged to have fallen into distrees to enable the over-

seers of the town notified to identify the particular person or persons to be removed. *Thomaston* v. *Greenbush*, 98 Me., 140, 142. It is, however, facts that must be stated. Trivial errors in immaterial particulars may not vitiate a notice or may be waived; but "misstatements of material facts—facts so important that they change the settlement of the pauper—will vitiate it." *Glenburn* v. *Oldtown*, 63 Me., 582.

It is contended by the plaintiff in the case at bar that the overseers of the poor of the defendant town knew, or could by inquiry, and did in fact ascertain who the person, named in the notice as having fallen into distress, was. On the mere question of identity, if the notice had not also contained information that, if untrue, was misleading, it might be held sufficient; but the defendant contends that it contained matter which, if true, changed the pauper residence of the person sought to be charged, and, therefore, if not true, vitiated the notice.

The notice states not merely that a child known as Clyde Dorr, Jr., had fallen into distress, but that he was the child of Clyde Dorr and Mabel (Harris) Dorr. It is not contended that Clyde Dorr ever had a pauper residence in the defendant town. It, therefore, would not be liable for pauper supplies furnished to a legitimate son of Clyde Dorr and Mabel Harris Dorr. The plaintiff, however, contends that the evidence discloses that the daughter of John Harris whose maiden name was Mabel L. Harris, the mother of the child, known as Clyde Dorr, Jr., did have a pauper residence at the date of his birth in the defendant town, that she was not then lawfully married, though she and Clyde Dorr were then living together as man and wife and, therefore, unless she was afterwards lawfully married to the father of the child, the child known as Clyde Dorr, Jr., would retain the pauper residence of the mother until he became of age and acquired a settlement of his own. *Houlton* v. *Lubec*, 35 Me., 411.

The construction of such notices as of other legal instruments is a question of law for the Court. *Sanford* v. *Lebanon*, 31 Me., 124. The only fair construction of the notice is that a legitimate child of Clyde Dorr and Mabel Harris Dorr had fallen into distress. We know of no rule of construction which holds that by merely enclosing the maiden name of the mother in parenthesis a bar sinister in the family escutcheon is thereby indicated.

Upon the notice, therefore, as we construe it, under the decisions in *Holden* v. *Glenburn, supra,* and *Glenburn* v. *Oldtown, supra,* the evidence and the inquiries of the overseers of the defendant town disclosing that Clyde Dorr had no settlement in the defendant town, the defendant was not liable and the overseers were warranted in refusing to remove; even though the overseers could have and did learn upon inquiry that the child referred to was at birth the illegitimate child of Mabel L. Harris and that her residence at that time was in the defendant town, the plaintiff can recover only upon the facts as stated in the notice.

While misstatements of immaterial facts may not vitiate and may be waived, facts stated in such a notice as to the parentage of a minor are highly material, and there was no waiver in this case, as the defendant answered, denying liability. The overseers of the defendant town were notified to remove a child whom they had a right to infer from the terms of the notice was a legitimate child of Clyde Dorr and Mabel Harris Dorr. If they found such child, whether legitimate at birth or by later marriage of the parents; Sec. 1, Par. II, III, Chapter 29 R. S.; *Wellington* v. *Corinna, supra,* his residence was that of the father, and upon the evidence in the case, they properly denied liability. If they found no such child, but an illegitimate child, even though the child of the above-named parties, the notice was not sufficient and they were not required to remove, *Holden* v. *Glenburn, supra*; *Glenburn* v. *Old Town, supra.* Certainly such a notice was not sufficient to require the overseers to remove an illegitimate child of Mabel Harris by any other person than Clyde Dorr.

Motion sustained.
New trial granted.

GEORGE J. KUHN *vs.* PERCY C. SIMMONS

Lincoln. Opinion November 28, 1927.

In an action by payee on a promissory note, absolute in form, delivered to payee not as a binding obligation except upon the happening of a certain event, constituting a condition precedent, such prior or contemporaneous oral agreement may be shown, not so when such a note is delivered by the promisor as a binding obligation, but conditional, its payment or enforcement depending on a contingency, constituting a condition subsequent.

It is a question of fact whether a written agreement, though in the possession of the obligee, was delivered by the obligor as a binding agreement or whether such delivery was conditional only.

In this case upon a fair construction of the charge of the presiding justice, taken as a whole, he appears to have had in mind and intended to convey by his use of the word "void" the meaning of a condition precedent going to the delivery of the note and that the jury must have understood that the questions, which were left to them to decide, were whether the defendant signed and delivered the note with the intention that it was not to be considered by the parties as a note, unless the defendant got satisfactory supply of water, and whether he did get such a supply.

On exceptions and motion. An action of assumpsit on a promissory note given by defendant to plaintiff. The note was for defendant's part of the cost of erecting a windmill and tank for supplying water to five others besides himself, including plaintiff, who had paid the full amount of the cost. Defendant contended that at the time the note was given it was agreed and understood between plaintiff and defendant that it was not to be paid unless the supply of water to him was satisfactory, and that the supply was not satisfactory. Plaintiff excepted to a part of the charge, and after a verdict for defendant, filed a general motion for a new trial. Exceptions and motion overruled.

The case sufficiently appears in the opinion.

Harold R. Smith, for plaintiff.

George R. Ashworth, for defendant.

SITTING: WILSON, C. J., DUNN, DEASY, STURGIS, BARNES, BASSETT, JJ., MORRILL, A. R. J.
MORRILL, A. R. J., not concurring.

BASSETT, J. Action on a demand promissory note for $87.65, dated December 11, 1923, given by the defendant to the plaintiff. Plea general issue, with brief statement that prior to the delivery of the note an agreement was made between the defendant and the plaintiff whereby the note should be void in the event water was not supplied to the satisfaction of the defendant, and it was not so supplied. Verdict for the defendant. Case comes up on exceptions and general motion.

The plaintiff, defendant and four others had been drawing water from a spring to their respective houses by pumps. The plaintiff proposed that all contribute equally to the installation of a windmill and storage tank to furnish a supply by gravity. The defendant doubted the success of the plan and declined to take part but finally assented upon the understanding, as he claimed, that he was not to pay if he did not get a satisfactory supply of water. After the work had been completed, the plaintiff, who had paid the entire expense, requested the defendant to give him a promissory note for one sixth of the expense and the defendant gave the one in suit upon the verbal agreement, as he claimed, and as set up in the brief statement. Whether there was an agreement, and if so, its precise terms were in issue.

EXCEPTIONS.

The exceptions were to the following instruction of the presiding justice, "If the agreement was made and entered into understandingly, as the defendant claims, and the water was not supplied, or, to use the term of the defendant, 'in the event the water was not supplied to the satisfaction of the defendant,' then I instruct you that the defendant is entitled to a verdict."

The case raises the question to what extent a bill or note, delivered at least manually to the payee, may in an action between the original parties be shown by evidence of a prior or contemporaneous oral agreement to be dependent upon a contingency.

It may be shown that a bill or note, absolute in form, although manually delivered to the payee was, by a prior or contemporaneous oral agreement, not to become a binding obligation except upon the happening of a certain event. *Goddard* v. *Cutts* 11 Me. 440; *Watkins* v. *Bowers* 119 Mass. 383; *Hill* v. *Hall* 191 Mass. 253; *Mass. Biographical Soc.* v. *Howard,* 234 Mass. 383; 20 A. L. R. 421, 422. Note: Public Laws 1917 Chap. 257 Sec. 16.

It cannot be shown that such a note delivered by the promisor as an obligation was not absolute according to its terms but conditional, its payment or enforcement depending on a contingency. *Cunningham* v. *Wardwell* 12 Me. 466; *Boody* v. *McKenney* 23 Me. 517; *Sears* v. *Wright* 24 Me. 278; *Sylvester* v. *Staples* 44 Me. 496; *Porter* v. *Porter,* 51 Me. 376, 379; *Ockington* v. *Law* 66 Me. 551; 20 A. L. R. 454, 471, Note.

That is, it may be shown that the note's becoming a binding obligation was dependent upon a condition precedent. It cannot be shown that its obligation, if it were delivered as an obligation, was dependent upon a condition subsequent contradicting or at variance with the express terms, because of the well established rule that parol evidence is inadmissible to vary or contradict the terms of a written instrument, *Goddard* v. *Cutts,* supra.

It is a question of fact whether any written agreement, though in the possession of the obligee, has been delivered by the obligor as a binding agreement or whether any delivery is conditional only. *Hill* v. *Hall,* 191 Mass. 253, 265. Doubtless testimony to prove such a state of facts should be weighed with care. Ibid.

No exception was taken to the admission of any of the evidence, which question in many of the reported cases was the one to be decided. The exception was to the specific part of the charge above stated. But that part must be considered with the entire charge.

The parol agreement, as alleged in the brief statement, which the presiding justice referred to and quoted in his charge, was that "the note should be void in the event" etc. The word "void" does not in itself determine the question raised in this case. While a statement that an instrument is to be or become void upon a contingency may, and perhaps often implies that the instrument is an existing obligation, it may mean, as used by the court, and in cases it is apparent that it has been so used, a condition precedent going to the

delivery of the instrument rather than a condition subsequent to defeat a valid existing obligation.

We think that by a fair construction of the charge taken as a whole the presiding justice appears to have had in mind and intended to convey by his use of the word "void" the meaning of a condition precedent going to the signing and delivery of the note and that he intended to lay down the rule, and the jury must have so understood, that, if the defendant signed the note and delivered it with the intention that it was not to be considered by the parties as a note unless he got a satisfactory supply of water, and he didn't in fact get such a supply, he was not liable. The presiding justice charged that the plaintiff had established a prima facie case and was entitled to a verdict unless the jury found that there was an agreement for the note's being void, apparently in the meaning just stated. Whether there was such an agreement and whether the defendant got a supply of water, he left to the jury to decide. The correct rule was given to the jury and the exception was not well taken.

MOTION:

There were only three witnesses in the case, the plaintiff, defendant and his wife. The plaintiff denied there was any such agreement as defendant claimed and stated that the only understanding, when the note was signed, was that the defendant should be given ample opportunity to pay in small instalments. The defendant's wife overheard the conversation at the time of the second conversation, when there was the alleged final assent. From that conversation as testified to by them both and from the other two conversations between the plaintiff and defendant, as testified to by the latter, the jury, if they believed the testimony, could have found that there was the agreement, as claimed by the defendant and as defined by the presiding justice.

The mandate must therefore be

Exceptions and Motion overruled.

THEODORE KERR *vs.* ALICE B. MCDONALD

Cumberland. Opinion November 30, 1927.

Where a mortgagee in a prior mortgage, under a demand for a true account due under the mortgage, states to a person about to take a subsequent mortgage, that a certain amount had been paid on the prior mortgage, he and his assignee of the mortgage are estopped from claiming the full amount of the prior mortgage, and also estopped from claiming interest on the amount which had been stated as having been paid on the prior mortgage.

In this case when the assignee of the prior mortgage received the mortgage and the note thereby secured, when it was overdue, she took it subject to the same defenses as her assignor.

On exceptions. A bill in equity by the owner of a subsequent mortgage on real estate to obtain an account of the amount due on a prior mortgage and an assignment of such prior mortgage upon payment of the amount due, as provided under R. S. chap. 95, sec. 24. Cause was heard on bill, answer, replication and proofs, and the sitting justice sustained the bill and ordered defendant to assign to plaintiff the mortgage upon payment of $6518.55, and plaintiff excepted to the decree as to the amount of interest due on the prior mortgage. Case remanded for correction of decree in accordance with opinion.

The case is fully stated in the opinion.

Clinton C. Palmer, for plaintiff.

Clifford E. McGlauflin, for defendant.

SITTING: PHILBROOK, DUNN, DEASY, STURGIS, PATTANGALL, JJ.

PHILBROOK, J. This is a bill in equity brought under R. S., Chap. 95, Sec. 24, which provides that the owner of a subsequent mortgage of real estate may request assignment of a prior mortgage under foreclosure and may bring a bill in equity to compel assignment.

On June 1, A. D. 1922, Ansel E. Hamlin of Portland was the owner in fee simple of a certain lot or parcel of land situated in East Deering. On that date he mortgaged the premises to William G. McDonald of said Portland to secure the payment of a note of $6,000 and interest thereon. For convenience and brevity this will be referred to as the senior mortgage. On August 25, A. D. 1923, said Ansel E. Hamlin conveyed the premises to Lucy A. Hamlin, subject to said senior mortgage. On February 6, A. D. 1924, the said Lucy A. Hamlin gave a mortgage of the premises, subject to the senior mortgage, to James C. DeWolfe to secure payment of $350 within sixty days from the date of said last named mortgage. For the reason already stated this will be referred to as the junior mortgage. In this junior mortgage the mortgagor recited that there was then due on the senior mortgage $5,000 principal, and interest. On June 16, A. D. 1924, DeWolfe assigned this junior mortgage to Theodore Kerr, the complainant in this bill.

On July 15, A. D. 1925, the said William G. McDonald, mortgagee in the senior mortgage, entered upon and took possession of the premises for the purpose of foreclosing said mortgage. On July 18, A. D. 1925, the said William C. McDonald assigned the senior mortgage to Alice B. McDonald who is the defendant herein, but in said assignment no reference was made to any rights acquired by said William G. McDonald under or by virtue of said entry on July 15, A. D. 1925.

On July 14, A. D. 1926, the complainant Kerr, then owner of the junior mortgage, in writing requested the defendant, then owner of the senior mortgage, to assign said senior mortgage and the debt thereby secured to him, the said Kerr, and in the same writing there was demanded of the defendant a true account of the sums due on said mortgage, and of the rents and profits and money expended in repairs and improvements. In response to this demand the defendant, on July 15, A. D. 1926, gave to the plaintiff the following statement of the amount which she claimed to be due on the senior mortgage:

Amount of note	$6,000.00
Interest 4 yrs. 1 mo. 15 d. at 6%	1,485.00
	$7,485.00
Taxes	256.15
Water	26.00

Hardware	16.10
	$7,783.25
Credits	
Rents	209.00
Bal. due July 15th, 1926	$7,574.25
	25.70
	$7,548.55

The bill of exceptions states that the only issue between the parties to be decided by the court below was whether or not the account which the defendant gave the plaintiff on July 15, A. D. 1926, was a true account of the sums due on the senior mortgage.

After hearing below an interlocutory decree was signed by the presiding justice holding that the defendant received the note and senior mortgage when it was overdue and took it subject to the same defenses as her assignor, who was estopped to deny that the sums due on the principal of the senior mortgage note on February 6, A. D. 1924 exceeded $5,000; and that the plaintiff was entitled to an assignment of said senior mortgage upon the payment of the principal sum of $5,000 plus interest to be computed on the principal sum of $6,000 to February 6, A. D. 1924 and on the principal sum of $5,000 from February 6, A. D. 1924 to date, together with such sums as had been paid for taxes and other assessments, and the necessary upkeep of said property, less receipts for rental of the amount of $234.70. In the final decree the defendant was ordered and directed to assign the senior mortgage to the complainant upon a payment of $6,518.55 according to the following figures:

Principal sum February 6, 1924	5,000.00
Interest on $6000 to Feb. 6, 1924	605.00
Interest on $5000 from Feb. 6, 1924, to date	850.00
	$6,455.00
Taxes, water rates, repairs	298.25
	$6,753.25

Less rentals	234.70
	$6,518.55

The case is before us upon plaintiff's bill of exceptions, in which he alleges:

"FIRST: To that part of the so-called interlocutory decree made and entered therein on December 6th, 1926, wherein the Court found that Defendant's assignor (and Defendant) 'was estopped to deny that the sum due on the principal of the mortgage note on February 6th, 1924, exceeded $5000' and that Plaintiff is entitled to an assignment of said mortgage upon payment of $5000 'plus interest to be computed on the principal sum of $6000 to February 6th, 1924' with other amounts, upon the ground that the admissions in Defendant's answer and the uncontroverted testimony lead to the inevitable conclusion that Defendant's assignor and Defendant was estopped to deny that the sum due on the mortgage note on February 6th, 1924, exceeded $5000.

SECOND: To that part of the final decree made and entered in said cause on December 6th, 1926, whereby the Court ordered and directed Defendant to assign to Plaintiff the mortgage referred to in said decree upon payment to her by Plaintiff or his assigns of interest on $6000 to February 6th, 1924, $605.00' included in a gross amount of $6518.55 therein named or upon payment of any sum in excess of $5913.55."

ESTOPPEL. The bill of exceptions shows that Ansel E. Hamlin, mortgagor in the senior mortgage, paid William G. McDonald, mortgagee in that instrument, sundry sums of money between the date of the senior mortgage and the date of the junior mortgage, and that he had performed work for McDonald during the same period, for all of which he claimed he was entitled to credit on the senior mortgage; that he received from McDonald receipts for the moneys so paid, which receipts he showed to Mr. Kerr at the time when the latter was requested to take up the junior mortgage, and that they were in his possession up to a few months prior to the hearing but that these receipts had been lost or destroyed when he, Hamlin, last moved; that he had no books of account, papers or memoranda showing the amount of payment to McDonald, or what amounts might be credited for work performed, or what amount he owed McDonald

at any time, or the balance due on any transaction or upon the gross indebtedness of Hamlin. McDonald likewise testified that he had no books containing entries of receipts of interest on mortgages held by him, or by himself as agent for the respondent.

Mr. DeWolfe, called as a witness by the complainant, testified that he loaned Mrs. Hamlin, or Mr. Hamlin, the sum mentioned in the junior mortgage. On the date of that mortgage, February 6, A. D. 1924, he knew that William G. McDonald was the record owner of the senior mortgage; that before advancing any money on the junior mortgage he talked with Mr. McDonald over the telephone and explained to him that he, DeWolfe, had a claim against Hamlin and that his only lookout for getting the money was to take a junior mortgage; that he asked McDonald what he considered the value of the property to be and received the reply that it was worth between $6,000 and $6,500. DeWolfe then suggested to McDonald that the latter had a mortgage for the full amount. McDonald then said that he had received some payments on it and when asked if there were sufficient payments to warrant taking a junior mortgage of $350 he replied he thought there were. On being asked to look the matter up McDonald replied, "There is approximately $1,000 paid on it." On being asked if that included the interest McDonald replied, "That $5,000 would be safe."

Thereupon the junior mortgage was taken by DeWolfe containing the following words, "This conveyance being subject to a mortgage of $6,000 given by Ansel E. Hamlin to William G. McDonald upon which there is now due $5,000 principal and interest." The complainant also testified that prior to taking the assignment of the junior mortgage he also had a telephone conversation with Mr. McDonald of similar tenor as the conversation testified to by DeWolfe.

In argument the plaintiff submits that the statements made by McDonald to DeWolfe on February 6, A. D. 1924 lead to the indisputable conclusion that he intended DeWolfe to understand, and that DeWolfe did then understand, that the amount then due on the first mortgage, principal and interest, did not exceed $5,000, and that DeWolfe acted in accordance with such understanding and belief and drafted the junior mortgage containing the recital of such understanding and took the junior mortgage from Mrs. Hamlin.

The plaintiff argues, therefore, that the court below was undoubtedly correct in finding that the amount due on the senior mortgage on February 6, A. D. 1924, was not $6,000 with interest from the date of that mortgage, as claimed in the defendant account, and that she was estopped to deny that there was then due some less amount.

We fully concur with the finding below that the defendant is estopped to claim that the principal of the senior mortgage was in excess of $5000.00, on February 6, A. D. 1924, but since that principal was thus reduced we are of opinion that the learned justice erred in allowing interest on $6000.00 from the date of the senior mortgage to the date of the junior mortgage, which interest amounted to $605.00. The total amount allowed in the final decree should be reduced by deducting this interest so allowed, and the case is hereby remanded for correction of the decree in accordance with this opinion.

So ordered.

JAMES L. BOYLE, Trustee

vs.

CARRIE N. CLUKEY, EXR'X., et als.

Kennebec. Opinion November 30, 1927.

A conveyance by a corporation to one of its directors and treasurer by deed executed by the treasurer puts a purchaser upon his inquiry as to the authority of the officer executing the deed and the good faith of the transaction.

As to what constitutes sufficient notice to put one on his inquiry as to possible fraudulent transactions, no general rule can be laid down. Each case must rest on its own facts.

A creditor who attaches property obtained by fraud acquires no interest superior to that of the debtor.

A defrauded vendor may recover property conveyed so long as it remains in the hands of the vendee and has not passed to an innocent party for a new and valuable consideration.

In case of a fradulent transfer as to creditors the vendee holds only the naked legal title in trust for the creditors of the vendor.

A purchaser of such officer, however, by the deed itself may not be put upon his inquiry further than to ascertain whether it was duly authorized and appears to have been given for an adequate consideration, provided there are not attendant circumstances calculated to arouse suspicion in the mind of a reasonably prudent man.

On appeal. A bill in equity seeking to have a conveyance of real estate, alleged to have been fraudulent and intended to hinder and delay creditors in the collection of their debts, declared void, and also a mortgage given by the grantee in such alleged fraudulent conveyance, and a real estate attachment, declared void. Upon a hearing on bill, answers, replications and proofs, the sitting justice found that the conveyance was fraudulent and declared it void and also declared the mortgage given by the grantee in the alleged fraudulent conveyance to Waterville Savings Bank for a present and valuable consideration void, and further declared that the real estate attachment made in favor of Pepperell Trust Company dissolved. From such findings the Waterville Savings Bank and the Pepperell Trust Company appealed. Appeal of Pepperell Trust Company dismissed. Appeal of Waterville Savings Bank sustained with costs. Decree below to be modified to accord with opinion.

The contentions of the parties fully appear in the opinion.

Maurice E. Rosen, and *F. Harold Dubord,* for plaintiff.

Harvey D. Eaton, for Waterville Savings Bank.

John E. Nelson, for Carrie N. Clukey, executrix.

Louis B. Lozier, for Pepperell Trust Company.

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

WILSON, C. J. A bill in equity brought by the plaintiff as trustee in bankruptcy of the Oakland Belgrade Silver Black Fox Ranch Co., which will hereinafter for brevity be referred to as the Fox Ranch Co., seeking to set aside and declare void a certain conveyance of real estate by said Fox Ranch Co. to Charles J. Clukey, also a mortgage given by him to the defendant, Waterville Savings Bank, and also an attachment of said property on an action brought by the defendant, Pepperell Trust Co. against said Charles J. Clukey.

On July 31, 1925, the Fox Ranch Co. was the owner of the parcel of land described in the plaintiff's bill, and was hopelessly insolvent. Its directors consisted of Charles J. Clukey, now deceased, his brother, and brother-in-law. The brother and brother-in-law had no financial interest in the corporation and are described in the bill as mere "dummies" acting under the direction of Charles J. Clukey, and found to be such by the Court below. His brother, Harry Clukey, was president and Charles J. Clukey was treasurer.

On the above date, the board of directors of the Fox Ranch Co. passed the following vote:

> "The President presented to the meeting the proposition of Charles J. Clukey to purchase the real estate of the company situate in Belgrade, Me. * * * After discussion, it was voted to accept the proposition and sell said real estate to Charles J. Clukey, those voting in favor of the sale being Harry J. Clukey and J. Arthur Rodrigue (Charles J. Clukey did not vote). It was also voted that the president and treasurer prepare and execcute the deed of the company of said real estate to Charles J. Clukey."

and on the same day, the president, Harry Clukey, and Charles J. Clukey, treasurer, executed a deed of the property to Charles J. Clukey subject to a previous mortgage of $4500, which sets forth as the consideration, "one dollar and other valuable considerations." Attached thereto, however, was a United States revenue stamp, indicating a consideration not exceeding three thousand dollars.

On August 18th, 1925, while the record title of said real estate was in Charles J. Clukey, the defendant Pepperell Trust Co. brought suit against him on a personal obligation and attached all his real estate in Kennebec county.

On or about August 24th, 1925, Charles J. Clukey, having previously applied for a loan at the Waterville Savings Bank, conveyed the property in question by his mortgage deed to the Savings Bank, to secure a loan of twenty-five hundred dollars.

The bill alleged and the Court below found that the conveyance by the corporation to its treasurer was intended to hinder and delay and defraud its creditors, and was, therefore, void.

The Court, however, found that the officials of the Savings Bank had no knowledge of the insolvent condition of the Fox Ranch Co. at the time of the conveyance to Charles J. Clukey or "any knowledge directly or indirectly of any facts connected with the administration of the Fox Ranch Co. which could be regarded as sufficient to convey actual notice to or put the bank on suspicion of the condition of the corporation when Clukey took the deed of the property;" but ruled as a matter of law that a deed to one of its directors and treasurer, setting forth as a consideration "one dollar and other valuable considerations," and the vote of the board of directors authorizing such a conveyance failing to specify the consideration for the transfer, was sufficient to put the Bank upon its inquiry, not only as to the authority of the treasurer to execute the deed, but also as to the sufficiency of the consideration, and held both the mortgage and attachment to be void as to the plaintiff as trustee in bankruptcy of the Fox Ranch Co., and ordered appropriate conveyances and releases by the defendants to restore the title to the trustee.

From his decree, the Waterville Savings Bank and the Peppercll Trust Co. appealed. We think the appeal of the Waterville Savings Bank must be sustained.

The evidence warranted the finding of the Court below that the deed was given to hinder, delay, and defraud the creditors of the Fox Ranch Co. and also the finding that there was no evidence that the Savings Bank had any actual knowledge of the insolvent condition of the Fox Ranch Co. at the time of the transfer to Clukey or "had any knowledge either directly or indirectly of any facts" that could be regarded as sufficient "to put the bank on suspicion of the insolvent condition of the corporation" at that time.

It is true that a transaction between a corporation and one of its directors and a deed executed by an officer of a corporation running to himself as grantee raises at once the question of authority and good faith, and in the absence of absolute good faith may be avoided by the corporation or its stockholders, not only as to the grantee but as to a third person with notice of the infirmity or knowledge of facts that would put him upon his inquiry. Thompson on Corp. 2nd Ed. vol. 2, sections 1411, 1412; *Vermeule* v. *Hover*. 113 Me., 74. A purchaser of such officer, however, by the deed itself may not be put upon his inquiry further than to ascertain whether it was duly au-

thorized and appears to have been given for an adequate consideration. Thompson on Corp. 2nd Ed. vol. 2, sec. 1411; provided, of course, there are no attendant circumstances that would excite suspicion of a fraudulent purpose.

As to what constitutes sufficient notice to put one on his inquiry no rule of general application can be laid down. Each case must rest on its own facts. *Knapp* v. *Bailey*, 79 Me. 195, 204.

We concur in the ruling of the Court below in holding that the deed to Clukey executed by himself as treasurer of the corporation put the Savings Bank upon its inquiry as to his authority to execute the deed.

This information was furnished by a vote of the other two directors, whom, so far as the evidence discloses, the officials of the bank had no reason to suspect were "dummies" and acting under the control of Charles Clukey, or were not financially interested in the corporation and in the preservation of its assets.

The Court below based its conclusion that the bank was put upon its inquiry as to the good faith of the transaction upon the facts that the deed and note disclosed that no consideration passed for the conveyance.

A failure to set forth the real consideration in a deed from a corporation to one of its directors or in the vote authorizing it might well put a third person purchasing of such director upon his inquiry as to the adequacy of the consideration paid, if there was no other information furnished him.

In the case at bar, the evidence discloses that the officials of the Savings Bank were confronted with the following situation at the time of making the loan: they had known Mr. Clukey, the applicant for the loan, long and favorably as a successful business man in their community, and, according to the findings of the Court below, had no knowledge of any facts tending to arouse their suspicions as to any irregularities in the administration of the affairs of the Fox Ranch Co.

The examining committee for the bank found property worth approximately $7500, the original purchase price of which the evidence disclosed was $7200. The deed from the Fox Ranch Co. to Mr. Clukey, according to its terms, was only of an equity in the property, it being conveyed subject to a mortgage which the records disclosed was for

the principal sum of $4500. That this mortgage was discharged after the deed to Clukey was given, but before it was recorded, was a matter in which the Savings Bank had no interest, except as to its bearing on the title at the time its mortgage was given. Nor in the light of any information then in the possession of the bank was it a suspicious circumstance, as the reasonable inference would be that it had been paid by the grantee. The information conveyed to officers of the bank by the deed was that the Fox Ranch Co. had conveyed to Clukey property which their examination disclosed was worth approximately $7500, subject to a mortgage of $4500, and by evidence just as conclusive as if it had been written in the deed in so many words, for a consideration in excess of $2500.

By law, a grantor at the time of this conveyance, was compelled to attach to his deed a United States revenue stamp to the value of fifty cents for each five hundred dollars of value of property conveyed or fractional part thereof. There was attached to the deed from the Fox Ranch Co. to Clukey a revenue stamp of the denomination of three dollars, indicating a consideration in excess of $2500 and possibly $3000, which on its face was a fair and adequate consideration for the equity in the property conveyed by the company to Clukey.

It is not true, therefore, as the Court below found, that the note and deed disclosed that no consideration was paid. The vote sets forth a proposal of purchase and sale. A sale *ipso facto* implies a consideration, and the deed on its face contained evidence that the consideration paid was fair and adequate. Later events disclosed that the consideration was inadequate and that the conveyance was fraudulent; but except for the fact that the terms of the purchase were not spread upon the records of the corporation, the transaction on its face appeared to be perfectly regular, duly authorized and for an adequate consideration. This omission alone with no knowledge on the part of the bank at that time tending to arouse even a suspicion as to any irregularity in the administration of the affairs of the Fox Ranch Co. or to question the integrity of Mr. Clukey would not as a matter of law put the bank on further inquiry.

This is not a case where an agent acted in a transaction in which his interests were adverse to those of his principal and no inquiry was made as to his authority in the premises and where there were

other circumstances that might well have tended to arouse suspicion as in the case of *American Realty* v. *Amey*, 121 Me., 545.

The question raised by this appeal is not whether the mortgagee omitted to require information as to the authority of the officer and agent to act; but whether a deed in the form described, and a vote showing a proposal of purchase and acceptance, and authority to the agent to execute a deed, is alone sufficient as a matter of law to put on inquiry as to the adequacy of the consideration a third person who has no other information that would lead him to suspect that the transfer was in fraud of creditors, or in any way irregular, but on the contrary had reason to believe that the officer in question was a reputable and experienced business man of good standing in the community, and the deed on its face appears to have been given for an adequate consideration. We think the Court below erred in ruling that as a matter of law such a vote and deed alone was sufficient to put the Savings Bank on inquiry as to a possible fraudulent transfer. Coupled with other circumstances sufficient to induce inquiry by a reasonably prudent person, the rule might well be different.

The appeal of the defendant Pepperell Trust Co. must be dismissed. A creditor who attaches property obtained by fraud acquires no interest therein superior to that of his debtor. He stands in the shoes of his debtor. The defrauded vendor may recover the property so long as it remains in the hands of the vendee or has not passed from him to an innocent party for a new and valuable consideration. *Hackett* v. *Callender*, 32 Vt. 97; *Poor* v. *Woodburn*, 25 Vt., 234; *Field, Morris & Co.* v. *Stearns*, 42 Vt., 106; 6 C. J. 294, sec. 554; *Westervelt* v. *Hagge*, 61 Neb. 647; 2 R. C. L. 857; Freeman on Judgments, sec. 357.

The sale to Charles J. Clukey being fraudulent, he held only the naked legal title in trust for the creditors of the Fox Ranch Co. The attachment of the real estate by the Pepperell Trust Co. was subject to the prior equities of the creditors of the Fox Ranch Co. The trustee in bankruptcy, therefore, is entitled to have a release of the attachment of the Pepperell Trust Co.

Appeal of Pepperell Trust Co. dismissed. Appeal of Waterville Savings Bank sustained with costs. Decree below to be modified to conform to the opinion.

MARY M. TAYLOR'S CASE

Oxford. Opinion December 10, 1927.

In the Workmen's Compensation Act the words "Arising out of" mean that there must be some casual connection between the conditions under which the employee worked and the injury which he received; and the words "In the course of" refer to time, place and circumstances under which the accident occurs. The accident must have been due to a risk to which the injured person was exposed because employed and while employed by his employer. Both elements must appear and the burden of proof rests upon the claimant to prove all the facts necessary to establish a right to compensation under the act.

In this case the burden was upon the petitioner to show that the injured man, when leaving the premises and starting to cross the street, was in prosecution of a duty incumbent upon him by reason of his employment. In other words the petitioner must show that the injury arose out of some casual connection between the employment and the accident which caused the injury. This petitioner failed to do.

On appeal. Petition of Mary M. Taylor as alleged dependent widow of William A. Taylor, an employee of the Dunton Lumber Company of Rumford as a night watchman, who, soon after beginning his work at 5 P. M. on May 5, 1926, while walking in making his rounds in the discharge of his duties on the side of a public way adjacent to the property of employer, stopped and spoke to a man on the other side of the road and stepped toward the person spoken to and was struck by an automobile, sustaining fatal injuries. Compensation was granted and respondents entered an appeal. Appeal sustained. Decree below reversed.

The case fully appears in the opinion.

Reginald H. Harris and William Flanagan, for petitioner.

Eben F. Littlefield and William B. Mahoney, for respondents.

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

PHILBROOK, J. This is a Workmen's Compensation Case arising from the accidental death of William A. Taylor while an employee of the Dunton Lumber Company. It is admitted that the death was caused by accidental injuries, and it is also admitted that the petitioner is the dependent widow of the deceased, but the employer and its insurance carrier, appealing from the decree sustaining the award of compensation, claim that the reported case is utterly devoid of any evidence to prove that the fatal injury arose out of and in the course of Taylor's employment, and that there is no evidence from which a reasonable and rational inference can be drawn to sustain the award of compensation.

This court has held that the great weight of authority sustains the view that the words "arising out of" mean that there must be some casual connection between the conditions under which the employee worked and the injury which he received; and that the words "in the course of" refer to time, place and cirumstances under which the accident occurs. *Westman's Case,* 118 Me. 133. In other words, it must have been due to a risk to which the deceased was exposed while employed and because employed by the employer. Both elements must appear, and in the hearing before the commission the burden of proof rests upon the claimant to prove the facts necessary to establish a right to compensation under a Workmen's Compensasation Act. *Mailman's Case,* 118 Me. 172.

For four years prior to the accident Taylor had been employed by the Dunton Lumber Company as night watchman. He began work at five o'clock in the afternoon and his duties ended at six o'clock of the following morning when the mill engineer came upon the premises.

The property of the Lumber Company upon which the duties of Mr. Taylor were to be performed was located on the easterly side of a certain highway known as Prospect Avenue, and was approximately 1600 feet long on said avenue. Taylor's duties as watchman required him to patrol practically all of the premises occupied by the Lumber Company. It appears that a certain portion of the lumber yard lying adjacent to the avenue was wet and marshy, and that it was customary, in passing from one point to another on the avenue side of the property, for Taylor to walk along on the edge of the highway. On the day of the accident, while performing his custom-

ary rounds of the mill property, Taylor was walking on the avenue side of the same. Seeing a fellow-employee on the opposite side of the street he called the latter by name and took a step toward him. Whether warned by sight or sound of an approaching automobile he stepped back but was struck by the car and received the injury from which he died eight hours later.

The accident occurred about quarter past five in the afternoon, and the time clock which he was obliged to carry showed that he had performed his five o'clock punching for that afternoon.

This so-called avenue is a county road four rods in actual width. The traveled portion is a state road having a tarvia top about eighteen feet in width with shoulders on each side which are about two or three feet in width. The lumber company's buildings apparently occupy a portion of the land which is included within the four rod strip laid out as a county road.

In view of these facts the defendants claim that Taylor had left the property of his employer and started across the street on a venture of his own, not shown to be in any way connected with his employment, and that he was not in the course of his employment.

As we have already observed, the expression "in the course" of employment refers to time, place and circumstances, under which the accident occurs. Since Taylor's work began at five o'clock in the afternoon, and the accident occurred only about fifteen minutes later, during which time he had punched the watchman's clock, there should be no hesitation in saying that the accident occurred within the time of his employment.

But time of the accident alone does not settle the question of right to compensation. Place and circumstances are also essential elements. In *Paulauskis Case*, 126 Maine, 32, it is said that an accident occurring upon a public way, when the employee is prosecuting no duty incumbent upon him by reason of his employment, is not compensable because not arising out of his employment, and not occurring in the course of his employment. In the instant case, while walking upon the side of the street where automobile travel might not threaten safety, and in so walking was in the performance of duty required of him, Taylor might be in a place and under circumstances which would satisfy the requirements of law. But the evidence, instead of proving these facts, plainly shows that he had started to

cross the street, and it utterly fails to show that the crossing was in the prosecution of any duty incumbent upon him by reason of his employment. The rule is so familiar as to require no citation of authorities, that the petitioner in a compensation case must prove all the necessary elements of his case.

In *Saucier's Case,* 122 Maine, 325, an employee, leaving the factory in which she was working, voluntarily went twenty-one feet out of her way to an exhaust fan and put her hand up in front of it to see whether any air was coming into the room from it. Her hand was drawn into the fan and as a result she lost the thumb and index finger of her left hand and a part of the wrist bones. No part of her work required her to be at or near the fan. It was held that she was not doing anything connected with the business for which she was employed and she was denied compensation.

Citations might be made *ad infinitum.* The British Court in *Herbert* v. *Fox,* (1916) A. C. 405, referring to the mass of decisions turning upon nice distinctions, and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion, said "From their number counsel can, in most cases, cite what seems to be an authority for resolving in his favor, on whichever side he may be, the question in dispute." We hold that under the peculiar conditions of the instant case, and the utter failure of the petitioner to prove that her husband started to cross the highway on business connected with his employment, the accident did not occur at a place and under circumstances which would entitle her to compensation.

Nor can we say that the injury arose out of the employment. There is no causal connection, shown by the petitioner to exist, between the employment and the accident which caused the injury. Failure on the part of the petitioner to show such connection, or to prove facts from which a reasonable deduction in that behalf might be drawn, is fatal. The claimant must go further than simply to show a state of facts which is as equally consistent with no right to compensation as it is with such right. Surmise, conjecture, guess or speculation are not sufficient to sustain the burden and justify a finding in behalf of the claimant. *Westman's Case,* supra.

Appeal sustained.
Decree below reversed.

EMILE DIONNE

vs.

WEST PARIS BUILDING ASSOCIATION, ET ALS.

Oxford. Opinion December 14, 1927.

The language "excavate earth, stone, rubbish, and all other materials" in a building contract is not broad enough to cover blasting and removing ledge.

Where it appears that a finding of fact by the sitting Justice on which final decree was based was contrary to the evidence, an appeal in equity must be sustained.

On appeal. A bill in equity to enforce a lien on a building owned by the West Paris Manufacturing Association, consolidated with another bill brought by the Chalmers Lumber Company against Emile Dionne, et als, to enforce a lien on the same building. The sitting Justice found against the complainant in the first bill and in favor of the complainant in the second bill, and Emile Dionne, complainant in the first bill, took an appeal. Appeal sustained with costs. Decree below to be modified to accord with opinion.

The case fully appears in the opinion.

Herbert E. Holmes, for Emile Dionne.

Walter L. Gray and Harry Manser, for West Paris Building Association.

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

WILSON, C. J. A bill in equity brought by the plaintiff to enforce a lien on a building owned by the West Paris Manufacturing Ass., with which a bill brought by the Chalmers Lumber Co. against Emile Dionne, et als, to enforce a lien on the same building was consolidated.

The sitting Justice below found that the Chalmers Lumber Co. was entitled to a lien for an unpaid balance of its account for materials furnished Dionne. Under the bill brought by Dionne, the only dispute was with reference to two items or claims: one for blasting and removing ledge in excavating for the cellar, and the second for fuel used in heating the building to enable the work to be carried on during the winter months after the date stipulated in the contract for its completion, the delay in completion being chiefly caused, according to the plaintiff, by an alleged failure on the part of the owner to comply with the terms of the contract in installing the heating plant which was essential to the prosecution of the plaintiff's work of construction.

The sitting Justice disallowed both items, and from his decree the plaintiff, Emile Dionne, appealed. The decree below held that even if the removal of the ledge was not covered by the contract, the parties agreed upon an adjustment of the dispute between them as to whether it was covered by the contract or the plaintiff was entitled to an extra compensation for his work; and that the plaintiff had failed to show that any breach of the contract by the owner was the cause of the delay in the completion of the building and for this reason denied the claim for fuel supplied in heating the building after the date stipulated in the contract for its completion.

We adopt the finding of the sitting Justice as to the claim for heating. The plaintiff failed to sustain the burden of showing that the delay in completion of the building was due to any fault of the owner or failure to comply with the terms of the contract on its part.

As to the claim for blasting and removing the ledge, the clause of the contract covering it reads as follows:

> "Excavate the earth, stone, old foundations, rubbish and all other materials according to the area of the plans of sufficient depth to build all walls, piers, foundations, etc."

We think the above provision is not broad enough to cover blasting and removing ledge. The word "stone" according to its ordinary use covers small pieces of rock or one of moderate size. Webster's Dic. Large masses are usually described as rock or ledge.

To excavate is to hollow out or make a cavity by digging or scooping, and unless there is something in the contract or written instrument to indicate a broader use of the term, it does not include blasting and removing rock or ledge. See title, Words and Phrases; *Hellwig* v. *Blumenberg et al*, 7 N. Y. S. 746. The use of the general term and "all other materials" adds nothing. According to the familiar rule of construction of *ejusdem generis*, this phrase should be construed only as applying to "other materials" of a similar nature to those already specifically mentioned.

We are unable to find evidence in the record sufficient to sustain the finding of the sitting Justice that there was an adjustment of the dispute between the parties as to the construction of the clause of the contract.

As soon as the ledge was uncovered, the plaintiff made his claim for extra compensation. A conference was had with defendant's building committee. The plaintiff informed the committee of the cost of removal. The committee denied its liability, it is true, but it was finally qualified with the provision that if they were liable they would pay. A proposal by the committee was made, as they testify, to help out the plaintiff, and as he says, to lessen their expense; that the building be raised one foot and the depth of the cellar be reduced six inches, which reduced the amount of blasting required by eighteen inches. That this was not accepted by the parties as an adjustment of their dispute is clearly indicated, we think, by the fact that after this change in the plans was made by the committee, the plaintiff informed them that the cost of blasting and removing the ledge would then be $2100, and the committee, while the work was going on, kept account of the time and men engaged in the work, as they said, to protect themselves in case suit was brought. That the change in elevating the building one foot required five sets of steps outside for which the plaintiff charged nothing is accounted for by the fact that by the change he was saved the construction of six inches of concrete wall in building the foundations and has little weight as against the plaintiff's notice to defendant's committee of the cost after the change in the elevation was made, and the committee's acts in keeping account of the time and expense of doing the blasting. It is clear, we think, that parties arrived at no settlement of their dis-

pute, but the contractor went ahead, leaving it to be later determined as to his claim.

On this account the appeal must be sustained. The evidence, however, falls far short of sustaining any such a charge as $1708 for doing the work. After the change in depth of the excavation was made, the highest estimate of any part of the depth of ledge requiring removal was thirty inches, and its area obviously from the plaintiff's own testimony and exhibit did not cover more than one-half of the superficial area of the excavation. The entire excavation for the cellar and foundation walls totaled about fifteen hundred cubic yards.

The plaintiff now claims the ledge removed was over four hundred cubic yards, or more than one-fourth of the entire excavation. The architect estimated the rock taken out as about one hundred cubic yards. Assuming, as the evidence indicates, that it covered no more than half the superficial area of the cellar and at its highest point did not exceed thirty inches in depth or had an average depth of fifteen inches, the rock removed would not exceed one hundred and thirty-five yards, and even if at all points was of the full depth of thirty inches, the volume would not exceed two hundred and seventy yards.

In the light of the architect's testimony, we think the former figures are nearer the actual facts and with an allowance for the saving of the removal of an equal amount of earth which the plaintiff testified was worth one dollar per yard we find that five hundred dollars is ample to compensate the plaintiff for the work of blasting and removing the ledge. This is corroborated by the evidence as to the time and expense incurred. The drilling machine and men cost fifty-five dollars per day according to the plaintiff and were engaged five days. According to the evidence of the defendant there were four other men engaged eight days removing and disposing of the rock; and according to the plaintiff eight or ten men. In either case, having in mind the saving on earth excavation to the amount of the number of yards of rock removed, five hundred dollars is ample compensation for this work, and for this amount the plaintiff may recover and have his lien.

Appeal sustained with costs. Decree below to be modified to accord with opinion.

SHERMAN F. PIPER *vs.* WILLIAM M. DANIELS

Androscoggin. Opinion December 16, 1927.

A judgment against a principal is res adjudicata as to an agent of the principal for the same cause of action.

Where the action against the principal has been disposed of by a nonsuit, it will not constitute a bar in an action against his agent for the same cause.

A plaintiff can recover only secundum allegata. Under a declaration alleging damages for diverting the waters of a brook by building two culverts, a plaintiff can not recover for damages caused by digging a trench upon his land when by his own testimony the damages complained of were caused solely by digging the trench.

When the point is raised at the trial at nisi prius that the declaration is not broad enough to cover the acts from which it is claimed the injuries flowed, the case can not be treated before the Appellate Court as though an amendment had been made, but must be determined according to the well established rules of pleading and proof.

On exceptions. An action to recover damages for alleged diversion of natural water courses resulting in overflowing and injuring lands of plaintiff. Plaintiff excepted to directed verdict for defendant.

The case sufficiently appears in the opinion.

Nicolaus Harithas, for plaintiff.

Tascus Atwood, for defendant.

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

WILSON, C. J. An action on the case to recover damages for alleged diversion of two natural water courses so that the lands of the plaintiff were overflowed and injured. At the close of the defendant's testimony, the Court directed a verdict for the defendant. The case comes up on plaintiff's exceptions to this order.

The declaration, which contains two counts, sets forth in the first count that the diversion of one stream was caused by narrowing the

span between two abutments of a bridge, and in the second count that the diversion of the second stream was caused by constructing two culverts across or under two intersecting highways in such a manner that the lower one emptied onto the land of the plaintiff to his damage.

There is no dispute but that at one time prior to 1915 a bridge existed over the first and larger stream, the span of which was twelve or fourteen feet between the abutments, that it was in 1915 destroyed in a freshet and a new bridge built by the town of Minot with only a span of three and one-half feet.

An action was then brought by the plaintiff against the town on the ground that by narrowing the span a cattle pass between two parts of plaintiff's pasture was obstructed, and a settlement was reached by which the selectmen of the town, in its behalf, agreed to reconstruct the abutments with a span of five feet and of sufficient height to permit cattle and horses to pass through.

This was evidently done. In 1916, one of the abutments appears to have been washed out, and in 1917 by order of the selectmen of the town the abutments were again rebuilt by the defendant.

In 1918, the plaintiff brought an action against the town of Minot for failing to construct the cattle pass in accordance with the agreement entered into in 1915, in which action a jury found for the town.

The damages resulting to the plaintiff set forth in the case at bar with reference to the diversion of the stream flowing under this bridge are alleged to have resulted from the abutments being placed nearer together than they had previously been, so that the water flowed through them with greater depth and force than formerly; but having failed in his action against the town for alleged failure to construct the abutments to this bridge according to the agreement entered into in 1915, he can not now recover of its agent, who did the work, for any damages resulting therefrom by reason of the width of the span as here alleged. *Emery* v. *Fowler*, 39 Me., 326; *Atkinson* v. *White*, 60 Me., 396, 398.

The plaintiff in 1919 brought an action against the town upon a declaration of the same tenor as in the instant case and was nonsuited by order of Court, but it was neither pleaded as a bar to this action against the defendant as agent, not would it constitute a bar

having been disposed of by a non-suit. *Holman* v. *Lewis*, 107 Me., 28.

We must, therefore, consider the second count upon the record in this case. The declaration in the second count sets forth that a culvert was installed "across the easterly end of the old Highway at a point where it enters the New Highway and thereby * * diverted a brook; * * and at the southerly end of said culvert another culvert at right angles to the culvert was constructed and placed under the New Road * * * with the westerly end of the last mentioned culvert emptying onto the land of the plaintiff."

The record, however, as to the allegations in the second count is so vague and confused that it is not clear whether or not as to this count the plaintiff was aggrieved by the Court's ruling. Apparently the parties at the trial had a plan or chalk from which or with reference to which the witnesses were testifying, but no plan was introduced in the case, and the record itself conveys no clear idea of what the facts were on which the plaintiff relies.

As near as can be ascertained from the record, a small brook originally flowed across the so-called "Old Highway" and near or in the locus of the "New Highway" and after the construction of the "New Highway" flowed along a ditch on the easterly side of the New Highway to the larger stream at the upper side of the bridge mentioned in the first count.

In June, 1917, the defendant by direction of the road commissioner of the town of Minot put a new culvert under the "Old Highway" and another culvert across the "New Highway," so-called, thus conveying the water of the brook under the "New Highway" to the westerly side thereof. Whether it would then have made its way in the ditch along the easterly side of the way to the larger stream below the bridge and cattle pass, so-called, or would have overflowed the defendant's land is not entirely clear, except as it must be inferred from the plaintiff's reply to a question as to whether the water flowing through the culvert went onto the plaintiff's land differently than formerly, his answer was:

> "By cutting a channel. It couldn't possibly go unless he cut the channel."

The real grievance the plaintiff has against the defendant appears to be that to ensure carrying off of the water so that it would not

overflow and wash out the road, the defendant dug a trench through the plaintiff's land for sixty feet, thus conducting the water of the stream across his land for a distance and then overflowing it, causing the damage he claims in this action. His declaration, however, is not grounded on the invasion of his land by the digging of this trench.

While either the road commissioner or the defendant might be liable in damage for digging a trench through the plaintiff's land, *Plummer* v. *Sturtevant*, 32 Me., 325, or for constructing culverts which diverted the waters of a natural stream upon his land, it does not appear from the record in this case that the construction of the culverts contributed to the plaintiff's damage or would have caused him any damage if the trench had not been dug.

The plaintiff in his declaration alleges damages from the diversion of a stream by the installing of the culverts. He must recover, if at all, *secundum allegata.*

So far as can be determined from the record, there was no evidence upon which a verdict could fairly rest that the injuries suffered by the plaintiff were caused by the installing of the culverts alone, or in other words, that if the trench had not been dug, the waters flowing through the culverts could not have been taken care of by ordinary ditches beside the road until they reached the larger stream below. If the facts are otherwise, the record sent up to this Court does not disclose it.

The objection that the plaintiff could not recover under his declaration for injuries resulting from the digging of the trench was fairly raised below by the counsel for defendant in the course of the trial, so that the case does not fall within the rule laid down in *Clapp* v. *Cumberland Co. P. & Lt. Co.*, 121 Me., 356, if an amendment were permissible.

Upon the record before this Court, the order of the Court below directing a verdict for the defendant appears to have been justified.

Exceptions overruled.

BERT W. BEMIS *vs.* DAVID BRADLEY.

Oxford. Oponion December 17, 1927.

A boundary line may, under certain circumstances, be permanently and irrevocably established by parol agreement of adjoining owners, and a line so agreed upon by the parties in interest and occupied to for more than twenty years is conclusive.

When the principle of estoppel applies a shorter period may be sufficient.

A line established by agreement of parties, at or near the time of making the conveyance, may be conclusive, although the occupation be for less than twenty years, as proving the intent of the parties to the conveyance.

An agreement fixing a boundary line under the belief that it is the true line, when in fact it is not, is not binding and may be set aside by either party when the mistake is discovered unless some principle of estoppel prevents.

In the instant case, defendant having failed to establish a line by agreement within the required limitations and plaintiff having sustained the burden of establishing the true line, the plaintiff prevails.

Rents and profits not being specifically claimed in the declaration are not considered in this decision.

On report. A real action to determine the dividing line between adjoining lots, one being owned by plaintiff and the other by defendant who claimed his line to have been established by agreement. At the conclusion of the evidence by agreement the cause was reported to the Law Court. Judgment for the plaintiff.

The case appears fully in the opinion.

Albert J. Stearns and Elias Smith, for plaintiff.

Hastings and Son, for defendant.

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

PATTANGALL, J. Real action. On report. Plaintiff is the owner of the western portion of Lot No. 5 in the Town of Stowe. Defend-

ant is the owner of the eastern portion of the same lot. The dispute is as to the dividing line between them, the disputed territory including an area of between four and five acres.

Plaintiff claims the division line as one beginning at a point on the southerly side line of Lot No. 5, one hundred fifty-four (154) rods westerly of the town line dividing Stowe from Lovell, which is also the east line of No. 5, and running northerly fifty-four and two-tenths (54.2) rods to the north line of the lot. All of the land east of the line and embraced in the area of Lot No. 5 is conceded to belong to the defendant.

Defendant claims that the division line begins at a point on the south line of Lot No. 5, fourteen and four-tenths (14.4) rods westerly of the point of beginning claimed by the plaintiff, then running northerly fifty-four and two-tenths (54.2) rods to the north line of the lot, terminating at a point fifteen and six-tenths (15.6) rods west of the line claimed by the plaintiff.

The title of both parties comes from a common source. Lot No. 5 was originally owned by Ann A. Barrows. In 1843, she conveyed to Eli Whitney "fifty acres off the east end of Lot No. 5." The land thus acquired by Whitney was conveyed through a series of owners, by the same description, until the title finally came to this defendant, in 1902. In 1854, Ann A. Barrows conveyed to Ithiel E. Clay the portion of Lot No. 5 not already sold to Whitney, and through a series of conveyance title to this property was finally acquired by the plaintiff, in 1920.

Plaintiff bases his claim to the division line above referred to on an actual survey made recently, the line thus marked inclosing an area of slightly more than fifty acres. There is evidence of spotted trees which indicates that, at some former time, a division line was run on this location. This evidence consists of a spotted post or stump on the south line of Lot No. 5, the spots being described by the surveyor as very old; an old spotted beech stump about twelve rods northerly therefrom; another spotted beech stump about ten feet farther north; a spotted beech about thirty rods still farther north, located four feet east of the line; and a spotted hemlock tree at the northerly terminus of the line. The surveyor testified that if this line was accepted as the east line of the defendant's lot, it would inclose an area of between fifty and fifty-one acres. A computation

of the inclosed area, however, using the measurements given, appears to indicate a fraction over fifty-two acres.

Defendant claims a line based on the proposition that in April, 1906, the then owner of the plaintiff's land and this defendant located a line by agreement, nearly parallel with the line claimed by the plaintiff and westerly therefrom a sufficient distance to include between four and five acres in addition to the land conceded him by plaintiff.

It is a familiar and well settled principle of law that a boundary line may, under certain circumstances, be permanently and irrevocably established by parol agreement of adjoining owners.

In *Ames* v. *Hilton*, 70 Me. 36, our court defined certain limitations within which a line may be so established: "It is only where there are two or more monuments upon the face of the earth, each of which answers to the call of the deed, that proof of the one erected by the parties will govern; or where the parties running a line as of a certain course or distance and then making a deed calling for a line of the same course or distance, intending it as the line run; or where the deed conveys a part of a lot by a line which shall embrace a certain quantity and the parties have run and marked the line as embracing the quantity called for; and in cases similar in principle."

It is also well settled that a line agreed upon by the parties in interest and occupied to for more than twenty years is conclusive. *May* v. *Labbe*, 114 Me. 379. The early case of *Moody* v. *Nichols*, 16 Me. 23, states the rule to be "that the parties may agree upon a line of boundary and when they have so agreed and the possession is in accordance with it, such boundary, after an acquiescence for so long a time as to give title by disseizin, will not be disturbed."

Emery v. *Fowler*, 38 Me. 102, is authority for the further proposition that "Whether monuments are erected upon the face of the earth by the mutual agreement of parties, and a deed is given intended to conform thereto, or whether they are subsequently erected by them with intent to conform to a deed already given, those monuments must control, notwithstanding they may embrace more or less land than is mentioned in the deed." This case is quoted in *Knowles* v. *Toothaker*, 58 Me. 174, as extending the doctrine of *Moody* v. *Nichols* to cases where possession had not been long enough to give title by disseizin, and the opinion further states that "When a line described

in a deed as running from a given point, is soon afterwards located and marked upon the face of the earth by the parties, and thereafterwards the line thus established is recognized and treated by them as the true line, it is conclusive upon the parties and their assigns, although it be subsequently ascertained that it varies from the one given in the deed."

Moody v. *Nichols* and *Knowles* v. *Toothaker*, supra, rest, however, upon the theory that the acts of the parties evidence the intent of the conveyance. When doubt exists as to a dividing line between adjacent owners, the contemporaneous and subsequent acts of the parties, in establishing or recognizing a line as the line intended by the deed, are admissible and of probative force. *Borneman* v. *Milliken*, 123 Me. 488. But, this situation is not before us. The line claimed by defendant was first surveyed in 1906. The conveyance from Barrows to Whitney, the original setting off of defendant's land from the remainder of Lot No. 5, was in 1843. The intention of the parties to this early deed cannot be interpreted by the acts of their respective successors in title sixty-three years afterwards.

Plaintiff argues that the line claimed by defendant, even if established by agreement in August 1906, would not be binding upon the then owners or their grantees until twenty years had passed, and that his action having been brought in April, 1926, the necessary time had not elapsed to cause the agreeement as to the line to become conclusive.

Authorities are at odds as to whether or not occupation up to an agreed line must be for the period required in cases of adverse possession in order that the line so agreed upon may be conclusive.

It has been stated as a general rule that acquiescence in a boundary line between contiguous owners, fixed by agreement, need not be for the full statutory period required to establish disseizin, but that such acquiescence for a reasonable period short of that time may be decisive as to the rights of the parties or their successors. 4 R. C. L. 129; 8 Ann. Cas. 85, note; *Riley* v. *Griffin* (G.A.) 60 Am. Dec. 726, and note; 110 Am. St. Rep. 686, note; 22 Am. St. Rep. 35, note; 83 Am. St. Rep. 793, note; 16 Ann. Cas. 150, note. But this view of the law is not universally accepted, and we do not find any case in which

our court has concurred in it. The precise question has apparently not been definitely decided here. In *Abbott* v. *Abbott,* 51 Me. 584, our court, noticing a division of authorities on the point, said, "In some of the states, such an agreement is held to be binding and conclusive at once on the ground of estoppel. This doctrine is questioned in other states, but it seems to be everywhere conceded that exclusive possession under such an agreement for twenty years or long enough to bar an entry will establish a title in the possessor, by disseizin, if not by estoppel."

In *Proctor* v. *Libby,* 110 Me. 39, the court held that when a line is located and marked upon the face of the earth by the parties, and thereafterwards the line thus established is recognized and treated by them as the true line, it is conclusive upon the parties or their assigns. And again, in *Ilsley* v. *Kelley,* 113 Me. 503, "The owners of adjoining land may agree to a division line and that agreement be binding upon them and those claiming under them." It will be noticed that in neither of these cases was there any discussion as to the length of time of occupation necessary to make such an agreement effective.

In *May* v. *Labbe,* 114 Me. 379, a position not in accord with the majority rule is indicated. In this case, the court said, "The title does not pass to the occupier on either side by agreement, for that would controvert the Statute of Conveyances. It passes by disseizin. Each party claims and possesses to the agreed line adversely to the other, because of the agreement." But the case was decided on other grounds.

The majority rule is based on the theory of estoppel, not on adverse possession, and our court has not, as yet, authoritatively discussed the distinction or decided the question.

We are not called upon to decide it here. The line claimed by the defendant cannot in any event be regarded as a conventional or agreed boundary because, measured by another standard altogether, it fails to fill the requirements necessary to such a line.

An agreement fixing a boundary line under the belief that it is the true line, when in fact it is not, is not binding and may be set aside by either party when the mistake is discovered, unless some principle of estoppel prevents it, as where the rights of innocent third parties have intervened. 4 R. C. L. 131.

The mere making of declarations and admissions as to position of boundary lines, when made in good faith and by mistake and in ignorance of the true location of the line, does not work an estoppel. *Brewer* v. *Railroad Corporation*, 5 Metc. 478.

The weight of authority is that where the intention was to establish the line according to the true boundary, and by mistake the parties agreed upon a line which does not conform to such a boundary, the line so agreed on is not conclusive, and the agreement may be set aside by either party. 9 C. J. 238.

If a dividing line is settled by parol agreement and actual location between the owners of adjoining tracts of land, such location will be received as strong evidence of the line thus established, though it is not conclusive to prevent either party from showing that it was settled erroneously. *Gove* v. *Richardson*, 4 Me. 327. Many authorities can be quoted in support of this rule.

A careful analysis of the evidence relating to the marking of the line claimed by the defendant, leads to the conclusion that Mrs. Kneeland, the predecessor in title to the plaintiff, and this defendant, were not at that time endeavoring to establish a line by agreement, but were endeavoring to ascertain and mark their division line as they then understood it to be. They had both assumed, from information which they had received, that a pine stump marked the northeast corner of Mrs. Kneeland's lot; and assuming that fact, they ran a line from this stump to the south line of Lot No. 5 on a course which was inteded to parallel the eastern and western lines of the original lot. Having done this, they set up a corner on the south line of the lot and marked a division line connecting the termini thus established. They apparently agreed, not that this line *should be* the dividing line between their properties, but that it *had been* such dividing line. In other words, they were not attempting to establish a line by agreement, but to reproduce an original line.

The dispute between the parties, therefore, narrows down to the question of whether the line claimed by the plaintiff, or the line claimed by the defendant is the true division line between them. There is no evidence supporting the defendant's line as the true line, excepting the testimony that Mrs. Kneeland, during her ownership, of the land now owned by the plaintiff, and this defendant had both been told that the pine stump, which is the northerly terminus of the

defendant's line, marked their corner. The source of this information is not given, nor were there any marks on the pine stump to assist in identifying it as a corner, nor was there anything on the face of the earth to indicate that there ever had been a division line between the two lots, running south from the pine stump; and the line so run would inclose an area of approximately fifty-seven acres, rather than the fifty acres set off in the original deed from Barrows to Whitney.

On the other hand, the line contended for by the plaintiff gives to the defendant a somewhat larger acreage than that demanded in his deed, and is substantiated by markings on the face of the earth, consistent with an old line, and as distinct and connected as one would expect to find in cut-over land. It may fairly be said that on the question of which of the two lines is the true division line between the lots, the preponderance of the evidence lies with the plaintiff, and the burden of proof is sustained. The only alternative to accepting plaintiff's line as the correct line would be to disregard entirely the evidence relating to both lines, and set off exactly fifty acres to the defendant in accordance with the original grant; in which event, he would receive somewhat less land than that which the plaintiff concedes to him.

Rents and profits are not considered in this decision. They were not claimed in the writ. *Pierce* v. *Strickland,* 25 Me. 440; *Larrabee* v. *Lambert,* 36 Me. 440; *Rollins* v. *Blackden,* 112 Me. 464; *Lowe v. Brown,* 123 Me. 398.

Judgment for plaintiff.

CLARENCE NEALLUS *vs.* HUTCHINSON AMUSEMENT COMPANY

Cumberland. Opinion December 22, 1927

A police officer, whose appointment is secured by and whose services are paid by a person or corporation, acts sometimes as an officer and sometimes as a servant of such person or corporation.

Whether in a particular case the doer of the act complained of was at the time acting in his official capacity or within the scope of his employment as a servant or employee is ordinarily a question of fact for the jury.

In the instant case, if, at the time of the asault, the officer was making an arrest for the commission of a crime, he was acting as a police officer and the defendant would not be responsible although he used excessive force in so doing. If he was not so acting but was discharging his duties of protecting the business of the defendant and of maintaining order upon the premises and did so in a negligent or wanton manner the defendant was liable.

On exceptions and motion. An action of tort against the proprietor of a moving picture theatre by a patron for an alleged assault upon him by a special police officer claimed by the plaintiff to have been an employee of the defendant at the time of the assault.

To a refusal to direct a verdict for defendant exceptions were taken and after a verdict for plaintiff was rendered a general motion for a new trial was filed. Exceptions and motion overruled.

The case is sufficiently stated in the opinion.

John J. Devine, for plaintiff.

Herbert J. Welch and Edward J. Harrigan, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DUNN, STURGIS, BASSETT, JJ., MORRILL, A. R. J.

BASSETT, J. Case against the proprietor of a moving picture theatre by a patron for an alleged assault upon him by a special police

officer alleged to be an employee of the defendant. Plea general issue with brief statement that the officer was in the act of placing the plaintiff under arrest and, being assaulted by him, used only the force necessary for self defence.

At the close of the evidence a motion by the defendant for a directed verdict was denied. Verdict of $110 for the plaintiff. The case comes up on exceptions to the refusal to direct a verdict and upon general motion for new trial.

The fundamental question of the case is whether there was evidence which would warrant a finding that one Benson, who was appointed a special policeman at the defendant's theatre at its request and whose services were paid by it, was acting as its agent or employee at the time of the alleged assault.

To answer this question we must first determine, and it has not been hitherto by this court, what is the status of such a police officer and to what extent is the person or corporation, who so secures his appointment and pays for his services, liable for his acts.

The decisions hold generally that such officers act sometimes as officers and sometimes as servants of the person employing them; that they are not, although paid for all their services by the persons at whose instance they are appointed, servants of such persons in respect to all the acts they perform by virtue of their offices but only in respect to services rendered to those persons, such as protecting and preserving their property or maintaining order on their premises; that the line of distinction, sometimes hard to recognize under the circumstances of a given case, marks the point at which the act ceases to be one of service to the employer and becomes one of vindication of public right and justice, of the apprehension or punishment of a wrong doer, not for the injury done to the employer but to the public at large; that to make the employer liable he must have directed the injurious and wrongful act to be done, not necessarily in express terms but by implied authority or direction from him to the officer to do the act; in other words, if the act done was within the scope of the duty imposed upon the officer by his contract of service in favor of the employer, the employer is responsible. *McKain* v. *Baltimore, etc., R. R. Co.* 65 W. Va. 233 (1909); 64 S. E. 18; 131 A. S. R. 964; 17 Ann. Cas. 634 and note; 23 L. R. A. (N. S.) 289 and note. *Layne* v. *Chesapeake & O. Ry. Co.* 66 W. Va. 607 (1910); 67 S. E.

1103; 30 L. R. A. (N. S.) 483 note. *Deck* v. *Baltimore & O. R. R. Co.* 100 Md. 168 (1905) 108 A. S. R. 394; 59 Atl. 650; *Foster* v. *Grand Rapids Ry. Co.* 140 Mich. 689 (1905); 104 N. W. 380. *Dickson* v. *Waldron* 135 Ind. 507 (1893); 34 N. E. 483; 35 N. E. 1; 24 L. R. A. 483; 41 A. S. R. 440. *Taylor* v. *New York & L. B. R. Co.* 80 N. J. L. 282 (1910); 78 A. 169; 39 L. R. A. (N. S.) 122; *Rice* v. *Harrington* 38 R. I. 47 (1915); 94 A. 736.

"The weight of modern opinion is that where private persons, with the consent of the state, employ its police officers to represent them, and to do special work for them in protecting and preserving their property and maintaining order on their premises, and such officers are engaged in the performance of their duties to their employers and are acting within the scope of their powers and duties, they become and are the servants and employees of such private persons and for negligent and wanton acts committed by them in the line of their duty, and when engaged in the performance of such duties, to the injury of others, their masters or employers are liable." 18 R. C. L. Sec. 246, p. 786; Ann. Cas. 1913 D 112 note; *Kusnir* v. *Pressed Steel Car Co.*, 201 Fed. 146, 150, (1913).

The fact of being a police officer does not prevent his being employed. *Hirst* v. *Fitchburg & L. St. Ry.*, 196 Mass. 354 (1907).

A peace officer may undertake to act in a capacity which in law constitutes civil agency, endeavoring to aid an aggrieved or molested citizen in obtaining or defending his rights and in the event of a subsequent disorder or breach of the peace assume and exercise the duties incidental to his official character. *Jardine* v. *Cornell*, 50 N. J. L. 485 (1888); 14 A. 590; Ann. Cas. 1913 D. 112.

The question whether in a particular case the doer of the act complained of was at the time acting in his official capacity or within the scope of his employment as a servant or employee is ordinarily a question of fact for the determination of the jury. *Sharp* v. *Erie R. Co.* 184 N. Y. 100 (1906); 76 N. E. 923; 6 A. & E Ann Cas. 250; *Tyson* v. *Bauland Co.* 186 N. Y. 397 (1906); 79 N. E. 3; *Perkins Bros. Co.* v. *Anderson* 155 S. W. 556 (Tex. 1913). *Deck* v. *Baltimore & O. R. R. Co.* supra. *Layne* v. *C. & O. Ry. Co.* supra, 17 Ann. Cas. 639. note. Ann. Cas. 1913 D. 114 note. *Buman* v. *Michigan Cent. R. Co.* 168 Mich. 651 (1912); 134 N. W. 972.

It may, however, so clearly appear that the officer was acting only in his capacity as an officer, *Tolchester Beach Improvement Co.* v. *Steinmeier* 72 Md. 313 (1890); 20 Atl. 188; 23 L. R. A. (N. S.) 290 note; *Jardine* v. *Cornell* supra, *Healey* v. *Lothrop* 171 Mass. 263, or beyond the limits of any express or implied authority derived from or of any duty owed to the employer, *Pennsylvania R. R. Co.* v. *Kelley* 177 Fed. 189 (1910); 30 L. R. A. (N. S.) 481, that no conclusion, other than that the officer was not acting in his capacity as an employee, could reasonably be drawn, or the only reasonable conclusion may be that he was acting not as an officer but as employee, *Heggen* v. *Fort Dodge R. Co.* 150 Ia. 313 (1911) 130 N. W. 148, and consequently there is no issue for the jury.

The plaintiff has the burden of showing the express or implied authority of the officer to perform the injurious act for and on behalf of the defendant. *Layne* v. *C. and O. Ry. Co.* supra.

We turn now, for the application of the foregoing principles to the instant case.

The defendant conducted a moving picture theatre known as the Portland Theatre. George B. Gordon was the manager. Benson had been employed about a year at the time of the alleged assault on March 4, 1924. He had been, upon the written request of the defendant, appointed by the City Council of Portland special policeman at the Portland Theatre. The council made similar appointments for other theatres. His services were paid by the defendant and by the week. These services were, as testified by him, in the morning cleaning up about the theatre; on one morning a week distributing in shops and stores advertising posters; usually in afternoons, when the ticket taker was off duty, taking tickets; in the evening he put on his uniform and was stationed in the balcony and ordinarily the only one there; he did not show patrons to seats, they found their own. Two flights of stairs led on the right and left from the lobby or orchestra floor to the balcony and into a passage way, which circled around behind the balcony seats and the moving picture booth in the center of the theatre and from which two aisles led down to the front of the balcony for patrons to reach the seats. Benson testified "after I put on my uniform at night I go up stairs and see that they keep the peace up there." There were these questions and answers: "What are your duties at the Portland Theatre when you

are working there?" "Special officer." "What else do you do up there?" "Nothing only preserve order and see that nobody fires paper or causes disturbance." "Your duties as such special officer were what?" "To keep order, to keep the aisles clear on account of the fire rules and keep quietness."

As a public officer, Benson was a peace officer. Rev. Stats. Chap. 85, Sec. 58; *Quimby* v. *Adams* 1 Me. 332. The defendant claimed that the employment of a special officer for duty at its theatre was not optional with the defendant but required by ordinances of the city. But there was no evidence of such ordinances and judicial notice cannot be taken of city ordinances by this court; 15 R. C. L. Sec. 16, 1077.

As a peace officer, Benson's sole duty was to preserve the public peace and to arrest those who were engaged in a breach thereof, *Foster* v. *Grand Rapids Ry. Co.* supra; *Rucker* v. *Barker* 151 S. W. 871 (Tex. 1912).

As an employee, his duty was to protect the defendant's property and to maintain order upon the premises.

"It was necessary to the business of the defendant that he should so conduct his resort as to make it attractive to his patrons. This required him to restrain some who might be rude and boisterous and thus prevent the annoyance of others. Many acts which are not criminal but are offences against good manners and good order, the defendant would be justified in restraining and with authority could declare he would not permit such conduct on his premises. But such acts would not thereby become misdemeanors for which the police constables in his employ could arrest an offender as for the commission of a crime. It was in furtherance of this policy that the defendant employed Henry and his associates. In many ways it is apparent that it would be of advantage to the defendant to employ men who were police constables; but while they were thus employed, they were his servants and he was responsible for their acts in the course of their employment. It would also be of advantage to the defendant to have upon his premises and in his employ some person or persons with legal authority to make an arrest if a crime should be committed on his grounds. Insofar as such servants made an arrest for the commission of a crime they were acting as police constables; but when they were patrolling his grounds and his buildings restrain-

ing the boisterousness or the rudeness of his patrons and regulating good order among them, such employees were acting as his agents and not as police officers." *Rice* v. *Harrington*, supra.

It appears from the evidence that the plaintiff, Neallus and a companion, Brown, came to the theatre about eight in the evening, when the pictures were on, purchased tickets for the first or orchestra floor, but instead of entering went up the right stairway leading from the orchestra lobby into the balcony. The plaintiff stated they did so because he wished to speak to a man whom he saw going into the balcony. The ticket taker, Bailey, who was stationed in the orchestra lobby, stated that he asked them why they were going up stairs, to which the plaintiff replied, "Just for the fun of it," and he told them if they went up, to stay. Neallus and Brown stepped out into the passageway in the balcony which has been described, and stood there. Near them, also standing in the passageway and leaning against the rail between the passageway and the seats, was the wife of Benson. As to what was said and done in the balcony, the witnesses were Neallus, Brown, Benson and his wife.

According to Neallus and Brown, Benson came over to them and told them they must secure seats, of which, admittedly, there was ample supply; they told him they had seats down stairs, were looking for a man, and, as soon as they saw him, would go below. Benson said, "All right" and moved away and Neallus made a remark about him which Mrs. Benson overheard; she at once charged them with calling him a foul name, which they denied. Benson came back and his wife told him what he had been called and he at once told them to go out and began to push and drive them down stairs, using his club; they reached the orchestra floor, Brown having jumped ahead, and they then turned down the stairs leading from the orchestra floor to the theatre entrance; they remonstrated with Manager Gordon, who, with Bailey, the ticket taker and also a special police officer, was standing near the door into the orchestra, and wanted to know why they were being put out and he told them to keep on; that as the plaintiff began to descend the entrance stairs, Benson reached down and struck him a hard blow with his club on the back of the head.

According to Mrs. Benson, Neallus and Brown were noisy as they came in, had their hats on and blocked the aisle; Benson came over

and requested them to stand aside; they said they had tickets for down stairs and he told them to go down stairs, and one of them defied him to make him go down; as Benson moved away to go down the aisle, the plaintiff called him the foul name "and made him so mad he came back and said, 'You fellows have come up here for a fight, isn't you?'" Both of them seized him and struck him; he grabbed his club which they tried to take; Brown rushed ahead but the plaintiff and Benson struggled down the balcony stairs to the top of the entrance stairs where the plaintiff kicked Benson, who thereupon struck him, and the plaintiff went down the stairs.

According to Benson the two stood with hats on in the passageway blocking it and he asked them to step aside; they were noisy and he told them to keep quiet; he moved away and they said something to his wife; he came back, as they were still in the aisle and his wife told him what they had said, "My wife told me what they told her and they was arguing with her and I ordered them out of the theatre. They asked me who I thought I was and took hold of me and shoved me up against the wall. I was going to take them down stairs to arrest them because they refused to go out of the theatre. I ordered them out of the theatre; they refused to do it; they absolutely refused to go out. So they took hold of me, shoved me up against the wall, still holding on to me. I struggled with them till I got them down stairs. Never used no club. Never took no club out of my pocket, nor even offered to attempt to strike them. As I got them down stairs, the office stairs, these two fellows who had hold of me, fired me over against the stair, and this Neallus turned around and kicked me in the intestines and I gave it to him, I gave him one whack. That was on the stairway going down towards the street."

Gordon and Bailey stated that Benson was pushing and pulling along the two, who were resisting Benson in ordering them out and that one of them asked Gordon what he was being put out for and Gordon replied, "I have nothing to do with it. Go on."

One witness, called by the plaintiff, a stranger to him at the time and apparently disinterested, was coming into the theatre with his little boy and was part way up the entrance stairs when Neallus and Brown appeared. He stated they had just come around the corner of the orchestra corridor to come down the entrance stairs, were together, when an officer in uniform also came around the corner; "it

seems as though he hung on the corner and walloped him like that (indicating) and then dodged out of sight and I didn't see him from that time on."

Without process Benson could not have arrested Neallus unless he had been guilty of a breach of the peace in his presence. *Caffinni* v. *Hermann,* 112 Me. 282.

There was evidence from which the jury might have found that the plaintiff had, as said in *Harrington* v. *Rice* supra, "disturbed the good order of the place and had done one of the things which the defendant had employed (Benson) to prevent and suppress." A more difficult question would be whether the plaintiff committed an offense "against the law for which he could be arrested or detained for a longer time than was necessary to eject him" from the theatre. The jury might have so found.

Did Benson arrest the plaintiff? He did not so inform the plaintiff or Brown and they testified they were not arrested that evening or after. Benson's testimony varied. On his direct examination he said, "I was going to take them down stairs to arrest them because they refused to go out of the theatre." In cross examination he said, "I placed him (Neallus) under arrest up stairs and was taking him down stairs when he pulled me over there." Neallus testified that after the blow and he reached the foot of the entrance stairs he directed a boy to go up to the square and "get me a police officer." Shortly after, an officer, Newell, came in. Neither Benson, Gordon or Bailey sent for him or summoned police or the police wagon. Bailey told Newell the men were under arrest and to take them out. He did not do so. Neallus and Brown, at Newell's suggestion as they state, went to the police station to have the wound on plaintiff's head treated. Newell did not detain them and no proceedings were begun by Benson or Gordon.

On the evidence which was conflicting, even as between Mr. and Mrs. Benson, and Gordon and Bailey, the jury might have found that Benson had not arrested the plaintiff, if he would have been justified in so doing, and that what he intended to do and, so far as he could do, did, was to order the two to leave the theatre and forcibly to eject them upon their refusal to go.

If Benson was at the time of the assault making an arrest for the commission of a crime, he was acting as a police officer and the de-

fendant would not be responsible, although he used excessive force in so doing.

If he was not so acting but had been employed to protect the business of the defendant and to maintain order on the premises and he was at the time discharging the duties of such employment but did so in a negligent or wanton manner the defendant was liable.

These were questions of fact for the determination of the jury. There was ample evidence from which they could find that Benson acted not as an officer but as employee and within the scope of his employment and the defendant was liable.

There was also evidence from which the jury could have found that the defendant approved Benson's acts, because its manager was present, saw what was being done, had full knowledge of the ejectment and in the midst of it directed the plaintiff, who asked him why, to keep on going. In reply, however, to the question "Didn't it concern you whether one of the patrons was being put out?" he answered, "Not a bit."

The presiding justice therefore rightfully submitted the case to the jury. The exception is not sustained.

The motion raises the same questions that were raised by the exception and is determined by the disposition of the exceptions.

No question as to the amount of the damages found by the jury is raised by the defendant.

The mandate must therefore be

Exceptions and motion overruled.

BELLE AUSTIN

vs.

MAINE FARMERS MUTUAL FIRE INSURANCE COMPANY.

Somerset. Opinion December 27, 1927.

If a plaintiff in an action on a policy of fire insurance falsely and knowingly inserts in his sworn proof of loss, any articles as burned which were not burned, or knowingly puts such a false and excessive valuation on single articles or on the whole property as displays a reckless disregard of truth, he cannot recover.

In such an action if the defendant alleges fraud the burden is upon him to prove it.

In this case the owner was miles away, the property quite properly in the charge of her husband, and nothing but inference is incorporated in the testimony to prove the fraudulent and criminal act charged against the owner.

The question of the existence of a criminal intent on the part of the owner, of negligence, and the degree thereof were peculiarly questions for the jury and the verdict is sustained.

On general motion for a new trial. An action of assumpsit on a fire insurance policy. Defendant pleaded the general issue and under a brief statement alleged that plaintiff's proofs of loss contained fraudulent statements, and that the fire was set by the plaintiff or through her procurement. Verdict for plaintiff. General motion for new trial filed. Motion overruled.

The case fully appears in the opinion.

Harry R. Coolidge and J. H. Haley, for plaintiff.

L. A. Jack and Arthur J. Dunton, for defendant.

SITTING: PHILBROOK, DEASY, STURGIS, BARNES, BASSETT, JJ.

BARNES, J. Farm buildings, consisting of a story and a half house with ell, containing six rooms and hall on the ground floor, with one finished room above, a barn the dimensions of which are not given,

tho the "tie-up" is described as about 36 feet long, four hen houses, each 8 or 9 feet square, and a shop, seven by nine feet, together with certain house furniture and furnishings valued at $72.00, insured by the defendant, were destroyed by fire on Nov. 29, 1925.

The amount of insurance on the buildings was $1250.00, and on the contents of the house $300.00, wholly with the defendant.

The policy is of the Maine Standard form, and at the time of the fire all premiums due had been paid.

Suit was brought by the owner and occupant; a verdict rendered for $1322.22, and the defendant brings the case up on the general motion for a new trial.

The fire was discovered between the hours of six and seven o'clock in the morning of a day when the only tenants were plaintiff's husband and sons, the boys said to be deer hunting, the plaintiff then and for a few weeks theretofore living temporarily in the village of Hartland, seven miles distant from the insured property with her daughters, that they might attend school.

Defences argued on appeal were:—

1. "The proofs of loss furnished to the defendant by the plaintiff under the requirements of her policy and under the law, are fraudulent in that they contain a gross and fraudulent over-valuation of certain items of property which were destroyed by fire, and being so fraudulent, render said policy void.

2. The actual cash value of the property insured by the plaintiff's policy at the time immediately preceding said fire was less than the amount for which said property was insured by said policy, and by the terms of said policy plaintiff could recover only three-fourths of said value in any event.

3. The fire which caused the loss complained of in the plaintiff's writ and declaration was set by the plaintiff or through her procurement.

4. The damages are excessive."

Discussion of defendant's claims under all but the third reason for appeal may proceed as though they were included in one.

The only testimony in support of the action was that of the plaintiff herself, who had lived on this farm and in the house now destroyed for eleven years.

She testified that she paid for the farm, in accordance with a contract made in 1914, the sum of $1300.00; that she had made repairs and additions to the barn and house with an outlay of $250.00 and much labor on the part of her husband and herself.

In the proof of loss she declared the house to be worth $2000.00, the barn $800.00, the four hen houses, and the shop $40.00. These buildings were entirely destroyed.

Of the insured furniture and furnishings, articles which she specified as burned were stated by her to have been worth $72.00.

Among the latter were two chamber sets, valued at $10.00 each, which she testified were stored by her, before she went to Hartland, in the upper part of the house.

Part of the chamber sets were two wire springs, and because a witness testified that no remains of bed springs were found by him in the residue in the cellar, after the fire, defendant claims over-valuation of the chamber sets. As to the other articles of personal property, for the loss of which claim is made, defendant raises no issue.

If, for purposes of illustration, we assume that the proof of loss was received by the defendant on Feb. 20, 1926; verdict April 8, 1927, and that the jury considered the loss of $72.00 on the personal property as proven, the amount found by the jury as indemnity for loss on the buildings would be $1187.04, they having thereby found the actual cash value of the buildings to be $1582.72. We find in the record certain express testimony on which they must have based their findings.

They had the testimony of the plaintiff, a farmer's wife, who may have had not much experience in valuing farm buildings, nor much education, but who coveted education for her daughters, as the evidence shows. She testified that the hen houses and shop were worth $140.00, and that the replacement value of the house, ell and barn was $2750.00.

Two witnesses for the defendant, assessors of the town, testified that a fair valuation of the buildings was $700.00, or "right around $700.00."

With this testimony the jury set the value called for in the contract of insurance at approximately $1582.72, and, regardless of what might be the individual opinions of members of this Court, if we

were attempting to arrive at such value, after having heard the evidence, we cannot say, on this point, that their verdict is wrong.

In the proof of loss plaintiff had set the "whole value" of the buildings destroyed as $2940.00. Was this such gross and fraudulent over-valuation as to render the policy void?

She testified that the figures set out in the proof of loss as the value of the buildings destroyed was her idea of their replacement value.

"It is a firmly established legal doctrine that if a plaintiff in an action on a policy of fire insurance falsely and knowingly inserts in his sworn proof of loss, any articles as burned which were not burned, or knowingly puts such a false and excessive valuation on single articles or on the whole property as displays a reckless disregard of truth, he cannot recover. His own fraudulent act prohibits it." *Pottle* vs. *Insurance Co.*, 108 Me., 401.

But, not every statement in a proof of loss which is proven to be false is such a false statement as to render the policy void. "Replacement value alone is not sufficient evidence of false swearing." *Hilton* vs. *Phoenix Assurance Co.*, 92 Me., 272.

"A false answer as to any matter of fact material to the inquiry, knowingly and wilfully made, with intent to deceive the insurer, would be fraudulent. If it accomplished its result, it would be a fraud effected; if it failed, it would be a fraud attempted. And if the matter were material and the statement false, to the knowledge of the party making it, and wilfully made, the intention to deceive the insurer would be necessarily implied, for the law presumes every man to intend the natural consequences of his acts." *Claflin* vs. *Commonwealth Insurance Co.*, 110 U. S., 81, 85.

To effect avoidance of a policy of insurance, statements of the insured as to a material matter must be known by him to be false, and be wilfully so made.

"To avoid the policies, it must be shown that the statements in the proofs of loss were knowingly and intentionally untrue." *Cole* vs. *Insurance Co.*, 113 Me., 512. "Mistaken and honest over-valuation is not fatal to recovery." *Archibald* vs. *Fire Insurance Co.*, 117 Me. 205.

"It is settled law in this state that if the insured, knowingly and purposely makes false statements on oath in his proofs of loss in relation to the amount or value of the goods destroyed, the policy is

thereby voided. Erroneous estimates and innocent mistakes are not a cause of forfeiture." *Hanscom* vs. *Insurance Co.*, 90 Me., 333, 350.

The law, as given by the Justice before whom *Linscott* vs. *Insurance Co.* (88 Me. 497) was tried, is still the law upon this point, namely, "If a man attempt to defraud the company by reason of false swearing, then by our statute he has forfeited his whole claim. If he is blameless in these particulars, but although inaccurate, although he has made misstatements that are not chargeable to his dishonesty, not chargeable to his falsehood, not chargeable to his desire and determination to cheat and defraud and deceive, but are mere mistakes of either judgment or memory, then, gentlemen, you will deal with the witness accordingly."

Whether the statements of the plaintiff in her proof of loss, as to value of buildings or other property, were known to her to be false, and were willfully and dishonestly so falsely made were questions for the jury. *Archibald* vs. *Insurance Co.*, supra, *Hilton* vs. *Phoenix Assurance Co.*, supra.

By their verdict the jury have said that no such statements have been made as should forfeit the policy, and there is not evidence enough to the contrary to justify interference by this Court.

As to the value which the jury placed upon the chamber sets when considering whether or no the springs were burned, they may have decided that the father and sons were using these springs on their beds downstairs, or may have valued the chamber sets at $10.00 each without the springs. Again they may have deducted something for the value of the springs. We have no information how they arrived at the sum total of value of the separate articles or the several buildings, but we assume they did not set a higher value than three-fourths of $72.00 for the personal property burned.

Considering now the third defence;—The fire "was set by the plaintiff or through her procurement."

The burden is on the defendant, alleging such fraud, to prove it. The evidence is clear that the occupancy and control over the lost property was that of a husband in the home of his wife. What the near neighbors saw of the portions of the buildings in combustion, when aroused by the husband's call for help, and the quarter from

which the wind was then blowing is all the evidence in the record upon this point.

Cases decided in other jurisdictions, where the facts are somewhat similar to those detailed here, throw light on the law applicable. "The policy on a dwelling house was issued to Foster (mortgagee) and Baumhard (mortgagor); loss, if any payable to Thomas J. Foster as his interest may appear. It was contended that the evidence tended to prove that the building was burned by Baumhard. Held: The insurance "was payable to Foster, and he alone could recover upon it, and if it was true that Baumhard caused the building to be burned, without the knowledge or assent of Foster, Foster's rights could not be affected by the unlawful acts of Baumhard." *Westchester Fire Insurance Co.* vs. *Foster*, 90 Ill., 121.

Evidence in another case was produced that a son of plaintiff was in charge of the burned store as plaintiff's agent and employee; that on the evening before the fire the son built in the stove of said store a fire composed of combustible timbers, which was calculated to increase the danger of fire to said building, and that when the attention of the son was called to this likelihood of causing fire in the store, he said, "I don't care; let her go to hell."

Held: "It was not alleged that the (Insured) ordered or directed the stove to be filled with combustible material at night, or that he ever had any knowledge or notice that it had been done.

Under no theory of law or justice is he chargeable with the alleged wrongful act of his son." *Malin* vs. *Merchantile Town Mutual Insurance Co.* 180 S. W. 56.

As to the liability of defendant for the negligent acts of the insured and her husband, the law seems to be well settled. Story, J., in the *Columbia Insurance Co.* vs. *Lawrence*, 10 Peters, 507, remarks: "In relation to insurance against fire on land, the doctrine seems to have prevailed, for a great length of time that they cover losses occasioned by the mere faults and negligence of the assured and his servants, unaffected by any fraud or design", (citing authorities).

It has been held that this rule will not excuse extreme, reckless and inexcusable negligence on the part of the assured, the consequence of which must have been palpably obvious to him at the time. *Mickey* vs. *Burlington Insurance Co.* 35 Iowa, 174, 14 Am. Rep., 494.

Testimony as to gross negligence and carelessness, and gross misconduct, of the plaintiff in an action to recover on an insurance policy, is admissible. *Chandler* vs. *Worcester Mutual Fire Insurance Co.* 3 Cush. 328.

And there is some discussion of the effect of gross negligence on the part of the owner of burned property in the case, *Bouchard* vs. *Dirigo Mutual Fire Insurance Co.*, 114 Me., 361.

But in the case at bar the owner was miles away, the property quite properly in the charge of her husband and nothing but inference is incorporated in the testimony to prove the fraudulent and criminal act charged against the owner.

A clear statement of the principles of law applicable to the state of facts in the case on trial must have been given by the learned justice who presided at the trial, for no exceptions were taken; the question of the existence of a criminal intent on the part of the owner, of negligence, and the degree thereof were peculiarly questions for the jury, and our conclusion is that their verdict is sustained.

Motion overruled.

STATE *vs.* ARCHIE B. SHORTWELL

Lincoln. Opinion January 2, 1928.

A ruling on a question of remoteness of time not exceptional error in absence of abuse of discretion.

An exception to the introduction of evidence may be waived by the introduction of defensive testimony.

In this case, when the government closed its evidence in chief, the respondent made an oral motion for the peremptory direction of a verdict in his favor, apparently challenging that any of the adduced evidence tended to establish his guilt, but

the respondent did not rest his own case. The motion was not granted. It was addressed to judicial discretion, and the refusal of the trial judge to grant the motion on less than the entire evidence is not subject to exception.

The ground for the next exception is the assertion that the case should not have been submitted to the jury in the absence of evidence tending to prove: (a) that the place described in the indictment had been habitually and commonly used by the respondent for the illegal sale or keeping of intoxicating liquor; (b) that, within statutory meaning, the place had been one of resort.

If, during any part of the time comprised within the days of the indictment, the respondent's place were habitually used for the illegal sale, or, if it were a place of resort where intoxicating liquors were kept, sold, given away, drank, or dispensed illegally, it were a common nuisance.

The case was not one of absolutely no evidence of the crime charged, but of conflicting evidence, and of the conflicting evidence the jurors were the sole judges.

On exceptions. Respondent was found guilty on an indictment for maintaining a liquor nuisance and reserved an exception to the refusal of the presiding justice to direct a verdict in his favor, and excepted to the admission of certain testimony, and also excepted to certain parts of the charge.

Exceptions overruled. Judgment for the State.

The case is fully stated in the opinion.

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

George W. Heselton and Edward W. Bridgham, for the respondent.

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

DUNN, J. The respondent pleaded not guilty to a liquor nuisance indictment (R. S., Chap. 23, Sec. 1), found against him in Lincoln county, at the Supreme Judicial Court in October 1926, and was put upon his trial. The jury convicted him. He has exceptions to the admission of evidence of a former conviction, to the refusal to direct a verdict in his favor, and to instructions.

As bearing on the question, whether certain cider were had by the respondent with intent to sell it for tippling purposes, or as a beverage, the State was permitted against objection to show that, eleven months before, in consequence of his dealing with other cider on the same premises described in the indictment, and within the period covered by it, the respondent had been convicted and punished for

violation of the liquor law. On exception the point of the remoteness of time was saved. If any other point were reserved, it has not been advanced, and is considered as waived.

When the government closed its evidence in chief the respondent made an oral motion for the peremptory direction of a verdict in his favor, apparently challenging that any of the adduced evidence tended to establish his guilt, but the respondent did not rest his own case.

On the overruling of the motion for the direction of a verdict, the defendant introduced evidence to support his grounds of defense, and the trial proceeded to the conclusion of the evidence on both sides, whereupon the respondent rested his case without renewing his motion.

After the counsel had argued, the Justice having the control and conduct of the cause, submitted to the jury under instructions respecting the subject of statutory nuisance: (1) Whether the place described in the indictment had been habitually and commonly used by the respondent for the illegal sale or keeping of intoxicating liquor? (2) Whether, within the meaning of the statute, that place had been one of resort? Total failure of evidence of guilt on the part of the respondent, if not as to both these matters, plainly as to the latter, is the predicate for exception.

First, for decision, is the exception to the evidence of the former conviction.

The Justice presiding at the trial ruled that the offered evidence was not too remote in point of time, and it is not to be said that he wrongly exercised discretion. *State* v. *O'Toole*, 118 Maine 314. The situation was not without resemblance to that in *State* v. *Welch*, 64 N. H. 525, where, on an indictment for the illegal sale of cider, the prosecution introduced evidence in reference to the fact of sales in the year next preceding the indictment. "It was competent," says the opinion, "to prove that the respondent kept cider for sale; that he was in the business."

Next, the exception to the refusal of the motion for the direction of a verdict, presents.

Where, in a criminal prosecution, at the close of the government's evidence, the respondent rests his case on such evidence and moves for a verdict in his favor, a case may be presented in which the refusal to direct a verdict for the respondent will be good ground of

exception. *State* v. *Cady*, 82 Maine 426; *State* v. *Donahue*, 125 Maine 516.

But a motion by the respondent for the direction of a verdict of not guilty, made when the government closes in chief, and without the respondent resting his case upon the evidence of the government, is addressed to judicial discretion, and the refusal of the presiding judge to grant the motion on less than the entire evidence is not subject to exception. *State* v. *Cady*, 82 Maine 426; *State* v. *Donahue*, 125 Maine 516.

On the civil side, such is the general rule. 26 R. C. L. 1082; *Columbia, etc., R. Co.* v. *Hawthorne*, 144 U. S. 202, 36 Law ed., 405; *Weatherbee* v. *Potter*, 99 Mass. 354. And this accords with common practice in criminal cases.

A motion to nonsuit is unknown in a criminal case. Although some material allegation of the indictment lacks support in the evidence, or the supporting evidence is so loose and indeterminate that a verdict rested on it could not withstand attack, still a nonsuit may not be moved. And a respondent cannot move a nolle prosequi, this being for the prosecution.

Inasmuch, therefore, as a respondent may not have any alleged failure of the prosecution considered expeditiously on motion for nonsuit, or on motion to nolle, he may consistently, when the prosecution rests, and before introducing evidence in his own behalf, motion for the direction of an acquittal. Not so to motion, and have his motion require a ruling as a matter of right, because the right to a ruling attaches only when the whole evidence is in, but so to motion within the discretion of the sitting judge.

There is still another reason why the exception cannot be sustained. The exception was waived by the introduction of defensive testimony. *McGregory* v. *Prescott*, 5 Cush. 67; *Wild* v. *Boston & Maine Railroad*, 171 Mass. 245; *Latremouille* v. *Bennington, etc., R. Co.*, 63 Vt. 386; *Oates* v. *Union R. Co.*, 27 R. I., 499. The rule applies to criminal as well as to civil cases. *Burnett* v. *State*, 62 N. J. L. 510; *State* v. *Piscioneri* (W. Va.) 69 S. E. 375; *Leyer* v. *United States*, 183 Fed. 102.

And now the exception noted last.

If during any part of the time comprised within the days of the indictment the respondent's place were habitually used for the illegal

sale, or the illegal keeping, of intoxicating liquor, or, if it were a place of resort where intoxicating liquors were kept, sold, given away, drank, or dispensed illegally, it were a common nuisance. R. S., supra.

The printed case has, to speak but generally of the showing against the respondent, the evidence of a sale of cider to an automobile party in the nighttime; evidence of three bottles, one containing alcohol, one a mixture of alcohol and cider, and the third filled to the full with liquor of a kind not specified, all found hidden in a box in a pile of rubbish near the garage on the respondent's place; evidence of a full barrel of cider and of one half-full, horsed on an old sled by the powder house in the woods, the open bung in one barrel covered by a piece of wood, and both barrels covered by bagging; evidence of a pail and the funnel and other things there at hand; the evidence of the paths through the woods; the evidence, going to intent only, of the former conviction; the evidence of the empty container, of the barrels filled with vinegar, and of the upturned and fauceted hogshead, from which came but the dregs of cider; the container and the barrels and the hogshead, one and all, in the cellar of the respondent's dwelling house.

The case was not one of absolutely no evidence of the crime charged, but of conflicting evidence, and of the conflicting evidence the jurors were the sole judges.

From the circumstances attending a single act of an illegal keeping or selling, it has been remarked, a jury may be justified in finding a custom or habit of keeping or selling. *State* v. *Gastonquay*, 118 Maine 31. Whether the respondent habitually kept or sold intoxicating liquor was a jury question.

And within the province of the jury it was, on the evidence of the single transaction with the automobile party, in connection with all the other evidence, and the inferences from the circumstances, to say whether, as the indictment alleged, the respondent's place had been, in customary practice, one of resort.

The case was clearly, concisely, and accurately submitted to the jury, and the jury justified in returning the verdict of guilty.

Exceptions overruled.
Judgment for the State.

HARRY F. GRANT

vs.

AMERICAN RAILWAY EXPRESS COMPANY.

Hancock. Opinion January 2, 1928.

In an action against a common carrier alleging negligence, ordinarily where non-delivery of a shipment is proved, a prima facie case is supported by a presumption of causative fault; not so, however, when the loss resulted from an event, liability for which is excluded by a valid stipulation in the contract for carriage.

In this case it is apparent that the inherent nature or propensity of the dog, the consequence of her vitality, her irrepressible instinct to escape from bondage, or, as some of the decided cases say, "her proper vice," freed the animal; no negligence of the carrier contributing. The contract of transportation exempts the carrier from loss so arising.

Although the defendant is not liable for the escape from the crate, is liability shown afterwards? Negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent person would do or omit to do in such circumstances. Measured by this standard, no fact proved, nor inference legitimately to be drawn, ascribes the loss of the dog to any neglect or fault of the defendant. For the want of such evidence the plaintiff's case must fail.

On report. An action against a common carrier to recover the value of a dog delivered to it for transportation, which escaped from the possession of defendant and was killed by an automobile. At the conclusion of the evidence the case was reported to the Law Court. Judgment for defendant.

The case fully appears in the opinion.

Fellows & Fellows, for plaintiff.

Ryder & Simpson, for defendant.

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

DUNN, J. This action comes here on report by the nisi prius justice with the assent of the parties for decision on the legally admissible evidence. R. S., Chap. 82, Sec. 46.

Harry F. Grant, a breeder of dogs, seeks to recover from the American Railway Express Company, a common carrier, damages for the loss in transit of his brood bitch, the interstate carriage whereof that company had undertaken for hire.

The declaration is in tort. There are two counts. One differs essentially from the other only in alleging that notice and filing of the plaintiff's claim for damages were timely, and that the present action was seasonably begun. The first count is for full common-law liability. The second, by its allegations respecting preliminary notice and the beginning of suit, impliedly recognizes the Interstate Commerce Act, an enactment by the Congress of the United States. 24 U. S. Stat. L., 379, and acts amendatory; Code Title 49. Both counts contemplate liability through want of care and diligence of the carrier's antecedent duty to transport safely and deliver the property intrusted to its care. Defendant pleads the general issue.

The case being up on report, the underlying proposition, whether liability be established, may have consideration directly. *Folsom* v. *Smith*, 113 Maine, 83.

Falling within that class wherein the jurisdiction of the Congress is exclusive, the controversy must be decided by Federal law. *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 57 Law ed. 314. Our State rules, thus to designate those of the forum, may have no other office than to regulate the evidence and the procedure. *Cincinnati, N. O. & P. R. Co.* v. *Rankin*, 241 U. S., 319, 60 Law ed. 1022; *Continental P. B. Co.* v. *Maine C. R. Co.*, 115 Maine 449.

There is small conflict in the evidence. On November 20, 1925, plaintiff took his bitch to the receiving office of the defendant in Bucksport, Maine. The dog was inclosed in a double-lathed crate. The plaintiff says, in evidence, that the crate, which was originally well made, had been used by him without mishap to ship singly three or four other dogs, as the agent knew, and that it was in fit condition for shipping this dog.

At the express, though the shipper may not have stated that the crate was secure, he so implied. The plaintiff testifies that the agent, on looking at the crate, agreed that it appeared to be "all right." If the crate were insecure, apparently the agent was unaware of it, and any doubt he might have had plaintiff's attitude dispelled.

The crated dog was accepted for continuous carriage over the defendant's route on connecting railroads to Reading, Massachusetts.

Testimony by the plaintiff portraits, what his counsel argue was equivalent to the plaintiff's saying, that responsibility for the shipment should be coextensive with the measure of responsibility at common law. For this, the plaintiff, it is urged, stood prepared to pay. But, counsel continue, on being told in effect by the agent, that the express company would not become a quasi insurer, and that shipment might be on contract limiting the carrier's liability, but not assuming to exempt the carrier from loss or injury resulting from its own negligence, or not at all, the plaintiff, thus denied option or opportunity to ship as he would, coercively shipped as he did.

It is in testimony by the plaintiff that he asked to have his dog insured for $250. Concededly this was the dog's real worth. The agent, on the stand, gives it as his impression that the subject of insurance was mentioned. Again, he testifies that the shipper wanted $250. in case of loss, "and, as far as we knew in our office, we did that."

From the carrier's schedule of rates and classifications, which had been filed with the Interstate Commerce Commission, approved by that tribunal, and published and posted, the agent determined the shipment rate with reference to the declared value, and informed the shipper the amount. The shipper paid the expressage. He signed, and the carrier's agent in its behalf signed also, that document which defendant has put in evidence as the contract for transportation. The counterpart was issued to the shipper for the bill of lading.

The signed document provides that the carrier shall not be liable for loss arising from the nature or propensities of the animal, and requires, precedently to the recovery of damages, that the plaintiff make proof of the carrier's negligence.

Insistence is that, whether that which purports to be a contract, is a contract, must be determined from the facts and circumstances

surrounding its execution. Not that counsel for the plaintiff would essay to contradict or explain unambiguous written terms, but they rely on evidence advanced as tending to show that plaintiff never freely and fairly assented to the terms. Argument is that, as the plaintiff was not permitted to ship as he desired, his signature is, in legal view, no signature.

On a different record the argument might be apropos, but in this case it falls short. No rate for transporting property of the kind tendered by the plaintiff, on the basis of virtual insurance against all acts which result from human agency, although occurring without any fault or neglect upon the carrier's part, appears to have been approved by the Interstate Commerce Commission. A contract at variance with an approved tariff would have been invalid. *Chicago & A. R. Co.* v. *Kirby*, 225 U. S. 155, 56 Law ed. 1033.

Interstate shipments are controlled by Federal statutes. *Adams Express Co.* v. *Croninger*, supra. Under the congressional Act to Regulate Commerce, as amended, common carriers of commerce among the states must file with the Interstate Commission schedules of all rates or tariffs. Until the rates are filed and approved the carrier may not carry or convey from a point in one state to a point in another. When the carrier may transport the duly filed and approved rate is, for all shipments of like character, the only lawful rate. *Chicago & A. R. Co.* v. *Kirby*, supra; *Southern R. Co.* v. *Prescott*, 240 U. S. 632, 60 Law ed. 836; *Georgia, F. & A. R. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 60 Law ed. 948. Deviation therefrom there may not be, because deviation would be violative of equality and uniformity, and deny all shippers similarly situated that like treatment, which the interstate statute requires. *Chicago & A. R. Co.* v. *Kirby*, supra; *Southern R. Co.* v. *Prescott*, supra; *Georgia, F. & A. R. Co.* v. *Blish Milling Co.*, supra; *Boston & M. R. Co.* v. *Hooker*, 233 U. S., 97, 58 Law ed., 868; *Atchison, T. & S. F. R. Co.* v. *Robinson*, 233 U. S. 173, 58 Law ed. 901; *Louisville & N. R. Co.* 237 U. S. 94, 59 Law ed., 853; *Pittsburgh, C. C. & St. L. R. Co.* v. *Fink*, 250 U. S. 577, 63 Law ed., 1151.

Copies of the defendant's rate tables, and of its classification schedules, the latter certified by the Secretary of the Interstate Commerce Commission, as effective on the shipment date, are of the record. In relation to the transportation of dogs there are but two rates.

These are available only by uniform contracts limiting liability of the carrier to negligence. One rate is initial or basic. Under a contract of carriage with this rate an element fifty dollars is the limit of damages. Under the other form, the shipper may, by paying a higher rate, secure a higher recovery than the initial rate affords. Value the shipment, the shipper may as he will, and, to the value set by him, it is for the rate to be adjusted. It is competent for a carrier to have alternate rates. *Kansas City S. R. Co.* v. *Carl*, 227 U. S. 639, 57 Law ed. 683.

Defense is that this shipper, with option and opportunity to choose between the lower and higher rates, chose the higher, and declared the actual value of his dog as the basis of the carriage charge. The defense is justified. The grounds demonstrating such result are that, as the carrier might not carry at common-law liability without rates approved by the Interstate Commerce Commission, and therefore the plaintiff could ship in but one or the other of the only two ways for which there were approved rates, the plaintiff must be held to have shipped at the higher rate. When applied to facts like those in the case at bar, this, in the speech of the agent, was insurance "as far as we knew in our office." It was as nearly full common-law liability as might be in the circumstances.

Noon was the time when the shipment went forward from Bucksport, unaccompanied by the shipper or any agent of his, nor required by the shipping arrangement to be.

An hour later the quiet and unharmed dog, in the still unimpaired crate, arrived at Bangor, a junction point. Transshipment was had from the branch-line express car to the through express car, in which the crate and its content were left near an open side door. Of the two transfermen, one went into an express car ahead, the other into the express room in the station, some twelve feet away, and there remained about ten minutes.

On his way back from the room the transferman saw the dog loose on the car floor and made for her. The dog, however, jumped out of the car and dashed up the track. The man gave chase afoot. Other employees of the defendant soon joined in the chase; some of them went in an automobile. The dog was located readily. From the railroad track she turned and ran, over public streets and private lands, hither and yon, well out on the east side of the city. The dog

was seldom out of the sight of her pursuers. Attempts to coax her within reach, which the pursuers continued till the darkness of night settled, all failed. Meanwhile, the carrier had sent word through the telephone for the shipper, who, being away from home that afternoon, was advised for the first time on the following morning. Defendant advertised the loss in the newspapers, notified the police department, and warned its own drivers to keep lookout for the runaway. Next afternoon, at the opposite end of the city, a stranger's motor truck killed the dog.

That, to quote the plaintiff, the dog made her escape from the crate by "gnawing out of it," seems to be accepted by the opposite counsel as the manner in which the escape had been effected, and is reasonable inference from proved facts.

Notice and filing by the plaintiff of his claim for damages, and the institution of his action, are admitted to have been seasonable.

That the loss actually resulted from the carrier's negligence, plaintiff must prove. *Morse* v. *Canadian P. R. Co.*, 97 Maine 77. The presumption of causative fault which, in an action against a common carrier, when non-delivery of a shipment is proved, makes a prima facie case, and leaves it for the defendant to go forward with rebutting evidence, is not applicable where, as here, the evidence shows, at first sight at least, that the loss resulted from an event, liability for which is excluded by a valid stipulation in the contract for carriage. Careless or negligent conduct or other fault in fact, preponderatingly established against the carrier by the shipper, is the test of liability. *Morse* v. *Canadian P. R. Co.*, supra.

Liability on the part of the defendant, until the escape of the dog from the crate, is not, and plaintiff does not stress it to be, shown.

It would seem too clear for anything but statement that the inherent nature of the dog, the consequence of her vitality, the irrepressible instinct of the animal to escape from bondage, or, as some of the decided cases say, "her proper vice," freed the animal; no negligence of the carrier contributing.

At common law, as the mother country knows it, the vice of the beast excuses the carrier, provided the carrier has been guilty of no negligence causing the loss. *Blower* v. *Great Western R. Co.*, L. R. 7 C. P. 655. In the present case, the contract of transportation, to

recur to it again, exempts the carrier from loss arising from the nature or propensity of the animal.

Although the carrier is not liable for the escape from the crate, is liability shown afterward?

Negligence is the gist of the action. Negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit to do in such circumstances. *Charnock* v. *Texas & P. R. Co.*, 194 U. S. 432, 48 Law ed. 1057. Measured by this standard, no fact proved, nor inference legitimately to be drawn, ascribes the loss of the dog to any neglect or fault of the defendant. For the want of such evidence, the plaintiff's case must fail.

Judgment for defendant.

ABBIE M. HEARD, APPELLANT,

FROM DECREE OF JUDGE OF PROBATE.

Knox. Opinion January 4, 1928.

In an appeal from a decree of judge of probate the decree below is vacated, and the whole subject matter of the appeal comes de novo before the appellate court, but confined to such matters and questions as are contained in the reasons of appeal.

The evidence presented to the appellate court may be the same or entirely different from that presented to the court below, and the decree of the appellate court must be based on the proofs before it and cannot be based on proofs or upon the legal effects of such proofs in the court below and not before it.

On exceptions by appellant. From a decree of judge of probate disallowing an item in the account of the administratrix she entered an appeal, and in the appellate court a motion by the appellees to dismiss the appeal was granted and appellant excepted. Exceptions sustained and appeal to stand for further hearing.

The case appears in the opinion.

Z. M. Dwinal, for appellant.

Rodney I. Thompson, for appellees.

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

BASSETT, J. Exceptions to ruling of the Justice at Supreme Court of Probate sustaining motion to dismiss an appeal by an administratrix from the decree of the Judge of Probate on the allowance of the final account of the administratrix.

Abbie M. Heard, adminstratrix of the estate of Angus A. Staples, filed her second and final account in the Probate Court for Knox County. She claimed as her individual property an account in the Rockland Savings Bank which had been opened by the intestate in his lifetime in the name of "A. A. Staples or Abbie M. Heard." The Judge of Probate required her as administratrix to include this account in the inventory of the estate but she did so under protest. In her second and final account she included in the credit items a payment of $2816.80, the proceeds of this bank account, to herself individually of that amount, as being money which belonged to her. After hearing upon the account, the Judge of Probate decreed that the item be disallowed and that the administratrix account for the sum as part of the estate and distribute the same to the heirs of Angus A. Staples.

From the decree the administratrix seasonably appealed to the Supreme Court sitting as a court of probate and duly filed and served reasons for and notice of appeal.

At the following term of the Supreme Court appellees moved that the appeal be dismissed, first, "because the appellant was not an interested party within the meaning of the law who has the right of appeal"; second, "because no decree, which this court, sitting as the Supreme Court of Probate, can make, can settle the title to the property in question" and, third, "because she appeals in the capacity of administratrix and claims the property involved as donee of the intestate."

The presiding justice refused to grant the motion for the first two reasons but did grant it for the third, finding that the judge of probate had found the property belonged to the estate; that on appeal the burden was on the administratrix to prove the property belonged to her individually and that the only question raised on appeal was whether there was any evidence upon which the ruling of the judge

of probate could be sustained; that the judge, having required the inclusion of the account in the inventory of the estate, forced the administratrix into the position of an administratrix who has a private claim against the estate and in such case the judge has statutory authority (Rev. Stat. Chap. 68, Sec. 66) to make a decree; that it must be presumed, since nothing of record appeared to the contrary, that the proceedings below were in strict accord with the statute; that no record of the evidence tending to show title to the bank account in Abbie M. Heard was presented to this court and therefore, turning to the decree below, its statement "after fully considering the evidence offered" must stand. Upon these findings the presiding justice ruled that the motion to dismiss be sustained, to which ruling the appellant excepted.

We do not think the appeal should have been dismissed for the reason stated. The appeal did not raise only the question whether there was any evidence upon which the decree of the probate court could be based not did it raise that question at all. The appeal vacated the decree and brought the whole subject matter of the appeal de novo before the Supreme Court of Probate but with the appellant confined to such matters and questions as were specifically stated in the reasons of appeal. *Gilman* v. *Gilman* 53 Me. 184; *Rawley, Appellant,* 118 Me. 109; *Garland's Appeal,* 126 Me. 84, 87. A new decree was to be made by the appellate court upon the evidence presented to it, which might have been the same or entirely different from that presented to the probate court. The decree of the appellate court must be based on the proofs before it and cannot be based on proofs or upon the legal effect of such proofs in the court below and not before it.

The appeal, therefore, should stand for further hearing and the mandate should be

Exceptions sustained.

AUGUSTUS S. BURKE

vs.

FRANK LANGLOIS

FRANK LANGLOIS

vs.

AUGUSTUS S. BURKE

Somerset. Opinion January 5, 1928.

Where the results depend upon conflicting testimony, the credibility of witnesses is distinctly a question for the jury who see and hear the witnesses.

The fact that the Appellate Court from the printed record might have arrived at a different conclusion than the jury did is not sufficient ground for overturning their verdict. It must appear to be clearly wrong due to some mistake, bias, or prejudice.

In the case at bar, this Court can not say that the jury clearly did not make due allowance for the claims of the owner of the building as to bad workmanship in its special findings for allowances for completing the building in the action brought by the contractor.

On general motions. Two actions tried together, the first to recover for work performed and materials furnished under a written contract between the parties; the second to recover damages for failure to perform the conditions of the contract.

A verdict for plaintiff was rendered in the first action and defendant filed a general motion for a new trial. A verdict was rendered for plaintiff in the second action who filed a general motion. Motion in each case overruled.

The cases fully appear in the opinion.

H. E. Weeks and Merrill & Merrill, for Augustus S. Burke.

F. Harold Dubord and N. A. Marcou, for Frank Langlois.

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

WILSON, C. J. In the late fall of 1924, Augustus Burke, the plaintiff in the first action, entered into a contract with the defendant, Langlois, to repair or remodel a building belonging to Langlois. The contract provided for the raising of the building two feet, building a concrete foundation wall, laying a cement floor in the basement, putting in windows, doors and shelving, doing all the digging and grading, painting the new woodwork and building a chimney from the basement to the top, and also finishing off a tenement in the upper part of the building. It is not necessary for the purpose of this case to further specify the details of the contract.

The work on the building was not begun until about the first of November, 1924, for the reason, as Burke testified, which was not denied by Langlois, that Langlois was using the building for a store and roadside stand for tourists and did not wish his business interfered with until after the tourist traffic was over.

When the excavation was completed for the basement and the forms for the foundation walls were constructed, cold weather came on. The day on which they were prepared to run the concrete was cold, and Burke claimed that he notified Langlois it was too cold to run concrete without danger of freezing and eventually peeling. Burke further testified, and was corroborated by several witnesses, that Langlois told him to go ahead and run it. Burke also testified that before the contract was entered into he told Langlois that if he delayed doing the work until late fall, he might encounter just such conditions.

Freezing and thawing weather followed the running of the concrete into the forms, and although the forms were permitted to remain for a longer time than is customary to allow the cement to set, in course of time the walls both peeled and cracked. What caused the latter condition is not clear from the evidence, whether it was caused by the heaving of the ground due to freezing, the walls being built on clay soil and surface water flowing against the walls, or by poor material used as claimed by Langlois. The jury may have found it was due to leaving the building without heat the following winter and without proper drainage for which Burke was in no way

responsible, as the repair or building of a drain was no part of his contract.

It was conceded by Burke that the work contemplated by the contract was not completed; but that as to certain parts, namely, the completion of the basement floor, certain painting and the grading he purposely left it to be finished in the spring after the weather was warmer, as it was not advisable, and as to the grading, was impossible to complete it during the winter, and when he returned in the spring to finish it was refused admission to the premises for that purpose by Langlois.

Whereupon Burke brought his action to recover on his contract and for certain extra labor and materials furnished by him; and Langlois brought a cross action to recover for failure to complete and damages due to improper workmanship.

The cases were tried together and four questions were submitted to the jury for special findings from which a general verdict was made up, and found by the jury, of $1491.13 for Burke and $10.30 for Langlois in his cross action. From these verdicts Langlois filed a motion for a new trial in each action.

The principal ground relied upon by Langlois as warranting the setting aside of the verdicts relates to the construction of the foundation walls, although in addition thereto he contends the basement floor was improperly laid and left unfinished, that the grading and painting was incompleted, certain posts supporting the building were improperly set, and certain carpenter work improperly done and in his action claimed damages to an amount far in excess of the price originally agreed upon for doing the work.

There is no dispute between the parties as to any question of law involved. The cases appear to hinge almost entirely on the credibility of witnesses and the weight to be given to their testimony, which are, of course, distinctly jury questions.

Upon the question of the basement floor, the grading and painting, Burke admitted in the course of the trial that they were not completed and consented to having a sum sufficient to complete them deducted from his contract price, which the jury passed on as well as question of the improper setting of the posts. They were peculiarly jury questions. We can not disturb the verdicts by reason of the findings on these questions.

Neither do we think the evidence warrants a setting aside of Langlois' verdict for damages for defective workmanship or loss of goods due thereto, apart from the questions arising in connection with the foundation walls. It is quite evident that a system of drainage was necessary to carry off the water in the soil about the building and the surface water that naturally flowed down against this wall, and for this Burke was not responsible, and was under no obligation to provide against it. The jury evidently were not impressed by Langlois' claim for injury to his goods from water which may well have seemed to the jury exorbitant, and so far as any neglect of Burke was concerned, unfounded.

The chief contention arose over the construction of the foundation walls. That they peeled and cracked, Burke admitted. The photographs introduced in evidence disclosed it. It should be noted, however, that the photographs were taken just before the trial, nearly two years after the walls were built and after Langlois had had some patching done where the wall peeled, and following the winter he left the building without heat for five months and the underdrain froze up and failed to carry off the water.

Burke's insistence was that the cause of the peeling and cracking of the wall was due to Langlois' insisting that the concrete wall be run on a cold day in November against Burke's advice and judgment, and thereby Langlois assumed the liability of the effects of the weather, from which, together with the lack of suitable drainage, all the trouble with the wall arose. Langlois denied this, but Burke was corroborated by several witnesses and the jury may have believed them instead of Langlois.

Langlois, however, goes further and contends that evidence produced by him and the admission of one of Burke's witnesses, who built the wall, shows that poor gravel was used and this was responsible for the trouble, together with a failure to use steam or hot water while the cement was being prepared and run.

While the testimony of the witness who built the wall in a measure supports Langlois' contention as to the quality of the gravel and the practice of using steam or hot water in preparing the concrete in cold weather, the testimony of other witnesses, even of the men employed by Langlois to finish the mason work and patch the walls, was that the gravel was of good average quality and that the core of the wall

was strong and solid and when they had finished their work of patching it was a good substantial wall.

Burke, however, during the trial appears to have assented to the proposition that he was bound to resurface the wall and gave an estimate of the cost of resurfacing where it had peeled and of filling the cracks. Instead of the expense being included in Langlois' verdict for damages for poor workmanship, however, it was included in the questions submitted as to the expense of completing the contract. Burke estimated that the cost of properly resurfacing the foundations and remedying the damage done by the frost would be $38.50, and that the cost of completing the basement floor, the grading and painting was $70.30, which with the expense of restoring the walls totaled $108.80. The jury was asked to specially find what was due Langlois for completing the work in addition to the sum of $108.80 admitted by Burke. Their answer was $31.90.

It is impossible to tell from the record whether the additional sum was for restoring the wall alone or for other items which Langlois claimed was not completed; but from the evidence in the case, it can not be said some part or all of it was not for additional expense for resurfacing the walls.

Langlois claimed that the wall was wholly worthless and would have to be replaced; but his only witness to that effect was one who admitted that he had stated during the course of the trial that he proposed to get even in this case with the mason who built the wall, while Burke's witnesses, including the mason and tender who worked on the wall for Langlois, stated that the core appeared to be perfectly solid and only required resurfacing to make a perfectly good wall.

The jury was clearly warranted in rejecting Langlois' claim as to the entirely worthless condition of the wall, and we can not say they were not clearly warranted in finding that a good concrete wall could have been had by the additional expenditure of not exceeding sixty-eight dollars, which the deduction by the jury from Burke's contract price may have allowed for this purpose.

The jury heard the witnesses, saw the photographs and passed on the specific questions presented to them. While this Court might have arrived at different conclusions, if it could have heard and seen the witnesses, but from the record it can not say that the final results arrived at were clearly wrong and that Langlois was aggrieved.

Motion in each case overruled.

JOHN M. MITCHELL, Petitioner

vs.

DOROTHY J. LLOYD

Cumberland. Opinion January 9, 1928.

A man who, believing and relying upon a woman's representation that he is responsible for her pregnancy, marries her, cannot have the marriage annulled upon showing merely that, besides himself, another man or men had sexual relations with her at about the time of conception.

Such a representation if false and known by the woman to be false, will authorize and justify an annulment decree; not so mere doubt.

Prenuptial unchastity is not a ground for annulment of marriage especially at the suit of a man who has participated in it.

On exceptions. A petition for annulment of marriage heard by the presiding Justice, who, at the conclusion of all of the evidence, decreed that the marriage be annulled, and respondent excepted. Exceptions sustained.

The case fully appears in the opinion.

Henry C. Sullivan, for petitioner.

Harry E. Nixon, for respondent.

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

DEASY, J. Petition for Annulment of Marriage. The case was heard by the Superior Court without a jury. The justice found the facts. His findings may be thus summarized:

The respondent told the petitioner that the child with which she was then pregnant was begotten by him. He believed her assertion and relying upon it, married her. About the time of conception she

had sexual relations not only with the petitioner, but (unknown to him) also with one or more other men. She does not know who begat the child. To quote from the finding: "The facts are such that it is not possible, by human agency, to ascertain the parentage of the child." An annulment decree was granted. The respondent excepted.

A petition for annulment of marriage differs widely from an action of tort for deceit. Such an action concerns only the parties. Society has an interest in cases like this.

Moreover if annulment is decreed, the child, who may be legitimate, will be branded as a bastard and barred of inheritance, either from or through the petitioner.

But applying the rule governing recovery in ordinary actions of deceit, the petitioner fails. Though representations as known truth, of matters not known to be untrue, may be the basis of such actions, proof of their falsity must be produced before the plaintiff is entitled to judgment.

In the instant case, the falsity of the representation is not proved and cannot be proved "by human agency."

The Petitioner relies upon the case of *Jackson* vs. *Ruby*, 120 Me. 391. The soundness of that decision is not now questioned.

In his brief the petitioner's learned counsel frankly and felicitously states the distinction between the cases thus:

"In this instance the paternity of the child, pre-nuptially conceived, is, by the trial court's finding, humanly impossible of determination. In the prior case (*Jackson* vs. *Ruby*) the fatherhood of the child was definitely found to have been spurious."

The distinction is vital. Compared, these cases exemplify the wide difference between certainty and possibility; between proof and surmise.

The petitioner's contention, sustained as law, would go far toward holding antenuptial unchastity a ground of annulment, even at the suit of one who participates in it. This doctrine is condemned both by reason and authority. 9 R. C. L. 297. 33 Ann. Cas. 1291.

Exceptions sustained.

STATE OF MAINE

vs.

CHARLES K. DONNELL

STATE OF MAINE

vs.

CHARLES K. DONNELL AND ELLA OSGOOD.

Androscoggin. Opinion January 16, 1928.

Superior Courts of this state possess no inherent power to order cases transferred from one to the other, or from one to any other court, nor is such power conferred upon them by statute directly or by necessary implication.

On exceptions. A petition for a change of venue from the Superior Court of Androscoggin County to some Superior Court of some other county. After a hearing the presiding Justice granted the petition and ordered the cases to be transferred to the docket of the Superior Court of Cumberland County, and respondents excepted.

Exceptions sustained.

The case fully appears in the opinion.

Fred H. Lancaster, County Attorney, and H. E. Belleau, for the State.

Louis J. Brann, Frank T. Powers and Clifford & Clifford, for respondents.

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

PATTANGALL, J. On exceptions. These cases may be considered together. The same questions arise in both. The same considerations govern both decisions.

At the June term (1927) of the Superior Court of Androscoggin County, indictments were returned against these respondents; one against Donnell, charging him with manslaughter, another charging him, together with the respondent Osgood, with conspiracy. Both respondents were arraigned, plead not guilty, and the cases were continued. At the October term, the State presented motions for a change of venue in both cases. The presiding justice ordered the cases transferred to the docket of the Superior Court of the County of Cumberland. Respondents excepted to the decrees of the Court in this respect, challenging its authority to so order, and the plain issue thus joined is before us.

The Superior Court of Androscoggin County was created by Chapter 260, P. L. 1917.

Section 1 of the Act provides that "A Superior Court is hereby established at Auburn, within and for the County of Androscoggin, consisting of one Justice who shall be an inhabitant of said County."

Section 2 provides that "Said Justice shall establish a seal for said court."

Section 4 provides that "The original and appellate jurisdiction in all criminal matters now vested in and exercised by the Supreme Judicial Court within and for the County of Androscoggin, and all powers incident thereto shall be transferred to and conferred upon the Superior Court within and for said County, which Court shall exercise the same in the same manner as heretofore authorized by law to be exercised by the Supreme Judicial Court in said County."

Nowhere in the act, is any express authority given to transfer either civil or criminal cases from its docket to that of any other Court. If such authority exists, it must be found in the inherent powers of the Court or be implied from the language of Section 4.

By the great weight of authority and notwithstanding the dictum of *State* v. *Vannah*, 112 Me. 252, the Supreme Judicial Court of this state had authority, at common law, to transfer cases from one county to another, when it was necessary to do so, in order to procure an impartial trial. *Crocker* v. *Justices* of the Superior Court, 208 Mass. 162; *Cocheco R. R.* v. *Farrington*, 26 N. H. 428; *State* v. *Albee*, 61 N. H. 423; *Hewitt* v. *State*, 30 So. 795 (Fla); Cooke, 41 Md. 362; *Bell* v. *Niewahner*, 66 N. Y. Supp. 1096; *Shortwell* v. *Dixon*, 72 N. Y. Supp. 668.

But this is only true of courts of general jurisdiction whose authority equals in scope that of the Courts of Kings Bench in England. It is not true of courts of limited jurisdiction. It was not true of our early Courts of Common Pleas, established by Chapter 11, Mass. St. 1782. *Lincoln County* v. *Prince*, 2 Mass. 544; *Cleveland* v. *Welsh*, 4 Mass. 591; *Hawkes* v. *Kennebec*, 7 Mass. 461.

The Superior Courts in our state should not be confused with the Superior Courts of our neighboring New England states. Courts of Massachusetts, so entitled, possess, by statutory enactment, all of the powers of Courts of the Kings Bench as well as those formerly exercised by the Courts of Common Pleas.

Our Superior Courts are County Courts. Each was created independently of the others. They have no common seal. The presiding justice of each must be an inhabitant of the county in which he acts. Each has its own docket. They are in no way connected with and in no sense dependent upon each other. The common law confers upon such courts no power to transfer cases, one to the other.

Nor do the provisions of Section 4, Chapter 260 P. L. 1917, supply the needed authority. That section, in general terms, granted to the Superior Court of Androscoggin County full jurisdiction in criminal cases in that county, and, in order to carry on its work properly, in that respect, conferred upon it all of the powers incident to that jurisdiction then possessed by the Supreme Judicial Court, to be exercised as heretofore exercised by the latter Court in that county.

The Common law power of the Supreme Judicial Court did not authorize the transfer of cases from it to another court. It permitted a change in the place of trial only. Nor has that power been so enlarged by statute. Previous to the enactment of Chapter 45 P. L. 1872, there was no statute on the subject in Maine. With no material change, this law now appears as Section 25, Chapter 87 R. S. 1916: "Any Judge of the Supreme Judicial Court, while holding a nisi prius term, on motion of either party, shall, for cause shown, order the transfer of any civil action, or criminal case, pending in said Court, to the docket thereof in any other county for trial, preserving all attachments."

So far as this statute undertakes to grant authority to the Supreme Judicial Court to order a change of venue, it is declaratory of the common law but by its exact provisions it limits that power and pre-

scribes the manner in which it shall be exercised. Cases may be transferred by any Judge of the Supreme Judicial Court "while holding a nisi prius term," thus denying authority to make such transfer in vacation. *Powers* v. *Mitchell*, 75 Me. 364. A case pending in the Supreme Judicial Court may be transferred "to the docket thereof in any other county."

No authority is given it to transfer a case to the docket of another and independent court. It has not and did not have, at the time the Superior Court of Androscoggin County was established, power to transfer a case from its docket to that of the Superior Court of Cumberland County. The Superior Court of Androscoggin County could not, therefore, have acquired such a right by virtue of the provisions of the act of establishment by which it was endowed with certain powers of the Supreme Judicial Court. It could not acquire from the Supreme Judicial Court a power which that court did not possess.

When the Superior Court of Androscoggin County was asked to transfer a case "to its docket in some other county," it was obviously unable to comply with the request, for it had no docket in any other county. It possessed no power at common law to transfer a case from its docket to that of another court and no such power has been conferred upon it by statute either directly or by necessary implication.

In view of this finding it is unnecessary to consider the remaining questions raised by the bill of exceptions.

Exceptions sustained.

STATE *vs.* WALTER HARVEY

Waldo. Opinion January 18, 1928.

While it is necessary to allege the place of the commission of the crime, it is sufficient to allege it to have been committed within the county without naming the town or locality where the Court has county-wide jurisdiction.

It is not necessary to prove the offense was committed in the place alleged, unless the locus is a part of the description of the offense, if the proof is of an offense committed within the jurisdiction of the Court.

In this case it was not necessary under the indictment as drawn for the State to prove the offense was committed at Belfast if shown to have been committed in the county of Waldo. The words "at Belfast" could have been treated as a surplusage. It was a matter of form rather than one of substance, the venue and place being otherwise sufficiently alleged.

The objection that, unless the place is not proven as alleged, the respondent could not avail himself of his conviction or acquittal, in case it became necessary to plead a former jeopardy, has no more merit than if another date than the one alleged was proved.

On exceptions. At the September Term, 1927, of the Supreme Judicial Court in Waldo county, the respondent was indicted on a charge of unlawful possession of a still at Belfast in the county of Waldo. After a plea of not guilty by the respondent the county attorney filed a motion to amend the indictment by striking out the words "at Belfast" which was granted and respondent excepted. Exceptions overruled. Judgment for the State.

The case appears in the opinion.

Clyde R. Chapman, County Attorney, for the State.

Arthur Ritchie, for respondent.

SITTING: WILSON, C. J., PHILBROOK, BARNES, BASSETT, PATTANGALL, JJ.

WILSON, C. J. The respondent was indicted by the Grand Jury of Waldo County under an indictment setting forth in the margin,

as is customary in this state, the name of the county, to wit: "Waldo ss," and alleging in terms: that Walter Harvey of Waldo in the county of Waldo at Belfast in said county of Waldo on the twelfth day of August in the year of our Lord one thousand nine hundred and twenty-seven * * * unlawfully did have in his possession a certain still for the purpose of manufacturing intoxicating liquors," etc.

To the indictment the respondent pleaded not guilty, but before trial, counsel for the state having learned that the crime charged was committed within the town of Waldo instead of the city of Belfast as alleged, moved to amend by striking out the words, "at Belfast" leaving merely the allegation that it was committed in the county of Waldo.

To the allowance of the amendment the respondent excepted, and the case is before this Court on his bill of exceptions.

While it is necessary to allege a definite place of the commission of every offense for the purpose of showing the offense is within the jurisdiction of the court, it is sufficient to allege it was committed within the county where the Court has county-wide jurisdiction, unless the locus of the offense is an essential part of the crime. Bishop's Crim. Pro. Vol. 1, sec. 370, 371; 14 R. C. L., 181; 31 C. J. 677, sec. 203; Ency. Pl. & Pr. vol. 10, p. 520, Par. XIV; *State* v. *Roberts*, 26 Me., 263; *State v. Mahoney*, 115 Me., 251; *State* v. *Cotton*, 24 N. H., 143.

Nor is it necessary when a particular town or place is alleged, where it appears that the offense was committed within the jurisdiction of the Court, to prove the place as alleged. *State* v. *Sobel*, 124 Me., 35; *State* v. *Mahoney, supra; Com.* v. *Tolliver*, 8 Gray, 386.

It appearing, therefore, that the respondent was charged with having committed the offense within the county of Waldo, the State was not obliged under the indictment as drawn to prove it was committed at Belfast. *State* v. *Sobel, supra.* The words, "at Belfast", therefore, may be treated as surplusage and a matter of form and not of substance. Ency. Pl. & Pr. vol. 10 p. 530, Par XVI; *State* v. *Mayberry*, 48 Me., 237; *State* v. *Arnold*, 50 Vt., 731, 735.

The indictment was not within the constitutional provision requiring it to be found by a Grand Jury, the offense charged not being of the grade therein designated as infamous. Not only was the amendment permissible at any time before judgment, it being a matter of form, sec. 13, chap. 133 R. S., but it being surplusage and the

state not being obliged to prove the particular place of the crime as alleged, the respondent was not aggrieved by the ruling excepted to. *Hammond* v. *State*, 14 Md., 135.

It is unnecessary, therefore, to determine whether under the amendment to Sec. 13, Chap. 133 R. S., Chap. 133 P. L. 1927 allowing amendments in matter of substance under certain circumstances, such amendments must be made before plea is entered.

The contention of the respondent's counsel that, unless the place of the offense is proved as alleged, a judgment on the indictment could not be pleaded in bar of another charge for the same offense is also without merit. Such an objection, assuming, of course, the offense is proved to have occurred within the jurisdiction of the Court and the locus is not descriptive of the offense, would be equally as valid in case of proof of a date other than that alleged in the indictment, which is always permissible, unless time is also an essence of the offense.

Exception overruled.
Judgment for the State.

INHABITANTS OF SOMERVILLE

vs.

INHABITANTS OF SMITHFIELD

Lincoln. Opinion January 23, 1928.

A verdict based upon the facts and the law not so clearly wrong as to warrant it being set aside.

On general motion for a new trial by defendant. An action to recover for pauper supplies furnished by the plaintiff town to one Harlow Bigelow. The settlement of the pauper was the sole issue.

A verdict of $1131.60 was rendered for plaintiff and defendant filed a general motion for a new trial. Motion overruled.

The case fully appears in the opinion.

George W. Heselton, Herbert E. Locke and Cyril Joly, for plaintiffs.

Gower & Shumway, for defendants.

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

PHILBROOK, J. This is an action brought by the inhabitants of Somerville against the inhabitants of Smithfield to recover the expense of pauper supplies furnished by the plaintiffs to one Harlow Bigelow. The plaintiffs recovered a verdict and the case is before us on motion for a new trial. There being no exceptions presented we adopt the familiar rule that the jury was fully and correctly instructed regarding the law pertaining to the case. We are to examine the facts with a view to ascertaining whether the jury correctly interpreted the facts in the light of the instructions given, or whether there was plain and manifest failure to so do, and that bias, prejudice or such misunderstanding of the law influenced their deliberations to such an extent that we should disregard the verdict and grant a new trial.

Harlow Bigelow is the legitimate son of Levi H. Bigelow, was born in Smithfield, April 6, 1869 and therefore became twenty-one years of age April 5, 1890. He could not acquire a pauper settlement in Smithfield merely because he was born there, R. S. Chap. 29, Sec. 1 par. III. When he was about two years old his father moved to Augusta taking Harlow and the other members of his family with him. The father and his family must have lived in Augusta for a sufficient time and under such circumstances that he gained a pauper settlement for it is admitted that on July 12, 1888, Harlow Bigelow had a pauper settlement in Augusta. This must have been a derivative settlement since legitimate children have the settlement of the father if he has any in the state, R. S. Chap. 29, Sec. 1, par. II.

By virtue of R. S. Chap. 29, Sec. 3, a pauper settlement acquired under existing laws remains until a new one is acquired. A pauper settlement once acquired can be defeated only by one of three ways.

(1) A former settlement is defeated by the acquisition of a new one. (2) When a person having a pauper settlement in a town has lived or shall live for five years in any unincorporated place or places in the state, he and those who derive their settlement from him lose their settlement in such town. (3) Whenever a person having a pauper settlement in any town in the state shall live for five consecutive years beyond the limits of the state without receiving pauper supplies from any source within the state, he and those who derive their settlement from him lose their settlement in such town. We are not called upon to discuss the provisions of statute regarding pauper settlement of women which may be affected by marriage, since those provisions have nothing to do with the present case. Provisions (2) and (3) have no application here. It is claimed by the plaintiff that Harlow Bigelow, in his own right, acquired a pauper settlement in Smithfield which he continued to enjoy until the date of the writ and thereby his original derivative settlement in Augusta had been lost.

In the year 1888 an arrangement was made between Harlow and his father, and Harlow's great-uncle, John Harlow Bigelow, whereby Harlow was to go to a farm in Smithfield, known as the Marston farm. It is not denied that the uncle told Harlow, "If you will go out on the farm and stay with your father and brother,—sick brother Frank—I will buy the farm." Pursuant to this agreement Harlow and his father, and the brother Frank, moved to the Marston farm in Smithfield on July 12, 1888, Harlow then being a minor. On being asked as to his intention in regard to living on that farm when he went there, he answered, "To live there right along, because I expected to have the place. That was the agreement between my father and uncle."

Since Harlow had a derivative settlement in the city of Augusta at the time when he moved to Smithfield the plaintiff town must prove that for at least five successive years between his becoming of age, and the date of the writ, Harlow Bigelow had a home in the defendant town without receiving pauper supplies either directly or indirectly, and in the same manner had not since acquired a settlement in any other town. *Ellsworth* vs. *Bar Harbor* 122 Me. 356. In the case just cited the court reiterated the familiar doctrine that "To establish a home in the first instance in any town there must be per-

sonal presence with an intent to remain, or in other words, to reside there. If absence from such town is later shown before five successive years have elapsed, it must be made to appear that such absence was only temporary, that there was a fixed purpose to return. The home must be continuous. If within the five years the person is absent from the town without an intention of returning to it the continuity of his home is broken, and the settlement is not acquired. To continue a home while absent there must be at all times an intention to return to it. The intent need not at all times be active in the mind, but as often as it is the subject of thought at all, the animus revertendi must be found to exist or the home is lost."

On January 18, 1889, Harlow was married to Cora Bickford, daughter of Charles Bickford, and they lived on the Marston farm for a time. It should be noted that upon the date of that marriage he was still in his non-age. Soon after that marriage Harlow and his wife went to a farm known as the Stevens place, located in the same town of Smithfield, which farm he leased for a year and carried it on for halves. He took no household goods with him as the house was furnished. He planted and harvested a crop on the Stevens place and at the expiration of his year he went from the Stevens farm to the Charles Bickford place in Belgrade and in the spring of 1891 he moved back to the Marston farm. In a letter written by Harlow to the attorney for the defendant town on April 12, 1926, Harlow stated that he moved from the Marston farm to the Stevens farm in Smithfield in the year 1890, that he planted potatoes on the Stevens farm and that in the fall of 1890 he moved from the Stevens farm to the Charles Bickford place in Belgrade and in the spring of 1891 he moved back to the Marston farm in mud time. In his testimony at the trial it would appear that Harlow moved back to the Marston farm at the expiration of his lease of the Stevens place and that while he was on the Stevens place he visited back and forth at the home of Charles Bickford, exchanging work in haying, but he does not say that he moved to the Bickford farm from the Stevens place before returning to the Marston farm.

In argument the defendants emphasized the reasons which they allege controlled the action of Harlow in going to the Stevens place and thence, to the Bickford place, urging that the real reason which induced Harlow to go to the Stevens place was because he had not

received a deed of any portion of the Marston farm and was disappointed to such an extent that he left the Marston farm without any intention of returning there. In his testimony Harlow says that he went to the Stevens farm because the work was too hard for his wife on the Marston farm. Whatever influences caused him to leave the Marston farm at the time which he did yet the fact remains that in the spring of 1891 he did receive the promised deed and in mud time of that year he returned to the Marston farm. From that time onward his movements and intentions become important because he had then reached the age of maturity and could begin to acquire a pauper settlement in his own right. The defendants claim that there were several interruptions to his residence in Smithfield after 1891 to such an extent and of such nature as to preclude him from obtaining pauper settlement in his own right after he returned to the Marston farm in 1891. It is urged that Harlow drove a Star route in 1893 from Augusta by the way of Belgrade to New Sharon and that at another time he drove another Star route from North Belgrade to Smithfield but a careful examination of the facts shows that Harlow went to the Marston farm in Smithfield more or less and always returned there whenever opportunity or necessity permitted him to do so. It would exceed the limit of this opinion to recite in detail all of the movements of Harlow from the time when he went on to the Marston farm in 1891, as a man who had reached the age of maturity, and the date in 1901 when the foreclosure of a mortgage dispossessed him of his interests in that farm. This was a period of about ten years. And in his direct testimony on page 36 of the record he was asked "From the time that you went on to the Marston farm up to the time that you left the Marston farm in 1901, if that is the date, did you have any intention of changing your residence?" To which a negative answer was returned.

We feel justified in saying that so far as this element of the case is involved the jury properly found that Harlow, after receiving the deed in 1901, remained upon the Marston farm in Smithfield for more than five successive years without receiving pauper supplies and had thereby established a pauper residence in the defendant town, after he attained his majority.

A second issue presented by the defendants is this: if Harlow Bigelow did gain a pauper settlement in Smithfield, did he lose it by gain-

ing one elsewhere, and as there is no contention that he gained one elsewhere, except in Augusta, the question may be stated "Did Harlow Bigelow later gain a pauper settlement in Augusta?"

Under the contention thus raised on the second issue it becomes unnecessary to trace the wanderings of Harlow through various cities and towns in Somerset, Androscoggin and Kennebec counties. Briefly touching upon them it would appear that after leaving the Marston farm in Smithfield he went to the house of Elbridge Bickford in Belgrade, thence to Oakland, thence to the Steve Bickford house in Belgrade, thence to Waterville, thence to Madison, thence to Portland for a little while where he was working in a restaurant, thence back to Madison, thence back to Waterville, thence to Lewiston, thence to Auburn, thence to North Belgrade, thence to the Charles Bickford place again in Belgrade and thence to Augusta. In some of those cities and towns he declared his intention to remain and in some of them he voted and paid poll tax but in none of them did he remain long enough to gain a pauper settlement.

As having an important bearing upon his intention when he went to Augusta in 1913, i. e., as to whether he was only there for a temporary purpose or for the purpose of making that city his home it is claimed that Harlow registered as a voter in Augusta on March 6, 1914. In his application he declared his residence to be in ward four at 16 Water Street, saying that he had been a resident of Augusta since May, 1913, and giving his occupation as a clerk for G. W. Bigelow. This person is the brother of Harlow and was keeping a hotel known as the Cushnoc House where Harlow claimed to be acting as a clerk. His wife was not there with him nor his children. On the other hand his wife was at that time living at Belgrade with her daughter. After he got through working for his brother he worked for a short time for a Mrs. Marston in Monmouth and then went to work in Vassalboro at the Oak Grove School. Before going to Oak Grove he worked for a while as janitor in Waterville at the Maine Central Station, then worked in the railroad yard as a section man. It also appears that for a brief time before going to Oak Grove he worked for Henry Martin at East Vassalboro, although he is not quite certain whether his work for Henry Martin was before or after he went to Oak Grove. He only worked at Oak Grove three months and according to the certificate of the principal of Oak Grove Semin-

ary these three months were in the spring of 1919. While he was working in East Vassalboro his wife caused a libel for divorce to be served upon him which libel was served in Augusta.

"Q. When the libel was served upon you where were you?
A. Down to Augusta.
Q. What were you doing there?
A. I wasn't doing anything there.
Q. Did you meet him (the sheriff) on the street?
A. Yes, sir."

The libel was entered in court at the November term 1918 and the decree was granted November 23, 1918. After the divorce was granted Harlow went to Jefferson to work for Eben Trask where he worked "some over a year I guess." He then went to the Day place in Jefferson where he lived one winter and in the meantime had married one Abbie E. Hisler. It is admitted that the date of the marriage was November 26, 1919, the place of marriage was Jefferson and the residence of the groom was declared to be Augusta, Maine. From Jefferson Harlow went to Washington where he remained a few months and then to Somerville where he fell into distress as a pauper.

It should be observed that Harlow testified with reference to his residence at Augusta as follows:

"Q. When you left Belgrade and went over to Augusta, clerking for your brother Gard, did you intend to settle there?
A. No, sir.
Q. Why not?
A. I didn't have no place there.
Q. You stopped with your brother Gard?
A. Just temporarily; worked there a little while."

It should also be observed that when Harlow moved from Washington to Somerville, after his marriage on November 26, 1919, he had his wife with him and intended to settle in Somerville.

Gardner Bigelow, brother of Harlow, testifying with reference to Harlow's being in Augusta at the hotel was asked the following questions and gave the following answers, after testimony had been given with reference to Harlow's going to Belgrade.:

"Q. Did he come back to your house—the city hotel?
A. Yes, he was back and forth.
Q. How long a time would he stay?
A. Not but a short time.
Q. By a short time how long would you say?
A. Oh, he might be there a couple of months sometimes.
Q. Did he leave any goods there when he went away?
A. No, sir.
Q. Did he bring any goods when he came back?
A. No, sir.
Q. Did he do any work such as clerking in the house when he came back those times?
A. Well, as near as I remember it for about two years there—might be two years and a half—when he came back he would help some but after that he just came on a visit when he was going back and forth to his daughter's or son's that is all; just a stopping place when he would be going back and forth."

* * * * * * *

"Q. Between the first time that he came to your house in 1912 and stayed there, as you say, off and on for a year or two, did he live at your house—make your house his house?
A. No."

In cross examination the brother, Gardner, testified that he came back to Augusta to live in 1912 and engaged in the hotel business at the Cushnoc House. He testified that in 1913 that Harlow was there some of the time at work in the hotel but not working steadily and that the same condition existed in 1914 and that Harlow's wife was never at work in the hotel but always lived at Belgrade; also that Harlow was in Augusta in 1915 but not to stay there; that in 1916 Harlow was in and out of Augusta but not there to stop any length of time; that in 1917 he does not think Harlow was in Augusta "Not to work to my knowledge, but I may be wrong"; the witness could not tell whether Harlow was in Augusta in 1918 and does not think that Harlow was in Augusta at all, to stop, in 1919; that in 1919 Harlow went to Jefferson.

Before closing the plaintiff's case and after conference with counsel for the defendant it was agreed that the tax record and the records of voting in the city of Augusta, so far as Harlow Bigelow was concerned, would show the following:

POLL TAXES PAID. Harlow Bigelow paid poll taxes in Augusta for the years 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922 and a poll tax assessed for the year 1923 was abated July 21, 1924;

VOTING. The check lists in Augusta, so far as produced, would show that Harlow Bigelow voted in Augusta in 1915, 1916 and 1922. The check lists for 1914, 1917, 1918, 1919 were not produced. The check lists for 1920 and 1921 and 1923 were produced but did not show that Bigelow voted.

In defense there was presented considerable evidence by way of oral testimony and depositions in the attempt to show that Harlow did not gain a pauper settlement in Smithfield between the years 1891 and 1901 but we have already passed upon that phase and decided adversely to the defendants' contention. In argument defendants' counsel rested heavily on the effect of the evidence produced from the tax records and voting lists just above referred to.

In *Monroe* vs. *Hampden*, 95 Me. 111, this court, speaking through Mr. Justice Powers, gives an illuminating discussion of the effect of taxation and voting as bearing upon the question of establishing a pauper residence. The court there says: "Taxation and voting, while important, are not conclusive. The assessment and payment of a poll tax is strong evidence that a person has his home in a town on the first day of April. It applies with much less force to the intervening periods and is not inconsistant with a person having changed and abandoned his home in such town during the time between April first of two successive years. The inference to be drawn from voting is much stronger as to the three months immediately preceding than as to the intervening time. It is simply a fact with the other facts in the case to be weighed by the jury. Voting and taxation acquiesced in and affirmed by the payment of the tax are acts of much stronger probative force when relied upon to prevent the gaining of a pauper settlement, than when offered to establish one. The former may be effected in a day if the requisite intention coincides with the absence from home. The latter must stretch through every day for five successive years. They tend much more strongly to establish the pres-

ence at the time when the tax is assessed and the intention at the time the vote is cast than they do at any subsequent time." It is true that the tax records show that the poll tax of Harlow Bigelow was paid in Augusta for nine successive years from 1914 to 1922 but it is quite plain that Harlow Bigelow did not understand his full obligation or duty with reference to the payment of poll tax because of the following questions and answers:

"Q. Did you understand that you did not have to pay a poll tax if you didn't live in a place?

A. I didn't understand it, I paid it because they sent it to me, that is all.

Q. And you paid the poll tax to the city of Augusta after you had changed your residence?

A. Well, they sent me the bill and so I sent it to them."

Thus it will be seen that although he paid a poll tax for nine consecutive years in Augusta, yet he voted in that city only three times, namely, in the years 1915, 1916 and 1922.

But the evidence is quite plenary that between the years 1914 and 1922 he had been wandering from town to town getting work where he could and expressing his intention in some instances to reside elsewhere than in Augusta. Not only does Harlow give testimony of his absence from Augusta during the years just referred to but his brother, Gardner, and Gardner's wife, substantiate Harlow's testimony and they are not contradicted by testimony of oral witnesses. Moreover he took no personal belongings to Augusta and left none when he went away. He was simply a laboring man going where he could obtain work and having no particular house or place in Augusta to which he might of right resort, having open to him only the home of an indulgent brother.

The questions involved are questions of fact and to borrow the closing words of the court in *Monroe* vs. *Hampden*, supra, "To grant the motion would be to substitute the judgment of the court for that of the jury, as to pure questions of fact about which intelligent and conscientious men might have different views. This the court will not do."

Motion overruled.

JESSIE F. HINDS

vs.

VERA JEWETT HINDS, ET ALS.

Kennebec. Opinion January 23, 1928.

The interpretation of deeds is governed by the intention of the parties wherever possible; and if a deed may operate in two ways, the one of which is consistent with the intent of the parties, and the other repugnant thereto, it will be so construed as to give effect as to the intention indicated by the whole instrument.

When the objects of a trust are fully performed the title of the trustees ceases and the legal as well as the equitable title vests in the beneficial owner unless the intention of the creator clearly shows that the legal title would continue in the trustee.

Where the purposes for which a trust was created have ceased the court may declare it terminated. The estate given to a trustee endures no longer than the thing to be secured by the trust demands.

In the case at bar the deed conveyed the property in trust when the beneficiary was of tender years and incapable of properly caring for real estate, or possessing competent judgment to convey the same. A fair interpretation of the terms of the trust deed, the relations of the parties, and the object to be accomplished, warrant a proper inference that it was the intention of the creator to establish a trust which should terminate when the beneficiary had become twenty-one years of age.

The trust having ceased, the trustees have no further duties to perform and there is no necessity for the appointment of another trustee.

When Leonard attained his majority, by operation of law the trust became executed, so that the legal and equitable title united in him.

Having passed his majority, and the legal and equitable title having become vested in Leonard he had the power to convey the property and a deed thus given by him is valid.

The only necessity for a deed from the trustees, or from the surviving trustee, is to remove a cloud from the title but a decree recorded according to the provisions of R. S. Chap. 82, Sec. 30, will effectually remove the cloud.

On report. A bill in equity seeking the construction and interpretation of a deed dated October 17, 1903, given by William C. Hinds to Jessie F. Hinds, plaintiff, and her husband, Revillo L. Hinds, since deceased, with the words "trustees of E. Leonard Hinds, minor son of Revillo and Jessie F. Hinds" following the names of the grantees.

On December 16, 1922, said minor, E. Leonard Hinds, having attained twenty-one years of age conveyed the same premises to Vera J. Hinds. Held that the deed created a trust to continue during the minority of the said E. Leonard Hinds, and that the trust terminated on his arrival to the age of twenty-one years, and that the deed given by him was valid.

The case fully appears in the opinion.

Ralph W. Farris, for plaintiff.

E. M. Thompson, for defendant

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

PHILBROOK, J. On the 17th day of October, A. D. 1903, William C. Hinds conveyed a certain piece of real estate, in consideration of one dollar and other valuable considerations, to Revillo L. Hinds and Jessie Hinds, his wife. The names of the grantees in said deed are followed by the words "Trustees of E. Leonard Hinds, minor son of the said Revillo L. and Jessie Hinds."

By allegation and pleading it is agreed that the said Revillo L. Hinds died on September 28th, A. D. 1921. By the same token it is agreed that on February 4th, A. D. 1919 the said E. Leonard Hinds, minor son of Revillo and Jessie Hinds, became twenty-one years of age.

The present proceeding is a bill in equity coming to this court on report in which the plaintiff, Jessie Hinds, prays that the court will construe and interpret the provisions of said deed and particularly determine the following:

> (1) Whether said deed to the plaintiff and her husband, Revillo L. Hinds conveyed legal title to them as trustees of E. Leonard Hinds, or whether they took

title in fee as tenants in common in their individual capacities.

(2) If said deed created a trust whether the trust is to continue during the minority of E. Leonard Hinds or during the lifetime of E. Leonard Hinds.

(3) If the word "Trustees" in the premises of said deed created the plaintiff and her husband, Revillo L. Hinds, trustees under said deed, (the said Revillo L. Hinds having deceased,) whether she is a surviving trustee or should another trustee be appointed by the court.

(4) If said deed created a trust during the lifetime of E. Leonard Hinds or the lifetime of the trustee, or if said deed gave the title in fee to the plaintiff and Revillo L. Hinds, whether the deed from E. Leonard Hinds to Vera J. Hinds marked "Plaintiff's Exhibit 2" conveyed any interest in the premises described in "Plaintiff's Exhibit 1."

(5) If said deed from E. Leonard Hinds to Vera J. Hinds conveyed no interest that the said defendant Vera J. Hinds may be ordered and decreed to surrender the same, and same be cancelled of record and be decreed to be void.

(6) That she may have such other and further relief as the nature of the case may require.

The defendants are three in number, namely, Vera Jewett, alias Vera Jewett Hinds, E. Leonard Hinds and William C. Hinds. The latter two filed no plea, answer or demurrer and apparently took no interest in the outcome of the case. The remaining defendant, who denominates herself as Vera Jewett Hinds, files an answer and joins with the plaintiff in the prayer for a construction and interpretation of the provisions of the deed from William C. Hinds to Revillo L. Hinds and Jessie Hinds.

Considering the provisions just referred to, in their numerical order, it should be observed that the position taken by the plaintiff is that the words "Trustees of E. Leonard Hinds, minor son of the said Revillo L. and Jessie Hinds," inserted in the granting clause

of the deed from William C. Hinds to Revillo and Jessie, hereinafter referred to as Plaintiff's Exhibit 1, are only words *descriptio personae* and should be construed accordingly; that there is an absence of all proof tending to show the existence of a trust estate, as there is none created by the deed and no declaration of trust accompanying the deed; that the words being descriptive merely the grantees took title in their individual capacity; that the word "Trustees" should be regarded as mere surplusage as this word in the deed leaves nothing to be done by the trustees.

The defendant, Vera Jewett Hinds, claims that the deed, known as Plaintiff's Exhibit 1, established a plain, simple, naked, passive or dry trust, falling within the provision of the statute of uses.

The well established and primary rule with respect to the interpretation of deeds is that the real intention of the parties is to be sought and carried out wherever possible. This rule is enunciated in 8 R. C. L. 1037, where from the list of cases cited it will appear that a very large proportion of the states of this Union have adopted that rule. Our own court, in *Pike* vs. *Monroe*, 35 Me. 309, said that in modern times the technical rules of construction used in earlier times have given way to the more sensible rule of construction which is, in all cases, to give effect to the intention of the parties if practicable, when no principle of law is thereby violated. This intention is to be ascertained by taking into consideration all the provisions of the deed as well as the situation of the parties to it; and if a deed may operate in two ways, the one of which is consistent with the intent of the parties, and the other repugnant thereto, it will be so construed as to give effect as to the intention indicated by the whole instrument. This rule was restated and confirmed in *Bates* vs. *Foster*, 59 Me. 157. The latter case was decided in 1871 and the rule has not been revoked in this state by later decisions. Turning to Plaintiff's Exhibit 1, however inartificially it may have been drawn, yet the instrument contains strong internal evidence of the intention of the grantor. After denominating the grantees as trustees, in the conveying clause, we find the words "Unto the said Revillo L. Hinds and Jessie Hinds, in their said capacity, their successors and assigns forever." Again in the habendum clause the property is to be held by the said grantees "In their said capacity, their successors and assigns." Again in the covenant clause the grantor covenants with

the grantees "Their successors and assigns" that they will warrant and defend the premises to the grantees "Their successors and assigns forever."

If the grantor in Plaintiff's Exhibit 1 intended to convey the premises to the grantees in their individual capacity his language would be entirely inconsistant with the expressions which we have just quoted. The grantor distinctly says that he grants to the grantees in "Their said capacity," and three times in the instrument says that he is conveying to the grantees and to their successors. If the grantor was conveying to the grantees as individuals why should he have used the expressions which he did in regard to the capacity of the grantees, and why should he have three times said that he was conveying to their successors rather than to their heirs and assigns forever, as would be found in a deed conveying real estate to the grantees as individuals.

We have no hesitation in determining that Plaintiff's Exhibit 1 conveyed the property in trust to the grantees therein mentioned who were to act as trustees of E. Leonard Hinds, minor son of said Revillo L. and Jessie.

The second provision presented to us for consideration by the bill in equity is, if the deed created a trust, whether the trust is to continue during the minority of Leonard or during his lifetime.

The terms of a trust must be ascertained by applying the usual rules of interpretation to the instrument which creates it, *Scott* vs. *Rand,* 115 Mass. 104. Ordinarily the duration of a trust depends largely upon the intention of the creator as shown by the proper construction of the trust instrument and the nature and purposes of the trust, 39 Cyc. 96.

Since the trust deed here under consideration, Plaintiff's Exhibit 1, was dated October 17, 1903, and Leonard became of age on February 4, 1919, it follows that he was only about five years old when the trust deed was given. The trust created has none of the characteristics of a spendthrift trust which is defined as one created with a view of providing a fund for the maintenance of another, at the same time securing it against his own improvidence or incapacity for self-protection, provisions against alienation of the fund by the voluntary act of the beneficiary or in invitum by his creditors being the usual

incidents of such trusts, *Croom* v. *Ocala Plumbing & Electric Co.*, 62 Fla. 60, 57 South. 243.

In *Edwards* v. *Edwards*, 142 Ala. 267; 39 So. 82 where a trust was created in favor of certain beneficiaries, some of whom were minors, the court said that the creator of the trust could not have intended that the trust was to continue forever because the trust was for the benefit of certain persons and those persons could not live forever to take the benefit; nor could the creator intended even that the trust should continue during the lives of the beneficiaries, because the ends to be subserved by the trust could be fully accomplished short of the deaths of all the beneficiaries; and that it is familiar law that a trust estate of this sort ceases as soon as the purposes of its creation have been accomplished.

In *Kohtz* vs. *Eldred*, 208 Ill. 508; 77 N. E. 900, it was held that where a testator by his will creates a trust and fixes the duration thereof, his direction will, if not in violation of the rule against perpetuities, be given effect and the trust will continue for the time indicated, but where a testator does not specfically indicate the time for which the trust is to continue, his intention, if possible, must be determined from the entire will; also that where the evident purpose of a trust is the accomplishment of a particular object the trust will terminate so soon as that object has been accomplished. Citing Page on Wills, Sec. 618.

When the objects of a trust are fully performed the title of the trustee ceases and the legal as well as the equitable title vests in the beneficial owner unless the intention of the creator clearly appears that the legal title should continue in the trustee. *Comby* vs. *McMichael*, 19 Ala. 747.

Where the purposes for which a trust was created have ceased the court may declare it terminated. In re *Stone*, 138 Mass. 476. An estate given to a trustee endures no longer than the thing to be secured by the trust demands, *Appeal of Coover*, 74 Pa. 143.

In *Newman* vs. *Dotson*, 57 Tex. 117, by the terms of a will, Newman was given possession, management and control of the property until the daughter of the testator should have arrived at the age of twenty-one years. It was the evident intention of the testator to give Newman this power during the minority of the daughter, but

no longer. And it was held that when the minority of the daughter had ceased the powers and privileges of the trustee ceased

We see no reason why these rules for construction of a will should not apply to the construction of a deed whether the trust is created by either instrument.

In the case at bar the deed conveyed the property in trust when the beneficiary was of tender years and incapable of caring properly for real estate or possessing competent judgment to convey the same, until he should have reached his maturity. We are of opinion therefore, that a fair interpretation of the terms of the trust deed, the relations of the parties, and the object to be accomplished, warrant a proper inference that it was the intention of the creator, in this particular case, to create a trust which should terminate when the beneficiary had become twenty-one years of age.

In view of the conclusions already reached the third, fourth and fifth provisions heretofore referred to may be discussed jointly.

The trust having ceased the trustees have nothing more to do and there is no necessity for the appointment of another trustee.

In *Dixon* vs. *Dixon*, 123 Me. 470, it was held that where there are no directions for the management of the estate, nor for investment of the funds, nor for payment of any charges against the estate, no power of sale, and that there was no necessity that the legal estate should remain in the trustees, in order to preserve it for the cestuiis que trustents, nor in order that it may pass to others, that the trustees are simply depositaries of the title and that the trust, under such circumstances, was a dry, naked, simple, passive, trust; but, while not attempting to express a rule which shall bind in other cases not wholly similar to the one at bar, there is a strong implication, owing to the very tender age of the minor, that it was expected and intended that his parents should manage and preserve the property during his minority and therefore until that time was reached it was an active trust; but when majority was reached the trust became a passive trust and the cestui que was entitled to have the legal title transferred to him and could convey the fee without such transfer; in other words, the legal title having been vested in the trustees, and the equitable title in the cestui que, then upon the termination of the trust the legal title will vest in the beneficiary without convey-

ance. Both estates being vested there is no perpetuity, *Pulitizer* v. *Livingston*, 89 Me. 359.

It follows that when Leonard attained his majority the trust became passive and thereupon by operation of law the trust became executed so that the legal and equitable title united in him, *Johnson* vs. *Johnson*, 89 Mass. (7 Allen) 196; 26 R. C. L. 1173.

Having reached and passed his majority Leonard had power of conveyance and his deed to Vera must be held to be valid. The only need of a deed from Jessie is to remove a cloud from the title but a decree recorded according to the provisions of R. S. Chap. 82, Sec. 30, will effectually remove the cloud, *Laughlin, trustee* vs. *Page*, et als, 108 Me. 307. Reported cases generally hold, and text writers, without qualifications, state that dry trusts are executed by operation of law so that complete title vests in the cestui que. Our court has in effect adopted this rule in *Sawyer* vs. *Skowhegan*, 57 Me. 500.

Summarizing for the purpose of suggestion as to the terms of the decree which should be prepared below, we hold:

1; That the instrument known as Plaintiff's Exhibit 1 created a trust in favor of E. Leonard Hinds as beneficiary until he reached maturity, and that when this event occurred the trust was terminated.

2; The trust having thus terminated no further appointment of trustee is required.

3; That the deed from E. Leonard Hinds to Vera J. Hinds is valid and conveys the interest of E. Leonard Hinds to Vera J. Hinds.

4; That the defendant, Vera J. Hinds, shall recover her taxable costs from the plaintiff.

This decree should be prepared by counsel for Vera J. Hinds, and presented to the court below.

So ordered.

WILLARD P. HAMILTON *vs.* SAMUEL WILCOX, ET ALS.

Aroostook. Opinion January 25, 1928.

Mutual debts do not per se extinguish themselves. A cross demand cannot be treated as a payment except by agreement of the parties to that effect.

In the instant case without the consent of the original owners of the judgment of return a credit upon cross demand against them did not constitute payment of the value of the hay, satisfy the judgment, or constitute a performance of the conditions of the bond.

This rule applies in principle to the payment of a judgment debt, or, as in this case, to a liability under an executory contract fixing the payment of money as the medium of satisfaction of a judgment of return in replevin.

Neither statutory nor equitable set-off is pleaded. A like limitation upon the issue appears in the bill of exceptions. Questions not raised at the trial and not appearing in the bill of exceptions cannot be considered by the Law Court.

On exceptions. An action of debt on a replevin bond by an assignee of the replevin bond and judgment of return under an assignment from the defendants in the replevin suit. The general issue was pleaded and by way of a brief statement it was alleged that the conditions of the bond had been performed by giving credit on an existing valid indebtedness between defendant Wilcox, the plaintiff in the replevin suit, and the defendants in the replevin suit, owners of the judgment of return, who did not agree to such credit being given. The cause was heard by the presiding justice without a jury on an agreed statement of facts, who found for the plaintiff and defendants excepted. Exceptions overruled.

The case fully appears in the opinion.

C. L. Keyes, for plaintiff.

Cyrus F. Small, for defendants.

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

STURGIS, J. Action on a replevin bond. The case was heard below by a single Justice with jury waived, and is here on an exception limited to the single question of error in the disallowance of the defense of performance as set forth in the brief statement. The case was submitted in the trial court on an agreed statement of facts, which together with the pleadings, are made a part of the Bill.

The agreed statement sets forth that the plaintiff in this action is assignee of a judgment of return and bond in a replevin suit begun by the defendant Wilcox against Grover C. and Edna J. Wardwell. The result of that suit was a judgment of return of $8\frac{2}{3}$ tons of hay which the parties agreed was worth $86.67, with a stipulation not entered of record that the judgment should be satisfied by the payment of that amount in lieu of a return.

Judgment having been entered at the February term, 1924, and not satisfied by payment as stipulated, on January 10, 1925, execution issued, and on the same day the judgment was assigned to the plaintiff in this action. At sometime the replevin bond was also assigned to the plaintiff, and no question being raised as to his right to maintain this suit, proper assignment of the bond must be assumed.

The plaintiff charges a breach of the replevin bond in the failure of the defendant Wilcox to pay $86.67, the agreed value of the hay ordered returned. The defense as pleaded is that the bond was in usual form, conditioned to pay damages and costs recovered and to restore property taken on the replevin writ, with a further averment that these conditions had been fully performed by a credit of $86.67 given by the defendant Wilcox (principal on the bond in suit) to Grover C. and Edna J. Wardwell (original owners of judgment of return) on their debt to Wilcox secured by a chattel mortgage on the hay replevied. The exception reserved is based on the ruling of the Justice hearing the cause that the defendant Wilcox had no legal right to satisfy the judgment of return by giving credit to the original owners of the judgment as set forth in the defendants' pleadings. Upon the facts stated we find no error in this ruling.

Primarily upon judgment of return in replevin the condition of the replevin bond can only be performed by a return of the identical goods replevied with a payment of damages and costs awarded. *Smith* v. *Dillingham*, 33 Maine, 387. In this case, however, the original parties to the replevin action stipulated and agreed that the money

value of the hay replevied should be paid in lieu of a return. The agreement was executory with no time fixed for performance.

The defendant Wilcox, therefore, was bound to perform the conditions of the agreement punctually and fully, in default of which the owners of the judgment might rescind the agreement and be remitted to their original rights under the judgment. 34 Cyc., 701. The fact, however, that the parties to this suit, including the sureties upon the replevin bond, rely upon the terms of this agreement as the basis of their respective rights indicates that the agreement remained unrescinded and binding upon the original parties. It also bound the plaintiff in this suit, who took the assignment of the judgment *cum onere*. *Collins* v. *Campbell*, 97 Maine, 23; *Peirce* v. *Bent*, 69 Maine, 386.

The agreement called for payment of $86.67 in satisfaction of the judgment of return. The defendant Wilcox attempted to satisfy the judgment and perform the conditions of the bond by giving credit upon a cross demand against the original owners of the judgment. The consent of the latter to this method of satisfying the judgment, or the substituted agreement for payment, is, however, lacking in the bill of exceptions. Without their consent there was no payment and no satisfaction or performance.

A cross demand cannot be treated as a payment except by agreement to that effect by the parties. Mutual debts do not per se extinguish themselves. 39 Cyc., 1190; 21 R. C. L., 44. The rule stated in 21 R. C. L. at page 9 is peculiarly applicable: "When the creditor owes a claim or demand to the debtor, he cannot, without the consent or direction of the debtor, apply what he owes as a credit on the note or demand he holds against the debtor. The reason for this rule is that the debtor, who is, to the extent of his demand, a creditor, has the right to direct and control the disposition that shall be made of his debt, and to apply or not apply as he pleases to the payment of demands that he owes, and this privilege cannot be taken out of his hands by the mere act of another person." Such an unauthorized application of a cross demand is not payment. And we have no doubt that this rule applies in principle to the payment of a judgment debt, or, as in this case, to a liability under an executory contract fixing the payment of money as the medium of satisfaction of a judgment of return in replevin.

The defendants have pleaded performance not set-off, statutory or equitable. They have placed a like limitation upon the issue in the bill of exceptions. Set-off by the Court is not now open to them. Questions not raised at the trial and not appearing in the bill of exceptions will not be considered by the Law Court. *Verona* v. *Bridges*, 98 Maine, 491.

For the reasons stated the mandate must be

Exceptions overruled.

LEWIS BORNSTEIN, APPELLANT

FROM

DECREE OF COMMISSIONER OF AGRICULTURE.

Androscoggin. Opinion January 26, 1928.

The license to manufacture or bottle for sale at wholesale any drink product or other non-alcoholic beverage, provided under Chap. 155, P. L. 1925, is in no sense a contract or property, and a revocation of it does not deprive the licensee of any property, immunity or privilege.

On exceptions. A proceeding alleging a violation of Chap. 155, P. L. 1925, in selling a misbranded drink product. On April 11, 1927, a hearing was had before the Commissioner of Agriculture who found on the evidence that the provisions of the statute had been violated and revoked the license of appellant who appealed to the Supreme Judicial Court in Androscoggin County, where a hearing was had before the presiding Justice who dismissed the appeal and affirmed the decree of the Commissioner of Agriculture, and appellant excepted. Exceptions overruled.

The case appears in the opinion.

Peter A. Isaacson, for appellant.

Raymond Fellows, Attorney General, and *Sanford L. Fogg, Deputy Attorney General*, for appellee.

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

STURGIS, J. Chap. 155, P. L. 1925, requires that any person, firm or corporation manufacturing or bottling for sale at wholesale any drink product or other non-alcoholic beverage within this State shall be licensed by the Commissioner of Agriculture. In Sec. 2 of the Act the Commissioner is given the power to revoke or suspend any license whenever it is determined by the officers there designated that any provisions of the Act have been violated. In Sec. 3 the right of appeal from the decision of the Commissioner to the Supreme Court or Superior Court of the County where the licensee resides is provided.

In the same Act in Sec. 5 appears the provision: "Whenever artificial colors or flavors are used in the manufacture of drink products or other non-alcoholic beverages, the bottle or other container shall be distinctly labeled or crowned 'Artificially colored and flavored.' "

The appellant (an individual doing business under the trade name of Maine Bottling Company) was licensed under the Act to manufacture and bottle drink products or other non-alcoholic beverages. On April 11, 1927, during the term of his license, after notice and hearing, the Commissioner revoked the license on the ground that the appellant had bottled a beverage known as "Whistle", containing artificial color, in bottles or containers not labeled or crowned "Artificially colored and flavored."

Upon appeal to the Supreme Court sitting in the County where the appellant resides, the presiding Justice there found that the beverage "Whistle" contained artificial color and the bottles or containers used were not labeled or crowned as required by the Act. The Commissioner's decision revoking the license was affirmed.

The case is before this Court on exceptions to the rulings of the single Justice. The error urged below and here argued on the brief

is a violation of the appellant's constitutional guarantees. He says that he is deprived of a property right without due process of law.

The constitutional questions argued are not open to the appellant in this proceeding. The single issue here is revocation of the license granted by the Commissioner. In accepting the license and acting under it, the appellant consented to all conditions imposed thereby. He took it subject to such conditions as the Legislature had seen fit to impose. Such license is in no sense a contract or property, immunity or privilege. *State* v. *Cote*, 122 Maine, 450; *Burgess* v. *Brockton*, 235 Mass., 95; *Com.* v. *Kinsley*, 133 Mass., 578; 17 R. C. L., 554. The requirements of the Act as to labeling or crowning bottles and containers must be read into the license as a condition to which the appellant consented. *State* v. *Cote*, supra. If the validity of the Act in its branding requirements is to be tested, it must be in another and different proceeding.

Exceptions overruled.

SHERMAN TRIPP, ET ALS. IN EQUITY

vs.

GEORGE S. CLAPP, ET AL.

Androscoggin. Opinion January 28, 1928.

The weight of authority supports the general rule that exclusive jurisdiction rests in our Probate Courts over all matters relating to the probate of wills and the administration of estates.

Under the Statutes, Chap. 68, Sec. 4, R. S., and the decisions of the Court full authority exists in the Probate Court to afford the plaintiffs ample remedy at law under the facts shown in the case at bar.

On appeal. A bill in equity to which respondents demurred alleging that the matters and things set forth in the bill were exclusively within the jurisdiction of the Probate Court and the Supreme Court of Probate, and the presiding Justice sustained the demurrer and dismissed the bill and an appeal was taken by complainants. Appeal dismissed with additional costs.

The case sufficiently appears in the opinion.

Franklin Fisher, for plaintiffs.

George C. Webber, for defendants.

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

WILSON, C. J. A bill in equity seeking to set aside a will already admitted to probate on the ground that it had been revoked by a later will which had been suppressed and concealed by the defendants and also asking to have the defendants produce and file in the Probate Court the later will.

The bill alleges that the testatrix on January 30, 1918, made a will leaving the bulk of her property to Lottie Tukey Clapp, one of the defendants, that in January, 1925, said testatrix executed a new will, revoking the previous will, the contents of which will are to the complainants unknown, and that the defendants by fraud obtained possession of the will alleged to have been executed in 1925 and conspired to conceal and suppress it, and that on the death of the testatrix substituted the will executed in 1918 and procured its probate.

The defendants filed a demurrer in their answer and upon hearing below on the bill and demurrer the demurrer was sustained and the bill ordered dismissed. The cause is here on appeal from this ruling.

The appeal must be dismissed. The ground on which the demurrer was sustained was the exclusive jurisdiction in this State of the Probate Courts in all matters relating to the probate of wills and the administration of estates.

Counsel for plaintiff urges that, since courts of equity originally had jurisdiction of all matters in relation to the probate of wills and the jurisdiction of all estates and has now full equity powers, particularly where fraud is alleged, and the statute creating Courts of

Probate does not in terms give them exclusive jurisdiction over the probate of wills and the administration of estates, a Court of equity has power to revoke a decree of a Probate Court probating a will and require a concealed will to be delivered into the Probate Court.

The defendant's answer sets forth that the issue now raised has already been passed on in the Probate Court and in the Supreme Court of Probate and is now *res adjudicata*, but as it does not so appear in the plaintiff's bill, the Court below very properly ruled that this question is not raised by the demurrer.

Without deciding that under no circumstances will a Court of equity afford relief from a decree of a Probate Court shown to have been grounded on fraud where there is no adequate remedy at law, the overwhelming weight of authority supports the ruling of the Court below, that as a general rule exclusive jurisdiction rests in our Probate Courts over all matters relating to the probate of wills, and the administration of estates.

The leading case establishing this rule appears to be the case of Broderick's will, 21 Wall., 503, decided in 1874 which was followed in *Simmons* v. *Saul*, 138 U. S., 439; *Missionary Soc.* v. *Eells, et al.*, 68 Vt., 497; *Bradley* v. *Bradley*, 117 Md., 515, and cases cited in notes in 106 Am. St. Rep., 643 and 18 Am. & Eng. Ann. Cases, 803; 10 R. C. L. 362, Pomeroy Eq. Juris., sec. 348.

The Court in Broderick's case stated the rule as follows: "It is undoubtedly the general rule established both in England and this country that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof. * * * One of the principal reasons assigned by equity courts for not entertaining bills on questions of probate is that probate courts themselves have all the powers and machinery to give full and adequate relief."

The case of *Gaines* v. *Chew*, 2 How., 619, relied upon by the plaintiff's counsel is not contrary to the general rule. The Court in that case said: "In cases of fraud, equity has concurrent jurisdiction with a court of law, but in regard to a will charged to have been obtained through fraud this rule does not hold."

The contention that no other adequate remedy is available for the plaintiffs in the case at bar has no merit. It is not even alleged in the bill. Nor do the facts alleged disclose the lack. On the contrary, under the statutes and the decisions of this Court ample power exists

in the Probate Court, Sec. 4, Chap. 68 R. S.; *Merrill Trust Co., Appellant* v. *Hartford*, 104 Me., 566, 572, in which the Court says: "It is well settled that a probate court has the power and duty upon subsequent petition, notice and hearing to vacate or annul a prior decree, even a decree of probate of will, clearly shown to be without foundation in law or fact and in derogation of legal right," citing *Cousens* v. *Advent Church*, 93 Me., 292; *Hotchkiss* v. *Ladd's Estate*, 62 Vt., 209; *Waters* v. *Stickney*, 12 Allen 1. Also see *Gale* v. *Nickerson*, 144 Mass., 415, and *Conners' Case*, 121 Me., 37, 42.

Appeal dismissed with additional costs.

YORK HARBOR VILLAGE CORPORATION

vs.

FRED H. LIBBY, ET AL.

York. Opinion January 31, 1928.

Due process of law, guaranteed by the Federal Constitution, requires notice, opportunity for hearing and a judgment of some judicial or other authorized tribunal. The mere ipse dixit of a legislature or a municipality exercising delegated authority is not due process.

No person can be constitutionally deprived of property without due process of law. But land, as well as other property, is held subject to the implied condition that it shall not be used for any purpose that injures or impairs the public health, morals, safety, order or welfare.

With the expediency, justice, wisdom or policy of a statute the Court is not concerned. The judgment of the legislative department of the government is as to those matters conclusive and final.

A legislative act is presumptively constitutional. It cannot be declared invalid by the Court unless beyond a reasonable doubt it violates some constitutional limitation.

If a given act or condition is substantially injurious to the public, there is no constitutional and can be no other limitation of a state's legislative power to characterize it as a nuisance and provide for its restraint by judicial process.

The Court takes judicial notice of public statutes. It presumes that a municipal ordinance duly pleaded and proved is based upon such public statute as justifies its enactment.

A village corporation ordinance establishing zones and forbidding in one zone "camping grounds conducted for private gain," such ordinance being authorized by statute, is not a deprivation of property. It is an enforcement of a condition. The implied legislative determination that such camping grounds are injurious to the public interest is not manifestly erroneous.

A zoning ordinance, otherwise valid, is not rendered void by reason of causing financial loss nor because some land in the unrestricted is conditioned like that in the restricted zone.

When the legislative department has constitutionally declared that a certain act or thing is a nuisance, a complaint sufficient in other respects is not demurrable because of its omission to allege the reasons why it is a nuisance.

On report. A bill in equity by which the York Harbor Village Corporation seeks to enjoin the defendants from maintaining a camping ground for private gain within the limits of a certain portion of the town of York which has been laid out as a district or zone and designated zone B. A hearing was had upon bill, answer with demurrer inserted, replication and proof, and at the conclusion of the evidence, by agreement, the cause was reported to the Law Court.

Bill sustained. Permanent injunction to issue.

The case appears in the opinion.

Willard & Ford, for plaintiff.

Stewart & Hawkes, for defendants.

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

DEASY, J. *The Case Stated.* The Complainant is a village corporation chartered by Special Act of 1901, Chap. 481.

By Public Law of 1925, Chap. 209, Sec. 1, village corporations are authorized to enact ordinances dividing their territory into zones and providing that "Camping grounds conducted for private gain" shall be restricted to certain zones and excluded from others.

In 1926 the complainant adopted an ordinance dividing the corporation territory into Zones "A" and "B" and providing that "no

person shall within the limits of Zone B conduct for private gain a camping ground or grounds."

The bill alleges that the defendants "threaten, propose and intend and are now proceeding to make arrangements for the purpose of using (certain land) within Zone B for conducting a camping ground or grounds for private gain within Zone B."

The answer admits the truth of these allegations. The complainant prays for a permanent injunction.

It is strenuously argued that the Legislative Act of 1925 and the ordinance enacted under it are unconstitutional and void.

DUE PROCESS. DEPRIVATION OF PROPERTY.

The constitutional limitation relied upon by the defendants and most frequently invoked by litigants, who challenge the validity of state statutes, is the fourteenth amendment to the Federal Constitution.

This amendment provides that no state shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1 of the State Constitution contains analogous provisions.

If, by the ordinance complained of, the defendants have been *deprived* of property, it has been done without the due process of law guaranteed by the constitution.

Due process requires notice and opportunity for hearing. "Due process" said Webster "hears before it condemns."

It also requires a judgment of some judicial or other authorized tribunal. *Bennett* vs. *Davis*, 90 Me. 105; *Randall* vs. *Patch*, 118 Me. 303; 6 R. C. L. 457.

The mere ipse dixit of a legislature or of a municipality exercising delegated legislative authority is not due process.

Have the defendants been deprived of property? The land which, under a deed of conveyance, they have been occupying and using has not been taken from them. But this consideration is not decisive.

The legal right to use and derive a profit from land or other thing is property. *Buchanan* vs. *Warley*, 245 U. S. 74, 62 L. Ed. 161.

Before the passage of the ordinance the defendants enjoyed the right of using their land to conduct thereon a "camping ground for

private gain." This privilege is now denied them. Thus, it is argued, they have been deprived of property.

This reasoning proceeds upon the erroneous theory that property rights are wholly absolute.

But so called private property is held subject to the public rights of taxation and eminent domain.

It is also held subject to the implied condition that it shall not be used for any purpose that injures or impairs the public health, morals, safety, order or welfare. *Mugler* vs. *Kansas*, 123 U. S. 623; 31 L. Ed. 211; *Commonwealth* vs. *Alger*, 7 Cush. 85; *State* vs. *Robb*, 100 Me. 185, 6 R. C. L. 193.

The enforcement of a condition in subordination to which land or other thing is held is not a deprivation of property.

DUE PROCESS. POLICE POWER.

It is one of the manifestations of the far reaching police power of the states to enforce and give practical effect to these conditions which the law reads into every title deed. 6 R. C. L. 187.

It is said that police power has not been and perhaps cannot be defined with precision. 6 R. C. L. 184.

It is not the offspring of constitutions. It is older than any written constitution. It is the power which the states have not surrendered to the nation, and which by the Tenth Amendment were expressly reserved "to the states respectively or to the people."

Limitations expressed or necessarily implied in the Federal Constitution are the frontiers which the Police Power cannot pass. Within those frontiers its authority is recognized and respected by the constitution and given effect by all courts.

We have seen that private property is held subject to the implied condition that it shall not be used for any purpose that injures or impairs the public health, morals, safety, order or welfare. Under the police power statutes and authorized ordinances give this condition practical effect by restrictions which regulate or prohibit such uses.

If the use is actually and substantially an injury or impairment of the public interest in any of its aspects above enumerated a regulating or restraining statute or ordinance conforming thereto, if itself reasonable and not merely arbitrary, and not violative of any con-

stitutional limitation, is valid. It is not a deprivation of property which the constitution forbids, but an enforcement of a condition subject to which property is held.

Many and divers uses of property have been held to be so detrimental to the public interest as to be subject to restriction. *State* vs. *Robb,* 100 Me., 185, and cases cited. *Opinion of Justices,* 103 Me., 512 and cases cited.

Zoning laws are the same in principle as those involved in the above cases. It is stated in 150 N. E. 123 that prior to 1926, 40 state legislatures had authorized Zoning ordinances and 320 municipalities adopted them. Most of these prohibit the carrying on of business in zones set apart for residential purposes. While there are a few authorities contra, most of them sustain Zoning laws and ordinances as constitutional and valid.

The Federal Supreme Court in 1926 held valid a Zoning ordinance adopted by the Village of Euclid, Ohio. In the opinion by Mr. Justice Sutherland it is said that "This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny it altogether or narrowly limit it * * " "There is a constantly increasing tendency in the direction of the broader view." *Euclid* vs. *Ambler Realty Co.* U. S. S. C. 71, L. Ed. 176.

Three justices dissented, but the majority opinion is supported by cases therein cited from Massachusetts, Louisiana, Illinois, Minnesota, Wisconsin, Kansas, California and Rhode Island. See also the following sustaining authorities: Appeal of Ward 289 Penn. 458, 137 At. 630. *Wulfsohn* vs. *Burden* 241 N. Y. 288, 150 N. E. 120. *Des Moines* vs. *Oil Co.* 193 Iowa 1096, 184 N. W. 823. *Max* vs. *Saul* (N. J.) 127, At. 785. *Colby* vs. *Board* (Colo.) 255 Pac. 445. *Larrabee* vs. *Bell* (D. C.) 10 Fed. (2nd) 986. *Harris* vs. *State* (Ohio) 155 N. E. 166. *Wadleigh* vs. *Gilman,* 12 Me. 403.

The United States Supreme Court has recently affirmed the reasoning and conclusions of the Euclid case. *Goreib* vs. *Fox,* 71 L. Ed. 1231.

Our attention has been called to no zoning statute like that under consideration. As above appears courts of many states and the Federal Supreme Court have held that defined areas or zones may be constitutionally restricted against *all* business uses. The Maine statute authorizes the restriction of a zone or zones against *one* business use to wit, conducting camping grounds for private gain.

The reasons for holding that business in certain areas may be constitutionally treated as so detrimental to the public welfare as to justify legislative restraint are summarized in *Euclid* vs. *Ambler Realty Co.* supra. Some, at least, of these reasons, apply to the business of conducting camping grounds. More especially is this true as respects order and sanitation. There is no evidence it is true that camping grounds conducted by the defendants or others have caused any impairment of the public health or order. But the legislature may properly have considered tendencies. It was not obliged to wait until the horse was stolen before putting a button on the stable door.

It is suggested, but we think not proved, that offensiveness to some supersensitive eyes is the only respect in which camping grounds affect the public welfare.

If this were true and proved, we are not prepared to say that we should hold the restrictions to be reasonable and valid,— even if one of the reactions were a depreciation in value of surrounding property.

But the fact "that considerations, of an aesthetic nature also entered into their passage would not invalidate them." *Welch* vs. *Swazey*, 214 U. S. 91, 53 L. Ed. 930.

The legislature has determined that the use of land as camping grounds conducted for business is so injurious or menacing to the public as to justify ordinances confining it to certain zones.

Every presumption being in favor of the constitutionality of legislative acts, this court would not be justified in holding that the legislative restraint shown in this case is so arbitrary and unreasonable as to be an unconstitutional deprivation of property.

DENIAL OF EQUAL PROTECTION.

The defendants also contend that they have been denied the "equal protection of the laws" guaranteed by the Fourteenth Amendment. The statute is, they urge, discriminatory. But discriminatory statutes are not, for that reason, invalid.

In the enactment of many statutes, classification of persons is proper, legal and indeed necessary. Classifications based on age, sex, occupation, degree of relationship and density of population are familiar.

A classification must not be arbitrary. It must be natural and reasonable. *Dirken* vs. *Paper Co.* 110 Me. 386. *Rast* vs. *Van Deman* 240 U. S. 357, 60 L. Ed. 687. *Royster* vs. *Virginia* 253 U. S. 415, 64 L.Ed. 990. *Railway Co.* vs. *Vosburg*, 238 U. S. 59, 59 L.Ed. 1200. *Insurance Co.* vs. *Lewis*, 233 U. S. 418, 58 L.Ed. 1024.

It must be based upon an actual difference in the classes bearing some substantial relation to the public purpose sought to be accomplished by the discrimination in rights and burdens. *State* vs. *Latham*, 115 Me. 178. *Opinion of Justices* 220 Mass. 631. *Welch* vs. *Swazey*, 193 Mass. 364. *Insurance Co.* v. *McMaster*, 237 U. S. 73, 59 L.Ed. 843. *Railway Co.* vs. *Vosburg*, supra.

If a classification, though necessarily discriminatory, stands these tests, it is not a denial of equal protection of the laws.

The statute in question classifies cities and hence property owners therein. It gives the power of enacting zoning ordinances to cities, and to those only having a population exceeding 35,000. It puts towns and village corporations in separate classes. The defendants do not complain of these discriminations.

They point out however that the statute does not apply to all village corporations, but to those only "whose electors and voters resident therein are also qualified voters in the town wherein said corporation is located." Act of 1925, Chap. 209, Sec. 8. It is argued that this is an unnatural, arbitrary and unreasonable classification; that there is no substantial relation between limitations of the right of suffrage and restrictions upon the use of land. The statute however is an enabling act. Under the charters of some village corporations, non-resident property owners are authorized to vote in village affairs. The legislature did not deem it proper or wise to delegate any of its police power to such non-resident voters.

All legislative acts are presumptively legal and valid. This classification is not so clearly unreasonable as to render the statute unconstitutional.

It cannot be said that the ordinance, "passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Extract Co.* vs. *Lynch* 226 U. S. 204, 57 L. Ed. 188.

The defendants complain that the classification is unreasonable in another respect. The statute applies, it is said, only to such camping grounds as are conducted for private gain. This is true. In other words it prohibits, in certain zones the *business* of conducting camping grounds. Subject to regulations it permits the maintenance of camps, which are not maintained for profit. Such a classification is not merely arbitrary.

Again it is said that by the statute one kind of business is arbitrarily and unreasonably singled out for restraint. But this discrimination is based upon distinctions that may well be deemed substantial.

The legislature may have determined that the tendency of camping grounds maintained as a business is to attract a temporary, promiscuous, nomadic, congested population living in tents or under conditions making difficult the enforcement of police and sanitary regulations. This classification is not wholly unreasonable.

"If an evil is specially experienced in a particular branch of business it is not necessary that the prohibition should be couched in all-embracing terms." *Radice* vs. *New York*, 264 U. S. 298, 68 L.Ed. 695.

STATUTORY NUISANCE.

The defendants attack Sec. 2 of the statute which declares that "camping grounds maintained contrary to the provisions of an ordinance, or by-law, passed hereunder is a nuisance" (are nuisances). They argue that "the legislature has no authority to make any given state of facts constitute a nuisance by virtue of its mere declaration."

Except as it confers jurisdiction under R. S. Chap. 82, Sec. 6 it may be doubted that this proposition, even if well founded is of any importance. An act injurious to the public welfare may be restrained without calling it a nuisance. We are concerned, not with words, but with rights.

Moreover if a given act or condition is substantially injurious to the public, there is no constitutional, and can be no other limitation of a state's legislative power to characterize it as a nuisance and pro-

vide for its restraint by judicial process. Among many authorities so holding are the following: *Houlton* vs. *Titcomb*, 102 Me. 285; *Mugler* vs. *Kansas* 123 U. S. 623, 31 L. Ed. 214; *Carlton* vs. *Rugg* 149 Mass. 554; *People* vs. *Edison Co.* 144 N. Y. S. 707, 20 R. C. L. 387.

REASONABLENESS OF ORDINANCE.

The York Harbor Village Corporation had authority to enact *a* zoning ordinance. But the defendants challenge the validity of *the* ordinance which is adopted. The lines dividing the zones are claimed to be so drawn as to be unreasonable and oppressive.

It is urged that the ordinance causes financial loss to persons owning land in the restricted zone. This is probably true of all zoning ordinances. In theory, at least, this loss is in part offset by participation in improved public welfare.

"Every exercise of the police power in respect to the use of land is likely to affect adversely the property interests of somebody." *Spector* vs. *Building Inspector*. (Mass.) 145 N. E. 267.

It is said that certain other land outside of Zone B is conditioned precisely like the defendants' property. This is probably true wherever zones have been established. It is true wherever lines are drawn by man and not by nature in space, time or circumstance. "In some field the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished in terms of legislation." *Euclid* vs. *Ambler Realty Co.*, Supra.

In considering the reasonableness of the particular ordinance the general situation, the setting, so to speak is material. We quote and adopt the language of Mr. Justice Sturgis in his decree granting a temporary injunction.

"The town of York is essentially a summer resort. It has no important industries or commercial enterprises. Its chief and only substantial business is such as arises in the course of supplying the needs of summer visitors and residents. The native population is limited. The summer residents are numerous and their property holdings are extensive. The residences are of an expensive type, with spacious grounds. It is a town distinctly of summer homes. The camping ground heretofore maintained by the defendants is immediately adjacent to one of the residential areas of the character

described, and in the last season at times held approximately one hundred and fifty tents. Its sanitary conveniences are limited, and its maintenance in the future will undoubtedly involve the usual incidents of the gathering together of such a number of persons under camping ground circumstances."

The voters of the York Harbor Village Corporation presumably having in view not individual instances, but all the village territory, its business, needs and welfare, have determined that the lines established are reasonable.

The court cannot say that this determination is clearly erroneous.

DEMURRER.

A general demurrer is inserted in the answer. The defendants argue that this demurrer should be sustained and the bill dismissed notwithstanding the validity of the statute and ordinance.

(1) As one ground of demurrer the defendants urge that the bill contains no allegation that an action complaint or indictment is pending as required by R. S. Chap. 23, Sec. 20.

This suit however is brought, not under Chap. 23, but under Chap. 82, Sec. 6 R. S. which gives to the court equitable jurisdiction in case of nuisances. When a nuisance is not existent but threatened and imminent, Chap. 82 affords the only remedy. When, however, as in the instant case the nuisance is alleged to be existent and its continuance threatened, the complainant has a choice of remedies. If he elects Chap. 82, he must allege and prove that his right has been previously established by a legal proceeding, so courts have frequently said. But to this there are several well settled exceptions, to wit: cases of, (a) long uninterrrupted enjoyment of right invaded, or (b) imperious necessity as where great and irreparable damage is threatened and imminent, or (c) menace of a multiplicity of suits which equitable procedure will avoid, or (d) absence of plain adequate and complete remedy at law. *Tracy* vs. *LeBlanc*, 89 Me., 309. Exception (d) is sufficiently set forth in the bill.

For a further reason we think that the bill should not be dismissed on this ground. The disinclination of the chancery court to exercise original jurisdiction to restrain nuisances notwithstanding that in this state such jurisdiction was vested in it ninety years ago (Act of 1837, Chap. 302), is no doubt due in some part to its reluctance to

use the process of injunction. But it is in large part due, we think, to the theory that before resorting to equity litigants should have the facts in issue in their contentions, decided by a court of law where a jury trial can be had as a matter of right. But when facts are not in dispute this reason ceases. In the instant case the defendants admit by demurrer (also by answer) that they are conducting and intend, threaten and are preparing to conduct a business in a place where the legislature of the state has declared that such use is a nuisance. The only real dispute is as to the law. Such being the case it would be incongruous to tell a litigant that he cannot be heard because he came in the wrong door.

(2) The interest and competency of the village corporation itself as a party complainant is not disputed. Were it questioned the opinion of this court in *Houlton* vs. *Titcomb* 102 Me. 286 would afford a complete answer.

But under the demurrer the point is made that the bill fails to allege any vote of the corporation authorizing the suit. Such allegation is not necessary.

The bill was brought, signed and filed by solicitors who are officers of this court.

Their authority to represent the plaintiff is prima facie presumed. *Flint* vs. *Comly*, 95 Me., 255; *Steffe* vs. *Railroad*, 156 Mass. 263, 6 C. J. 631, 2 R. C. L. 980.

This rule applies to corporations as well as individual parties. *Boom Corporation* vs. *Lamson*, 16 Me. 224; *Osborn* vs. *U. S. Bank*, 9 Wheat 738, 6 C. J. 633.

The presumption is rebuttable. *Bridgton* vs. *Bennett*, 23 Me. 420. If seasonably and properly called for, authority must be proved. 2 R. C. L. 981. In a suit at law this point must be raised at the return term. *Prentiss* vs. *Kelley*, 41 Me. 440.

It cannot be availed of by demurrer, 6 C. J. 636; certainly not by general demurrer.

(3) The ordinance is set forth in full in the bill. Without specific allegation, of the want of which the defendants complain, the court takes notice of the provisions of the public act authorizing it, (15 R. C. L. 1066), and it will be "judicially regarded as emanating from that power that would have warranted its passage." Dillon Municipal Corporations Pg. 330.

(4) In Section 2 we read that: "The provisions of this act shall be carried out in such manner as will best promote the health, safety, morals and general welfare of the community."

The defendants complain that the ordinance does not in terms declare, and that the bill does not specifically state how, or even that, camping grounds impair the public interest in any of the aforementioned aspects. Such declaration would have been in accordance with good practice, but was not essential. In any case the purpose is open to judicial inquiry. 36 Cyc 1111.

When the legislative department has constitutionally declared that a certain specified act or thing is a nuisance, a complaint, sufficient in other respects, is not demurrable because of its omission to allege the reasons why it is a nuisance.

INTEREST OF ASSESSOR.

It is objected that J. W. Simpson who when the ordinance was adopted was an assessor and active in securing its passage was not disinterested. The ordinance was adopted however not by the assessors, but by the voters of the municipality. The same body may modify or repeal it.

That an interested party should be a judge is abhorrent to the law. Nothing bars such interested party from acting as advocate.

EXISTING USE.

Section 6 of the Act is as follows: "No ordinance or by-law adopted under the powers created by this act shall apply to structures existing at the time of the adoption of the ordinance nor to the then existing use of any building, but it shall apply to any alteration of a building to provide for its use for a purpose or in a manner substantially different from the use to which it was put before the alteration, and shall apply to a substantial change in the uses of a building when put to a new use without alteration."

Existing buildings and structures unless used for a purpose contravening the ordinance, are saved from the operation of the statute and must be excepted in the mandate of any injunction.

The defendants ingeniously maintain that before and at the time the law became effective, the buildings upon their land (toilets and a store) were used for the convenience of, or for dealing with tenants

of camping grounds conducted for private gain in what is now zone B, and that such use is excepted by the words "then existing use." But a reading of the whole section shows clearly that the words "then existing use" were designed to limit rather than to extend the exemption created by the preceding language.

If the legislature had intended to except, not buildings only, but land upon which there are no buildings, it would have employed more explicit phraseology.

PRESUMPTION OF CONSTITUTIONALITY.

With the expediency, wisdom, justice and policy of the statute and ordinance this court is not concerned. The judgment of the legislative department of the government is as to these matters conclusive and final. *Corbin* vs. *Houlehan* 100 Me. 254; *State* vs. *Mayo* 106 Me. 68; *Dirken* vs. *Paper Co.* 110 Me. 389; *Green* vs. *Frazier* 253 U. S. 240, 64 L.Ed. 882.

We have carefully considered the important, though subordinate defences urged by counsel which go to the maintenance of the suit, or the construction of the Act. It is obvious however that their main reliance is upon the challenge of constitutionality.

The presumption of constitutionality has been adverted to. Federal and State Courts stress and emphasize it. We cite a few among many authorities:

"An act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt." Legal Tender Cases 12 Wall 531.

"The constitutionality of a law is to be presumed until the contrary is shown beyond a reasonable doubt." *State* vs. *Pooler*, Me. 229; *Laughlin* vs. *Portland*, 111 Me. 486; *State* vs. *Webber*, 125 Me. 321.

The facts in this case, examined in the light of the thorough and exhaustive briefs of counsel do not in our opinion overcome the strong presumption of constitutionality. As neither evidence or argument relate to camping grounds maintained without profit the court has not considered this phase of the subject.

Bill sustained.
Permanent injunction to issue.

BERNICE EDGECOMB

vs.

MARTIN LAWLIS, Sheriff

Aroostook. Opinion January 31, 1928.

In an action against an officer as a trespasser based upon an insufficient bond, the burden is upon him to show he took a sufficient bond. A replevin bond signed by the sureties, who were named in the bond individually, but executed by the sureties in the name of A. Co., B. Treas., C. Pres., is sufficient and the sureties are bound as individuals.

Evidence of a replevin bond signed in the name of the principal by an agent who is known to be the representative of the principal in conducting its business in the community and that the replevin writ was entered in court by the plaintiff's attorney is sufficient to go to the jury on the agent's authority to execute the bond.

The evidence in this case of retention of possession by the officer of a building in which the replevin goods were stored is held insufficient to warrant a verdict against the officer in an action of *trespass quare clausum* by the owner of the building as against the evidence of the officer's instructions both in the writ and by the plaintiff in the replevin suit, his return on his writ and the undisputed testimony as to the acts of all the parties involved following delivery of the potatoes to the agent of the plaintiff in the replevin suit as directed.

On exceptions and motion. An action of trespass to recover damages of defendant, sheriff of Aroostook County, resulting from the service of a replevin writ by a deputy of defendant. Exceptions were taken to certain instructions by the defendant, and after a verdict for plaintiff a general motion for a new trial was filed.

Motion sustained. New trial granted.

The case sufficiently appears in the opinion.

Archibalds, for plaintiff.

Powers & Mathews, Robert M. Lawlis and Nathaniel Tompkins, for defendant.

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

DUNN, BASSETT, JJ., concurring in the result.

WILSON, C. J. An action of *trespass quare clausum* against the defendant who at the time of the alleged trespass was sheriff of Aroostook County, for acts committed by one of his deputies. The plaintiff was the owner of a potato house built for the winter storage of potatoes. In the fall of 1923, one Richardson became a tenant at will of the premises, holding them in common with the plaintiff who retained the right to store therein certain farm machinery. Richardson harvested his potatoes in the fall, on which the International Agricultural corporation, Buffalo Fertilizer Works, which will hereinafter be referred to as the Fertilizer Co., had a crop mortgage, and stored them in the potato house of the plaintiff under the above arrangements as to tenancy.

In the early winter, Richardson began hauling the potatoes, but not having paid his rent, the plaintiff notified him not to move any more until the rent was paid, and on January 24, 1924, the plaintiff put a lock on the door and excluded Richardson from the potato house.

Richardson then called up the agent for the Fertilizer Co., who consulted the attorney for the company. The attorney thereupon sued out a replevin writ in which the Fertilizer Co. was named as plaintiff, and the plaintiff in this action as defendant.

A bond in which the Fertilizer Co. was named as principal and executed in the name of the principal by Frank L. Rhoda, the Fertilizer Company's representative in that community, who described himself as agent, was delivered to the officer who served the writ. The sureties though named in the body of the bond as Mark T. Phair and Henry Phair, signed as Phair Co., M. T. Phair Treas., Henry Phair, Pres. An ordinary wafer was attached as a seal to the signatures of the principal and of the sureties.

The officer was then instructed by the agent for the Fertilizer Co. that he was to take the potatoes and deliver them to Richardson for the Fertilizer Co.

Armed with this precept, the officer went to the house of Mr. Edgecomb and asked for the key to the lock on the potato house. On being

refused, the officer sent for Richardson, went to the potato house and pulled or broke the staple holding the lock on the door and entered. As it was very cold, he then suggested to Richardson that he build a fire to keep the potatoes from freezing.

Up to this point, the parties are in substantial accord as to the facts.

The defendant through his deputy is charged in the case at bar with breaking and entering the potato house and destroying its contents, it having burned on the night of January 30, 1924. The defendant pleaded the general issue and in a brief statement justified the entry of his deputy by his precept described above.

Under sec. 10, Chapter 101 R. S., the officer before serving a replevin writ shall take from the plaintiff a bond with sufficient sureties. If he serve such a writ without a sufficient bond, he is a trespasser. *Garlin* v. *Strickland*, 27 Me., 443, 449; *Williams* v. *Dunn*, 120 Me. 506.

When the question is raised in the replevin suit as between the two claimants, the officer is presumed to have acted regularly. If the defendant seeks to dismiss the replevin action because the officer did not take a good bond or with sufficient sureties, he must do it by plea in abatement and furnish proof, otherwise the officer is presumed to have complied with the statute if the bond appears regular on its face. *Massachusetts Breweries Co.* v. *Herman*, 106 Me., 524. This is also true when the action is on the bond between the principal or sureties and the obligee. *Howe* v. *Handley*, 28 Me., 251.

But where the action is against the officer as a trespasser and he justified by virtue of his precept, the burden is on him to show that he had taken a valid bond, otherwise he may be liable. *Williams* v. *Dunn, supra.*

The first issue raised at the trial was whether the officer had taken a sufficient bond. The presiding Justice instructed the jury that the bond was not sufficient, and they should find at least nominal damages.

The signing by the sureties, while somewhat irregular in form, must be held to be by them individually; that the words, "Pres." and "Treas." after their names are merely *descriptio personae. Sturdivant* v. *Hull*, 59 Me., 172; *Me. Red Granite Co.* v. *York*, 89 Me., 54; *Edwards* v. *Pinkham*, 113 Me., 4. No question is raised here or was raised below as to the adequacy of the sureties.

It was also urged that there is no authority shown for the giving of the replevin bond in the name of the corporation. The plaintiff introduced the replevin writ from the files of the Court and offered to introduce a plea in abatement filed in the replevin suit and the record of the Court showing the disposition of the case. Only the replevin writ was admitted, however, which discloses that the officer had returned that he had taken the potatoes and delivered them to the plaintiff named in the writ.

It is unnecessary upon this evidence to rely on a presumption that the officer had proceeded regularly or that the agent's authority to sign the bond is to be presumed, no evidence appearing to the contrary. We think the defendant or the plaintiff for him presented sufficient evidence upon which the jury would have been warranted in finding that the execution of the bond was duly authorized and was sufficient. *Proprietors* v. *Wentworth*, 36 Me., 339.

Not only did it appear that the same man who authorized the bringing of the action signed the plaintiff's name to the bond, and was apparently the duly accredited agent of the plaintiff in that community for the transaction of its business, but the plaintiff by its attorney entered the replevin writ in Court. On what ground it was abated, if it was, we do not know, but the entry of the writ in Court by plaintiff's attorney, who is presumed to have authority for the purpose, *Flint* v. *Comly*, 95 Me., 255; *Boom Corp.* v. *Lamson*, 16 Me., 224; *York Harbor Village Corp.* v. *Libby* et al, 126 Me., 537, was sufficient together with the other testimony as to the agent's apparent general authority to warrant a finding by the jury that the act of the agent in signing the bond was duly authorized. This is not a case where it is admitted that the agent had no authority, *Proprietors* v. *Wentworth, supra.* The agent here may have had authority in the first instance. It is not a question of ratification. The proof offered by the plaintiff himself is not only consistent with full authority in the agent to sign the replevin bond, but is sufficient to base such a finding by the jury thereon. If so, the instruction of the Court that, as a matter of law, the bond was not a good bond, was error.

It is true that the defendant even then might not have been aggrieved by this ruling if the officer afterward exceeded his authority and became a trespasser *ab initio.* We think, however, that the evi-

dence is so clear as to the officer's acts and their legal effect that it does not warrant such a conclusion.

The plaintiff, it is true, testified that the officer after breaking open the door of the potato house stated that he was going to leave Richardson there as keeper, and Richardson in testifying after some pressing by the attorney for the plaintiff, assented that he supposed that thereafter he was in there representing the sheriff.

The officer, however, says he simply followed his directions from the agent or attorney of the plaintiff in the replevin writ, viz., to take the potatoes and turn them over to Richardson for the Fertilizer Co. and mortgagee and thereby complied with the directions in his writ, and returned the bond with his writ to Court, on which he made a return in the usual form, viz., that he took the goods described and delivered them to the plaintiff, that thereafter he had nothing to do with the potatoes, has no recollection of putting another lock on the door, but believed that he fastened it with some hay wire.

Whatever the officer may have said to the plaintiff as to leaving Richardson there as keeper, the officer's subsequent acts and his return on his writ clearly show that he did not as a finalty leave Richardson there in that capacity, but simply complied with the directions in his precept and the oral instructions authorizing Richardson to receive the potatoes for the plaintiff in the replevin suit, nor did Richardson so understand it. He proceeded at once to move the potatoes and sell them. The officer never afterwards visited the premises. On the other hand, the plaintiff did and undertook to tell Richardson how to care for the property.

Assuming that the officer put a new lock on one door, he gave the key or keys to Richardson who was rightfully there as tenant. As to whether Richardson should permit the plaintiff as his landlord to enter under their arrangements was between them. The plaintiff never asked to go in. There was another door by which with some difficulty he could enter. Nor is there any evidence that admission would have been denied him.

All the circumstances when taken into consideration indicate that whatever the plaintiff and Richardson may have understood as to the intent of the officer, the legal effect of his acts was merely a delivery of the goods replevied to the plaintiff's agent as directed in the writ and as instructed by its attorney. It is so evident from the un-

disputed facts that the deputy was not in possession of the potato house when it burned that we think the jury must have been mislead by the Court's instruction as to the validity of the bond. At least their verdict was clearly wrong.

Motion sustained.
New trial granted.

CLARENCE A. ROBBINS, Petitioner

Androscoggin. Opinion February 4, 1928.

Under a policy of insurance on the life of a soldier under the World War Veteran's Act, the mother of the insured being the beneficiary, upon the death of the insured intestate, leaving a widow but no issue, the beneficiary after the death of the insured having received several installments under the policy died intestate, leaving a widow, but no issue, the present value of the remaining unpaid monthly installments is a part of the corpus of the insured soldier's estate, and goes to the widow of the insured under R. S. Chap. 80, Sec. 21.

On exceptions. A petition to enter an appeal in the Supreme Court of Probate which was dismissed and exceptions entered. Exceptions overruled. The case is fully stated in the opinion.

Herbert E. Holmes, for petitioner.

Frank T. Powers, for the administratrix.

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

BARNES, J. This case is one wherein a party adversely interested denies the application of the Maine statute for the distribution of life insurance when his widow survives the insured, and there is no "issue."

It is the distribution of the balance of the insurance on the life of a soldier that is sought; and construction of the World War Veteran's Act, relative to the administration of the War Risk Insurance

Act is involved. The facts are, briefly, that at the time of his death, September 24, 1918, the insured was a soldier in the United States army, and died intestate. His insurance was war risk, converted, yearly renewable term insurance issued by the Federal Government, under two policies of $5000.00 each, in one of which his mother was beneficiary at the soldier's decease.

He had some personal property, and, after his death, his widow, Esther R. Robbins, now Esther R. Phillips, qualified as administratrix of his estate.

Under the appropriate policy his mother received installments of insurance, until October 7, 1925, when she died intestate.

She left no issue surviving; but her widower, Clarence A. Robbins, father of the soldier, is the petitioner in this case.

Further proceedings are claimed by the administratrix to be in accord with the probate law of our state and the Federal World War Veteran's Act.

So much of the Federal Act as is involved is a part of Section 303 thereof and reads as follows:—"If no person within the permitted class be designated as beneficiary for yearly renewable term insurance by the insured either in his lifetime or by his last will and testament or if the designated beneficiary does not survive the insured or survives the insured and dies prior to receiving all of the two hundred and forty installments or all such as are payable and applicable, there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable, said value to be computed as of date of last payment made under any existing award: *Provided,* That all awards of yearly renewable term insurance which are in course of payment on the date of the approval of this Act shall continue until the death of the person receiving such payments, or until he forfeits same under the provisions of this Act.

When any person to whom such insurance is now awarded dies or forfeits his rights to such insurance then there shall be paid to the estate of the insured the present value of the remaining unpaid monthly installments of the insurance so awarded to such person."

The probate court held that the proceeds of such a policy of insurance, under the circumstances stated above, were payable to the widow of the soldier, agreeably to the provisions of Chapter 80, Section 21, R. S., "Money received for insurance on the life of any per-

son dying intestate, deducting the premium paid therefor within three years with interest, does not constitute a part of the estate of such person for the payment of debts or for purposes specified in Section 1 of Chapter 71, when the intestate leaves a widow, or widower, or issue, but descends, one-third to the widow or widower and the remainder to the issue; if no issue, the whole to the widow or widower, and, if no widow or widower, the whole to the issue."

Petitioner appealed from the decree of the probate court; his appeal was denied, and he presents it here, waiving all objections other than to the application of our state statute to this case.

So far as the Federal Government dealt with the insurance we hold its proceedings correct and unassailable.

Life insurance is a contract, whereby one party insures a person against loss by the death of another.

In this case the Federal Government entered into a contract, according to the terms of which, on the occurrence of the events that have admittedly transpired, the "present value of the remaining unpaid monthly installments" was to be paid to the legal representative of the insured soldier. The Government made the computations, transmitted the funds, and relinquished control thereof.

The administratrix found herself then the custodian of such present value, in cash. Such money became in her hands a part of the corpus of decedent's estate, to be distributed according to the laws of this state, and we hold that Section 21, Chapter 80, R. S., applies and directs the administratrix to pay the same to Esther R. Phillips, the widow of the insured.

Appeal dismissed.
Remanded to the probate court for further proceedings in accordance with this opinion.

EDGAR H. STURTEVANT, Admr.

vs.

JOSEPH E. OUELLETTE

Androscoggin. Opinion February 7, 1928.

The operation of a motor vehicle at a speed in excess of the statutory limit is evidence of negligence but not conclusive proof.

A driver of an automobile in the public ways in using due care must exercise so high a degree of dilligence in observing the rights of a foot passenger or team when approaching them as to enable him to control it or stop it, if necessary, to avoid a collision which cannot be regarded as a pure accident or due to contributory negligence.

Failure by a pedestrian about to cross a street to look or listen for approaching automobiles may be strong evidence of his lack of due care, but it cannot be said as an absolute rule of law that he is bound to take such precaution.

The real test is, what would be done by an ordinarily careful and prudent person under like circumstances, having in mind his own safety.

This case is peculiarly one for the jury. The human element of credibility is involved to a marked degree. A finding that the defendant was negligent and the plaintiff was in the exercise of due care would not be so clearly erroneous as to require reversal.

On exceptions. The plaintiff's intestate was hit by an automobile while attempting to cross Elm Street in Waterville, and received fatal injuries. This action was brought to recover damages for the benefit of the widow and children of the deceased, under R. S. Chap. 92, Sec. 9. At the conclusion of the evidence the presiding Justice directed a verdict for defendant and plaintiff excepted. Exception sustained. The case fully appears in the opinion.

Gordon F. Gallert and Frank T. Powers, for plaintiff.

Robert A. Cony, for defendant.

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

STURGIS, J. The plaintiff's intestate, Arthur H. Sturtevant, while crossing Elm Street in the city of Waterville on the evening of October 23, 1925, was struck by the defendant's automobile and died without conscious suffering. This action is brought to recover damages under R. S., Chap. 92, Sec. 9.

The case is before this Court on exceptions to the order of the presiding Justice directing a verdict for the defendant. It is the duty of the Court, therefore, simply to determine whether upon the evidence the jury could properly have found for the plaintiff. "If there was evidence which the jury were warranted in believing, and upon the basis of which honest and fair minded men might reasonably have decided in favor of the plaintiff, it is reversible error to take the issue from the jury." *Johnson v. N. Y., N. H. & H. R. R.*, 111 Maine, 263, 265.

A careful examination of the evidence discloses these facts. Elm Street in Waterville is a heavily travelled main thoroughfare about fifty feet wide at its intersection with Western Avenue coming in from the west. About six o'clock on the evening of October 23, 1925, the plaintiff's intestate came down Western Avenue with one Alphonse Pelletier and stopped at the edge of the sidewalk in the northwest corner of the intersection. From this point his view up and down Elm Street was practically unobstructed. The defendant was then driving up Elm Street, approaching the intersection from the south. His view ahead in the street, including the sidewalk where the deceased stood, was likewise unobstructed. The plaintiff left the sidewalk and attempted to cross Elm Street and was struck down by the defendant's automobile, dying without conscious suffering as a result of the collision. These facts are not in dispute.

There is a sharp conflict of testimony, however, upon the question of what actually took place. The companion of the deceased, Mr. Pelletier, was called by the plaintiff, and his account of the accident as stated upon the stand is, that after standing at the sidewalk edge for a few moments the deceased started to walk acrosss Elm Street on the crosswalk while the witness turned down Elm Street. He says, that attracted by the sound of the horn and glare of the headlights

of the defendant's on-coming car, he shouted to the deceased "look out, a car coming," and threw up his arm as a warning. He says the automobile was traveling at a speed of thirty miles an hour; and he places the deceased, when he gave the warning, as near the outer car track, fixed by the engineer as about thirteen feet east from the sidewalk where the men parted.

James Barnes, a medical student, came down Western Avenue just behind Mr. Sturtevant and Mr. Pelletier. He testifies that the men parted at the edge of the sidewalk as described by Mr. Pelletier; the deceased started across Elm Street and on reaching the middle of the car track started to hurry; he says Mr. Sturtevant continued on to the middle of the street "when it seemed as though the right front fender of the automobile hit him in the abdomen." This witness saw the accident. And while there is testimony impeaching the account of the accident given by Mr. Pelletier, this statement of the occurrence by Mr. Barnes, while contradicted by the defendant's witnesses, is unimpeached.

The witnesses for the defendant say that the deceased had been drinking some alcoholic beverage—the kind and amount, however, is not disclosed. They say, that driving along Elm Street on the car track in the middle of the street 150 feet away from Western Avenue, the deceased was visible as he stood at the edge of the sidewalk, and when the car reached a point 10 to 25 feet from the deceased he suddenly, although restrained by his companion, pulled away and started to stagger with uplifted hands across the street, and, in spite of the defendant's swerving of his car to the left, ran into the right side of the automobile, breaking the windshield with his hand and tearing off the tire carried on the right running-board as he fell backward. They assert that the defendant was driving slowly, but admit that the car, an open touring model, had its sides curtains up along the entire right side, the side towards the sidewalk from which the plaintiff walked into the street.

These in brief are the facts in evidence. Is a finding of negligence based on this evidence clearly wrong? Is contributory negligence proved? Unless both these questions as a matter of law can be answered in the affirmative, the issue is one of fact and the case should be submitted to a jury.

Elm Street, as already stated, is a main thoroughfare. There is evidence that the deceased was attempting to cross on an established crosswalk; that the defendant was driving his car thirty miles an hour on the car track in the middle of the street with side curtains up the length of the right hand side of the car. It is not an impossible inference that the curtains made a "blind corner" to the right, cutting off the driver's vision to the right almost to the moment of contact. Speed in excess of the statutory limit is evidence of negligence, —not conclusive proof, but evidence to be considered. *Fernald* v. *French*, 122 Maine, 565. This portion of the city of Waterville was compact. The speed limit was fifteen miles an hour. Public Laws 1921, Chap. 211, Sec. 62.

With the increase in automobiles and the present development of higher power and increased speed, application of the salutory rule stated in *Savoy* v. *McLeod*, 111 Maine, 234, is now even more imperative than when laid down: "The driver of an automobile in the public highways, constantly travelled by pedestrians and teams and occupied by children of ages, should, to establish due care, exercise so high a degree of diligence in observing the rights of a foot passenger or team when approaching them, as to enable him to control it, or stop it if necessary, to avoid a collision, which cannot be regarded as a pure accident or due to contributory negligence." The care to be exercised by the driver of an automobile on the public streets must be "commensurate with the danger to be avoided." *Savoy* v. *McLeod*, supra; *Day* v. *Cunningham*, 125 Maine, 328. At crosswalks established for the passage of pedestrians, of common knowledge so used and likely to be used, this measure of care demands an increased vigilance on the part of the driver. 2 R. C. L., 1184. If such vigilance is lacking the care is not commensurate with the known danger to be avoided. Upon the evidence in the record we cannot say that a finding of negligence on the part of the defendant would be clearly erroneous.

Upon the issue of contributory negligence, the deceased by statute is presumed to be in the exercise of due care. R. S., Chap. 87, Sec. 48. Contributory negligence was properly pleaded, but the statute also requires that it be proved. *Curran* v. *Ry. Co.*, 112 Maine, 96.

Rejecting the testimony of the witness Pelletier because of doubt of its credibility growing out of his alleged inconsistent statements,

we find the witness Barnes placing the deceased in the middle of the street when struck, indicating that he had travelled approximately 25 feet after leaving the sidewalk. There is evidence fixing the defendant's speed at thirty miles an hour. His approach at that rate of speed was 44 feet per second. Reason dictates that assuming the correctness of the Barnes statement and the alleged rate of speed, the defendant's car was 150 to 200 feet away when the deceased left the curb. He "had the right to assume that approaching motorists would obey the law." "His (the 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." *Day* v. *Cunningham*, supra. To paraphrase, he did his full duty if he waited until it reasonably appeared that a prompt crossing could be safely effected if approaching automobiles were lawfully managed and controlled. *Wetzler* v. *Gould*, 119 Maine, 276; *Day* v. *Cunningham*, supra. It cannot be said as an absolute rule of law that a pedestrian about to cross a street is bound to look or listen for approaching automobiles. *Shaw* v. *Bolton*, 122 Maine, 232. His failure to take this precaution before entering the highway may, however, be strong evidence of negligence. *Day* v. *Cunningham*, supra. The test is, "what would be done by an ordinarily careful and prudent person under like circumstances, having in mind his own safety?" *Wetzler* v. *Gould*, supra. The law does not say that he must look or how often, or "precisely how far, or when, or from where." *Shaw* v. *Bolton*, supra.

The burden of proof is upon the defendant to prove contributory negligence. Upon the testimony of the witnesses for the defendant alone such a finding might stand. A finding to the contrary, however, based on the physical facts and the testimony of the plaintiff witness Barnes would not have been so clearly wrong as to require reversal of a verdict. A jury might find that the defendant's automobile was down the street such a distance when the deceased left the curb that an ordinarily prudent man would have deemed it safe to attempt the crossing.

The case is peculiarly one for the jury. The human element of credibility is involved to a marked degree. The sound judgment of twelve men under the clear rules of law can well measure the facts in the light of probabilities and human experience. It should be submitted to them.

Exceptions sustained.

RAWSON'S CASE

Androscoggin. Opinion February 8, 1928.

An employee, whose duty it was to get employer's mail at Post Office during noon hour, carry same to his own home, telephone contents of important letters and then eat lunch and return to his work at the regular hour in the afternoon, incidentally bringing mail to the office when he returns, suffers no compensable injury by reason of slipping on the sidewalk and fracturing his hip, while thus returning to place of employment, as such an injury cannot be said to have occurred in the course of his employment.

On Appeal. A Workmen's Compensation case. There was no dispute about the facts. The only question involved was as to whether the injury was one arising out of and in course of claimant's employment.

Compensation was awarded and respondents entered an appeal. Appeal sustained.

The case fully appears in the opinion.

Harry Manser, for claimant.

Hinckley, Hinckley & Shesong, for respondents.

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

PATTANGALL, J. Workmen's Compensation case. On appeal from decree awarding compensation.

Petitioner was an office employee of respondent. It was his duty, during the noon hour, to go to the Post Office for his employer's mail and after examining same to telephone such orders as required immediate attention. After doing this, he ate lunch at his own home and, later, returned to his work, bringing the mail with him to the office.

In proceeding from his place of work to the Post Office, and in walking from the Post Office to his home, he travelled a different route

than that directly used in going from his place of work to his home. On leaving his home, after lunch, he went directly to his work by the usual route travelled by him, morning and night.

On the day of the accident, petitioner had proceeded to the Post Office, received the mail, carried it to his home, telephoned the one rush order received, eaten his lunch and was returning to his work, by the direct route, when he fell on the icy sidewalk and received the injury of which he complained.

The facts are not in dispute. The Commission found that the injury was the result of "an accident arising out of and in the course of his employment." From that finding respondent appeals. Whether or not the facts justify such a finding is the sole issue in the case.

This court has not passed on an exactly similar case. *Fogg's Case*, 125 Me. 168, involved an injury to a fireman. He was injured while on his way home to his noonday meal. The court held the injury compensable, on the ground that the injured man was subject to duty, at all times, even while at his meals. *Beers' Case*, 125 Me. 1, involved an injury while a workman was on his way to his home to dinner, but he was riding in a conveyance furnished by the employer and so riding at the employer's request, to save time, there being no stated noon hour. To the same effect is *Littlefield's Case*, 126 Me. 159. These cases more nearly approach the instant case than do any others in which this court has found liability. They are exceptions to the general rule that an injury resulting from an accident in a public street is not compensable even though the injured person is on his way to or from his work. *Paulauskis' Case*, 126 Me. 32; *Kinslow's Case*, 126 Me. 157; *Ferrerri's Case*, 126 Me. 381, 138 Atl. 561.

This general rule is subject to certain definite classes of exceptions. They are well set forth in *Whitney* v. *Hazard Lead Works et al*, 136 Atl. 105 (Conn). Four of them may be noted: (1) Where the employment requires the employee to travel on the highway; (2) Where the employer contracts to and does furnish transportation to and from work; (3) Where the employee is subject to emergency calls, as in the case of the fireman; (4) Where the employee is using the highway in doing something incidental to his employment, with the knowledge and approval of the employer.

The present case does not fall within these exceptions. It is true that in going to the Post Office from his place of work on an errand for his employer, petitioner was attending to a duty which had been assigned to him as a part of his daily work; but after reaching his home and telephoning the rush orders to the office, the service to be rendered his employer ceased. He was then at leisure to eat his lunch and return to his work at his own time, so long as it was within the limits of his noon recess, by such route as he should select and by such means of conveyance as he desired.

When he returned, he was to bring with him such mail, if any there was, as he had received at the Post Office, but the carrying of the mail on his return journey was incidental. The primary object in view was to return to his work. This he would have done regardless of whether or not there was mail to carry.

While thus in the street, petitioner was in no different position than that of any employee going to and from his home and his place of work, and was subject to no greater or different risk than that of any other pedestrian. The injury cannot be said to have occurred in the course of his employment. *Eby* v. *Industrial Accident Commission*, 242 Pac. 901; *Guarantee & Accident Co.* v. *Industrial Accident Commission*, 213 Pac. 977.

Appeal sustained.

MELINDA J. GATHERER

vs.

AMANDA W. WEST

Kennebec Opinion February 9, 1928.

In an action to recover for services performed outside of the plaintiff's own family, a refusal to instruct that the plaintiff could not recover in her own name, except by special arrangement with her husband, is not error.

In this case the evidence was sufficient to warrant the jury's finding that the services were performed outside of the plaintiff's own family and that the defendant should have expected to pay what the services were fairly worth, but the verdict, upon the evidence, was clearly excessive.

On exception. An action of assumpsit to recover for personal services rendered by plaintiff, a married woman, to the defendant. Defendant requested an instruction that plaintiff could not recover in her own name, except by special arrangement with her husband which was refused and exception taken. A verdict for plaintiff for $1,779.10 was returned by the jury and defendant filed a general motion.

Exception overruled. Motion for new trial granted, unless plaintiff within thirty days after receipt of rescript by clerk shall file a remittitur of all over one thousand dollars.

The case fully appears in the opinion.

Frank Plumstead and Mark J. Bartlett, for plaintiff.

Harvey D. Eaton, for defendant.

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

WILSON, C. J. An action to recover for services alleged to have been performed in caring for the defendant during a period from September 7, 1921 to November 7, 1926. In 1921, in some way it came to the knowledge of the defendant that the plaintiff and her husband were to leave the city of Bath where they had been living. Negotiations were entered into between the plaintiff's husband and the defendant, and as a result Mr. Gatherer leased the "upper tenement and its appurtenances of her dwelling house" for a term of one year at a rental of ten dollars per month, and on his part entered into a written agreement "to board" the defendant at her residence during the same period for the sum of ten dollars per month. The defendant had previously been living with another family occupying the upper tenement under some arrangements which do not appear in evidence. So far as the record discloses, it appears to have been mutually understood as a part of the arrangement that the defendant was to occupy three rooms, and the Gatherers the remainder of the upper tenement.

In 1921, Mrs. West, then Mrs. Percy, was about eighty years of age, somewhat infirm and nearly blind, but still able to move about her rooms, though with some difficulty. In May, 1922, she was married to Abner West, a man of about her age, who came to live with her, but boarded himself. Mrs. West's arrangement with the Gatherers as to board continued, and was renewed in writing in 1922 and again in 1924 and 1925.

From the time the Gatherers moved in, Mrs. Gatherer, according to the defendant's own testimony, performed more or less services in attending to Mrs. West's personal needs and the care of her rooms and also gave her such care as she required in one or more brief illnesses. In 1926, in February, Mr. West was taken ill and died in April following. Mrs. Gatherer also cared for him during his illness and supplied him with food for which she received $18.00 per week.

Following his death, Mrs. West was again taken ill, and was confined to her bed for six or seven weeks and was cared for by Mrs. Gatherer; and after that time required constant daily care and attendance. The question as to her compensation first arose in the fall of 1926, a guardian having been appointed for Mrs. West. In October, the lease of the Gatherers having terminated, they were notified to quit the premises which they did in December. Mrs.

West was removed by her guardian on November 7th and boarded elsewhere.

It was for these services in caring for Mrs. West during the entire period, upon the ground that the agreement with her husband covered only the table board of Mrs. West, that Mrs. Gatherer sought to recover in this action, and as set forth in her writ, at the rate of $10 per week from September 7, 1921 to April 25, 1926 or 240.86 weeks and $20.00 per week for the remainder of the period to November 7, 1926 or 27.74 weeks, or a total of $2,943. 81. The jury awarded a verdict of $1779.10, evidently based on $5 per week for the 240.86 weeks and $20.00 per week for the balance of the period.

One of the first questions raised at the trial below was the right of the plaintiff to sue in her own name for these services. Counsel for the defendant requested the following instruction: "Except by some special arrangement between the husband and wife, pay for the services such as Mrs. Gatherer claims to have rendered in this case should belong to the husband, and she could not sue and recover for the same. You must, therefore, be satisfied that Mr. Gatherer expressly gave his claim to the pay for such services to his wife and the burden is upon her to establish the fact by clear and uncontrovertible evidence."

The Court below refused to give the instruction and left it to the jury to determine whether upon the evidence the services could be said to have been performed for her own family.

To the refusal to give the requested instruction the defendant excepted. The exception must be overruled. Upon the evidence in this case, it could not be said as a matter of law that the services performed by the wife were performed "for her family." *Sampson* v. *Alexander*, 66 Me., 182; 30 C. J. 826. Having given the jury the law, as provided in Sec. 3, Chap. 66 R. S. it became a question of fact for the jury to determine upon the evidence whether the services could be said to have been performed "for her own family." The services rendered to Mrs. West for which Mrs. Gatherer seeks to recover in this action were not ordinary household duties performed for her own family, nor even within her own household, but were in the nature of care and nursing and the care of rooms occupied by a stranger. Such services as she performed in furnishing the board, which her husband contracted to furnish, it is admitted belonged to

her husband; but for the additional services not covered by the husband's agreement if performed under such circumstances, as would entitle her to compensation, she may recover in her own name under the statute. *Stratton* v. *Bailey*, 80 Me., 345. She further testified that it was expressly agreed between her and her husband that for such additional services she was entitled to the compensation.

The defendant also presents a motion for a new trial relying upon the ground that the damages are excessive. While admitting that Mrs. West should pay for such care and attention as she received after April 25, 1926, when she was taken ill, her counsel contends that for the period from September 7th, 1921, to April 25th, 1926, it was not the intention of the parties or the expectation of either that Mrs. Gatherer would receive any compensation for such services as she rendered in waiting on Mrs. West or in caring for her rooms.

Upon the question of liability for this period, the plaintiff testified that the defendant had told her and her husband when the arrangements were entered into that she would have a woman come in and take care of her rooms; that she reminded the defendant soon after they came, that their arrangements covered only her board and that she could not take care of her room or care for her person and wait on her; and further that defendant assured her that she should be well paid for all the work she did in addition to providing the board.

The defendant herself admitted that during this period the plaintiff waited on her, made her bed, and cleaned her rooms, and cared for her while she was ill, and that her attention was called to the fact, after her marriage in 1922, by her friends and her husband, to whom she showed her lease and agreement for board, that the agreement covered only her board and did not provide for care; yet she said nothing to the Gatherers, but renewed the agreement, at least twice, without protest so far as the evidence discloses, trusting, as she expressed it, that they would make no trouble for her.

The evidence chiefly relied on by the defense to so clearly outweigh this as to require a new trial is that the husband on his part renewed the agreements for rent and board three times without specifying that it did not cover the care of her person or room, although he well knew his wife was performing such services for which at the time of the renewal in 1925, according to her declaration, a large sum was due; and that in Mrs. West's condition she daily required personal

care and attention; and in addition, no bill was presented for these services until the plaintiff's claim amounted to nearly three thousand dollars, and a dispute having arisen they were ordered out of the tenement.

While such circumstances constitute evidence to be carefully scrutinized and weighed by the jury as bearing upon the good faith of the plaintiff and her husband and in view of the infirmities of the defendant, it is, of course, not conclusive. The jury may have found it was a reasonable explanation of her care being omitted from the first written agreement; if they believed the testimony of Mr. and Mrs. Gatherer, that Mrs. West had told them she had a woman come in and attend to her room and personal needs; and after that, as Mr. Gatherer testified, it was a matter between the defendant and his wife with which he had nothing to do.

The issue was clearly presented to the jury by the presiding Justice. The jury evidently gave more weight to the plaintiff's testimony of an express agreement to pay and to the defendant's failure on her part to have it expressly provided for in her written agreements, if such was her understanding that the arrangements included both care of her rooms and herself as well as board, and to the circumstances of the defendant's admitted infirmities and need of daily attention from which they may have found that the services rendered could not have been treated as mere gratuities, but that the defendant should have expected to pay for them.

We can not say the jury was clearly wrong in accepting the statements of the plaintiff, or in finding that under the circumstances the defendant should have expected to pay for the services rendered prior to April 25th, 1926, as well as those rendered during the remainder of the period, in view of her own admissions that she knew her written agreement covered only her board and that she merely relied on her faith that they would not present a bill for the additional care and attendance she knew she was receiving.

This Court, however, is satisfied upon a careful review of the evidence that the verdict of the jury is clearly excessive. The jury cut the compensation claimed in the writ during the period prior to her illness in April, 1926, to five dollars per week. From the evidence we think that the services rendered during a considerable portion of that period were limited largely to making her bed and some slight at-

tentions that required little time or effort on the plaintiff's part, though no doubt they increased as the defendant's infirmities grew; and inasmuch as the plaintiff fixed a value of $18.00 per week for board and care of Mr. West during his last illness, and it was testified by a physician that an "experienced" nurse in Waterville received $25.00 per week and that the care Mrs. West required during the last four months was such as any ordinary woman could give, though somewhat exacting, we think the sum of one thousand dollars is ample compensation for all the services rendered by the plaintiff during the entire period in addition to those rendered in carrying out her husband's agreement.

Unless, therefore, the plaintiff shall file a remittur of all over $1000, a new trial will be ordered.

Exceptions overruled.
Motion for new trial granted unless plaintiff within thirty days after receipt of rescript by Clerk shall file a remittitur of all over one thousand dollars.

SHAW'S CASE.

Cumberland. Opinion February 9, 1928.

Statements contained in medical writings are not competent evidence of the facts stated:

While the Appellate Court will not review findings of fact by the Industrial Accident Commissioner or his deputy, it is not bound by their reasoning.

Where an order of the Commissioner or his deputy is based in any part on statements or writings not offered in evidence, or on conjecture, it constitutes an error of law from which an appeal from the decree of the Court below based thereon will be sustained.

While on a petition to determine present incapacity the burden is on the petitioner to show that the employee's incapacity has ceased, or, if any exists, is not due to the injury, if the deputy commissioner in dismissing the petition bases findings of fact on evidence outside the record or his findings are the result of pure speculation or conjecture, an appeal from the decree confirming his order will be sustained.

That a certain obscure disease developed following a traumatic injury is not alone sufficient on which to base a finding that the disease resulted from the trauma without some competent evidence of cause and effect.

On appeal. Claimant, while in the employ of the respondent, received an injury to the left eye by a nut striking his glasses, breaking them and causing a hemorrhage of the eye. An agreement for compensation was entered into between the parties and approved by the Labor Commissioner which provided that compensation should be paid at the rate of $18 per week during the period of total incapacity beginning February 4, 1927, and that additional compensation should be paid for any subsequent period of incapacity. On May 11, 1927, respondent filed a petition to determine the present incapacity and a hearing was had and the petition dismissed and a decree entered that compensation for total incapacity be continued under the agreement, from which decree respondent appealed. Appeal sustained.

Petition granted. Case remanded to the Commission to determine the date of termination of incapacity due to the injury.

The case fully appears in the opinion.

Claimant was without counsel.

Verrill, Hale, Booth & Ives, for petitioner.

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

WILSON, C. J. One Wallace W. Shaw, on January 28, 1927, while in the course of his employment as a carpenter and engaged in cutting with a cold chisel and hammer small nuts from quarter inch bolts holding the hinges of a vestibule door of a street car, was struck near the eye by one of the nuts as it flew off, breaking his glasses and causing some of the pieces of the glass to enter the eye.

The only injury apparent to the physician who saw him within an hour of the accident was what he termed a sub-conjunctival hemmorrhage due to a slight injury to the tissues and blood vessels of the eyeball beneath the outer covering or membrane. Owing to the nature of the injury, he was sent on the following morning to a specialist in diseases and treatment of the eye who saw no other external signs of injury. Nor was his attention called to any during all the time of his treatment from January 29th to February 23rd, although the wife of the patient testified that there was a black place on the nose, meaning, we presume, what is ordinarily termed black and blue, a condition usually following a blow causing an injury to the blood vessels beneath the skin. Both she and her husband also testified that on the day following the accident there was some bloody mucous discharged from the nose.

The patient returned to work on January 31st and worked two or three days and then complained to the eye specialist that he was subject to headaches, dizziness, and double vision. As he also displayed symptoms of drowsiness, immobility of expression and lack of memory, the physician having had considerable experience with cases of encephalitis of the lethargic type, or sleeping sickness, advised him to have a physical examination to determine the cause of these symptoms. No infection developed in the eye and in due time, and long

before the hearing on the petition in this case, it went through the usual process of a complete recovery.

On February 10th, he consulted a general practitioner recommended by the eye specialist and on February 23rd his condition not improving, the physician made a thorough physical examination in the presence of four other specialists in certain branches of medicine. The diagnosis arrived at was "encephalitis and probably encephalitis lethargica."

So far as any inference could be drawn by a layman from the evidence in the record that is not pure conjecture, the injured employee is or was suffering from some form of this somewhat obscure disease caused by the entering into the blood stream and finally the brain cells, in some manner, of a germ about which little is known to medical science and which has not yet been isolated.

Following the injury to the eye and the consequent incapacity, an agreement between the employee and employer was entered into for compensation during disability. On May 11th, 1927, the employer filed a petition to determine his present capacity, alleging that "the incapacity for which the employee is being compensated is ended."

After a hearing at which the employee and his wife and the several physicians who attended or who had examined him testified, the deputy commissioner, without finding as a fact that the pathological conditions described by the physicians as existing was due to the disease known as encephalitis lethargica, and apparently conscious of the lack of evidence sufficient to warrant a positive finding as to any connection between the condition of the employee as diagnosed by the physicians and the slight injury he received, expressed his conclusions as follows: "We think all will agree that the man is suffering from some nerve disorder affecting the brain whatever the name of the disorder may be." This was folllowed by a discussion not based on any testimony in the record, of the olfactory nerves, the boney construction of the nose and its relation to the brain cavity and a theory which is purely speculative as to how the germs may have entered the blood stream and brain in this case. His final conclusion rises no higher than a belief, and has no support on any competent testimony in the case: "We believe the accident caused some sort of an injury to these nerves that the brain became affected. It

seems to us directly connected, even if there be argument as to the name of the disease. We oftimes hear of blows to the 'base of the brain' causing incapacity. This cribriform plate forms a part of the base of the cranium. The trauma was close up to it." There is no testimony in the record of any blow at the "base of the cranium" or any testimony as to the nature or location of any cribriform plate. The only evidence of a blow other than to the glasses is testimony of the wife of a place on the nose indicating a blow, but not of sufficient force even to break the outer skin.

And then by a process of *post hoc, ergo propter hoc* reasoning: "Employee was a well man to the moment of injury. Now he suffers." Therefore he concludes the present incapacity is due to the injury. While this Court must accept his findings of fact, if based on any competent evidence, it is not bound by his reasoning. *Mailman's case*, 118 Me., 177; *Kelley's case*, 123 Me., 261.

From the decree of the Court affirming the decree of the deputy commissioner the petitioner employer appealed. We think the appeal must be sustained.

It is true the present case is based on a petition by the employer, and if the petition had been dismissed upon the ground that an agreement having been entered into, and the status of incapacity being already found to have been caused by the accident, it being presumed to continue until the employer sustains the burden of showing that it has ended or diminished, *Orff's case*, 122 Me., 114, and that it was not sustained, no erroneous ruling of law would have been apparent, as the question of the weight of evidence and whether the burden of proof is sustained is solely for the commissioner. The rule on appeal, however, that slight evidence, if competent, is sufficient to sustain a decree is not the rule for determining whether the burden of proof is sustained before the Commission.

But the deputy commissioner in the case at bar assigned as grounds for his decree conclusions that are unsupported by any competent testimony, or beliefs that are the result of pure speculation and conjecture, which assigned as grounds for dismissing a petition constitute an error in law where they go to essential facts on which the petition is based.

It is undisputed that, at the date of the hearing on the petition, any incapacity due to the injury to the eye had long since terminated.

The issue upon the petition, therefore, was whether the pathological conditions, to which the present incapacity of the employee is due, in any degree resulted from the injuries received from the nut. So far as there is any competent evidence in the case on which to base a positive finding as to the cause of his present incapacity, it is due to the presence of the germ of encephalitis lethargica or the results of infection therefrom. To assign any other cause, so far as the record discloses, is pure speculation, as is apparent from the language of the deputy commissioner, who evidently appreciating the force of the petitioner's contention that from the evidence a conclusion that the disease of encephalitis lethargica could have resulted from the accident was unwarranted, expressed the belief that, while it might be doubtful as to what the nature of the disease was, the accident caused "some sort" of an injury to the nerves that affected the brain.

The only competent evidence in the case connecting the blow from the nut with the introduction of the sleeping sickness virus is the opinion of the physician who made the physical examination that it was "possible" from the history of the case furnished him if there was some lesion of the inner membrane of the nasal passage caused by the blow from the nut through which the germs may have entered, though even he would not say this was probable. He based his opinion upon a statement he found in some medical compendium stating "that the writer has observed a number of instances where trauma immediately antedated the onset of the symptoms of encephalitis" though this writer did not state any connection between a trauma and the disease had ever been proven; and also upon the physician's understanding that the symptoms in the instant case indicated a continuity following the accident in the natural progress of the disease, assuming the period of incubation of the sleeping sickness germ to be from three to six days. He frankly admitted, however, that he did not know and had been unable to ascertain the period of incubation of this germ.

His inference, however, based upon his assumed period of incubation, as to the appearance of the symptoms being consistent with the entering of the germ through any lesion in the nasal passages due to the accident was clearly founded on a false premise. Not that the physician was in any way to blame. He did not see the patient for two weeks after the injury and had to take the history of the case

as given him; but instead of the appearance of the first symptoms of sleeping sickness, namely: severe headaches and dizziness, appearing in due course of three to six days following the accident, as he had inferred from the history of the case given him at the time of the examination, and indicating the entrance of the germs after the injury, these symptoms appeared almost immediately following the accident. The undisputed testimony of the record is that the injured employee came home with a severe headache the very night of the accident and dizziness appeared the following day. This evidence was not before the commissioner at the time the physician expressed his opinion, and there is no evidence that it was called to his attention. If the time of the appearance of these symptoms has any significance as to when the germs entered his system, the only reasonable inference is that it was several days before the accident, and had no connection with it. All the medical testimony is to the effect that the sources of this infection are not yet determined,—in other words, are still the subject of speculation.

The deputy commissioner fell into the same error in his decree,—"that the symptoms began to appear at the proper time AFTER the accident for this disease to have begun at the same time." The stress laid on the word "after" is his. He not only relies on the suggested continuity in the progress of the disease following the accident, but apparently gives weight also to the statement in the loose leaf encyclopedia referred to by the physician as well as another authority named by himself which was in no way referred to in evidence or made a part of the case. Not only are medical books incompetent as evidence of any statement they contain, *Greenleaf on Ev.* Vol. I, sec. 440 note; *Jones on Ev.*, sec. 578; 10 R. C. L. p. 1163; *Ashworth* v. *Kittridge*, 12 Cush., 193; *Washburn* v. *Cuddihy*, 8 Gray, 430, but a decree based in part on any oral statements of material facts or contained in a treatise, outside of the record, is sufficient to sustain an appeal. *Mailman's Case, supra; Gauthier's Case*, 120 Me., 73.

Neither does either of these authorities, if they were competent as evidence, state to what form of encephalitis they refer; whether to encephalitis of the lethargic type or to some other form of brain trouble described under the general head of encephalitis.

The testimony clearly discloses that any connection between the pathological conditions described by the physicians and any injury received from the accident described is based on pure speculation and conjecture. Only one of the physicians was willing to say it was even possible. While the others, after a study of the authorities, unequivocally stated that in their opinion there could be no connection.

So far as we are advised, no Court has yet held that knowledge of the sources of the infection known to the medical profession as encephalitis lethargica was sufficiently positive to warrant a conclusion that its inception could be traced to any traumatic injury or was one of the hazards of an employment, *Dehn* v. *Kitchen* (N. D.) 209 N. W., 364; *Donovan* v. *Alliance Elec. Co.* 186 N. Y. S. 813.

While all diseases must have an inception, because a sufferer had some minor accident on the same day on which the symptoms of a particular disease first appeared does not alone lift out of the realm of speculation any causative relation between the two, especially in a case where all medical experience discloses that the sources of the particular infection involved have not been determined and so far as known are always other than traumatic.

When the deputy commissioner apparently abandoned the diagnosis of the medical experts and evolved a theory of his own of an injury to the nerves, olfactory or otherwise, and affecting the brain, based on a blow at the "base of the cranium" of which there is no supporting evidence in the record and by an elimination of all other sources of infection, because none is positively proven, notwithstanding the physicians all agreed that the sources of this particular infection are unknown; and then merely by a *post hoc* process of reasoning assigns the present incapacity to the injury from the blow of this nut, that did not even cause an abrasion in the outer skin of the face or a mark that any examining physician noticed, he wandered still farther into the realms of speculation and conjecture where this Court can not follow.

Appeal sustained. Petition granted. Case remanded to the Commission to determine the date of termination of the incapacity due to the injury.

STROUT'S CASE.

Hancock. Opinion February 10, 1928.

The evidence upon which a claim for continued compensation under the Workmen's Compensation Act was based, was plainly incompetent and inadmissible.

In this case the accident occurred on December 20, 1926, and the hearing was held on June 21, 1927. It is evident that the period for which the petitioner should have compensation had ceased long before the hearing. The injury was to the eye. The petitioner attempted to show that prostate trouble lengthened the period during which he should receive compensation. The evidence upon this point was plainly incompetent and inadmissible.

On appeal by respondents. Petition of Emery Strout for compensation for an injury sustained by him while in the employ of Whitcomb, Haynes & Whitney as a horse feeder alleging that as he was working around a horse it switched its tail into petitioner's eye, as a result ulcers formed on his eye causing a partial loss of sight. Compensation was awarded beginning December 30, 1926, and to continue so long as temporary total incapacity should last, and from an affirming decree respondents appealed. Case remanded for the purpose of determining the amount of compensation legitimately due on account of the injury to the eye. The case fully appears in the opinion.

Harry L. Crabtree, for petitioner.

Eben F. Littlefield and William B. Mahoney, for respondents.

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

PHILBROOK, J. Petition for award of compensation under the provisions of the Maine Workmen's Compensation Act filed with the Industrial Accident Commission on April 28, 1927. The petitioner

was employed in the stable of the defendant and while so employed, according to the findings of the Associate Legal Member of the Commission, a horse switched its tail in the face of the petitioner, the hairs evidently cutting his eye ball sufficiently to cause him pain and much inconvenience at once and thereafter. The accident upon which the petitioner relies occurred on December 20, 1926. On December 24, while in the woods to obtain a Christmas tree for his grandchild, an act in no way connected with his employment, the branches of the tree hit him in the face, and the insurance carrier relies upon this event as the incapacitating cause of the injury to the eye.

The petitioner testified that immediately after the horse switched his tail across the eye he had to go and sit down and that his eye turned red and was inflamed. A fellow employee, who was present when the accident occurred, testifies "He put his hand right over his eye and said 'I've got to go and sit down' and so he went over on the hay there and flopped down." The same witness testified that he saw the petitioner the next day and that the eye was then "all red and inflamed"; and that the condition and inflamation continued for some days. In cross examination the latter witness said that he noticed that the eye was inflamed immediately after the horse's tail hit it and that as soon as the petitioner sat down the witness said to him "Your eye is inflamed"; and that the next morning the eye run much water.

He told one of his employers that his eye was injured by the Christmas tree which he was fixing for his grandchild. Another one of the employers testified that the petitioner told him that he was struck by a Christmas tree. The surgeon who performed the operation on the eye said that in getting a history of the case the petitioner told him that he had been hit in the eye with a Christmas tree but later stated that he was working around horses and one of the animals switched his tail and struck him across the eye, causing considerable discomfort. On the first inquiry the physician got no history of the blow from the horse's tail. We quote the following questions addressed to the physician and his answers thereto:

> "Q. Did you have any talk about compensation with the man?

A. He asked me, when he spoke about the horse's tail, if I thought that caused it and I told him it could have or the other could have or both could have and he said 'Well, if I am entitled to it I want it and if not I don't; I don't know.' And I told him I didn't know. You see I didn't see him for a week after the last injury and they came pretty close together so I didn't know how I could tell."

* * * * *

"Q. Do you remember how he happened to be speaking the second time about the history of his injury? Do you recall the circumstances?

A. Why simply that as he said he recognized that he would get compensation for that and for that reason he wanted to know.

Q. You were unable to tell him which it might have been?

A. I told him, just as I said, that it could have been from either one and without knowing myself I could not tell by the looks of it then which caused it. All I knew, it was injured."

On redirect examination the petitioner testified as follows:

"Q. The doctor says you told him the history of your injury was the injury from the Christmas tree when you first came and then after about three days he thinks you told him that you had been hit in the eye with the horse's tail prior to the Christmas tree injury?

A. Yes, sir; I did.

Q. Why didn't you tell him, if you knew, about the horse's tail in the first instance?

A. I didn't remember and my eye was paining me so that I didn't remember; that is all that I can tell you."

In *Mailman's Case,* 118 Me. 172, it was held that in order to support a decree that there must be some competent evidence; it may be slender but it must be evidence and not speculation, surmise or

conjecture; and in *Swett's Case,* 125 Me. 389, it is stated that if a decree for compensation is founded upon speculation, surmise or conjecture it cannot stand. In the case at bar the defendants strenuously urge that the decree for compensation was not supported by competent evidence and that it was based entirely upon guess, surmise and conjecture. The case is dangerously near the border line but there is some evidence on which to base the finding of the Associate Legal Member that the disability was due to the blow received from the horse's tail. We allow that to stand under the familiar rule of finality as to his decision upon all questions of fact in the absence of fraud.

While the petitioner was receiving treatment for his eye he was taken to the Eastern Maine General Hospital where he underwent an operation upon the prostate gland. By reason of this last operation he was confined to the hospital for some time and claimed to be in a weakened condition at the time of the hearing upon his petition which was June 21, 1927. The only attempt to connect the eye trouble with the prostate gland trouble was the evidence of the petitioner himself that the doctor (a surgeon other than the eye specialist) said that the prostate trouble was due to his lying around the hospital. This was incompetent and inadmissible testimony. While the burden was on the petitioner he made no effort to support this statement by competent evidence from the eye specialist though the latter was on the stand more than once. It is clear that the Associate Legal Member's decree as to present incapacity must have been based solely on this incompetent testimony. If supported by medical testimony it might have been sufficient to sustain the decree, but not only is it hearsay, and even though held competent because admitted without objection, yet without medical support by the petitioner when it could have readily been furnished, if such were the fact, the conclusion that his prostate trouble arose from such a cause is not a reasonable deduction and is insufficient to support that part of the decree which granted compensation long after the time had expired when he was entitled to compensation for the eye trouble.

It will be observed that the accident was on December 20, 1926, the hearing was June 21, 1927. The petitioner himself testified that so far as his eye was concerned he could have gone back to work in

about a month after the injury and that his disability to work at the time of the hearing was due to his prostate trouble. Dr. Moulton, the eye specialist, also testified that in two weeks after January 21st he could have attended horses. This statement was made in answer to a question as to how long the petitioner was incapacitated because of the injury to the eye as distinguished from his prostate trouble. Unless the prostate trouble can be traced to the trouble caused by the switching of the horse's tail his incapacity to do the labor he was doing at the time he was injured ended long before the hearing and his right to compensation under this petition ceased then. It is therefore plain that the case must be sent back to determine the amount of his compensation due to the injury of the eye.

So ordered.

HAZEL PENLEY *vs.* TEAGUE & HARLOW CO.

Androscoggin. Opinion February 10, 1928.

The admission or rejection of photographs lies largely within the discretion of the presiding justice, and, in absence of abuse of discretion, exceptions do not lie.

Mortality tables are admissible if satisfactory to the court as to their authenticity by its own knowledge or upon evidence.

In a case involving injuries of a temporary nature, expectancy of life would not be an element to be considered, hence the admission of mortality tables would be error, but where the injuries are shown to be permanent in their character, it is proper to consider the probable expectancy of life, and mortality tables are admissible.

Upon the contention as to the defendant's negligence and of lack of contributory negligence on the part of the plaintiff the jury decided in favor of the latter. The evidence was conflicting but we cannot say that the verdict upon these questions was manifestly wrong, but the damages were plainly excessive.

On exceptions and motion for new trial by defendant. An action to recover for personal injuries sustained by plaintiff resulting from being struck while upon a public street crossing in Lewiston by an automobile driven by defendant's agent and servant. Defendant excepted to the admission of photographs and mortality tables. The

jury returned a verdict for plaintiff for $7,500, and defendant filed a general motion. Exceptions overruled. Motion granted unless remittitur filed. The case fully appears in the opinion.

Clifford & Clifford, for plaintiff.

Ralph W. Farris, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DUNN, BASSETT, PATTANGALL, JJ.

PHILBROOK, J. The plaintiff, a pedestrian upon one of the public street crossings in Lewiston, was struck by an automobile driven by the defendant's agent and servant, resulting in damages for which she recovered a verdict of $7500. The case is before us on exceptions and motion for a new trial.

Three elements appear in the bill of exceptions. The first exception was waived in the argument before the law court. The second was with reference to the admission of photographs of the plaintiff, and the third the admission of mortality tables to show the expectancy of life of the plaintiff.

ADMISSION OF PHOTOGRAPHS. Counsel for the defendant objected to the admission of two photographs of the plaintiff, alleging that the photographs were offered without identifying them or laying the proper foundation, thereby barring counsel for the defendant of the privilege of questioning the photographer who took the photographs; also on the ground that they were not original evidence, but secondary evidence, and would be prejudicial to the defendant's case where the subject of the photographs was in court and before the jury; also that the photographer, who took the pictures was not present at the trial and that the proper foundation had not been laid to offer the photographs. In *Rodick* vs. *Maine Central Railroad Co.,* 109 Maine, 530, our court has said, "This question of the admissibility of photographs in evidence has been several times considered by this court and the rule of practice in this State has been firmly established. Their admission or rejection lies largely within the discretion of the presiding Justice and the exercise of that discretion, unless the court finds the facts such as to show an abuse of discretion, is not the subject of exception. Whether it is sufficiently

verified, whether it appears to be fairly representative of the object portrayed and whether it may be useful to the jury, are preliminary questions addressed to him and his determination thereon is not open to exceptions." See also *State* v. *Jordan*, 126 Maine, 115. A careful examination of the entire record fails to disclose abuse of discretion on the part of the presiding Justice and this exception is therefore overruled.

ADMISSION OF MORALITY TABLES. This constitutes the ground of the third exception presented by the defendant. During the progress of the trial counsel for the plaintiff produced a copy of Leighton's Probate Practice, and read into the record, from the mortality tables therein, the expectancy of life of the plaintiff. Counsel for defendant objected on two grounds; (a) that the tables were not shown to be of standard authority; (b) that the expectancy of life was not material or relevent in the case at bar owing to the fact that the plaintiff had not proved to a reasonable certainty any future disability, and that the admission of these tables was prejudicial to the defendant's case.

In some courts it is said that such tables are admissible after proper preliminary proof of their authenticity and standard quality. But the general weight of authority is to the contrary and permits the introduction of such tables as are satisfactory to the court. The court may or may not require such preliminary proof, depending upon whether of its own knowledge it is satisfied, or whether it desires evidence to satisfy itself of the authenticity of the tables, *Keast, et al* vs. *Santa Ysbel Gold Mining Co.* (California), 68 Pac. Rep. 771.

In a note following *Ruehl* vs. *Lidgerwood Rural Telephone Co.*, (North Dakota) Am. Ann. Cas. 1914 C., 680, supported by numerous authorities, it is stated that courts will take judicial notice of standard mortality tables is now a well settled rule of evidence. The tables found in Leighton's Probate Practice are the so-called "Combined Experience Tables" and have been in general use, and recognized by courts as standard for many years. We, therefore, see no error on the part of the trial court in permitting these tables to be read, so far as any element of standard quality is concerned.

In an action to recover damages occasioned by the negligent act of a defendant, if the injuries received are of a temporary nature it is quite obvious that expectancy of life is not an element to be con-

sidered and in such cases admission of mortality tables for the purpose of showing the probable expectancy of life of the plaintiff would be error.

At this point it should be observed that there is a wide difference between permanent injury and total disability. This fact was recognized in *O'Brien* vs. *White and Company*, 105 Maine, 308, where the plaintiff, through the negligent act of the defendant, suffered loss of a right leg and the ends of two fingers of his left hand, by necessary amputation. The court there said "But he is not helpless, nor totally disabled for labor, for there are many occupations which can be pursued by persons having lost one leg and the partial use of the left hand." And so in many instances a plaintiff may suffer a permanent injury even though not totally disabled. Keeping this distinction in mind we proceed to the question of introduction of mortality tables when a plaintiff has sustained a permanent injury.

The rule stated in 17 C. J. 873, and supported by a long line of decided cases, is that in estimating damages, where the injuries are shown to be permanent in their character, it is proper to consider the probable expectancy of life of the plaintiff, and for this purpose standard life and mortality tables are admissible. The Federal Court, in *Whelan* v. *New York, L. E. & W. R. Co.*, 38 Fed. 15, states the rule to be that in ascertaining the damages for impaired ability to earn a livelihood, standard life and annuity tables are competent evidence to be considered. The same court, in *Colusa Parrot Mining Co.* vs. *Monahan*, 162 Fed. 276, says that it is not error to admit evidence, upon the question of damages, as to the plaintiff's expectancy of life according to the life tables, and in respect to the amount required to produce him an annuity for such life term equal to the difference between the amount which he would have earned each year if he had not been injured, and that which he could earn in his injured condition. Thus it will be seen that the Federal Court rule is somewhat broader than the general rule above stated but is not necessarily in conflict with that rule.

In *Banks* vs. *Braman*, 195 Mass. 97, 80 N. E. 799, it was held that where the plaintiff's contention was that his injury was permanent it was proper, if not necessary, for the jury in estimating the amount of compensation to take into consideration the probable duration

of his life; and on that question there can be no doubt that standard mortality or life expectancy tables would have been admissible.

Many other cases might be cited in support of the general rule already stated but we have no hesitancy in saying that the admission of the mortality tables in the case at bar was proper providing any of the injuries suffered by the plaintiff were permanent and would in any degree permanently affect her earning capacity.

We therefore turn to the record to ascertain whether the plaintiff suffered any injuries which were permanent and by reason of which her earning capacity might be reduced.

In her declaration the plaintiff alleges that she was thrown to the ground, and dragged over the surface of the highway whereby she received multiple contusions and abrasions; tearing and lacerating the flesh of her face, nose, chin, lips, and eyes, and causing soil, dirt, gravel and other substances to be ground into the tissues of her face, whereby she became permanently injured and disfigured.

From the medical testimony it appears by statements of reputable physicians, called by the plaintiff, that the marks upon her face are permanent. Three physicians called by the defendant also testified that the scars upon and disfiguration to her face are permanent.

At the time of the accident the plaintiff was working in a doctor's office but at the same time was pursuing the study of voice and piano and was giving instruction in both these branches to various pupils. She had been pursuing the study of music for about ten years. She claimed that she had made marked progress and received liberal patronage as a teacher, and that the disfigurement of her face rendered her personal appearance unattractive to such an extent as to affect her popularity as a teacher and her ability to obtain and retain pupils.

The charge of the presiding justice is not made a part of the record. No exceptions thereto are presented and we may assume that proper instructions were given. With those instructions the jury must have found that the disfiguration was permanent and that the injuries received diminished her earning capacity. Under the general rule of admission of mortality tables above stated we hold that their admission here was proper and this exception is overruled.

MOTION. Upon the contentions as to the defendant's negligence and the lack of contributory negligence on the part of the plaintiff

the jury have decided in favor of the latter. The evidence was conflicting but we are not prepared to say that the verdict of the jury upon the question of liability was manifestly wrong. We do feel that the damages awarded were excessive and plainly so. In such a case the sympathy of a jury might be easily aroused and even to such an extent as to warp their judgment. It is the opinion of the court that the damages should not exceed $3500.

The mandate will therefore be:

Exceptions overruled.
If plaintiff remits all of the verdict in excess of $3500 then the motion shall be overruled, otherwise motion for new trial granted.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

HUBERT E. SAUNDERS *vs.* FANNIE CROSBY.

Washington County. Decided January 5, 1927. This action was begun by an attorney at law to recover for professional services averred to have been rendered by him in behalf of the son of the defendant on the promise of the latter that she would pay the attorney for what in virtue of his retainer he might do.

The verdict was for the defendant.

Neither the usual-form motion by the plaintiff that the verdict be set aside as plainly wrong on the facts and in law, nor the record accompanying the motion for a new trial upon the ground of newly discovered evidence, is sufficient to purpose.

Both motions are hereby overruled. *Gray & Sawyer*, for plaintiff. *O. H. Dunbar*, for defendant.

ISABELLA A. WILBUR *vs.* MORRIS-LANCASTER COMPANY.

Hancock County. Decided January 24, 1927. Plaintiff claimed that contract evidenced a sale by her to defendant of the Durant touring car and that she was entitled to delivery of the Jewett car on payment or tender of $460. Defendant claimed that Durant car was taken by it to sell for plaintiff at the price fixed, the proceeds of sale to be credited to her if and when sale was made. The presiding justice decided in favor of the defendant. He could not do otherwise. The contract speaks for itself. The question does not admit

of discussion. Exceptions overruled. *D. E. Hurley*, for plaintiff. *Terence B. Towle*, for defendant.

MRS. R. L. BEAN *vs.* CAMDEN LUMBER & FUEL CO., ET ALS.

Knox County. Decided January 24, 1927. Plaintiff recovered a verdict in this case for the amount claimed in her writ, and it comes forward on a motion for a new trial, the motion being in the usual form. The action was brought on a promissory note, the declaration also embracing a count for money loaned and a count for money had and received.

This case in its various phases has already been before this court twice. 124 Maine 102, and 125 Maine 260. It has been twice tried to a jury. But for an unfortunate incident which caused the court to set aside a former verdict, it would have been finally disposed of long ago and favorably to the plaintiff.

The issue in the case is of fact and extremely simple. The jury was called upon to find whether or not the plaintiff loaned to the defendant on August 31, 1920, the sum of $5000.00 which the defendant had failed to repay. The finding was in her favor. There is ample evidence to sustain it. Motion overruled. *Oscar H. Emery*, for plaintiff. *J. H. Montgomery*, for defendant.

HAROLD L. ALT

vs.

HARRY H. CANNELL, Adm'r. c. t. a. of the Estate of ELIZA L. MAGUIRE.

Cumberland County. Decided February 10, 1927. Action of assumpsit to recover for twenty-three months' room and board of Eliza L. Maguire in the home of the plaintiff in Shanghai, China. The plaintiff is the husband of the grand daughter of Mrs. Maguire who at the time of the alleged services was almost eighty. She had made her home with the plaintiff for some years in this country and went with him and his family to Shanghai when he moved there. The jury found for the plaintiff for the period claimed at $75 per

month. The case comes before this Court on a motion for new trial on the usual grounds. The law of this State in cases of this kind is definitely settled, *Bryant* vs. *Fogg*, 125 Me. 420, and cases cited. The issue here was one of fact, whether under the circumstances the services were rendered on the basis of contract or not. The determination of that issue in cases like this is "peculiarly the province of the jury." There was evidence to support the verdict. It cannot be said that the record discloses any sound reason to disturb it. Motion overruled. *Harry A. Nickerson and Frank H. Haskell*, for plaintiff. *William* A. *Connellan and Elton H. Thompson*, for defendant.

MUTUAL BENEFIT LIFE INS. CO.

vs.

MAE M. LEIGHTON, EXECUTRIX, ET AL.

MASS. MUTUAL LIFE INS. CO. *vs.* MAE M. LEIGHTON, ET AL.

Androscoggin County. Decided February 16, 1927. Bills of interpleader to determine the right to proceeds of two insurance policies under assignments. The issues raised were fraud and undue influence on the part of the assignees and mental incapacity of the assured.

Three questions were submitted to a jury embodying the above issues. The jury answered the first question in the negative, that there was no fraud; but answered the two last questions in the affirmative, that there was both undue influence and lack of mental capacity, which are incompatible and indicated that the jury did not fully understand the issues or the law.

The only issues were of facts on which the jury verdict was merely advisory. Upon the evidence, minds might well differ as to the correct conclusions to be drawn. The sitting Justice, however, found that there was no fraud, or undue influence, and that the assured was of sufficient mental capacity to transact the business in hand. His findings are supported by sufficient testimony if believed, so that

this Court can not say they are clearly wrong. Appeal dismissed. Decree of sitting Justice affirmed. *Verrill, Hale, Booth & Ives,* for Mutual Benefit Life Insurance Company. *John F. Handy,* for Massachusetts Mutual Life Insurance Company. *Frank A. Morey, and A. L. Kavanagh,* for Mae M. Leighton, executrix. *Locke, Perkins & Williamson,* for Algia R. Vaughan and Ruth L. McLeary.

STATE *vs.* RAPHAEL CARTONIO.

Cumberland County. Decided February 24, 1927. After state and respondent had presented their evidence on trial under an indictment for maintaining a common nuisance, motion for a directed verdict was made and overruled, and exceptions were taken. Indictment, motion and the evidence are made part of the bill of exceptions.

The case was submitted to the jury and verdict of guilty was returned. The gravamen of the charge is that, within a time whose limits are given, the respondent did unlawfully keep and maintain a certain tenement, in Portland, used for the illegal sale and for the illegal keeping of intoxicating liquors, where intoxicating liquors were sold for tippling purposes, a tenement that was then and there a place of resort where intoxicating liquors were unlawfully kept, sold, given away, drank and dispensed.

There is evidence of sales, convincing, if of sufficient weight to remove reasonable doubt, evidence of search by officers of the law at different times, which resulted in the finding of alcohol in large quantities, in "hides" in or about the shop or store of the respondent. The precise location of these hiding-places for liquor was of sufficient moment to warrant a view by the jury, which was asked for, granted and had. We cannot say that the evidence, upon the whole, considered under the instructions of the judge, should not remove all reasonable doubt of the guilt of the accused.

The case is one peculiarly for the jury, and we find no abuse of judicial discretion. Exceptions overruled. Judgment for the state. *Ralph M. Ingalls, County Attorney, and Franz U. Burkett, Assistant County Attorney,* for the State. *Samuel L. Bates and Frank P. Preti,* for respondent.

S. D. PAGE *vs.* CHARLES E. MOULTON.

Androscoggin County. Decided March 14, 1927. The plaintiff claims damages by reason of negligent driving of an automobile by the defendant. The accident occurred on a public street where travel was very heavy. The plaintiff, ignoring white lines which indicated the street crossing for pedestrians, started to cross the street and collision between him and defendant's automobile resulted. It was a typical case of what is commonly called "jay walking." The jury returned a verdict for the plaintiff and assessed damages in the sum of $3500.00. The case is before us on motion for new trial on the customary grounds.

This court has always been very conservative when requested to set aside the verdict of a jury, especially in personal damage cases, but the power of the court to set aside verdicts, and its duty to do so when the verdicts are clearly wrong, or when the damages are clearly excessive, are unquestionable. *McNerney* vs. *East Livermore*, 83 Maine, 449.

In the instant case the damages are grossly excessive. That fact, to some extent, reflects the failure of the jury to fairly appreciate and apply the testimony as to the question of liability. Motion sustained. New trial granted. *Benjamin L. Berman, David V. Berman, Jacob H. Berman, and Edward J. Berman*, for plaintiff. *Ralph W. Farris*, for defendant.

MARIE J. PROVOST *vs.* EDMOND JODOIN, ET AL.

Androscoggin County. Decided April 5, 1927. A replevin writ is not demurrable for either or all of the following reasons:—

(1) "That the plaintiff's declaration does not allege or place any value on the goods and chattels described."

In replevin the value of the chattels replevied is not in issue. *Thomas* v. *Spofford*, 46 Me. 409 "The allegation of value is unnecessary." *Littlefield* vs. *Railroad Co.* 104 Me. 126.

(2) That it "does not specify all of the particular property replevied."

This is merely to say that the officer making the service took some goods not described in his writ. As to such chattels, if any, his writ does not protect him. But this is not a ground of demurrer.

(3) "That it does not appear that the sureties on the bond were approved by the sheriff as provided by law."

The statute providing for replevin of goods does not require that the replevin bond be formally approved. R. S. Ch. 101, Sec. 10.

The statute provides that the bond shall have "sufficient sureties," "in double the value of the goods to be replevied."

The return shows that this requirement was complied with.

Moreover a demurrer by a defendant challenges the legal sufficiency of the writ and declaration, not of the bond.

The defendant does not point out any other specific fault in the writ or declaration. Nor do we discover any. Exceptions overruled. *Frank A. Morey,* for plaintiff. *M. L. Lizotte,* for defendant.

MABEL PEASLEE *vs.* THE THOMAS SMILEY COMPANY.

Androscoggin County. Decided April 15, 1927. For about six months in the year 1925 the plaintiff was employed in the Portland store of the defendant, having charge of one department. Her wages fixed by agreement at twenty dollars per week were paid in full.

She contends however that, in addition, she is entitled to a commission of one per cent upon the sales made in her department during her employment and that such commission amounts to $150.70. For this she brought the pending suit and recovered a verdict of $152.20, apparently the commission claimed plus interest.

The contract of employment was made orally at an interview in Portland between the plaintiff in person and the defendant represented by Mr. Smiley, Proprietor, and Mr. Grant, Superintendent.

From the plaintiff's own explicit testimony these facts appear: At the time of her employment she asked for twenty-five dollars per week. The defendant's representative refused to pay this amount. They offered twenty dollars per week. She accepted their offer and went to work. Neither at this time nor subsequently during her employment was anything said by either party about a commission on department sales.

The plaintiff's claim for such commission was based upon an interview with Mr. Grant, had a week or two earlier. The plaintiff testifies that at such interview Mr. Grant responded affirmatively when she asked him "if he paid the usual one per cent buyer's commission."

It is not contended that the plaintiff was employed at this time. No wages were then agreed upon. No contract was made. Mr. Grant's account of the interview was quite different.

But assuming the plaintiff's version to be true, there is nothing in the evidence to justify a finding that when the contract of employment was closed the parties mutually intended that the plaintiff was to receive in addition to the wages then definitely agreed upon, a commission on department sales.

Other circumstances appearing in evidence tend to support this conclusion. But the issue being purely one of fact it is unnecessary to prolong this opinion by a discussion of such evidence.

Included in the declaration is a further claim of about fifteen dollars bonus upon sales made by the plaintiff in person. Apparently the jury did not allow this item. Motion sustained. New trial granted. *Louis J. Brann,* for plaintiff. *Walter M. Tapley, Jr.,* for defendant.

LOTTIE TUKEY CLAPP, EXECUTRIX *vs.* LORING H. TRIPP ET UXOR.

Cumberland County. Decided July 15, 1927. This case comes here on report by consent of the parties from the Supreme Judicial Court in Cumberland county. By the terms of the report, this court has jury power to decide the facts, upon the legally admissible evidence.

Loring H. Tripp and his wife, these defendants, executed and delivered to Loring's mother, their mortgage of certain real estate. Since then the mother has died. Action now is by the executrix of her will to foreclose the mortgage.

Against the prima-facie case which the undischarged mortgage, supplemented by the promissory note payment whereof the mortgage was given to secure, with indorsements on the note showing it

to be but partially paid, make for the plaintiff, the defense is an accord with satisfaction.

There is evidence which tends to show that in her life-time the mortgagee agreed with the mortgagors to accept the payment at an earlier time of a part of the whole debt due in substitution of the former one, and evidence also which tends to show the complete performance of the latter agreement to that point whence it was to operate a satisfaction of the pre-existing liability, and be bar to any suit on the original claim; all which other evidence tends to contradict.

Assuming, what seems consonant to statutory purpose, and that is, that within implied contemplation of the statute authorizing proceedings of this nature, in contradistinction to the common-law rule in real actions, an accord and satisfaction may be pleaded to this kind of a real action, it suffices to say that the competent and believable and believed evidence, taken as a whole, leaves the first-instance proof of a right of action in the plaintiff preponderating still.

The mandate will be, Judgment for plaintiff. *George C. Webber*, for plaintiff. *Pulsifer & Ludden and Franklin Fisher*, for defendants.

PEARL B. TIBBETTS *vs.* MAINE CENTRAL RAILROAD CO.

Penobscot County. Decided July 15, 1927. The plaintiff, a passenger upon one of the trains of the defendant company, claims that she was injured by the negligent operation of the train when she was about to alight at a railway station. This action is brought to recover damages for the alleged negligence of the company's servants. The defendant, while denying its negligence, urged that the plaintiff was barred from recovery on account of her own contributory negligence to the accident. Without entering into a discussion or deciding the question of negligence of the defendant, the majority of the Court are of opinion that the record shows that the plaintiff was guilty of contributory negligence, and the mandate will be: Motion for new trial granted. *L. B. Waldron and Fred W. Brown*, for plaintiff. *George E. Fogg*, for defendant.

RITACH'S CASE.

Androscoggin County. Decided July 16, 1927. Workmen's compensation case. Petition by insurance carrier setting forth that the petitioner's incapacity has ended or diminished and asking appropriate relief. The Commissioner finds in effect that the petitioner's incapacity has not ended or diminished and that the allegations of the petition are not sustained. There being evidence in the case, which if "standing alone and uncontradicted, would justify the decree," (118 Me., 177) there is no error of law. Decree affirmed. Appeal dismissed with costs. *Frank A. Morey*, for plaintiff. *Hinckley, Hinckley & Shesong*, for respondents.

CATHERINE VALLELY *vs.* ELLEN D. SCOTT.

York County. Decided August 11, 1927. When this plaintiff was walking across Main Street, at the intersection of Elm, in Sanford, about eight o'clock in the evening on August 14, 1926, she was struck and injured by the automobile which the defendant owned and was driving.

Plaintiff experienced serious hurts. Besides other injuries, her ankles were broken; four, and it may be that five, of her ribs were fractured; one shoulder was crushed, and her hips and thighs were mangled.

At the latest January term in York county, the jury found for the plaintiff, and assessed damages in the sum of $9883.33. Usual-form motion by the defendant for a new trial brings the case forward.

As to how the accident happened, the defendant tactily concedes, the finding by the jury in reference thereto, that she was negligent, is incapable of being made null or void.

Defendant, however, contends that plaintiff was negligent also, and that the negligence of the plaintiff, with that negligence attributed by the jury to the defendant, in union and concurrence directly caused the undesigned event. But the jury decided that there was not any contributory negligence on the part of the plaintiff, and no reason is perceived by the court for disturbing that decision.

Are the damages excessive, in a legal sense? The defendant, in main support of the motion, argues that they are. In a case like this,

where the tort was committed through mere negligence, and without wanton disregard of the rights of others, damages have no other purpose than that of affording actual compensation. The single award under review is inclusive, as the proof or the lack of it showed to the jury, of the value of the time this unmarried plaintiff has lost or may lose from her employment; of the expenses incurred or likely to be for medicines and care and nursing; of allowance for diminution of capacity to perform the kind of work for which she is fitted; and for mental and physical pain and suffering, past, present, and prospective; each element only in natural and necessary consequence of the tortious act of the defendant.

With the decrease in the value of money, ninety-eight hundred and eighty-three dollars and thirty-three cents does not signify what it would have in former days. The standard by which to test the validity of the instant award of damages against the argument of excessiveness is the present day measure of money. And with such established rule the damages awarded must be held to comport. The motion for a new trial is overruled. *Willard & Ford and Cecil J. Siddall*, for plaintiff. *Robinson & Richardson*, for defendant.

GEORGE A. BARBOUR

vs.

INTER-STATE BUSINESS MEN'S ACCIDENT ASSOCIATION.

Knox County. Decided September 6, 1927. The plaintiff was insured against illness in the defendant company under a policy which provided that if insured shall be continuously confined within the house under the constant care of a regular physician the association will pay a weekly indemnity of fifty dollars; and for such period, not exceeding ten weeks, that the insured shall not be confined to the house, but shall be compelled to refrain from performing any act of business and be under the constant treatment of a regular physician, the association will pay a weekly indemnity of twenty dollars.

The plaintiff's policy lapsed for a period for non-payment of premium, but was reinstated August 7th, 1926, but by its terms did not cover any illness occurring within ten days after such reinstatement.

The physician's statement sent to the company September 27, 1926, stated that the plaintiff's illness began on August 11th, 1926. Later the plaintiff notified the company that this was an error, as his illness did not begin until August 18th, or the day following the ten-day period. The jury heard the evidence upon this question, and found for the plaintiff. Upon this point, we think the verdict can not be disturbed because of any error here.

The jury awarded a verdict of five hundred and ninety-eight dollars and eighty-eight cents. This we think is clearly excessive. At the maximum he was not confined to the house under the care of a physician more than seven weeks. While he testified that he was unable to work until the middle of December following, his physician testified that he did not attend him after November 1st, and there is no testimony that he did, and during this period he worked five days for his old employer.

Upon a review of the evidence taken most strongly in the plaintiff's favor we think it can not support a verdict for more than four hundred and ten dollars. New trial granted, unless the plaintiff on or before the September Term files a remittitur of all over $410.00. *Charles T. Smalley,* for plaintiff. *Alan L. Bird,* for defendant.

FRANK D. AMES *vs.* GEORGE WESTON.

Lincoln County. Decided September 8, 1927. Action of replevin to recover certain household furniture "belonging to Frank D. Ames, Administrator of the estate of Charles E. Ames, deceased."

Except for the language above quoted, neither in the writ, declaration or bond is any allusion made to the decedent, or to the plaintiff's office as Administrator. A non suit was ordered. The plaintiff excepts. The appointment and qualification of the plaintiff as Administrator were admitted. Demand and refusal before suit brought were proved.

It was shown, prima facie at least, that the furniture was owned by the decedent at the time of his death and also that the plaintiff had not had possession of it before the taking on the replevin writ.

The plaintiff's counsel produces authorities tending to show that by some courts language similar to that hereinabove quoted has been

held sufficient to show that the action was brought by the plaintiff as Administrator, and to permit the maintenance of a suit in that capacity.

But the law is established otherwise in Maine. In *Bragdon* vs. *Harmon*, 69 Me. 30 it is said that "the words which in this suit described the plaintiff as an Executor were as unimportant as if they had described him as a farmer or a mechanic or a justice of the peace." The words of the declaration quoted in the first paragraph hereof were mere descriptio personae. *Bank* vs. *Lane*, 80 Me. 168.

The suit was brought by Frank D. Ames individually. The evidence showed that the replevied goods were the property of Charles E. Ames, deceased. On this ground a non suit was properly ordered.

The plaintiff argues that this is a narrow and technical rule. However this may be, it is logical and we perceive no sufficient reason for reversing the earlier decisions. Exceptions overruled. *George A. Cowan*, for plaintiff. *Weston M. Hilton*, for defendant.

HARRY A. MOORE *vs.* GEORGE CUOZZO.

Penobscot County. Decided September 8, 1927. The plaintiff, a machinist, recovered a verdict against the defendant for $114.30 for labor performed and certain parts furnished in repairing a broken rock crusher. The defendant moves for a new trial on the usual grounds.

He contends that the plaintiff orally agreed to do the job for fifty dollars. He also sets up accord and satisfaction.

The plaintiff, he says, accepted a check for fifty dollars in full settlement. The plaintiff positively denies that he agreed to do the work for any fixed sum, and also denies the alleged accord and satisfaction. Facts alone are in dispute.

Neither the plaintiff's evidence nor that of the defendant is grossly unreasonable or improbable. Neither is inconsistent with circumstances admitted or demonstrated.

The defendant's testimony is corroborated by certain of his employees. But the plaintiff's unsupported story was evidently believed by the jury.

We are asked to hold that the jury manifestly erred in accepting the testimony of one witness, rather than the contradicting testimony of two or three witnesses.

Error there may have been, but it is not thus made "manifest." It is frequently said that preponderance of evidence does not consist in mere superiority of numbers.

The account sued, all of which with interest was included in the verdict, contains an item of ten dollars and thirty-two cents for "over time". No charge of this kind was contained in the original bill as rendered. It appears not to have been contemplated when the work was done. The undisputed evidence does not warrant its recovery.

If within thirty days from the date of receipt of rescript by the Clerk of Courts for Penobscot County, the plaintiff files a remittitur for the sum of ten dollars and thirty-two cents the mandate will be, Motion overruled. If no remittitur filed, Motion sustained, New trial granted. *Simon J. Levi*, for plaintiff. *Daniel I. Gould*, for defendant.

BEVERAGE'S CASE.

Knox County. Decided September 24, 1927. Appeal from refusal to award compensation under Workmens' Compensation Act.

The sole issue was dependency.

The commission found against the petitioner, the decree stating, "There was no evidence that petitioner was actually dependent upon her son, in any degree."

Appellant urges that such a finding is not a finding of fact but a conclusion of law and reviewable.

We regard this finding as equivalent to one that there was no sufficient evidence of dependency. Not that there may not have been some testimony offered tending to establish dependency but, in the judgment of the commission, insufficient for that purpose. Meticulous nicety of language, although desirable, is not always found nor to be expected in legal decisions.

It is not uncommon to speak of insufficient evidence as "no evidence". The expression may be found, so used, in very many opinions of this and other courts.

The finding is, in intention and obvious meaning, similar to that in *Henry's Case*, 124 Me. 106. In the decree in that case the court said, "From all the evidence in the case it cannot be found that the claimant was actually dependent upon his son for support."

"This ruling", said Cornish, C. J., "which invokes a question of fact, should not be disturbed. The commission's finding is final under the evidence."

"The trier of fact is not bound to accept certain testimony as conclusive." *Orff's Case*, 122 Maine, 114.

He may reject as utterly false, testimony offered to establish any certain fact. He may regard such evidence as so unsubstantial as not to be entitled to any weight. Assuming such a situation, he is quite correct in saying that there was no evidence to sustain the given contention.

It is a mere play on words to distinguish the language used in this decree from that used in *Henry's Case*, supra.

The ruling involved a question of fact and there being sufficient in the record to give it basis, is not reviewable by this court. Appeal dismissed. *C. S. Roberts*, for petitioner. *Robinson & Richardson*, for respondents.

SIMON JACKIEWICZ *vs.* PAUL MALLICK.

Cumberland County. Decided September 29, 1927. An action for money loaned. A jury found for the plaintiff upon conflicting evidence composed mainly of the testimony of the two parties. The jury passed upon the credibility of the witnesses and the weight of such corroborating evidence as was offered on both sides. To set aside the finding of the jury on these questions would be taking from the jury questions peculiarly within their province. There being nothing so inherently improbable in the plaintiff's testimony as to render it incredible, this Court can not say that a jury that heard and saw the witnesses manifestly erred in assigning greater weight to the evidence of the plaintiff and the sustaining witnesses than to that of the defendant. Motion overruled. *Joseph Janas*, for plaintiff. *Henry C. Sullivan*, for defendant.

CARROLL W. PHILLIPS *vs.* PHILIP A. CUMMINGS.

Cumberland County. Decided October 20, 1927. On Motion. Action by husband alleging criminal conversation and alienation of affections. Verdict for plaintiff. Damages $1916.66.

The issues raised are of fact only. The evidence is voluminous and contradictory. Sufficient appears in the record, if believed, to warrant the verdict. A different result might be reached by this court were we acting as triers of fact but we cannot say that the jury manifestly erred.

The findings of a jury, on questions of fact, based on a reasonable construction of credible evidence, will not be disturbed by this court.

Assuming the verdict justified, damages are not excessive. Motion denied. *William Lyons and Frank H. Haskell*, for plaintiff. *Harry E. Nixon*, for defendant.

G. HERBERT FOSS *vs.* MAINE POTATO GROWER'S EXCHANGE.

APPEAL OF FREEMAN C. HATCH, CLAIMANT.

Aroostook County. Decided October 28, 1927. The record in this case is meager. From it, however, we learn that Hatch had a claim against the Exchange; that the Exchange had ceased to function, was being liquidated, its business about to be wound up; and that H. Merritt Cunningham was the duly appointed receiver of the corporation.

The brief record consists merely of a statement of the nature and amount of Hatch's claim, duly sworn to, so much of the decree of the justice in the court below as fixed the amount allowed, and the appeal of Hatch from that decree, together with the docket entries. The decree is in the following terms:

> "This cause came on to be heard this fifteenth day of
> "March, 1926, and it appearing that notice for hearing
> "had been duly given by the Receiver of the defendant
> "corporation in compliance with the order of court, and
> "upon hearing it appearing that certain claims had been
> "filed against the defendant corporation on or before
> "March 12, 1926, the date set for the filing of claims;

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED "that the following claims be allowed, in favor of the "following claimants respectively, and in the following "sums respectively, to wit:—F. C. Hatch $3334.48."

This decree was dated and filed July 29, 1926.

The appeal is in the following terms:

"Appeal of Freeman C. Hatch, a creditor of said Ex- "change, from the decree of the presiding justice in "his behalf made.

"And now, after hearing and decree on the claim of "said Freeman C. Hatch, a creditor in the above en- "titled cause, and within ten days after the final "decree on said claim was signed, entered and filed "and notice thereof given by the clerk of said court to "counsel of record for said Hatch, the said Hatch "comes and claims and takes an appeal from said decree "to the next term of the Law Court."

In argument the claimant asks that his claim be allowed in this court for $6,112.13, with interest on three-fourths thereof at such rate as the receiver has been obtaining, or should be obtaining, from his deposits in the banks in this matter since July 29, 1926, when a decree was entered directing the payment of a dividend of seventy-five per centum on the claims then allowed, or such other interest as this court may in equity order, and his costs of this appeal.

If this court feels that there should be more hearings upon this claim, claimant requests that the receiver record his objections and specify his grounds of objection, and that counsel for claimant be informed of such objections, and that the matter be referred to some other justice than the one who has passed upon it, or to a master, if this court, in the exercise of its own equity powers, will not itself pass upon such objections.

The claimant presented before this court certain affidavits and other papers which are not contained in the record of the case and properly certified. We cannot travel outside of the record as presented in this case. We must pass upon such questions only as are properly presented in that record. From that record we ascertain, both from the decree and from the appeal, that there was a hear-

ing before a single justice in the court below, but whether or not there was parole testimony or written evidence introduced at the hearing does not appear. A transcript of the evidence is not made a part of the record before us and for that reason the appeal must be dismissed. 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 grounds for dismissal. *Sawyer* v. *White*, 125 Maine, 206. R. S. Chap. 82, Sec. 32, provides that all evidence before the court below, or an abstract thereof, approved by the justice hearing the case, shall on appeal be reported. No witnesses shall be heard orally before the law court as a part of the case on appeal, but the court may, in such manner and on such terms as it deems proper, authorize additional evidence to be taken when the same has been omitted by accident or mistake, or discovered after the hearing. In the case at bar the record does not disclose the omission of evidence by accident or mistake or which was discovered after the hearing. Moreover, under the provisions of Chap. 82, Sec. 32, an appeal lies to the law court only from final decrees of the court below. 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; 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; which leaves nothing open to be decided by the court and does not determine the whole case. A decree to be final, for the purpose 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. *Sawyer* vs. *White*, supra. The decree here appealed from was not a final decree and was prematurely presented to the law court. Appeal dismissed. *W. S. Brown*, for Freeman C. Hatch, Claimant. *Archibalds*, for defendant.

ALFRED SEARS *vs.* ELIZABETH POMEROY & TR.

Washington County. Decided November 30, 1927. This is an action of assumpsit wherein the defendant has obtained a verdict and the case is brought before the Law Court on motion and excep-

tions by the plaintiff. The testimony is comparatively brief but so far as the plaintiff's case and the defendant's case are concerned it is squarely contradictory.

As to the defendant's testimony there is enough in the record to justify the finding of the jury if such testimony is believed by that body. We can not say that the jury so palpably erred that we would be justified in overthrowing their finding as expressed by their verdict.

In argument the plaintiff does not rely so much upon his motion as he does upon the exceptions to certain elements and statements contained in the charge of the presiding justice.

In most courteous and diplomatic language the plaintiff says that, although disclaiming any intention of determining the facts or of expressing any opinion in regard thereto, the presiding justice couched his charge in such mode of expression and by holding up before the jury propositions militating against the plaintiff to such an extent and in such a positive and forceful manner as to convey to the minds of the jury his opinion of the case and that adversely to the plaintiff; that although he did not express his opinion in words the jury felt and knew just what he thought of the case when he had finished his charge. The plaintiff seemed to be particularly aggrieved because, as he claimed, the presiding justice laid too much emphasis upon the reasonableness of trades as a test of truth.

At the close of the charge plaintiff's counsel requested an exception to that part of the charge relating to reasonableness of the claims upon the one side and the other of the case. Following that request the presiding justice said: "You have a right in considering the truth of a statement made by any witness concerning any fact, to judge of its truth by its apparent reasonableness or unreasonableness. You can apply that ruling to the testimony of every witness in this case."

Counsel for plaintiff also requested an exception because the presiding justice quoted in part only from the testimony of the plaintiff. To this request the presiding justice in substance said that he did not assume to quote the entire testimony of any witness; that he had quoted the testimony of the plaintiff according to the latter's claim as to what the contract was; that he had quoted also that part of the plaintiff's testimony which related to the sale; but that the plain-

tiff had testified to a great many other things of detail that the justice could not quote. Finally the plaintiff's counsel stated: "It was not to the fact that you gave instructions as to reasonableness; it was to your instructions as given. If you want my point I don't take exceptions to your instructions to the jury that they should take into account the reasonableness of the situation, but as to your instructions on that, the whole of your instructions on that, I couldn't pick that out now."

We have examined the charge with great care and repeatedly so. We can not take into account any alleged manner, force, inflection, and emphasis used by a presiding justice in the oral delivery of his charge, for we have before us only the colorless printed page, but in reading the record with utmost care, and in the light of the great latitude given by the decisions of the courts of this and other states with regard to the right of the Court to state the positions of the parties, the application of the testimony to those position, and appropriate arguments made upon the one side and the other, we are unable to conclude that the presiding justice in the case at bar transgressed the limits of his duties as the presiding officer in a court where truth and justice are the results to be obtained if possible. Motion and exceptions overruled. *Oscar L. Whalen and Gray & Sawyer*, for plaintiff. *Oscar H. Dunbar and Jonah & McCart*, for defendant.

WILLARD P. HAMILTON *vs.* JERRY SMITH.

Aroostook County. Decided December 13, 1927. On motion. Action of special and general assumpsit to recover money paid for defendant.

The plaintiff, owning a farm which had been attached by a fertilizer company to recover for fertilizer sold, sold it to one Holmes upon the agreement that a first mortgage would be given by the vendee to a Federal Land Bank, the proceeds of which should be used to settle the plaintiff's indebtedness to the fertilizer company, and a second mortgage given by the vendee to the plaintiff to secure the rest of the purchase price. The deed of the farm and the two mortgages were recorded in April before the loan by the Federal Land Bank had been completed and pending the perfecting of the Bank's

title. Subsequent to the recording the defendant took from Holmes a crop mortgage for that season, the plaintiff agreeing to waive his rights as second mortgagee. In August the Bank refused to complete the loan unless the 1924 tax on the farm, which had not been paid, was paid. The plaintiff testified that he refused to pay the tax and the defendant, in a conversation which the plaintiff had with him or his attorney, promised that he would take care of the tax and to obtain a record payment of the tax the plaintiff gave to the tax collector his note for the amount of the tax. The defendant did not pay the note and the plaintiff did. The defendant testified that he had not by himself or by authority, given his attorney, agreed to pay the tax and claimed that the plaintiff paid the tax in order to insure a loan which would be largely for his benefit.

The jury gave a verdict for the plaintiff for the full amount paid on the note. Case comes up on general motion.

The issues raised are of fact only. The witnesses were the plaintiff, defendant and his attorney. The evidence was conflicting but it was for the jury to say on which side was the greater weight of evidence. They passed upon the credibility of the witnesses and upon such corroborative evidence as was offered. We cannot say they, who saw and heard the witnesses, erred in giving greater weight to the evidence of the plaintiff. Sufficient evidence appears in the record, if believed, to warrant the verdict. Motion overruled. *O. L. Keyes*, for plaintiff. *R. W. Shaw and John B. Roberts*, for defendant.

BERT W. BEMIS *vs.* DAVID BRADLEY.

Oxford County. Decided December 20, 1927. This was an action of trespass quare clausum in which it was sought to recover damages for certain timber cut on land the title to which was in dispute between these parties. Their respective rights have since been determined in a real action.

The case comes to this court on exceptions; first as to the exclusion of certain testimony and, second, to the ordering of a non-suit.

The evidence which was excluded was plainly within the hearsay rule. The action of the presiding justice in ordering the non-suit

was obviously correct. It was necessary, in order that the plaintiff should make out a prima facie case, for him to definitely establish the division line between his land and that of the defendant, either by direct proof of the location of such line, or by locating it relatively to the town line dividing the Town of Stowe from the Town of Lovell. The evidence with regard to both of these propositions was inconclusive, and not sufficiently clear to fairly raise a question of fact for the jury. These defects were remedied in the later case, and in view of the fact that the real issue between the parties has now been settled, further discussion of the matter seems unnecessary. Exceptions overruled. *Elias Smith and A. J. Stearns*, for plaintiff. *Hastings and Son*, for defendant.

HARRY A. THURSTON *vs.* MARY A. NUTTER.

Penobscot County. Decided January 2, 1928. Motion by defendant to set aside verdict.

This case has been before this court before, (*Thurston* v. *Nutter*, 125 Me. 411) when it was considered from a different angle than that presented here. At the first trial, the verdict was for the defendant, based on the proposition that a contract existed between the parties and that plaintiff was guilty of a breach thereof. That verdict was set aside on the ground that no contract had ever been consummated, the minds of the parties never having met on the various details necessarily involved in the joint undertaking which they had attempted to negotiate.

The pertinent facts are so fully stated and discussed in the former opinion that they need not be restated here.

At the second trial, plaintiff's claim rested on a quantum meruit, in accordance with the findings of this court in the earlier case.

It appeared in the report of the evidence, both at the first and second trials, that plaintiff had expended considerable time and money in making certain improvements on defendant's property, with her knowledge and assent, had furnished her with at least a portion of her food during a period of nine months and also had furnished some food for her farm animals. All of these items were included in a some-

what lengthy account and were the subject of consideration by the jury.

There was no express agreement on the part of defendant to pay these amounts. This court has so found. Plaintiff's right to recover rests on an implied agreement.

Ordinarily, when one furnishes goods, or materials to, or performs labor for another, with his assent, but with no express contract, and there is nothing to indicate that a gratuity was intended, a contract is implied to pay a reasonable compensation therefor, the measure of which is the market value of the goods or materials, and for labor the wages ordinarily paid for similar labor in a like locality.

But this is the usual legal measure, because it is, under ordinary circumstances, presumably the intent of the parties so to adjust compensation.

Under the peculiar circumstances of this case, the presumption of such an intent is overcome. The benefit to the defendant is the more just, reasonable and equitable standard by which the compensation due the plaintiff may be measured.

The great bulk of the expenditures included in plaintiff's account were obviously not such as would have been assented to by defendant had she anticipated that she would be called upon to pay for them. Nor was plaintiff justified in expecting that defendant would pay him for them. They were largely incurred because they were, or were to be, beneficial to him and to his family. Such expenditures, in view of the exact situation existing between these parties are not charges upon which the plaintiff may recover.

A reasonable charge for food furnished defendant or to her farm stock, such slight appreciation, if there were appreciation, in the actual market value of her property, as may have resulted from plaintiff's labor or from materials and labor paid for by him, would be matters directly beneficial to defendant and should be paid for by her. This is the limit of her liability.

A careful analysis of the evidence fails to satisfy a majority of the court that, measured by such a rule, plaintiff could rightfully claim from defendant a sum in excess of two hundred dollars or that a verdict for a larger sum should be allowed to stand.

If, within thirty days after the filing of this rescript, the plaintiff file a remittitur of so much of the verdict as is in excess of two hundred

dollars, the motion for a new trial will be overruled, otherwise it must be sustained. Motion granted unless remittitur filed. *L. B. Waldron,* for plaintiff. *W. B. Peirce and James H. Hudson,* for defendant.

COYNE'S CASE.

Cumberland County. Decided January 17, 1928. On January 19, 1927, while in the employ of the Portland Forwarding Co., Inc., John E. Coyne received a compensable injury. An agreement between the employer and the employee as to payment of compensation was approved according to law, on March 29, 1927, by which agreement compensation was payable at the rate of eighteen dollars per week, during the period of temporary total incapacity, beginning January 26, 1927, due to the injury, and that additional compensation be paid for any subsequent period of incapacity either total or partial due to the same injury, in accordance with the Maine Workmen's Compensation Act.

On the 7th day of April, 1927, the insurance carrier presented a petition for review to determine present incapacity, alleging since said agreement or decree was made the incapacity for which the employee was being compensated had diminished or ended, that the employee had refused and continues to refuse to go to a hospital for a proper examination by a physician selected by the insurance carrier; and that the employee had failed and refused to co-operate with and submit to such treatment as the physicians treating him prescribed; wherefore the insurance carrier prayed that compensation might be diminished or ended. There is no testimony in the record to show that Coyne refused to go to a hospital for treatment, nor that he refused to be examined by a physician selected by the employer; on the contrary he was examined by an expert physician selected by the employer.

The insurance carrier presented two physicians, both of whom testified in substance supporting the contention of the insurance carrier, as to diminished incapacity. On the other hand one physician was called by Coyne, who testified in opposition to those called by the insurance carrier.

After hearing before the Associate Legal Member it was ordered and decreed that the petition be dismissed and compensation continued under the agreement. The case reaches this court upon appeal by the insurance carrier.

Counsel for the insurance carrier in argument says; "The only issue is whether or not the evidence in the case justified the finding by the commission. Our contention is that it did not, and that the appeal should be sustained, regardless of the fact that our court has consistently held that if there is any legal evidence on which the finding can be based that it will not be disturbed."

In cases of this class the Supreme Court is not authorized to determine the preponderance or weight of testimony; and will not pass on the weight of the evidence as to controverted facts. It is for the trier of facts, who sees and hears witnesses, to weigh their testimony and without appeal to determine their trustworthiness, *Mailman's Case,* 118 Me. 172. Appeal dismissed. Coyne to recover taxable costs. Decree below affirmed. *Edmund P. Mahoney and Abraham Breitbard,* for claimant. *William H. Tribou and Hinckley, Hinckley & Shesong,* for respondents.

JOHN E. CREAMER *vs.* LAURA S. COONY.

Lincoln County. Decided January 25, 1928. Action for damages for breach of contract of employment. General motion for a new trial on usual grounds.

The defendant employed the plaintiff as caretaker of her summer place at Waldoboro for the season of 1926, beginning June 6th and ending October 15th. Wages were fixed at $95 a month and board.

June 12, 1926, the defendant discharged the plaintiff with a week's notice, the employment ending June 19th following. To the plaintiff's suit for damages arising out of the discharge, the defendant pleads accord and satisfaction and reasonable cause for discharge based on incompetency and unfaithful performance of duty. Upon these issues the verdict was for the plaintiff for $300.

Accord and satisfaction is not established. The weight of the evidence negatives this defense.

Reasonable cause for discharge as claimed by the defendant finds proof in the doubtful gossip and criticism of fellow servants and neighbors. The jury gave little credence to this evidence. No sufficient reason appears to question the correctness of their conclusion on this issue.

The rule of damages not being violated, the mandate is Motion overruled. *George A. Cowan,* for plaintiff. *Harold R. Smith and Weston M. Hilton,* for defendant.

QUESTIONS AND ANSWERS

QUESTIONS SUBMITTED BY THE SENATE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT, MARCH 15, 1927, WITH THE ANSWERS OF THE JUSTICES THEREON.

STATE OF MAINE

IN SENATE March 15, 1927.

It appearing to the Senate of the Eighty-third Legislature that the following is an important question of law and the occasion a solemn one:

Ordered, the justices of the supreme judicial court are hereby requested to give to the Senate, according to the provisions of the constitution in this behalf, their opinion on the following questions, to wit:

WHEREAS, there is now pending in the Senate a bill entitled "An Act to Obtain the Benefit of Credit Allowed Under Federal Estate Tax," being House Document No. 58, an official copy of which is hereto annexed and made a part thereof.

QUESTION I. Has the legislature the right and power to enact a revenue law which shall be in form (as stated in section one of said bill) an estate tax law, but in intent and purpose (as stated in section four of said bill) an act to obtain for this state the benefit of the credit allowed under the provisions of Title III, section three hundred one, sub-section "b" of the Federal Revenue Act of 1926?

QUESTION 2. Has the legislature the right and power to enact a law which shall, by its terms (as stated in section three of this bill) become void and of no effect upon the repeal by the congress of Title III of said Federal Revenue Act or upon the amendment of said federal act by the congress whereby the congress repeals the provisions of said Title III providing for a credit of the taxes paid to the several

states of the United States not exceeding eighty per cent of the tax now imposed by said Title III?

QUESTION 3. If the justices are of opinion that this bill creates an excise tax, and if a property tax, is it within the constitutional power of the legislature under Article eight of the constitution as amended by Article thirty-six.

Presented by Senator Holmes of Androscoggin.

IN SENATE
MARCH 15, 1927
READ AND PASSED

ROYDEN V. BROWN, *Secretary.*

A TRUE COPY.

ATTEST:

ROYDEN V. BROWN, *Secretary.*

NOTE The reference to the constitution in question 3 is manifestly an error. The reference intended undoubtedly is Section 8 of Article IX of the Constitution as amended by Article XXXVI.

STATE OF MAINE

IN HOUSE OF REPRESENTATIVES

HOUSE DOCUMENT No. 58. February 2, 1927.

Referred to Committee on Taxation and 1000 copies ordered printed. Sent up for concurrence.

CLYDE R. CHAPMAN, *Clerk.*

Presented by Mr. Foster of Ellsworth.

STATE OF MAINE

In the year of our Lord one thousand nine hundred and twenty-seven.

AN ACT TO OBTAIN THE BENEFIT OF CREDIT ALLOWED UNDER FEDERAL ESTATE TAX.

EMERGENCY PREAMBLE.

WHEREAS, under the provisions of the Federal Revenue act relating to the assessment and collection of the estate tax the return must be filed within one year after the death of the decedent, and

WHEREAS, the deferred operation of this act would be inconsistent with its profitable, proper and efficient administration, and may cause great loss of revenue justly due the state, and

WHEREAS, in the judgment of the legislature these facts create an emergency within the meaning of the constitution and require the following legislation as immediately necessary for the preservation of the public peace, health and safety,

Now, therefore, Be it enacted by the People of the State of Maine, as follows:

SECTION I. There shall be assessed by the attorney general in addition to the inheritance tax as now provided by chapter sixty-nine of the revised statutes, an estate tax upon all estates which are subject to taxation under the present federal revenue act of nineteen hundred twenty-six. Said tax is hereby imposed upon the transfer of the estate of every person, who at the time of his death was a resident of this state. The amount of said tax so assessed shall be the amount by which eighty per cent of the estate tax, payable to the United States under the provisions of the said federal revenue act of nineteen hundred twenty-six, shall exceed the aggregate amount of all estate, inheritance, legacy and succession taxes actually paid to the several states of the United States in respect to any property owned by such decedent, or subject to such taxes as a part of or in connection with his estate.

SECTION 2. The tax imposed by this act shall become due and payable at the expiration of two years after granting of letters testamentary or of administration, and executors, administrators, trustees, grantees, donees, beneficiaries and surviving joint owners shall be and remain liable for the tax until it is paid. If the tax is not paid when due, interest at the rate of six per cent per annum shall be charged and collected from the time the same became payable. The attorney general may, however, for cause shown extend the time for payment with or without interest for such period as the circumstances require.

SECTION 3. This act shall become void and of no effect in respect to the estates of persons who die subsequent to the effective date of the repeal of Title III of said federal revenue act or of the provisions thereof providing for a credit of the taxes paid to the several states of the United States not exceeding eighty per cent of the tax imposed by said Title III.

SECTION 4. It is hereby declared to be the intent and purpose of this act to obtain for this state the benefit of the credit allowed under the provisions of said Title III, section three hundred one, sub-section (b) of the federal revenue act of nineteen hundred twenty-six to the extent that this state may be entitled by the provisions of this act by imposing additional taxes, and the same shall be liberally construed to effect this purpose. The attorney general may make such regulations relative to the assessment and the collection of the tax provided by this act, not inconsistent with law, as may be necessary to carry out this intent.

SECTION 5. The provisions of this act shall also apply to all estates not fully distributed and now in process of settlement, where the date of death was subsequent to February twenty-six, nineteen hundred twenty-six.

SECTION 6. All provisions of chapter sixty-nine of the revised statutes, and amendments thereto, relating to succession taxes, are hereby made a part of this act wherever the same are applicable.

SECTION 7. If any portion of this act is held to be unconstitutional, such decision shall not invalidate the portions unaffected thereby. In the event that any part of the federal revenue act or federal estate tax law, hereinbefore referred to, shall be declared to be in violation of the constitution of the United States, such declaration shall not be construed to affect the provisions of this act.

EMERGENCY CLAUSE. In view of the emergency cited in the preamble, this act shall take effect when approved.

A TRUE COPY,

ATTEST: CLYDE R. CHAPMAN, *Clerk.*

TO THE HONORABLE SENATE OF THE STATE OF MAINE:

The undersigned Justices of the Supreme Judicial Court having considered the questions on which their opinion was requested by

Senate Order passed March 15th, 1927, relating to an act now pending in your Honorable Body entitled "An Act to Obtain the Benefit of Credit Allowed under Federal Estate Tax," respectfully submit the following answers:

> QUESTION 1. Has the Legislature the right and power to enact a revenue law which shall be in form (as stated in Section one of said bill) an estate tax law, but in intent and purpose (as stated in section four of said bill) an act to obtain for this state the benefit of the credit allowed under the provisions of Title III. section three hundred one, sub-section "b" of the Federal Revenue Act of 1926?

This question we answer in the affirmative. A state legislature has plenary powers to pass all laws it deems essential to promote the public welfare, except as limited by the State, or Federal Constitution. We know of no provision of either the State or Federal Constitution that would be violated by the provision of the Act referred to in question 1. There can be no objection to a state enacting a law imposing any lawful tax. That it is for the avowed purpose of increasing its own revenues without imposing any greater burden on the estate of a deceased person by reason of a credit voluntarily extended by the federal government to the citizens of any state imposing such taxes is no valid objection.

> QUESTION 2. Has the Legislature the right and power to enact a law which shall, by its terms (as stated in section three of this bill) become void and of no effect upon the repeal by the Congress of Title III of said Federal Revenue Act or upon the amendment of said Federal Act by the Congress whereby the Congress repeals the provisions of said Title III providing for a credit of the taxes paid to the several states of the United States not exceeding eighty per cent of the tax now imposed by said Title III?

We answer this question in the affirmative. The question as framed does not in terms correctly state the purport of the section therein referred to. We construe the provision limiting the act to

the estates of those dying subsequent to the date of the effective repeal of Title III, Sec. 301, sub-section "b" of the Federal Revenue Act of 1926, not as a delegation by this state of legislative power to Congress, but rather as a definite limitation upon certain provisions of the act, a limitation fixed by the legislature of this state. The effect of the repeal of the Federal Act would not be to repeal the proposed Act in its entirety. It would still remain in force except as to the estates of persons dying subsequent to the effective date of the Act of Congress repealing the credit provision of Title III of the Federal Revenue Act.

> QUESTION 3. If the Justices are of opinion that this bill creates an estate tax, is it a property tax or an excise tax, and if a property tax, is it within the constitutional power of the Legislature under Article Eight of the constitution as amended by Article thirty-six?

Estate taxes of the nature proposed are by all the authorities regarded as excise taxes and not property taxes.

Respectfully submitted,

SCOTT WILSON
WARREN C. PHILBROOK
CHARLES J. DUNN
LUERE B. DEASY
GUY H. STURGIS
CHARLES P. BARNES
NORMAN L. BASSETT
WILLIAM R. PATTANGALL.

March 29, 1927.

QUESTIONS SUBMITTED BY THE SENATE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT, MARCH 24, 1927, WITH THE ANSWERS OF THE JUSTICES THEREON

STATE OF MAINE

IN SENATE March 24, 1927.

It appearing to the Senate that the following are important questions of law and the occasion a solemn one:—

ORDERED:—The justices of the supreme judicial court are hereby requested to give to the Senate according to the provisions of the Constitution in this behalf their opinion on the following questions, to which is prefaced the statement of facts.

There have been filed with the Legislature under the initiative and referendum provisions of the Constitution of Maine, petitions asking that a law repealing the Primary Law be submitted to the voters of the State. These petitions are in proper form and contain more than twelve thousand signatures. It is apparent, from an examination of some of the petitions, that several names are in the same hand-writing.

1. If on hearing, the Legislature finds as a fact that one person wrote several names on a petition does that invalidate the verification of the petition and should the other names on the petition be counted?

2. If on hearing, the Legislature finds as a fact that one person wrote several names on a petition but did so in good faith, believing that he had a right to do so, does that invalidate the verification of the petition and should the other names on the petition be counted?

3. If a person verifies a petition that he did not circulate and did not see such petitioner sign but does so honestly, believing that each name appearing on the petition is the true signature of the person whose name appears, is that a proper verification and should the names on that petition be counted?

Presented by Senator Oakes of Cumberland.

IN SENATE
MARCH 24, 1927.
READ AND PASSED

A TRUE COPY. ROYDEN V. BROWN, *Secretary.*
ATTEST:
ROYDEN V. BROWN, *Secretary.*

TO THE HONORABLE SENATE OF THE STATE OF MAINE:—

The undersigned Justices of the Supreme Judicial Court having considered the questions on which their opinion was requested by the Senate order passed March 24th, 1927, relating to the verification of petitions under the initiative and referendum provisions of the Constitution of Maine respectfully submit their opinion in the following answers:

> QUESTION 1. If on hearing, the Legislature finds as a fact that one person wrote several names on a petition does that invalidate the verification of the petition and should the other names on that petition be counted.

ANSWER: A petition regular in form and duly verified and certified in accordance with the provisions of section 20 of Part 3 of Article IV of the Constitution as amended by the thirty-first amendment may be regarded as *prima facie* evidence of its validity and of the authenticity of the signatures. The provision of the Constitution, however, requires such petitions to be signed with the "original signature of the petitioner." If it appears from the petition, or by proof

aliunde, that certain of the signatures thereon are not original, such signatures should not be counted; but we are of the opinion that the fact that some of the signatures are not original should not be held *ipso facto* to invalidate the verification as to the others, and the remainder of the names, no other reason to the contrary appearing, should be counted.

> QUESTION 2. If on hearing, the Legislature finds as a fact that one person wrote several names on a petition but did so in good faith, believing that he had a right to do so, does that invalidate the verification of the petition and should the other names on the petition be counted?

ANSWER: The answer to question number one also applies to question number two. The authority to sign such petitions can not be delegated, even if done in good faith.

> QUESTION 3. If a person verifies a petition that he did not circulate and did not see each petitioner sign but does so honestly, believing that each name appearing on the petition is the true signature of the person whose name appears, is that a proper verification and should the names on the petition be counted?

ANSWER: A petitioner verifying as to the authenticity of the signatures appearing on a petition should have personal knowledge thereof. He can not verify upon hearsay alone, however honest his belief. The Constitution does not, however, require that the signatures be subscribed in his presence. He may verify upon his identification of the handwriting, or even have sufficient warrant for verification, although the signing was not done within his actual vision, if it was done under such circumstances that no reasonable person would doubt its authenticity. What constitutes personal knowledge sufficient to warrant verification is a matter within the sound judgment of the body, which must act upon the petition, which tribunal may also determine for itself the nature of the evidence it will receive upon this question and its weight.

Although it may appear that as to certain names the verification was based upon hearsay alone, that should not be held to invalidate

the verification as to the remainder of the names which, no other objection appearing, may be counted.

Respectfully submitted,

SCOTT WILSON
WARREN C. PHILBROOK
CHARLES J. DUNN
LUERE B. DEASY
GUY H. STURGIS
CHARLES P. BARNES
NORMAN L. BASSETT
WILLIAM R. PATTANGALL.

March 29, 1927.

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ACCEPTANCE.

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ALIENATION OF AFFECTIONS.

In an action for alienation of affections brought by a wife against her husband's mother the burden is upon the plaintiff to show that the mother maliciously alienated the son's affections. Malice is not presumed, but must be proved, and may be by evidence of wrongful and unjustifiable conduct, prompted by hostile, wicked or malicious intent.

Newly discovered evidence relating to damages merely, if conforming in other respects to legal requirements, may be made the basis of a new trial either unqualifiedly or as to damages only.

Shalit v. *Shalit*, 291.

A parent is liable for any wrongful alienation of the affections of a married child but only when the parent's conduct is malicious.

It is incumbent on the plaintiff to prove malice on the part of the defendant.

Liability attaches only when the parent interferes with hostile, wicked or malicious intent or simply because she does not wish the marriage relation to continue longer.

The law has always recognized a broad distinction between the permitted attitude of parents toward their married children, in connection with their domestic difficulties and the attitude which may be taken by strangers under like circumstances.

It is not every interference between husband and wife nor every participation in their disagreements which renders a parent liable in damages.

A mother may advise a son in good faith and for his good, to leave his wife, if she believes that further continuance of the marriage relation tends to injure his health or destroy his peace of mind. She may persuade her son. She may use proper arguments. Whether the motive is proper or improper is always to be considered. If she acts in good faith, for the son's good, on reasonable grounds of belief, she is not liable.

This case does not meet these standards. It is bare of evidence of malice or improper motives on the part of the defendant. The jury erred in its findings.

McCollister v. *McCollister*, 318.

AMENDMENT.

The court has power, at any time before final judgment, to amend, enlarge or vacate entries erroneously, improvidently or falsely made.

When an erroneous judgment has been vacated by the court, parties are restored to their original position.

Sawyer v. *Calais National Bank*, 314.

While an amendment changing an action, from common law to one based on statute, or from one statute to another, introduces a new cause of action, an

amendment setting forth the terms of the statute on which an action is based, does not introduce a new cause of action.

An amendment supplying a fatal omission in a declaration does not necessarily introduce a new cause of action. The purpose of amendment is to cure defects.

An amendment, if proper, dates back to date of writ, and the amended writ is not barred by a statute of limitations if the writ was originally brought within the statute.

Frost, Admr., v. *C. W. Cone Taxi and Livery Co.*, 409.

ANNULMENT OF MARRIAGE.

A man who, believing and relying upon a woman's representation that he is responsible for her pregnancy, marries her, cannot have the marriage annulled upon showing merely that, besides himself, another man or men had sexual relations with her at about the time of conception.

Such a representation if false and known by the woman to be false, will authorize and justify an annulment decree; not so mere doubt.

Prenuptial unchastity is not a ground for annulment of marriage especially at the suit of a man who has participated in it.

John M. Mitchell, Petitioner, 503.

APPEAL.

On an appeal to the Supreme Court of Probate where questions are submitted to a jury, exceptions lie to erroneous rulings of the Presiding Justice admitting or excluding evidence or to erroneous instructions to the jury.

An appellant on appeal is confined to the issues raised by the reasons assigned in the Court below as grounds for his appeal. The notice of appeal can not be amended in the Supreme Court of Probate by adding thereto additional grounds for appeal.

Garland, Appellant, 84.

A party is aggrieved by and has the right to appeal from a probate decree that operates on his property, or bears upon his interest directly.

A decree of adoption which divests a mother of all legal rights in respect to her minor child bears directly upon the mother's interest. By such decree she is aggrieved and from it has the right of appeal.

R. S. Chap. 67, Sec. 31 providing for appeals by persons aggrieved is not in any part repealed or superseded by the statute providing for adoption of children, R. S. Chap. 72, Sec. 39.

The latter statute though a subsequent enactment does not supersede or limit the former, but rather supplements and extends it.

Cummings, Appellant, 111.

Where it appears that a finding of fact by the sitting Justice on which final decree was based was contrary to the evidence, an appeal in equity must be sustained.

Dionne v. *West Paris Building Association*, 454.

In an appeal from a decree of judge of probate the decree below is vacated, and the whole subject matter of the appeal comes de novo before the appellate court, but confined to such matters and questions as are contained in the reasons of appeal.

The evidence presented to the appellate court may be the same or entirely different from that presented to the court below, and the decree of the appellate court must be based on the proofs before it and cannot be based on proofs or upon the legal effects of such proofs in the court below and not before it.

Heard, Appellant, 495.

ARREST OF JUDGMENT.

A motion in arrest of judgment can only be made on account of some intrinsic defect apparent on inspection of the records.

State v. *Kopelow*, 384.

ATTACHMENT OF REAL ESTATE.

See *Lambert* v. *Allard et al* 49.

BANK DEPOSIT.

See *Garland, Appellant* 84.
See *Portland National Bank* v. *Brooks*, 251.

BANKRUPTCY.

After an adjudication of bankruptcy and until the appointment of a trustee, the bankrupt still has legal title to unexempt property as quasi trustee. He cannot transfer or incumber the property, but he may retrieve such of it as is in the hands of others. He may bring actions in respect to it. Such actions enure to the benefit of the trustee in bankruptcy if and when chosen and qualified.

A tender is not a prerequisite to an action to recover property or its value when the defendant has not the power to restore it.

Bedford v. *Bernstein*, 369.

BILLS AND NOTES.

Upon a person or corporation receiving a check of a corporation signed by one of its officers, and applied in payment of such officer's debt, rests the burden of proving that the issuance of such check was authorized for that purpose, and when not so authorized proceeds may be recovered back.

James L. Boyle Tr., v. *Lewiston Trust Co.*, 74.

In legal contemplation, no such thing exists as an innocent holder of negotiable paper executed by an officer of a corporation and payable to his personal creditor.

James L. Boyle, Tr., v. *Lewiston Trust Co.*, 74.

Where the obligors of a note jointly and severally contract the creditor may treat the contract as joint or several at his election and may join all in the same action or sue each one separately.

Where an instrument is made payable at a bank, presentment is not necessary in order to charge the person primarily liable.

Armour Fertilizer Co. v. *Tuttle*, 423.

In an action by payee on a promissory note, absolute in form, delivered to payee not as a binding obligation except upon the happening of a certain event, constituting a condition precedent, such prior or contemporaneous oral agreement may be shown, not so when such a note is delivered by the promisor as a binding obligation, but conditional, its payment or enforcement depending on a contingency, constituting a condition subsequent.

It is a question of fact whether a written agreement, though in the possession of the obligee, was delivered by the obligor as a binding agreement or whether such delivery was conditional only.

Kuhn v. *Simmons*, 434.

BOND FOR A DEED.

The interest of a vendor in a bond for a deed in the land is subject to attachment and levy.

The interest of such vendor differs from the non-attachable interest of a mere trustee, in that he (the vendor) has not only the legal title but as such legal owner has, while the purchase money remains unpaid, a personal and beneficial interest or estate.

The interest of such vendor differs from non-attachable interest of mortgagee (or levying creditor).

One who purchases land with full knowledge of an outstanding bond for a deed has no greater rights than had the vendor

Lambert v. *Allard, et. al.*, 49.

BOUNDARY LINE.

A boundary line may, under certain circumstances, be permanently and irrevocably established by parol agreement of adjoining owners, and a line so agreed upon by the parties in interest and occupied to for more than twenty years is conclusive.

When the principle of estoppel applies a shorter period may be sufficient.

CHARGE BY COURT.

CHECKS.

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lature, it does not become a part of the amendment if the vote is in the affirmative. Its function is not to inform the voter of the full import of the amendment, but a mere formula prescribed by the Legislature to enable the electorate to express its will as to whether the proposed amendment should become a part of the organic law.

In the instant case the amendment to section 10 of article IX of the Constitution was duly submitted to the people, having been printed in full upon the ballot; the vote was in the affirmative; it was duly proclaimed as part of the Constitution, and must be so regarded.

The Governor having proceeded in accordance with the opinion of a majority of the Court as to the proper construction of the amendment in removing the relator, while it may not have rendered the realtor's removal res adjudicata, nor do the rules of stare decisis apply to the advisory opinions of the Court under the Constitution; yet when property rights are not involved and the advice is given to guide the Governor in the performance of a constitutional function of government and having been followed, public policy requires that his acts be upheld, unless strong and compelling reasons are presented to the contrary; the petitioner presents no such reasons to this Court in these proceedings.

The existence of the office itself not being involved, and no damage being recoverable under the statutes of this state in these proceedings, no good could come from deciding the moot question of the title to the office, the terms of the office having already expired before the case was fully presented to this Court.

Cummings v. *Eastman*, 147.

CONTRIBUTORY NEGLIGENCE.

See *Rogers* v. *Forgione & Romano Co.*, 354.
See *Blanchette* v. *Waterville, Fairfield & Oakland Railway*, 40.

CONTINUNANDO.

See *State* v. *Morin*, 136.

CONTRACT.

In any contract there must be a meeting of minds. There must be an offer, and an acceptance conforming to the terms of the offer in some manner communicated to the offerer.

When the applicant for insurance and the Company are in different towns, and a policy, conforming to an application, is deposited in the mail, postpaid, properly directed to the applicant, the contract is complete as of the time when the acceptance is so posted.

If the policy is sent to the agent of the company to deliver pursuant to a prior intended acceptance by the company the contract is complete, whether delivery is made to applicant or not. If it is sent to the agent with authority to

DELIVERY AND ACCEPTANCE.

In an action for goods sold and delivered, where the goods are ordered to be shipped later, a delivery and acceptance must be shown.

Where there is no acceptance, the vendor's remedy is a special action for breach of implied contract to accept.

Smith, Fitzmaurice Co. v. *Harris*, 308.

Where in pursuance of a contract to sell the seller delivers the goods to a common carrier, whether named by the buyer or not, for transmission to the buyer, the seller in the absence of any evidence to the contrary is presumed to have unconditionally appropriated the goods to the contract and such delivery will be presumed to be a delivery to the buyer and title passes; but such appropriation is authorized only by the vendor's compliance with the contract in kind, quality and amount.

Smith, Fitzmaurice Co. v. *Harris*, 308.

DEMURRER.

Want of definite allegations essential to a cause of action render a pleading subject to demurrer.

It is sufficient as against general demurrer, however, that a cause of action can be reasonably inferred from the language used, and if to any extent on any reasonable theory the declaration presents facts sufficient to justify a recovery it will be sustained.

Brown v. *Rhoades*, 186.

On general demurrer if any count in an indictment is good, the demurrer must be overruled.

State v. *Thomas*, 230.

DIVORCE.

As a general rule in libels for divorce on the ground of gross and confirmed habits of intoxication it must be shown that the habit continued up to the time of filing the libel.

There are however circumstances under which the court is justified in the inference that a confirmed habit will continue, nothing to the contrary appearing, although such inference is not conclusive.

Reformation of habit implies the voluntary action of a sane mind. In the case at bar, the libelee being confined in an asylum for the insane when the libel was filed, going there when his habits in reference to intoxication were proved to exist, it might be impossible for the libelant to prove whether or not the libelee would return to his cups when restored to normality and granted his freedom. His last known condition before development of insanity, and con-

EQUITY.

ESTOPPEL.

EVIDENCE.

EXCEPTIONS.

EXHIBITS.

EXPERT EVIDENCE.

EXPRESS CONTRACT.

Damages for breach of an express contract to deliver a quantity of potatoes cannot be recovered in an action on account annexed for fertilizer sold. The form of action is inappropriate and the measure of damages different.

Hoyt v. *Easler*, 389.

FINDING OF FACT.

Where there is any evidence to support a finding of fact by the Supreme Court of Probate, it must stand.

Garland, Appellant, 84.

The findings of a single justice trying a cause without a jury on questions of fact are final.

Carey v. *James McNaughton*, 362.

FIXTURES.

See *Henderson* v. *Robbins*, 284.

FORECLOSURE.

Notice of foreclosure of mortgages under section 2, chapter 192, P. L. 1917, must be served upon the record holder of the right of redemption.

W. H. Glover Co. v. *Smith*, 397.

FOREIGN STATE—Common Law or Statute of.

This court is confined to the facts stated in a bill of exceptions in rendering its decision.

It will take judicial notice of the fact that the basis of the jurisprudence of New Brunswick is the common law. To this extent Owen v. Boyle, 15 Me., 147, is overruled.

What the common law or statute law of a foreign state is, if it is contended that the common law differs from our own, must be proved.

Frost, Admr., v. *C. W. Cone Taxi and Livery Co.*, 409.

FRAUD.

If one recklessly states as of his own knowledge material facts susceptible of knowledge which are in fact not true, even though he may believe them to be true, it may amount to fraud, if the statements were made to induce another person to act upon them, and he acts upon them believing them to be true.

Richards v. *Foss, et. als., Trs.*, 413.

INFANCY.

INFERENCES.

Where different inferences are deducible from the same facts, it cannot be said that the plaintiff has maintained the proposition on which alone there can be recovery.

In the case at bar a careful examination of all the evidence in the light of expert testimony of both kinds clearly shows that there were conditions resulting from child-birth, which could, as consistently as the douche, and, as time went on with greater consistency have caused the trouble complained of.

While there was evidence from which the jury could conclude there was some injury from the douche, it seems clear that the effect could not have been long continued and that the jury, obviously considering that the douche caused practically all of the conditions, erred in passing a point beyond which the alleged cause could not by a preponderance of evidence be sustained and were led by a misunderstanding of the duty imposed on the plaintiff or by sympathy to overestimate the damage.

Mills v. *Richardson*, 244.

INSURANCE.

If a plaintiff in an action on a policy of fire insurance falsely and knowingly inserts in his sworn proof of loss, any articles as burned which were not burned, or knowingly puts such a false and excessive valuation on single articles or on the whole property as displays a reckless disregard of truth, he cannot recover.

In such an action if the defendant alleges fraud the burden is upon him to prove it.

In this case the owner was miles away, the property quite properly in the charge of her husband, and nothing but inference is incorporated in the testimony to prove the fraudulent and criminal act charged against the owner.

The question of the existence of a criminal intent on the part of the owner, of negligence, and the degree thereof were peculiarly questions for the jury and the verdict is sustained.

Austin v. *Maine Farmers Mutual Fire Ins. Co.*, 478.

INTERVENTION.

Intervention may be claimed as a right when the intervenor will either gain or lose by the direct legal operation and effect of the judgment.

W. H. Glover Co. v. *Smith*, 397.

INVITEE.

See *Brown* v. *Rhoades*, 186.

JOINT TENANCIES.

Joint tenancies are not favored in this state, and evidence of an intent to create such tenancies should be clear and convincing. The four unities of title, time interest, and possession must be present.

Garland, Appellant, 84.

In the instant case, not only is proof of a completed gift of a joint interest lacking, but, at least, one or more of the unities essential to the creation of a joint tenancy.

Garland, Appellant, 84.

Both the doctrine of a joint interest created by such a deposit with a right of survivorship or a right of survivorship by contract violate well-settled principles of law in this state as to the creation of joint tenancies and the transfer of property by gift as well as the Statute of Wills, where the alleged donor has retained control for his own uses during his lifetime.

Garland, Appellant, 84.

An attempted contract to pass a gift after death is null and void, being in violation of the law as to transfer of property by gift as well as the Statute of Wills.

Portland National Bank v. *Brooks*, 251.

A deposit of funds of A in a bank in the name of A and B with right of survivorship, each with a right to draw said deposit, in the event of the death of A is a part of the estate of A. *Portland National Bank* v. *Brooks*, 251.

In the case at bar the donor retaining the right to use the deposit for her own use during her life prevents a completed gift inter vivos, and to permit the deposit to go to Helen G. Brooks would be in violation of the statute governing the testamentary disposition of property.

Portland National Bank v. *Brooks*, 251.

JUDGMENT.

A judgment, an indivisible part of which rests solely and merely upon hearsay, cannot legally be sustained.

In case of a judgment in a jury waived case in an action at law, error in the admission of evidence is not a ground for reversal, if there is sufficient legal evidence to support the judgment, since it will be presumed, if nothing appears to

the contrary, that the judge disregarded incompetent evidence. Not so where the trial of an action at law is by jury, as such error may be a ground for reversal.

In the instant case the judgment is not separable into parts. Hearsay, and nothing else, received against objection, is to an appreciable extent the sole support of a single complete thing. In other words, the competent evidence fails to extend to the entire judgment. Where such evidence fails, the judgment which must stand or fall in toto, is not legally sustained.

Edwards v. *Goodall*, 254.

See *Sawyer* v. *Calais National Bank*, 314.

JUDICIAL NOTICE.

The Court takes judicial notice of public statutes. It presumes that a municipal ordinance duly pleaded and proved is based upon any such public statute as justifies its enactment.

York Harbor Village Corporation v. *Libby*, 537.

JURISDICTION.

Transitory actions, in general, may be tried in this state whenever personal service can be made on the defendant.

But in actions between non-residents based on a cause of action arising outside the state, where no attachment has been made in this state, the courts are not obliged to entertain jurisdiction. They may, and usually do, on principles of comity, but not as a matter of strict right. It lies within the discretion of the courts whether or not they will entertain such a transaction.

Foss v. *Richards*, 419.

JURY TRIALS.

The jurisdiction conferred upon the Law Court by R. S., Chap. 82, Sec. 46, over "cases in which there are motions for new trials upon evidence reported by the justice," is limited to jury trials, and does not include cases submitted to the trial Judge for decision without the aid of a jury.

Levee v. *Mardin, et. al.*, 133.

LACHES.

Laches is negligence or omission seasonably to assert a right if such delay works to the disadvantage of another.

The bringing out is not sufficient to relieve a plaintiff from the charge of laches. He must prosecute his action with reasonable diligence.

In the instant case the delay which was permitted from the filing of the bill in 1909 to 1925, when the matter was set down for a hearing, relating to matters occurring twenty years before, and the facts that witnesses had in the mean-

time died, that defendant had become a feeble old man with failing memory, that during all such time the plaintiff alone had the possession of and access to all documentary evidence of the transaction, constitutes the defense of laches.

Stewart v. *Grant*, 195.

LANDLORD AND TENANT.

In the case of a tenancy for years, that is, for any fixed and definite term, no agreement to the contrary and no waiver appearing, a tenant must remove his buildings or other removable fixtures before the termination of his tenancy.

The tenant's continued possession after such termination, may with other circumstances, prove waiver of the land owner's rights, but does not ipso facto extend the tenant's privilege of removing fixtures.

If the duration of the tenancy is uncertain, the tenant is allowed a reasonable time after the termination of his tenancy to remove his fixtures.

If the tenant fail to effect the removal within the permitted time, no waiver being shown, the fixtures become a part of the real estate of the land owner, not upon any theory of abandonment, but by reason of breach of an implied condition of the tenancy.

Henderson v. *Robbins*, 284.

When a landlord provides an outside stairway or other way for the common use of several tenants he is not, except by reason of a special agreement, under any obligation to remove or otherwise dispose of snow and ice which naturally accumulate upon such way.

If a landlord knows or should know of a concealed defect in such way, which menaces its safety, it is his legal duty to make it known to a tenant.

If a tenement house is provided with a stairway, the common use of which is permitted by the lease to several tenants, the landlord is not under obligation to make such stairway safe, but he is bound to use due care to keep it in a condition as safe structurally as it is in or appears to be in at the beginning of the tenancy.

If, by reason of a defect concealed from the tenant, but known or that should be known to the landlord, or if because of the landlord's failure to exercise due care to keep such stairway as safe structurally as it was or appeared to be at the beginning of the tenancy, ice forms upon such way and is the proximate cause of injury to a tenant, or any member of his household, being in the exercise of due care, the landlord will be held liable.

A landlord may by special contract bind himself to remove or otherwise dispose of or make safe snow and ice which forms or accumulates, naturally or otherwise, without fault on his part.

Rosenberg v. *Chapman National Bank*, 403.

LARCENY.

LAST CLEAR CHANCE.

LICENSE.

LIEN.

MINOR.

MISADVENTURE.

MISTRIAL.

MORTALITY TABLES.

MORTGAGES.

MOTION FOR NEW TRIAL.

NEGLIGENCE.

The negligence of the automobile driver, in an action resulting from a collision between an automobile and a trolley car, is not imputable to a person who is riding with such driver as a mere passenger. In so far however as such negligence may have affected and qualified the duty of the defendant's servant it is a matter for the jury's consideration.

Dill v. *Androscoggin & Kennebec Railway Co.*, 1.

In an action of tort for injury sustained by plaintiff, it is not enough that negligence of the defendant is shown. It must also appear that the plaintiff was free of contributory negligence.

Blanchette v. *Waterville, Fairfield & Oakland Railway*, 40.

It is not the duty of proprietors of public amusements to warn patrons of obvious and known risks peculiar to the use of an amusement device to which the patrons voluntarily subject themselves.

Acts of a person put in peril by the negligence of another, and injured in an instinctive effort to escape from that peril under the stress of fright, are not the proximate cause of the injury, provided the acts of the injured party were justified as an exercise of ordinary care and prudence.

In the instant case the defendants owed the plaintiff, who was their invitee, an affirmative duty of using reasonable care, not only to see that the premises to which he was invited were in a reasonably safe condition, but also to take due precautions to guard him from dangers arising out of instrumentalities under their control, which duty is imposed by law and it can neither be enlarged nor diminished by averments of duty set out in the declaration. Such averments are conclusions of law only and may be ignored as surplusage if erroneous.

The plaintiff assumed the risk only of dangers the existence of which he knew, or of which he ought to have known in the exercise of that degree of care which ordinarily prudent children of his age and intelligence under like circumstances are accustomed to use. His affirmative allegation of due care on his part is sufficient averment of his freedom from contributory negligence and assumption of risks which were obvious.

In the instant case upon the undisputed facts alleged or admitted by the general demurrer, different inferences may fairly be drawn and fair minded men may reasonably arrive at different conclusions. Absence of negligence cannot, therefore, be predicated thereon as a matter of law.

Brown v. *Rhoades*, 186.

The skidding of a motor vehicle does not of itself prove negligence of the driver, nor the fact alone that the vehicle at the time did not have on skid chains. All the circumstances must be taken into consideration.

Where, however, as in the instant case, a driver of a truck, when the streets were slippery, is driving with the wheels on one side within the tracks of a street

railroad, sees a pedestrian standing in the street within four or five feet of his course and at a point where he must make a sharp turn to the right to enter another street, which will bring the rear end of the truck toward the pedestrian and will swing the rear wheels of the truck over the car tracks just as the rear end of the truck is passing the pedestrian, it is a question for a jury as to whether the driver, in so operating the truck under such conditions, in case it skids or slues as the wheels pass out over the car rails and injures the pedestrian, is in the exercise of due care.

King v. *Wolf Grocery Co.*, 202.

In actions of tort to recover damages for personal injuries it must appear affirmatively that the negligence of the defendant solely caused the injury in order to recover.

Though if the defendant were guilty of negligence, if the plaintiff too were guilty of a negligent act or omission which operated as one of the proximate causes he can not recover.

Negligence and contributory negligence are as a general rule questions of fact for the jury, and when the question involves the weighing and determining of evidence it must be submitted as one of fact to the jury.

In the instant case the court cannot say as a matter of law that there was contributory negligence on the part of the plaintiff, unless it be that any other inference could not reasonably be drawn from the evidence.

If defendant were negligent, which is not now necessary to decide, it is only too plain that had plaintiff been using ordinary care at the time and had not been at fault he would have escaped injury entirely.

Rogers v. *Forgione & Romano Co.*, 354.

In an action against a common carrier alleging negligence, ordinarily where nondelivery of a shipment is proved, a prima facie case is supported by a presumption of causative fault; not so, however, when the loss resulted from an event, liability for which is excluded by a valid stipulation in the contract for carriage.

In this case it is apparent that the inherent nature or propensity of the dog, the consequence of her vitality, her irrepressible instinct to escape from bondage, or, as some of the decided cases say, "her proper vice," freed the animal; no negligence of the carrier contributing. The contract of transportation exempts the carrier from loss so arising.

Although the defendant is not liable for the escape from the crate, is liability shown afterwards? Negligence has always relation to the circumstances in which one is placed, and what an ordinarily prudent person would do or omit to do in such circumstances. Measured by this standard, no fact proved, nor inference legitimately to be drawn, ascribes the loss of the dog to any neglect or fault of the defendant. For the want of such evidence the plaintiff's case must fail.

Grant v. *American Railway Express Co.*, 489.

See *Sturtevant, Admr.*, v. *Ouellette*, 558.

NEGLIGENCE—CONTRIBUTORY.

NOL PROS.

NUISANCE.

OFFICER.

PAUPER.

The construction of a pauper notice given under the requirements of sec. 35, chap. 29, R. S., is one of law for the court, and a misstatement therein of the parentage of a minor child is very material and vitiates the notice.

Durham v. *Lisbon*, 429.

PERJURY.

The essential elements of civil liability for perjury under R. S. Chap. 87, Sec. 159 are (1) a judgment obtained against a party (2) by the perjury of a witness (3) introduced at the trial by the adverse party.

A declaration that contains no allegation satisfying the third requirement is demurrable.

Milner v. *Hare*, 14.

PHOTOGRAPHS—Admission of.

The admission of a photograph in a jury trial, is a question addressed to the discretion of the trial judge, and in the absence of abuse of discretion, exceptions do not lie, and the testimony of the photographer is not a prerequisite if the photograph is shown to be an accurate representation by other competent testimony.

State v. *Jordan*, 115.

The admission or rejection of photographs lies largely within the discretion of the presiding justice, and, in absence of abuse of discretion, exceptions do not lie.

Penley v. *Teague & Harlow Co.*, 583.

PLEADING.

It is not necessary to declare specially on a promissory note. An action of money had and received or account annexed which in practice is substituted for the common money counts, lies by the endorsee of negotiable paper against the maker. The paper itself is admissible in support of the action.

In the instant case the allowance of an amendment striking out the second count of the plaintiff's declaration was addressed to the discretion of the trial judge and is not open to exception.

The defendants upon their exception to the admission of the note in evidence are confined to the grounds of objections stated at the trial.

Levee v. *Mardin et. al.*, 133.

A person charged with a criminal offense is entitled to have the accusation against him set out formally, fully and precisely, and the rules of criminal pleading require that the State negative the exception of the statute.

When the point is raised at the trial at nisi prius that the declaration is not broad enough to cover the acts from which it is claimed the injuries flowed, the case can not be treated before the Appellate Court as though an amendment had been made, but must be determined according to the well established rules of pleading and proof. *Piper* v. *Daniels*, 458.

While it is necessary to allege the place of the commission of the crime, it is sufficient to allege it to have been committed within the county without naming the town or locality where the Court has county-wide jurisdiction.

It is not necessary to prove the offense was committed in the place alleged, unless the locus is a part of the description of the offense, if the proof is of an offense committed within the jurisdiction of the Court.

State v. *Harvey*, 509.

PLEADING AND PRACTICE.

Under an indictment it is not necessary to prove that the offense charged was committed on the day alleged; it is sufficient if it is shown that it was committed within the period of limitation.

Although an indictment may not be worded in continunando, yet, acts prior to and also subsequent to the acts charged in the indictment, when indicating a continuance of the offense charged, are admissible.

In the case at bar the presumption is unescapable that in his charge to the jury the Judge had alluded to the date on which the evidence might lawfully lead them to find that the offense charged had been committed, and that it must be proved to have been committed within the period of limitation, because no exception was taken to any expression in or omission from the charge proper. While the latitude allowed to the state's attorney in proving the time of commission might have been more certainly hedged about by a different wording of the reply to the question of the jury, yet it is not every failure of perspicacity in instructions to the jury that justifies the awarding of a new trial. Furthermore, the respondent was not prejudiced by omission, at this time of reference to the Statute of Limitations, it being incredible that the evidence submitted to them did not relate to acts done shortly prior to the date alleged.

State v. *Morin*, 136.

POLICE OFFICER.

A police officer, whose appointment is secured by and whose services are paid by a person or corporation, acts sometimes as an officer and sometimes as a servant of such person or corporation.

Whether in a particular case the doer of the act complained of was at the time acting in his official capacity or within the scope of his employment as a servant or employee is ordinarily a question of fact for the jury.

Neallus v. *Hutchinson Amusement Co.*, 469.

POLICE POWERS.

See *State* v. *Small*, 235.

PRESCRIPTIVE TITLE.

Adverse possession which will ripen into title must be under a claim of right. The possession of the disseizor must be hostile or adverse in its character, importing a denial of the owner's title in the property claimed.

Central Maine Power Co. v. *Rollins*, 299.

See *Bemis* v. *Bradley*, 462.

PRINCIPAL AND AGENT.

A judgment against a principal is res adjudicata as to an agent of the principal for the same cause of action.

Where the action against the principal has been disposed of by a nonsuit, it will not constitute a bar in an action against his agent for the same cause.

Piper v. *Daniels*, 458.

PROBATE COURT—Agreements in.

Agreements relative to matters and proceedings in the probate courts are valid and enforcible contracts.

In the case at bar the agreement to withdraw his contest of the will, in consideration of money to be paid him by plaintiff, is not denied, and proof that it was reduced to writing and signed by or for the defendant is not required, for it is alleged in the bill and admitted in the answer.

Even if this were not so, and the promise to abandon the contest were in parole only, it has been repeatedly held in courts where the precise point has been raised that specific performance of the oral promise will be enforced.

Benner v. *Lunt*, 167.

PROBATE COURTS—Jurisdiction of.

The weight of authority supports the general rule that jurisdiction rests in our Probate Courts over all matters relating to the probate of wills and the administration of estates.

Tripp v. *Clapp*, 534.

PUBLIC UTILITIES COMMISSION.

A complaint against proposed changes in freight rates filed under sec. 2 of chapter 44 P. L., 1917 is seasonably filed if a hearing thereon can be fixed after reasonable notice to all parties within thirty days after such proposed changes become effective.

RES ADJUDICATA.

A judgment against a principal is res adjudicata as to an agent of the principal for the same cause of action.

Where the action against the principal has been disposed of by a nonsuit, it will not constitute a bar in an action against his agent for the same cause.

Piper v. *Daniels*, 458.

RES GESTAE.

All conversation between a respondent and the deceased at the time of the homicide and leading up to it, whether of threats or otherwise, indicating ill will between them, is admissible as a part of the res gestae.

State v. *Guptill*, 239.

SELF DEFENSE.

Where self-defense is the issue, evidence of some overt act indicating the deceased was the aggressor and the respondent had reasonable grounds of belief that he was in imminent danger must be shown as a basis for the introduction of threats by the deceased, in order to render the exclusion of such evidence reversible error.

State v. *Guptill*, 239.

SENTENCE (Split sentence).

A so-called "split sentence" viz: where the penalty of fine and imprisonment as provided by statute is imposed and the imprisonment part is suspended and the fine part enforced, is illegal.

The statutory authority for the suspension of the imposition or of the execution of a sentence or for a stay of execution is the Probation Act and R. S. Chap. 136, Sec. 27 as amended by P. L. 1917, chap. 156, sec. 3, which give no express or implied authority to divide an imposed sentence.

There is no discretionary power, aside from those statutes, inherent in our courts which have jurisdiction of a crime to divide the plain mandate of a statutory sentence.

In the instant case the petitioner's imprisonment was lawful if the judgment on October 20 was lawful, otherwise not; the defects or omissions in the mittimus not being material.

The judgment of August 31 was unlawful, first, because the powers as to sentences conferred by the Probation Act, R. S. chap. 137, secs. 12, 13 and 14, were for judicial consideration at the time the sentence was imposed on July 1. When sentence had been imposed and the session ended, as it was, the only power left for the judge on August 31, when the appeal was withdrawn, was the statutory power to order compliance with the sentence which had been imposed;

second, because the court had no power to impose sentence and suspend the execution of part of it.

The court was without jurisdiction on October 20 to order the petitioner to appear before it and to serve the two months and to issue mittimus therefor, hence the commitment of the petitioner was unlawful.

James Cote v. *Henry F. Cummimgs*, 330.

SET-OFF.

See *John G. Smith, Bank Commissioner*, v. *Bath Loan & Building Association*, 59.

SIDEWALKS.

See *State* v. *Small*, 235.

SPEEDY TRIAL.

The accused must claim his right to have a speedy trial and make a demand for trial. Such right may be waived by the conduct of the accused.

State v. *Kopelow*, 384.

STATUTE—CONSTRUCTION OF.

In case of a sale and purchase of the property and franchise of a public utility under section 86 of chapter 51, R. S., the purchaser or purchasers with necesary associates may organize themselves into a corporation, and the proceedings of such reorganization are under the direction of the Court and not of the Public Utilities Commission.

The transfer of the property and franchises by the purchaser to the new corporation organized under section 86 of chapter 51, R. S, is not a purchase or acquisition of property within the meaning of section 37 of chapter 55, nor one of the purposes for which capital stock may be issued and over which the Public Utilities Commission has jurisdiction.

In the instant case the acquiring of the franchises and property, the organization of the new corporation, the fixing of the amount of its capital stock and the determination of the proper amount to be issued to the purchasers and incorporators are a part of the reorganization, and must be done under the direction of and with the approval of the Court, and does not require the approval of the Public Utilities Commission.

Damariscotta-Newcastle Water Co., 141.

STATUTE OF ANOTHER STATE.

Where provisions of statute are to be read into an insurance policy, the statute, if of another state, must be proved. The Court has no authority to go outside the record and consider facts not in it, and this rule includes foreign statutes.

Clark v. *Metropolitan Life Ins. Co.*, 7.

TRADE ACCEPTANCES.

"30-60 days" in the recital of a contract concerning trade acceptances construed 30 and 60 days, and that one-half in amount of the trade acceptances might be on 30 days and the rest on 60 days.

The law indicates an equality of division when no other manner for dividing is defined.

Ellsworth Coal Co. v. *J. P. Partridge Co.*, 417.

TRUSTS.

When the objects of a trust are fully performed the title of the trustees ceases and the legal as well as the equitable title vests in the beneficial owner unless the intention of the creator clearly shows that the legal title would continue in the trustee.

Where the purposes for which a trust was created have ceased the court may declare it terminated. The estate given to a trustee endures no longer than the thing to be secured by the trust demands.

Hinds v. *Hinds*, 521.

VENUE.

Superior Courts of this state possess no inherent power to order cases transferred from one to the other, or from one to any other court, nor is such power conferred upon them by statute directly or by necessary implication.

State v. *Donnell*, 505.

VERDICT.

It is not within the discretion of the court to direct a verdict for either party, when the case shows material and admissible evidence upon which a verdict for the other party may be based.

Rowe v. *Kerr*, 35.

WAIVER.

Where procedure and rules relating to change of beneficiary are intended only for the benefit of the company and may, therefore, be waived by it, yet this does not give to the insuring company the privilege of destroying vested rights of a third party by waiver.

Clark v. *Metropolitan Life Ins. Co.*, 7.

WARRANTY.

There is no implied warranty arising from a contract of letting that the thing let is fit for the use intended, where the selection is made by the lessee.

Gaffey v. *Forgione & Romano Co.*, 220.

WAYS AND BRIDGES.

WILL.

WITNESS—TO WILL.

WORDS AND PHRASES

WORKMEN'S COMPENSATION ACT.

The findings of the Industrial Accident Commission on questions of fact are final if supported by some evidence, or based upon rational inferences drawn from proven facts, but such findings when based upon mere conjecture, surmise or probability, are erroneous.

Paulasukis' Case 32.

The construction of the contract of assent and the insurance policy under the Workmen's Compensation Act is a question of law.

If a division of employees is permitted by the Industrial Accident Commission that is not warranted under the Act, it does not follow that all employees must of necessity be included under the assent or are covered by a policy of insurance that is expressly limited to only a part.

Hutchinson's Case, 102.

In this case the additional evidence introduced at the rehearing clearly shows that the deceased when injured was not engaged in any work covered either by the written assent of the employer or the policy of insurance.

Hutchinson's Case, 10 2

Under the Workmen's Compensation Act an assenting employer is bound to furnish or pay for medical aid, for a period of thirty days and to the extent of one

hundred dollars, but a longer period or a greater sum may be determined by the Industrial Accident Commission upon a hearing on a petition by either in such cases only where the employee and employer do not agree, a prerequisite to jurisdiction.

In the instant case, the employer and insurance carrier, in their relationship to the injured employee, are as one and the same, and the procedure being by petition by the employer against the insurance carrier is unauthorized. The proceedings should have been instituted by the employee, or some one claiming under him adversely to the employer after a disagreement between them; a preliminary essential to the jurisdiction of the Commission.

White's Case, 105.

In the case of an employee residing in Maine and employed by the joint superintendent of two corporations, one a foreign corporation owning the stock in the other, a Maine corporation, but within the limits of this state, though the employee was at once sent to the foreign country to do work and remained there until his injury and death, there is a presumption that it was not the intention of the parties to violate the law of the foreign country, and a finding by the Commission awarding compensation on the ground that the contract was between the employee and the Maine corporation was warranted.

In the instant case though the Maine corporation had no plant in the foreign country or authority to do business there, and the furnishing of labor to do work there may have been ultra vires, yet under the circumstances shown to exist in this case, it was not foreign to its corporate purposes, but in extension thereof, and if its contract with the employee contemplated it, the employee would be entitled to compensation under the extra-territorial clause of the Act.

The evidence in the case does not disclose anything illegal under the laws of the state in the Maine corporation contracting with an employee to do work in a foreign country. An alien labor act of a foreign country applies only to contracts between its own citizens aliens. No question being raised but that the assent and insurance policy were broad enough to cover an employee engaged in work in a foreign country if contemplated under the contract of employment.

Saunders' Case, 144.

Under the Workmen's Compensation Act the injuries received by an employee in going to and from his work on a public street or in a private conveyance are not injuries received in the course of his employment unless the means of conveyance is furnished by the employer. *Kinslow's Case*, 157.

In workmen's compensation cases where transportation is furnished by the employer as an incident of employment, an injury suffered by an employee while going or coming in the vehicle furnished by the employer arises out of and is within the course of the employment. *Littlefield's Case*, 159.

The period of three hundred weeks specified in Sections 15 and 16 of the Workmen's Compensation Act limits the time during which incapacity is compensable, but is not a limitation of the time for filing petitions.

While an approved agreement unlimited as to time and providing for the maximum compensation for total incapacity caused by an accidental injury remains in force, res adjudicata, is a good defense to an original petition asking compensation for the same injury. If the defense of res adjudicata is not pleaded it is waived.

If a workman asks compensation for an accidental injury more than two years after its occurrence, and it appears that the injury for which compensation is claimed, is identical with, or a resultant of an injury specified in an approved agreement filed within said two years period, the remedy is not barred by the limitation of section 39.

Ripley's Case, 173.

Section thirteen of the Workmen's Compensation Act applies when the employee dies as a result of the injuries, leaving no dependents at the time of the injury.

In its amended form, section ten of the act authorizes the Industrial Accident Commission to enlarge the thirty day period therein mentioned when in its discretion the nature of the injury or the process of recovery require it, even though the services are rendered during the last sickness of the injured employee.

In the instant case section thirteen of the Workmen's Compensation Act does not apply.

Merrill's Case, 215.

Under chapter 25, R. S., the state highway commission is not an agent of the town through which a state aid highway happens to be located, but a state board acting for and in behalf of the state.

Chapter 154 P. L. 1917 and chapter 25, R. S. are in pari materia and must be construed together. By express terms of chapter 154, highways designated under it by the towns become state aid highways. Once so designated they fall in the same class as those designated under chapter 25, R. S.

Without specific provision in chapter 154 making the state highway commission the joint agent of both the towns and the state, the state highway commission must be presumed to act in the same capacity under chapter 154 P. L. 1927 as under chapter 25, R. S.

Grindell's Case, 287.

The work of constructing third class highways in distinction from state and state aid highways is governed by section 4 of chapter 263, P. L. 1919 as amended by chapter 169 P. L. 1925, which expressly provided that when a town has qualified itself to receive funds, the municipal officers shall proceed with the construction of the way.

That it must be constructed according to standards approved by the state highway commission, does not make the state highway commission a contracting party with respect to the materials and labor furnished in constructing the highway.

In the instant case, the evidence is plenary that the deceased was in fact employed by the city of Belfast.

Tuttle's Case, 349.

Under the Workmen's Compensation Act "Policemen" are employees of the city or town whose authorization is restricted within the limits of such city or town, whether appointed by elected local officials of such city or town, or appointed by officers appointed by the Governor and Council by virtue of a legislative act creating a commission.

The presumption of the law is against self-murder, and stands unless and until prima facie evidence is adduced by the opposite party.

In this case the finding by the commission that the death of the husband of the petitioner resulted from an accident between which and his employment there was causative connection, had sufficing legal foundation, and so had the finding that the injury was experienced in the course of employment.

Moriarty's Case, 358.

Under the Workmen's Compensation Act an injury resulting from accident and which remains latent for more than thirty days may be sufficient ground of "mistake," within the meaning of the word in section 20 of the act, for failure to give notice of the accident as required in section 17.

Such notice must, however, be given within a reasonable time after the latent injury becomes apparent if claimant is to receive the benefit of the act.

Brackett's Case, 365.

A section of highway under actual construction may be considered the employer's premises under the Workmen's Compensation law.

Not so when the portion of highway over which travel passes is completed and open for use by the public.

An injury to an employee while on a public highway on his way to his work is not an injury received in the course of his employment, nor one arising out of his employment.

Ferreri's Case, 381.

In a petition for review of agreement or decree under section 36 of the Workmen's Compensation Act, it must appear that the agreement was approved and that the period of compensation was definitely fixed by the agreement or by the decree.

Both the beginning and the date of the end of the period of compensation must be definitely fixed. *Wilfred Hamel's Case*, 401.

In the Workmen's Compensation Act the words "Arising out of" mean that there must be some casual connection between the conditions under which the employee worked and the injury which he received; and the words "In the course of" refer to time, place and circumstances under which the accident occurs. The accident must have been due to a risk to which the injured person was exposed because employed and while employed by his employer. Both elements must appear and the burden of proof rests upon the claimant to prove all the facts necessary to establish a right to compensation under the act.

In this case the burden was upon the petitioner to show that the injured man, when leaving the premises and starting to cross the street, was in prosecution of a duty incumbent upon him by reason of his employment. In other words the petitioner must show that the injury arose out of some casual connection between the employment and the accident which caused the injury. This petitioner failed to do.

Mary M. Taylor's Case, 450.

An employee, whose duty it was to get employer's mail at Post Office during noon hour, carry same to his own home, telephone contents of important letters and then eat lunch and return to his work at the regular hour in the afternoon, incidentally bringing mail to the office when he returns, suffers no compensable injury by reason of slipping on the sidewalk and fracturing his hip, while thus returning to place of employment, as such an injury cannot be said to have occurred in the course of his employment.

Rawson's Case, 563.

Statements contained in medical writings are not competent evidence of the facts stated.

While the Appellate Court will not review findings of fact by the Industrial Accident Commissioner or his deputy, it is not bound by their reasoning.

Where an order of the Commissioner or his deputy is based in any part on statements or writings not offered in evidence, or on conjecture, it constitutes an error of law from which an appeal from the decree of the Court below based thereon will be sustained.

Shaw's Case, 572.

In this case the accident occurred on December 20, 1926, and the hearing was held on June 21, 1927. It is evident that the period for which the petitioner should have compensation had ceased long before the hearing. The injury was to the eye. The petitioner attempted to show that prostate trouble lengthened the period during which he should receive compensation. The evidence upon this point was plainly incompetent and inadmissible.

Strout's Case, 579.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF MAINE.

ENGLISH STATUTES.

STATUTES OF THE UNITED STATES

SPECIAL LAWS OF MAINE

STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

ERRATA.

Substitute "Cox" for "Coy" name of Appellant on page 256.
Substitute "325" for "225" in tenth line from bottom on page 333.
Substitute "11 Me." for "1 Me." in seventh line from the top on page 473.