MAINE REPORTS

127

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

FEBRUARY 15, 1928, to MARCH 7, 1929

EDWARD S. ANTHOINE

REPORTER

PORTLAND, MAINE

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. SCOTT WILSON, CHIEF JUSTICE

HON. WARREN C. PHILBROOK[1]

HON. CHARLES J. DUNN

HON. LUERE B. DEASY

HON. GUY H. STURGIS

HON. CHARLES P. BARNES

HON. NORMAN L. BASSETT

HON. WILLIAM R. PATTANGALL

HON. FRANK G. FARRINGTON[2]

[1]Resigned November 29, 1928, and appointed Active Retired Justice November 29, 1928

[2]Appointed November 16, 1928

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HON. ALBERT M. SPEAR[3] HON. JOHN A. MORRILL

HON. WARREN C. PHILBROOK

[3]Died January 31, 1929

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HON. HARRY MANSER[2]	ANDROSCOGGIN COUNTY
HON. ARTHUR CHAPMAN	CUMBERLAND COUNTY
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[1]Resigned March 31, 1928, and appointed Active Retired Justice March 31, 1928

[2]Appointed April 1, 1928

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HON. HENRY W. OAKES

[3]Died November 26, 1928

ATTORNEY GENERAL

HON. RAYMOND FELLOWS to January 3, 1929

HON. CLEMENT F. ROBINSON from January 2, 1929

REPORTER OF DECISIONS

EDWARD S. ANTHOINE

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1928-1929

LAW TERMS

BANGOR TERM, First Tuesday in June.

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

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday in December.

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

PORTLAND TERM, First Tuesday in March, 1929.

SITTING: WILSON, Chief Justice; DUNN, STURGIS, BARNES, PATTANGALL, and FARRINGTON, Associate Justices.

TABLE OF CASES REPORTED

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

RUSSELL K. PRATT *vs.* WILLIAM E. DUNHAM.

Cumberland. Opinion February 15, 1928.

EXCEPTIONS. MANDAMUS. EVIDENCE. R. S. CHAP. 51, SEC. 22.

Exceptions do not lie to the findings of fact by a single Justice unless found without evidence or contrary to the only inference to be drawn from the testimony.

The granting of a writ of mandamus is not of right but discretionary with the Court and exceptions do not lie to the issuance or refusal unless there is a clear abuse of discretion.

The Court below having found upon the evidence that the petitioner was a bona fide stockholder in the corporation named in the petition, and was a person interested within the meaning of sec. 22, chap. 51 R. S., evidence of the activities of a certain stock broker of whom the petitioner had purchased his stock and who was also interested in assisting the petitioner in obtaining a list of stockholders as well as evidence of the expense of an audit of the corporation's books, it not appearing that the petitioner was seeking in these proceedings to obtain an audit of the books or had ever requested it, were properly excluded.

On exceptions by defendant. A petition brought by a stockholder in American Investment Securities Company, against the clerk of the Company for a writ of mandamus to compel the clerk to permit an inspection of the records and stock books of the company and to allow petitioner to make copies of parts affecting his interest. After hearing, the presiding Justice ordered the peremptory writ to issue finding as a fact that petitioner was a person interested

within the meaning of the statute pertaining, and that his purposes were lawful and proper. To this ruling and also to the exclusion of certain evidence the defendant took exceptions.

Exceptions overruled.

The case appears in the opinion.

Thaxter, White & Willey, for petitioner.

Choate, Hall & Stewart,

Verrill, Hale, Booth & Ives, for defendant.

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

WILSON, C. J. A petition for a writ of mandamus to compel the defendant as clerk of the American Investment Securities Company to permit the petitioner to inspect the records and stock book of the company and copy such parts as might pertain to his interests. An alternative writ was issued, and from the return thereon, it appears that the reason for refusing the petitioner the right to inspect the records, and the ground urged for which a peremptory writ should be refused, was that the petitioner is not a person interested within the meaning of sec. 22, chap. 51 R. S., as construed in *Day* v. *Booth,* 123, Me., 443, and that his purposes in obtaining such information were vexations and unlawful.

The Justice below found as facts that the petitioner was a bona fide holder of stock in the company and was a person interested within the meaning of the statute and that his purposes were legitimate and proper and ordered the peremptory writ to issue.

To this order and to the exclusion of certain evidence the defendant excepted, and presents his bill of exceptions to this Court.

The contention of the defendant was that the petitioner's stockholdings were only colorable and not bona fide holdings, or if bona fide, that his purpose in seeking the information and obtaining a list of stockholders was not for his own benefit, but as the agent or in behalf of a certain stock broker, or a firm of stockbrokers, in order that they might use them for improper purposes in circularizing the stockholders.

This was denied by the petitioner who testified that he bought a part, at least, of the stock standing in his name at the time the pro-

ceedings were begun, viz., one thousand shares, for cash at the market prices, and that he desired a list of the stockholders in order that he might communicate with them as to the affairs of the corporation with the management of which he was not satisfied.

Although there was evidence of a close connection between the petitioner and the stock broker in question, named Hotchkin, any agency on the part of Pratt in obtaining the stock list was also denied by Hotchkin, who testified in explanation of his interest in the proceedings and his efforts to aid the petitioner in obtaining the information sought, that both he and his wife held large blocks of the stock. He admitted that his firm dealt in the stock of this company and had circularized its stockholders, but claimed it already had a list of stockholders sufficiently complete for their purposes as brokers.

Exceptions do not lie to findings of facts by a single Justice unless found without any evidence or contrary to the only inferences to be drawn from the testimony. *Hazen* v. *Jones*, 68 Me., 343; *McLeod* v. *Amero*, 111 Me., 216; *Ayer* v. *Harris*, 125 Me., 249.

The granting of the peremptory writ of mandamus is not of right, but a discretionary power and exceptions do not lie to its issuance or refusal, unless it is a clear abuse of discretion which does not appear here. *Day* v. *Booth*, supra.

The defendant also presents exceptions to the exclusion of certain testimony offered by him relating to the activities of the stock broker, Mr. Hotchkin, and for the purpose of showing that he or his firm had previously invoked and was frequently invoking the writ of mandamus to obtain stock lists of other companies, that his firm had frequently and persistently circularized the stockholders of the American Investment Securities Co., that they had made offers to purchase stock at "steadily increasing prices" and had endeavored to induce stockholders to part with their holdings by depreciating its value.

All of which evidence without repeating it in detail, if the petition had been brought by the stock broker himself, might have been pertinent, but had no bearing on the interest of the petitioner in these proceedings, unless it was shown that he was a mere dummy or agent of the stock broker or had conspired with him to obtain the stock list for the improper uses by the stock broker or his firm.

Much evidence to the same effect was admitted without objection. The Justice below, however, found that the evidence did not sustain the contention of the defendant that the petitioner was acting solely in behalf of the stock broker or his firm, but was acting solely in his own behalf and that his purposes were lawful. The evidence of Mr. Hotchkin's activities along the lines suggested by the testimony offered and excluded had no tendency to prove any connection between the stock broker and the petitioner, and unless such agency was established, had no bearing on the issue of whether this petitioner was a person interested within the meaning of the statute. We think the defendant was not aggrieved by its exclusion.

Evidence was also offered of the expense of a complete audit of the financial affairs of the company and excluded. Defendant contends that this should have been admitted on the question of the good faith of the petitioner. But the petitioner does not seek to examine the financial records of the company in these proceedings and the record shows that he did not complain because he had not been permitted to have such an audit made, nor is it clear that he ever requested such an audit be permitted.

Mr. Hotchkin did testify that he had requested such an audit and was refused; but again, unless the petitioner had been shown to be the agent of Mr. Hotchkin in these proceedings and that they are being prosecuted by the petitioner in behalf of Hotchkin or his firm, such evidence had no tendency to discredit the petitioner's good faith in seeking to obtain a complete list of stockholders.

It is clear from the record that it was on this ground that the evidence was excluded. The petitioner expressly denied that such an audit was his aim or purpose. We think in view of the findings of fact by the Justice below, the defendant was not aggrieved by this ruling.

Exceptions overruled.

A. M. ROSS *vs.* RALPH W. RICHARDS.

Waldo. Opinion February 15, 1928.

EXECUTIONS. REDEMPTION. LACHES.

A vendee at sheriff's sale of real estate on execution cannot defeat the debtor's right to redeem same by setting up lack of title to the premises in the debtor at the time of sale.

The year allowed for redemption is to be reckoned from the date of sale of real estate, not from the date of seizure.

In the instant case the debtor was not guilty of laches in failing to bring his bill in equity for a year after his attempt to redeem the property failed by reason of vendee's refusal to accept tender, nothing having occurred during that period to prejudice vendee's right or work disadvantage to him.

On report. A bill in equity seeking to redeem certain real estate sold on execution. A hearing was had upon bill and answers. Facts showed date of sheriff's sale November 22, 1924 — seizure more than thirty days prior thereto — attempt to redeem November 21, 1925 — bill in equity dated October 21, 1926. By agreement of the parties the cause was reported to the Law Court. Bill to redeem sustained.

The case appears fully in the opinion.

Buzzell & Thornton, for plaintiff.

Arthur Ritchie, for defendant.

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

PATTANGALL, J. On report. Bill in equity to redeem real estate sold on execution.

The Bill recites (1) That on October 3, 1923, plaintiff was seized in fee of certain described real estate; (2) That on November 22, 1924, his interest in the same was sold on execution to this defendant; (3) That within one year thereafter plaintiff tendered the amount due defendant by reason of this sale and defendant refused

to accept same; (4) That plaintiff now offers to pay defendant all that may be found due him and therefore prays (1) for an accounting to ascertain the amount due defendant; (2) For permission to redeem property on payment of such amount; (3) That defendant may be ordered to convey property on receipt of payment of the same.

Defendant answers (1) By denying that plaintiff ever had title to the real estate in question; (2) By denying that any tender of the amount due him was made or any accounting asked for, within the period fixed by law for redeeming the property and also urges that plaintiff became bankrupt in February, 1923, and that if he ever had any title to the property in question it is in his Trustee in bankruptcy.

To this latter proposition plaintiff replies that the Trustee in bankruptcy released his interest to the plaintiff in December, 1924, after having been duly authorized by the United States District Court so to do.

Considering the first objection set up by defendant, viz., that plaintiff never had title to the real estate. Defendant could only have acquired, by sheriff's sale, such interest as plaintiff had. He may esteem that interest very lightly. Plaintiff may regard it more seriously. Such as it is, plaintiff has a right to it, free from interference from defendant, if he pays defendant the amount which defendant paid for that interest. Title in a third person cannot be set up to defeat plaintiff's right of redemption.

As to the second objection: It appears that the sheriff's sale occurred on November 22, 1924. Plaintiff had until November 22, 1925, to redeem from the sale, and as November 22 fell on Sunday, the time was extended to November 23. On Saturday, November 21, plaintiff and his attorney endeavored to get in touch with defendant for the purpose of redeeming the property. Defendant evaded them and they did not meet him until Monday, November 23. At that time defendant not only refused to state the amount due him but said that he would not permit plaintiff to redeem for any amount and that he had so informed plaintiff some time before. Plaintiff's attorney then tendered seventy-five dollars, which was refused. Tender was waived but notwithstanding the waiver, tender was made.

The Bill is dated October 21, 1926, nearly a year after the attempt was made to redeem the property. Defendant complains of laches. There is no evidence that the delay of eleven months in bringing the bill has worked any disadvantage to him.

Plaintiff is plainly entitled to redeem the property. An accounting should be had to determine the amount due defendant, and on payment of same he should release his claim to the property of plaintiff.

Bill sustained with costs.
Further proceedings to be had in accordance with these findings.

ALMON I. SPINNEY *vs.* JOHN M. ALLEN AND TRUSTEE.

Franklin. Opinion February 15, 1928.

WORDS AND PHRASES. PATENTS. LICENSES. ESTOPPEL.

Meaning of phrase "it appeared in evidence" defined:

Standing alone and unqualified in a bill of exceptions such phrase is to be construed as meaning that the facts are undisputed or admitted.

An agreement to pay a patentee for a license to manufacture and sell a particular machine, made when it is uncertain whether the machine is covered by the the patent or not, is binding and enforcible as an absolute promise to pay for exemption from disturbance by the patentee and immunity from claim under his patent.

A licensee under a contract for manufacture of machines on a royalty basis is estopped to assert that the machines he is manufacturing are not under the patent if the jury find from the evidence that the contract remained in force and applied to the situation.

In the instant case the plaintiff was entitled to substantially the instruction asked, since the contract if applicable treats it as settled that the machines being manufactured were in accordance with the patent.

The given instruction overlooked the doctrine of estoppel.

On exceptions. An action of assumpsit on account annexed. Plaintiff held a patent for a "skewer pointing machine." Defend-

ant, a machinist, and owning and operating a machine shop in the town of Farmington, entered into a contract with plaintiff, first verbal, then confirmed in writing, for manufacture of skewer pointing machines on a royalty basis. Before execution of such contract plaintiff had threatened to bring suit against defendant for infringement of his patent. Four machines were manufactured by defendant, plaintiff being employed by him on the work. After sale of these four machines defendant declined to pay plaintiff the stipulated royalty, contending that the machines were not manufactured under plaintiff's patent and were of different design. There was conflicting testimony as to whether such notice was given to plaintiff by defendant, prior to shipment and payment for these four machines.

The case was tried by the presiding Justice with jury. The jury found for the defendant.

Exceptions were taken by plaintiff to a refusal to give requested ruling and also to certain rulings. Exceptions sustained.

The case sufficiently appears in the opinion.

Frank W. Butler, for plaintiff.

Carll N. Fenderson, for defendant.

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

DUNN, J. "It appeared in evidence" begins the first sentence of the second paragraph of the bill of exceptions in this case. The bill was filed by the counsel for the plaintiff, agreed to by the counsel for the defendant, and then allowed by the trial court judge.

The expression "appeared in evidence," standing alone in a bill of exceptions, does not express the same thing as "there was evidence tending to prove," or "the evidence on the point was conflicting," or similar statement.

Unqualified it is to be construed as meaning that the facts were undisputed or admitted. *Neal* v. *Sherber*, 207 Mass., 323.

In this case these facts appeared in evidence: Plaintiff owned letters patent on a skewer-pointing machine. One day, in the spring or summer of 1926, plaintiff said to the defendant, who was then making the first of the four machines of that kind which he had

contracted to manufacture and sell, that that machine infringed the patented invention, and unless defendant agreed to pay plaintiff a royalty there would be suit both for the infringement and to enjoin further interference with the patent owner's rights. Defendant agreed to pay ten percentum on the selling price of each machine. Later on he hired the plaintiff, who helped to make the four machines. On November 24th, in a written instrument of that date, "confirming verbal agreement," the plaintiff "agreed to allow the latter (defendant) to manufacture skewer pointing machines according to his (plaintiff's) patent or patents," on the royalty basis. And defendant again promised payment.

This much being premised, a foundation is laid for saying that the alternative, to promise to pay royalty or litigate, appears to have been fairly tendered to the defendant, and that he chose to promise payment.

Witnesses on defendant's side, so is further recital in the bill of exceptions, testified defendant stated to the plaintiff at the time of contracting, and afterwards, "that the machines that he was manufacturing were different, were not in accordance with the Spinney patent." There was denial that defendant had put plaintiff on such notice "until after the last machine was shipped and paid for."

An agreement to pay the patentee for a license to manufacture and sell a particular machine, which agreement was made when it was uncertain whether the machine was covered by the patent or not, was held binding and enforcible, as an absolute promise to pay for exemption from disturbance by the patentee and immunity from any claim under his patent. *Strong* v. *Carver Cotton Gin Company*, 197 Mass., 53.

"After the last machine was shipped and paid for" plaintiff sued in an action of assumpsit on an account annexed. In what amount, or on what number of machines, he alleged royalty to be his due, is not shown.

The case came on for jury trial at the return term of the writ in the Supreme Judicial Court in Franklin county in May, 1927, and the defendant prevailed.

In the course of the trial plaintiff requested this instruction:

"After the agreement was made and entered into that he (plaintiff) was entitled to assume that his licensee remains such until the

defendant by a clear, definite and unequivocal notice that he is not manufacturing under his license but stands as an infringer if the patents is valid."

The instruction was refused. As validity of the patent was not in issue, the request may not have been wholly accurate, but whether or not it was, is not important on this record to consider.

Instead of the refused instruction, the Judge charged the jury in this manner:

"If he (defendant) did not notify him (plaintiff), if Mr. Spinney's (plaintiff's) testimony is correct in that respect, that does not prevent Mr. Allen (defendant) from coming here and saying that these machines are not manufactured under this contract but are different machines. But if he did not — if he went on manufacturing these skewer pointing machines after making this contract and did not say to Mr. Spinney (plaintiff), 'These machines I am manufacturing are not under our contract,' if he did not do that, you are justified in finding that that is in a sense an admission on his part that he was acting under the contract. It does not absolutely prevent him from defending and saying that these machines that he was manufacturing were different."

Plaintiff has shown himself aggrieved by the instruction.

So long, as the jury could find from the evidence, as the contract remained in force, and defendant acted under it, he was bound thereby.

The plaintiff was entitled to the instruction, at least in effect, that if, on the facts as the jury should find them, the contract applied to the situation, then defendant would be estopped to assert "that the machines that he was manufacturing were different, were not in accordance with the Spinney patent." This is because the contract, if applicable, treats it as settled that the machines being manufactured were in accordance with the patent.

The instruction given overlooked the doctrine of estoppel. This was error of prejudicial magnitude. The exception must be sustained.

Exception sustained.

SAMUEL H. RAYMOND *vs.* BYRON E. ELDRED.

MARY C. WING *vs.* SAME.

Oxford. Opinion February 15, 1928.

EVIDENCE. VERDICTS. NEGLIGENCE.

While the general rule is that when testimony is conflicting the verdict must stand, yet in order for a verdict to be sustained there must be in support of it reasonable evidence sufficiently consistent with the circumstances and probabilities of the case to raise a fair presumption of its truth.

A verdict clearly and manifestly against the evidence will be set aside.

Testimony of interested parties contrary to facts otherwise conclusively established and contrary to all reasonable inferences to be deduced from the situation does not raise a conflict even requiring a finding by the jury.

In the instant case while the fact the defendant's car was on his extreme left-hand side of the road raises a prima facie presumption of negligence on his part, yet his explanation of the situation relieves him of liability on that account.

The whole evidence clearly discloses that the defendant exercised ordinary care and the collision must be attributed to negligence on the part of the plaintiff Raymond.

The jury erred, not only in resolving all doubts in favor of plaintiffs, but in failing to analyze the evidence sufficiently to see that plaintiffs' story of the happening could not be correct.

On general motions for new trial by defendant. Actions to recover damages to plaintiff Raymond resulting from injuries to person and property, and to plaintiff Wing resulting from injuries to person, sustained in automobile collision on the highway between Rumford Falls and Dixfield. A verdict of $944 was rendered for the plaintiff Raymond and one for $1,973.72 for the plaintiff Wing. A general motion was filed in each case.

Motions sustained.

New trials granted.

The cases fully appear in the opinion.

Albert Beliveau, for plaintiffs.

Verrill, Hale, Booth & Ives, for defendant.

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

PATTANGALL, J. On motion. These actions, in which a jury awarded damages to the plaintiff Raymond for injuries to person and property, and to the plaintiff Wing for injuries to the person, grew out of an automobile collision occurring on the state highway between Rumford Falls and Dixfield, at a point approximately one mile south of Rumford Falls.

The plaintiffs were proceeding northerly from Dixfield, the plaintiff Raymond driving his car in which the plaintiff Wing was a passenger. The defendant, accompanied by his wife and secretary, was riding in the opposite direction. The highway at this point consisted of a sixteen-foot strip of macadam with a dirt shoulder on each side of approximately three feet, running close to the easterly bank of the Androscoggin River. Along this bank, which sloped off sharply to the river, was a railing, and on the opposite side of the road, a slight ditch beyond which a steep bank rose abruptly from the level of the road.

The automobiles collided at a point about ten feet from a pole numbered $\frac{91}{30}$, situated on the side of the road away from the river. Northerly of this pole there was a slight curve in the highway. The collision occurred on the easterly side of the highway, and the negligence complained of is that defendant's car was on his extreme left-hand side of the road at the time of the collision. This allegation is admittedly correct, and he was therefore guilty, prima facie, of negligence, but his explanation of the situation, if accepted as true, would relieve him of liability on that account. On the other hand, if the testimony of the plaintiffs is taken, defendant was negligent and his negligence was the cause of the accident.

The question involved are of fact, and ordinarily the jury findings would not be reviewed by this Court. In general, the rule is that when the testimony is conflicting the verdict must stand, but every case which results in a verdict by a jury must present some apparent conflict of testimony, and in order for a verdict to be sustained by this Court, there must be in support of it reasonable evidence sufficiently consistent with the circumstances and probabilities of the case to raise a fair presumption of its truth. *Rob-*

erts v. *Railroad*, 83 Me., 298; *Moulton* v. *Railway Company*, 99 Me., 509. If the verdict is clearly and manifestly against the evidence, it will be set aside. *Gilmore* v. *Bradford*, 82 Me., 547; *Cosgrove* v. *Kennebec Light & Heat Co.*, 98 Me., 473.

The testimony of interested parties, contrary to facts otherwise conclusively established and contrary to all reasonable inferences to be deduced from the situation disclosed by the evidence, does not raise a conflict even requiring a finding by the jury. *Moulton* v. *Railway Co.*, supra.

In the instant case, the defendant testified that, while driving at the rate of fifteen or twenty miles an hour on the right side of the road, as he approached the curve just beyond which the accident occurred, he saw the plaintiff's car on the river side of the highway, close up against the railing, moving very slowly. He noticed a man and a woman in the car, the woman leaning over toward the railing in front of the man. He sounded his horn and observed a motion of the hand on the part of the man, which he regarded as a signal to pass on the left, there being no room to pass on the right. He then ran directly diagonally across the road, and when he had reached about the middle of the road, plaintiff's automobile started ahead very slowly toward plaintiff's right. Defendant continued across the road, got as far out of the way as possible and stopped on the left-hand side close to the ditch, his car being parallel with the side lines of the road, with plaintiff's car thirty or forty feet distant, still on plaintiff's left-hand side of the road but coming diagonally toward defendant's car. These conditions obtained until plaintiff, still driving slowly, ran into defendant's car. Defendant says that at the time of the collision and just previous to it, plaintiff appeared to be panic-stricken and gave the impression of not having his car in control; that when the cars came together, plaintiff set fixedly in the same position in which he had been sitting and with the same apparent stare on his face that was noticeable prior to the collision. This testimony was corroborated by defendant's wife and secretary.

It appears that some three years before, the plaintiff Raymond had had an accident at the point where defendant says he first saw plaintiff's car, the accident consisting of running off the road and down the steep river bank; and it is agreed that he called his pas-

senger's attention to the fact of the accident and the place where it occurred, just before the collision. But, while Raymond admits that he did speak of this accident to Mrs. Wing and did (without removing his hand from the steering wheel) point toward the place of the accident, with his thumb, both he and Mrs. Wing say that this occurred when plaintiff's car was well over to the side of the road where the collision occurred; that they were on that side of the road all of the time and that the collision occurred by reason of the defendant, without any justifiable cause, leaving his right-hand side of the road at the point where the curve was most pronounced and driving across the highway, stopping only when the cars collided.

This testimony, on its face, seems to warrant the findings of the jury and in any event to raise a conflict so as to bring the case within the general rule governing the decision of questions of facts.

But, certain physical facts appear which are worthy of serious consideration, and about which there is no controversy. Before considering them, it may be recalled that defendant claims that prior to the collision he had brought his car to a stop, near the side of the highway and parallel to it. If this is so, plaintiff's version is incorrect. A stationary car cannot very well become the active factor in a collision, occurring in broad daylight, on a highway sixteen feet wide, with another car moving eight or ten miles an hour.

Plaintiff says that he was at no time on his left-hand side of the road. If this is so, there was no excuse for defendant driving over to his left. On the contrary, if it is not so, plaintiff's whole story is based on falsehood and unworthy of consideration.

The admitted facts, together with the physical evidence, become, therefore, of great importance and should be analyzed with care to determine, if possible, where the truth lies.

The position of the cars after the accident is of interest. Ordinarily, evidence of this nature is not of great importance because collisions usually occur between cars moving rapidly and the position in which each is found after the impact frequently has no bearing on their relative position at the time of accident.

But in this case, either both cars were moving very slowly or one was moving slowly and the other standing still at the moment of impact. Their position was not materially altered by the collision.

The right forward wheel of plaintiff's car was nearly at the edge of the macadam. Its left rear wheel was about a foot to the left of the centre of the highway. It stood at an angle of about thirty degrees as compared with the highway side line. Defendant's car was nearly parallel with this side line. Plaintiff claims that just previous to the accident he turned more to the right than he had previously been driving. Yet, when the accident occurred, his left rear wheel was left of the centre of the road by one foot and four inches according to the testimony of one of his witnesses who made actual measurements at the time. He claims that defendant's car collided with his while defendant was driving diagonally across the highway. Yet defendant's car was parallel with the highway at the time of collision.

Was plaintiff crossing the road from his left as defendant states, or, had he been on the right all of the time, as he says? Had defendant crossed the road and "straightened his car out" as he says, or was he crossing the highway diagonally as plaintiff claims? In view of the relative position of the cars after the accident, these questions can be answered in only one way and that sustaining defendant's contention.

Evidence was offered of tracks on the tarvia back of plaintiff's car indicating its course, but a brief study of that evidence clearly shows it to be of no value whatever.

Marks on the surface of the highway show clearly that the wheels of defendant's car were locked, by the application of the emergency brake, during the time in which it travelled thirty feet or more prior to reaching the point of contact corroborating his statement that he had brought his car to a stop before the collision occurred.

The damages sustained by the cars and the effect of the collision in throwing Mrs. Wing from plaintiff's car, in the manner in which she was thrown, tend to substantiate defendant's position.

All of the physical evidence weighs against the plaintiffs. A fair consideration of the oral testimony forces the conclusion that when plaintiff's car first came within defendant's range of vision,

it was on the side of the highway nearest to the river and almost if not quite stationary, Raymond being engaged in pointing out to Mrs. Wing the place of his former accident.

On this very important proposition, denied by Raymond and Mrs. Wing, the evidence is conclusive. Plaintiffs admitted that Raymond was pointing out the scene of his former accident to Mrs. Wing but, as has been stated, insisted that while doing so, they were driving on the side of the highway farthest away from the river, that they did not stop and that the pointing out of the place was done by a motion of Raymond's thumb, without his taking his hand from the steering wheel.

Raymond admitted, however, in cross examination, that immediately after the collision, defendant asked him what he meant by making a motion with his hand. Whether he, Raymond, did or not answer by saying that he was pointing out to Mrs. Wing where he went over the bank, he could not say.

He also admitted that in answer to a question put by the motor policeman, who arrived on the scene very shortly after the accident, he said that he made a motion.

The motor policeman testified that immediately after his arrival, Raymond told him that he was showing his niece where he went over the bank three years ago and suddenly looked up and saw defendant's car coming when he pulled over to the right-hand side of the road as far as he could go, until he was hit.

Defendant was a stranger to plaintiffs. He had no knowledge of the former accident. The facts concerning it were brought out by his informing the motor policeman with regard to the location of plaintiff's car when he first saw it, the position of the woman leaning across the man in order to look over the railing and the motion made by the man's hand.

If defendant invented these facts he managed, by chance, to invent a falsehood or a series of falsehoods absolutely consistent with admitted facts of which, at the time he told the story, he had no knowledge. If his testimony in these respects is untrue, he is not only a perjurer but gifted with second sight.

Raymond volunteered the information to the motor policeman that just before the collision he was pointing to the place where he went over the bank. If the pointing merely consisted of a mo-

tion of the thumb made while he had both hands on the steering wheel and while driving on the right-hand side of the road, the act of so pointing had no relation whatever to the accident and there was no reason to speak of it.

Confronted with this situation and asked why, under these circumstances, he gave that information to the officer, he answered "So that he would have something to work on."

Assuming plaintiff's car to have been nearly stationary and close to the railing, defendant was justified in turning to his left and if, after he had so turned, plaintiff started to go ahead, in a more or less uncertain and vacillating manner, it is difficult to think of any course which defendant could more wisely pursue than to drive his car to the side of the highway, even though it was the wrong side, and stop, which is what he very evidently did do.

We are strengthened in this view of the matter by the fact that the plaintiff Raymond's testimony was contradictory to that given by him in a former trial of the case and that he frequently contradicted himself in his testimony in this case. Both his testimony and that of Mrs. Wing with regard to the injuries sustained by them, and Mrs. Wing's testimony concerning her medical treatment are so exaggerated that confidence is not inspired in the accuracy of their statements concerning other features of the case.

On the whole evidence, defendant clearly appears to have exercised ordinary care and the collision must be attributed to negligence on the part of the plaintiff Raymond.

The jury apparently erred. There were features of the case which may well have excited their sympathy and prejudice. Raymond was a local laboring man, Mrs. Wing a working woman. Defendant was a summer visitor and a stranger to this locality. Plaintiffs had both suffered some injury. Defendant had escaped with no more than a slight property damage. It appeared in evidence, inadvertently to be sure, but still a part of the testimony which the jury heard, that defendant was protected by insurance.

The jurors not only resolved all doubts in favor of plaintiffs but failed to analyze the evidence sufficiently to see that plaintiffs' story of the happening could not be correct. Their indiscriminating generosity overcame their judgment. To permit the verdict

to stand, on the record before us, would be to endorse and perpetuate their error.

Motions sustained.
New Trials Granted.

B. H. COPELAND ET ALS *vs.* GEORGE H. STARRETT.

Knox. Opinion February 18, 1928.

MUNICIPAL CORPORATIONS. R. S. CHAP. 82, SEC. 6, CL. XIII.

Equity jurisdiction of the Supreme Judicial Court under R. S. Ch. 82, Sec. 6, Cl. XIII on petition of ten taxable inhabitants of a municipality complaining against the payment of money from its treasury for a purpose not authorized by law, or against any of its officers or agents for attempting to pay out the same, interpreted:

Not only must the municipality be made a party defendant to a bill in equity brought by ten taxable inhabitants thereof under the provisions of this statute, but it must appear in the allegations of the bill that the municipality has done some of the acts enumerated in the statute, or that some "officer" or "agent" is "attempting" to misappropriate the money of the municipality.

Tax payers may be heard only when they bring themselves within the statute.

In the instant case the owner of the judgment was the only defendant.

Neither the municipal corporation of Thomaston nor its officers or agents were parties to the suit.

No allegation appeared in the bill that the town had done any of the acts enumerated in the statute, or that any officer or agent was attempting to misappropriate the town's money.

The court had no jurisdiction on the bill and the demurrer was well sustained.

Whether the obtaining of a judgment against a municipality is the creation of a debt against it, within the meaning of the constitutional provision limiting the amount of indebtedness which a municipality may incur, not considered or determined by the court.

On exceptions by plaintiffs to ruling sustaining defendant's general demurrer to plaintiffs' bill. Bill in equity by ten taxable

inhabitants of the town of Thomaston alleging that prior to the obtaining by defendant of a judgment against the town the permanent indebtedness of the town was in excess of the five per cent constitutional limitation, and therefore asking that defendant be enjoined from enforcing his judgment, or any part thereof, against the town, or against the real estate of any inhabitant thereof situated therein. To enforce the judgment he had recovered against the town, defendant had caused levy to be made on property of an inhabitant thereof. To plaintiffs' bill defendant filed a general demurrer which was sustained by the court and exceptions thereto duly taken by plaintiffs.

Exceptions overruled.

The case appears in the opinion.

Frank B. Miller,

Rodney I. Thompson, for plaintiffs.

Charles T. Smalley, for defendant.

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

DUNN, J. When a town votes to pledge its credit or raise money by taxation or pay from its treasury any money for a purpose not authorized by law, or, for such purpose, any town officer or agent "attempts" to pay out the town's money, the equity jurisdiction of the Supreme Judicial Court, upon the petition or application of not less than ten taxable inhabitants of the town, may hear and determine the same. R. S., Chap. 82, Sec. 6, Cl. XIII.

These plaintiffs are ten taxable inhabitants of the town of Thomaston. The defendant is a judgment creditor of the town, whom the plaintiffs seek to prohibit and restrain from enforcing judgment, on the ground that at the time the debt, if it may be so called, which is merged in the judgment, was made by the town to the defendant, the indebtedness of the town already exceeded constitutional limitation. Con. of Maine, Art. XXXIV.

The owner of the judgment is the only defendant.

Of the facts alleged by the plaintiffs in their bill, the substance is that the present defendant brought an action of contract

against the town of Thomaston, in the Supreme Judicial Court in Knox county, and at the April (1927) Term recovered judgment for $3255.40. The court had jurisdiction, and the judgment was not set aside. Execution issued. The sheriff was commanded, for the want of goods and chattels wherewith to satisfy the execution, to levy upon real estate in the town, whether owned by the town or not, and sell so much of the real estate as might be necessary to pay the execution and the expense of the sale. The sheriff, who had certified his failure to find goods or chattels available, seized that Thomaston real estate which one Lois M. Creighton owned, and advertised that the real estate would be sold to satisfy the execution and charges. When Thomaston and the defendant had dealings, and before the debt to the defendant was incurred, the indebtedness of Thomaston exceeded the constitutional debt-limit.

There is prayer to enjoin the enforcement of the judgment, and for general relief.

Defendant demurred. The demurrer was sustained. Plaintiffs excepted.

It is unnecessary to consider whether the obtaining of a judgment against a municipality is the creation of a debt against it, within the meaning of the constitutional provision limiting the amount of indebtedness which a municipality may incur.

Neither the municipal corporation of Thomaston nor its officer or agent is party to this suit. A statute similar to that in Maine exists in Massachusetts. There it was held that the municipality must be a party. *Allen* v. *Turner*, 11 Gray, 436. By parity of reasoning, if the officer or agent of a town is concerned, he should be a party. Even if the town or its officer or agent were made a defendant, the result would be the same, because there appears no allegation in the bill that the town has done any of the acts enumerated in the statute, or that the officer or agent is "attempting" to misappropriate the town's money.

Taxpayers may be heard only when they bring themselves within the statute. *Johnson* v. *Thorndike*, 56 Maine, 32.

The court had no jurisdiction on the bill, and the demurrer was well sustained.

Exceptions overruled.

NELLIE M. CALLAHAN *vs.* FRED E. ROBERTS.

Cumberland. Opinion February 28, 1928.

LANDLORD AND TENANT. EVIDENCE. ADMISSIBILITY OF LETTERS IN A MEASURE SELF SERVING.

An abandonment of premises and surrender of the key to the landlord, who as a result goes into actual possession and occupation of the premises, justifies a finding that there was a surrender of the leasehold by operation of law.

A tenant who abandons the occupancy of demised premises before the expiration of the lease without the express or implied consent of the landlord or other legal justification, does not relieve himself thereby from payment of rent for the residue of the term.

If, however, a landlord, having resumed possession of the abandoned premises relets them on his own account, it must be assumed that, as of the time of reletting, he accepts a surrender and relieves the tenant from liability for future rent accruals.

Letters from one party to an agreement to the other party bearing upon the question of his intent in that particular dealing cannot be rejected as immaterial.

Letters written in the general course of business, not specifically to manufacture evidence, the contents of which are calculated to elicit a reply and denial by the recipient of facts and condition assumed therein if unfounded, are admissible.

In the instant case, the facts in evidence warranted the jury in finding that the plaintiff did not assent to a surrender of the lease, and herself resume possession of the demised premises until August 1, 1925, at which time she relet the same, four months after defendant's abandonment of the same.

The four letters written by plaintiff to defendant subsequent to defendant's abandonment of the premises were material to the issue as bearing upon her intent in the dealings, and while in a measure self serving, were admissible as they were written in the regular course of business and were calculated to elicit a reply and denial from the defendant if the assumption of the continuance of the tenancy indicated by the letters was in fact unfounded.

On exceptions and motion for new trial by defendant. Action of assumpsit to recover rent. Defendant claimed a surrender with consent of landlord. Plaintiff denied this and asserted an abandonment to which she did not consent. The case was tried in the Superior Court for Cumberland County. The jury returned a verdict of $480 for the plaintiff. To the admission of copies of four letters which plaintiff claimed to have sent defendant the defendant took exceptions, and likewise filed a general motion for new trial. Exceptions overruled. Motion overruled.

The case appears in the opinion.

Nellie M. Callahan, plaintiff pro se.

John J. Devine, for defendant.

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

STURGIS, J. Action of assumpsit to recover rent for use and occupation of a building in Chelsea, Mass., owned by the plaintiff. The relation of landlord and tenant is admitted, the parties having mutually executed a lease of the premises under date of October 1, 1924.

The account annexed stated an indebtedness for unpaid rents from April 1, 1925, to August 1, 1925, at the rate of $120 a month, the rental reserved in the lease. The verdict was for the plaintiff, and the case is before this Court on exceptions to the admission of copies of four letters and on a general motion for a new trial.

EXCEPTIONS.

The defendant claims a surrender of the leasehold with the consent of the plaintiff. He says that after taking the lease he installed his brother in the premises and came to Maine to reside. The brother testifies that on or about April 1, 1925, he vacated the premises and delivered the key to the plaintiff at her request. The plaintiff stoutly denies this statement and insistently asserts that without her knowledge and consent, some-

time in May, 1925, the premises were vacated, and not until August 1st following was she able to relet the building.

In support of her claim the plaintiff introduced copies of four letters which she wrote to the defendant during the months following April, 1925. Exceptions were reserved to the admission of these copies on the ground that the contents of each were self-serving and immaterial.

The letters bear upon the question of the intent of the plaintiff in her dealings with the defendant and his brother who occupied the premises, and the probability that the plaintiff consented to a surrender of the leasehold. As such they cannot be rejected as immaterial.

The letters also appear to have been written in the general course of business and not specifically to manufacture evidence, and while they are in a measure self-serving, the contents of each are calculated to elicit a reply and denial if the assumption of the continuance of the tenancy indicated by the letters was in fact unfounded. Such letters are admissible. *Keeling Easter Co.* v. *Dunning & Co.*, 113 Maine, 34; *Ross* v. *Reynolds*, 112 Maine, 223.

MOTION.

If as contended by the defendant the premises were abandoned early in April, 1925, and the key given up to the landlord, who in pursuance of such acts then went into actual possession and occupation of the premises, a finding that there was a surrender of the leasehold by operation of law would have been justified. *McCann* v. *Bass*, 117 Maine, 548; *Talbot et al* v. *Whipple*, 14 Allen (Mass.), 177.

The jury, however, evidently believed the plaintiff, who asserts that the keys to the building were never given up, and her only entry up to August 1, 1925, was to preserve the property and to prevent a partial destruction of the premises by the tenant's agents or employees. She charges an abandonment of the leasehold by the tenant sometime in May, 1925, and says that she resumed possession and relet the premises on her own account on August 1, 1925.

A tenant who abandons the occupancy of demised premises before the expiration of the lease, without the express or implied consent of the landlord or other legal justification, does not relieve himself thereby from payment of rent for the residue of the term. In case, however, the landlord, having resumed possession of the abandoned premises, relets them on his own account, it must be assumed that, as of the time of the reletting, he accepts a surrender and relieves the tenant from liability for future rent accruals. 16 R. C. L., 969, 971.

Upon a finding that the facts as stated by the plaintiff were supported by the weight of the evidence, an application of the foregoing rules justified the verdict rendered. No sufficient ground for a new trial appears in the record.

Exceptions overruled.
Motion overruled.

VIRA J. MCLAUGHLIN, ADMX.

vs.

BANGOR & AROOSTOOK RAILROAD COMPANY.

Penobscot. Opinion February 29, 1928.

FEDERAL EMPLOYER'S LIABILITY ACT. NEGLIGENCE. ASSUMPTION OF RISK.

To establish liability under the Federal Employer's Liability Act (U. S. Comp. St., sections 8657-8665), when no question arises as to compliance with the Safety Appliances Act, negligence on the part of the defendant must be affirmatively shown.

The duty of the employer is to see that ordinary care is exercised, that the place where work is to be performed is reasonably safe for the employee. The carrier does not guarantee the safety of the place to work.

The federal act does not eliminate the defense of assumption of risk.

In this state the doctrine of assumption of risk prevails, and whenever it is relevant it must be applied.

When a workman makes a contract to do dangerous work in a dangerous place he contracts with reference to that danger and assumes the risk of such dangers as are normally and necessarily incident to the occupation. This is a contractual assumption of risk under which the employer, with reference to risks covered by the contract, cannot be held guilty of negligence.

There may, however, be a voluntary assumption of risks, not contractual, by the workman, arising from the failure of the employer to perform his duties. This may occur when the workman becomes aware of them, or they are so plainly to be seen that he must be presumed to have known and appreciated them. In such case, if negligence of the employer is established, voluntary assumption of risks arising therefrom must be proved by the defendant.

While disputed questions of fact are within the province of a jury, yet where a stated group of facts prove a defense the party defendant is entitled to it.

In the case at bar it does not seem that there was any act of negligence on the part of co-employees which an experienced repairman should not have anticipated; the danger from which he should not have appreciated, and if such be true the risk which he assumed by his contract of employment was not changed or increased.

The employee is held to know and observe the rules which the defendant has promulgated to control in the operation of its road.

It would seem that he must have known that contact might be made at any time between cars on the repair track. An ordinarily prudent man would have had such knowledge. That is the test. If he had that knowledge, and he is chargeable with having it, he assumed the risk.

Untenable inferences were drawn by the jury.

On general motion for new trial by defendant. The action was brought under the Federal Employers' Liability Act to recover damages for the death of an employee, resulting from injuries received while in the service of the defendant. The general issue was pleaded, and under a brief statement assumption of risk was set up and relied on in defense. Verdict was for the plaintiff. The case is fully stated in the opinion.

Motion granted. New trial ordered.

Fellows & Fellows, for plaintiff.

George E. Thompson,

Henry J. Hart,

Frank P. Ayer, for defendant.

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

BARNES, J. At its yard, at Northern Maine Junction, the defendant delivers to the Maine Central Railroad Company many cars of freight in its service as a common carrier of interstate commerce.

For a clear understanding of this case and of the character of risks incidental to the employment of plaintiff's interstate, a description of portions of the yards of the connecting railroads at their junction point seems necessary.

Our investigation is limited to the movement of freight cars, which in great numbers are there daily received and delivered by the defendant to the Maine Central.

As the freight trains arrive from the northern section of the state they are assembled in defendant's receiving yard, there broken up by its switching crews, and all but such as need heavy repairing are coupled in groups of about twenty, each group called a "cut," and pushed, ahead of the switching engine, down the length of defendant's yard to its scales, where the cut is stopped, each car, excepting only such as are loaded with paper, run separately on the scales, weighed and pushed along toward the receiving tracks of the Maine Central, and again coupled as before and delivered on the receiving tracks of the latter road. The last act of carriage by the defendant is this delivery of the cars in cuts of about twenty.

It is well to remember that the modern freight car measures from 36 to 50 feet over all, with a clearance when coupled of three or four feet. They are ponderous vehicles, and the switching engine in use on the day of the accident weighed 60 tons.

The track of the Maine Central begins near the weighing scales of the defendant and soon divides into two tracks that extend eastward for such distance as to hold 64 cars each. The northerly track is known as track 2; the other as track 1.

After defendant delivered cars in the Maine Central receiving yard, there remained for it, jointly with the receiving road, the duty of inspecting and making light repairs, the replacing of missing nuts and screws, and such minor repairing as a man with pinch-

bar and wrench could do. This was done by inspectors and light repair men of the crews of the connecting carriers, generally working in pairs, the inspectors beginning at the easterly end of the delivered cars, working westward, chalking marks on the bodies of such cars as needed attention, and followed by the repair men.

The number of cars delivered daily was so great that commonly both tracks were in use, and for more than a year before the accident the repair men were constantly engaged on these tracks, and in this work only. Plaintiff's intestate was one of the repair men so employed by the defendant, and such had been his employment for "just about a year."

After the cars are weighed and re-coupled, the rear brakeman of the switching crew mounts the most easterly car and "sets" its hand brake, and then moves toward the engine, setting all brakes, until the engine must "make steam" to move its train, and until enough brakes are set to hold the cars stationary when loosed from the engine.

On the morning of the accident, May 23, 1926, the first cut of cars on track 2 was set at its extreme east end, and the switcher returned to receiving yard of defendant to make up and deliver succeeding cuts until the repair track should be filled.

It was the custom of defendant not to couple successive cuts to cars standing on the repair track, but to move them down, under the direction of the rear brakeman, till they approached the standing cars, a space, sometimes of ten feet sometimes much less being left between cuts. Why such space was left is not certain, but the Maine Central, not the defendant, after the repair men had reported the cars in condition to be moved, made up the westbound trains and drew them from the repair track.

On this 23rd of May, between seven and eight o'clock in the morning, plaintiff's intestate and George F. Ellis, a repair man of the Maine Central, with their light tools, and with nuts threaded on wire loops about their necks, began work, the former on track 2 and the latter on track 1, and worked along westward, following the inspectors, independent of each other, and on different strings of cars.

When plaintiff's intestate began work one of the cars stood at the easterly end of the repair track. A second cut was placed while

he repaired certain cars in the first cut, and when the second cut came to a stop its most easterly car stood so that only about a foot and a half separated its coupling knuckle from the coupling knuckle of the most westerly car of the first cut, leaving a comparatively narrow space between them.

When the inspectors were at or near the westerly end of cut 2, and after plaintiff's intestate had made repairs on four cars in cut 1, and had probably finished his work on cut 1, he crossed over to where Ellis was working, on track 1, some time between ten and ten-thirty o'clock, having no occasion to do so, as Ellis testified, other than, "that he wanted conversation with me, asked me what time of day it was and how we were getting along." He had his outfit with him, and such course was in the direction of the tool house where the repair men might leave their tools at the luncheon hour.

After such conversation as the repair men had, plaintiff's intestate left the spot where Ellis was working, and the next that Ellis recalls was hearing the rattling of draw-bars on track 2, as though, in the setting of cut 3, it had been pushed so far as to strike and set in motion the cars of cut 2. This is what had happened, and Ellis, "at the same time" heard a cry from plaintiff's interstate, who was caught between the coupling knuckles of the first and second cuts and instantly killed.

The knuckles did not couple, but were separated about six inches by the crushed torso of the deceased.

No one saw the accident. No repairs were made on either of the meeting cars, and Ogilvie, of the pair of inspectors who marked the cars in cut 1 that morning, testified there was nothing to be done that day on the couplers between cuts 1 and 2, and that deceased "had no right on that coupler, to work."

If he were passing between these cars to return to the northerly side of track 2, he had available the safety appliances furnished to make a reasonably safe passage, and it is in evidence that those appliances were then in good order.

It seems that he was passing through, between the cars, and whether walking on the ground, or stepping on the appliances or draw-bar of the easterly car of cut 2 and shaken off, is not determinable.

It is admitted the suit is brought under the Federal Employers' Liability Act (U. S. Comp. St., sections 8657-8665) and that no question arises here as to compliance with the Safety Appliance Act.

To establish defendant's liability, its negligence must affirmatively appear. There can be no recovery under the federal act, where the circumstances are as here related, in the absence of negligence. The duty of the employer is to see that ordinary care is exercised, that the place where work is to be performed is reasonably safe for the employee. The carrier does not guarantee the safety of the place to work.

Seaboard Air Line Ry. v. *Horton*, 233 U. S., 492, 501; *Missouri Pacific Railroad Company* v. *Mary I. Aeby*, U. S., opinion Jan. 3, 1928.

In all engagements in car repairing, on continuous tracks, hourly filled and vacated, there must be a necessary accompaniment of danger, and particularly with respect to movement of the cars.

Conditions and circumstances that threaten danger to the employee, of which he has been warned or instructed, or which are obvious to him, or such as the ordinarily prudent person must expect occasionally to arise, despite due care on the part of his employer, are not without the hazard of the employment.

The federal act does not eliminate the defence of assumption of risk (except where a violation of a federal statute is involved); all of the former effects of this doctrine remain as they were at common law. "The employee assumes, as a risk of his employment, such dangers as are normally and necessarily incident to his occupation, and a workman of mature years, is taken to assume them whether he is aware of their existence or not; but risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care. They are the unusual, extraordinary and unexpected acts, and the employee is not to be treated as assuming such risks until he become aware of their existence, unless the act or risk is so obvious that an ordinarily prudent person would have observed and appreciated them."

Seaboard Air Line Ry. v. *Horton*, supra.

In this state, "the rule (assumption of risk) prevails, and whenever it is relevant, we must apply it. Dangerous work must be per-

formed; and work must be done in dangerous places; and when a workman makes a contract to do such work, or to work in a dangerous place, he contracts with reference to that danger and assumes the open and obvious risks incident to the work, or as sometimes expressed, such dangers as are normally and necessarily incident to the occupation.

This is a contractual assumption of risk.

With reference to risks and dangers covered by the contract, the employer owes the employee no duty, and so cannot be held guilty of negligence. But there may be a voluntary assumption, by the workman, of risks arising from the failure of the employer to perform his duty, and this occurs when the workman becomes aware of them, or they are so plainly to be seen that he must be presumed to have known and appreciated them." *Morey* v. *Railroad Co.*, 125 Me., 272.

In such case, if negligence of the employer is established, voluntary assumption of the risks arising therefrom must be proved by the defendant.

Defendant, in the case at bar, argues that while the jury found negligence on its part, that body did not give due weight to the testimony which it claims unquestionably proves the assumption of the risk that must be present whenever the force used in adding a cut to the cars on the repair track is sufficient to strike and move, even slightly, the cars to which the cut is added.

Obviously an error in judgment of distance by the rear brakeman, a failure accurately to relay his signal, or an excess of energy released by the driver of the switching engine, or a combination of some or all of these, caused the third cut to strike and push forward the cars of cut 2.

But the defendant urges that such error or omission was a risk incident to the work or obviously likely to be present; that the workman had been instructed as to this risk; and there is evidence that on the morning of the accident this risk was called to his attention, when Ogilvie warned him to "Watch out for George Ellis and himself," or "look out for George Ellis, for you and him is here alone."

It does not seem that there was any act of negligence on the part of co-employees which an experienced repair man should not have

anticipated; the danger from which he should not have appreciated, and if this be true the risk which he assumed by his contract of employment was not changed or increased.

C. & O. Railroad Co. v. *De Atley*, 241 U. S., 310.

The employee is held to know and observe the rules which the defendant has promulgated to control in the operation of its road.

What drew plaintiff's intestate from track 2 does not appear, and evidence as to the location of the two repair men when their interview ended is conflicting.

It is undisputed that when coupled cars are hit so as to move them along the track there is a perceptible clicking sound as the "slack" in the draw-bar mechanism is taken up. This clicking sound progresses from the car first hit to the end of the line of cars.

Ellis testifies that the cars of cut 2 gave the clicking sound as they were pushed eastward, and that he heard it just before the accident.

From the evidence it does not seem probable that plaintiff's intestate was stepping on a draw-bar when a shock dislodged him; and, if not, he was stepping into a position of serious danger when he thrust his body between the grim knuckles of loaded freight cars, in an aperture as narrow as that here described.

Further, if he were mindfully going about his work, with eyes and ears open and attuned to indicia of danger, he must have heard the clicking of the draw-bars, and the more clearly if he were walking from the west.

It would seem he must have known that contact might be made at any time between cars on the repair track. An ordinarily prudent man would have had such knowledge. And this is the test.

If he had that knowledge, and he is chargeable with having it, he assumed the risk of danger to himself from such contact.

Granted that disputed questions of fact are within the province of a jury; where a stated group of facts prove a defense the party defendant is entitled to it.

In this case the jury must have drawn untenable inferences from the testimony, or wilfully or carelessly departed from the rules of law given them by the Court.

The facts prove the unfortunate accident to have been a mis-

chance under voluntary assumption of risk, rather than in contributory negligence of plaintiff's intestate.

Motion granted.
New trial ordered.

CITY OF WATERVILLE *vs.* C. B. KELLEHER.

Kennebec. Opinion March 5, 1928.

LANDLORD AND TENANT. ASSIGNMENT OF LEASE. SUBLETTING.

Covenants in lease against subletting are to be strictly construed.

An assignment of a lease and a subletting are not to be confused. The former transfers an existing estate. The latter creates an entirely new estate. The former reserves no reversionary interest in the assignor.

In order to find a subletting, the relation of landlord and tenant must be shown to have been created between the original lessee and the sublessee.

A contract involving the management and control of the business carried on in the leased premises, even though under it the profits and losses of the business so carried on are divided equally between the lessee and the manager of the business, does not, in itself, constitute a subletting.

In the instant case the contract entered into between the defendant and Waterville Theatres, Inc., was not equivalent to, and did not legally amount to, either an assignment of the lease or a subletting of the premises. Such contract held to be a legitimate arrangement for management of the business conducted on the premises in no way violating clauses in the lease forbidding an assignment thereof or a subletting of the premises.

On report. An action of forcible entry and detainer to recover possession of premises held by the defendant under written lease and renewal thereof. The plaintiff seeks to recover possession of the premises notwithstanding the written lease and renewal, and defendant's entry and possession thereunder, because of an alleged violation of the covenants against assignment and subletting, by an alleged subletting.

After plea, waiver of trial and judgment against defendant in the Municipal Court of Waterville appeal was taken to the Superior Court for the County of Kennebec.

By agreement of the parties the cause was reported to the Law Court. Judgment for defendant.

The case fully appears in the opinion.

Cyril M. Joly, City Solicitor,

Mark J. Bartlett, for plaintiff.

Perkins & Weeks,

Merrill & Merrill, for defendant.

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

PATTANGALL, J. On report. Action of forcible entry and detainer brought for the recovery of possession of the City Opera House occupied by defendant under a lease from plaintiff. The lease contained a clause forbidding assigning or subletting which plaintiff claims was violated by defendant and that, therefore, the lease was forfeited.

This claim of the plaintiff is based on a contract entered into between defendant and William P. Gray, agent for Waterville Theatres, Inc., which plaintiff construes to be equivalent in law to an assignment or sublease.

Defendant claims that the contract constitutes neither an assignment nor a subletting. The construction of the contract thus becomes a matter of ultimate importance.

When the contract was entered into, this defendant was operating a motion picture theatre on the leased premises. Waterville Theatres, Inc., was engaged in a similar business in Haines Theatre in the same city.

The contract provided (1) that both theatres should be operated by and under the general supervision of Waterville Theatres, Inc., which was to select the exhibitions for both but not to omit the giving of exhibitions in the Opera House without the consent of defendant; (2) that all employees of both theatres should be hired, discharged and have their rate of compensation fixed by Waterville Theatres, Inc.; (3) that the combined receipts of both theatres should be deposited in one account, out of which should

be paid expenses of operation, profits or losses to be divided equally between the contracting parties; (4) that rent for both theatres should be paid as part of expense of operation, before division of profits or adjustment of losses; (5) that permanent improvements in either theatre should only be made by mutual consent; (6) that accidents, liability for damages from any cause, losses by fire concerning either theatre should be borne by each party respectively; (7) that if either theatre was closed, parties should share in profits of the one remaining open; (8) that the operation and management of Opera House should be subject to terms of defendant's lease; (9) that defendant should retain control of letting Opera House to local parties; (10) that either party might terminate the contract by giving the other thirty days' notice in writing of his desire to do so.

The clause in the lease, for alleged violation of which plaintiff claims a forfeiture, reads: "that he will not assign or underlet the premises or any part thereof . . . without the consent of the lessor in writing." Such consent, admittedly, has not been given.

The distinction between an assignment and a subletting is clear. An assignment by a lessee is a transaction by which he transfers his entire interest in the premises or a part thereof for the unexpired term of the original lease. *Craig* v. *Summers*, 15 L. R. A., 236; *Childs* v. *Clark*, 49 Am. Dec., 164; Note, 10 A. S. R., 558. To constitute an assignment the instrument must convey the entire estate or interest conveyed by the lease. *Davis* v. *Vidal*, 42 L. R. A. (N. S.), 1084. An assignment creates no new estate but transfers an existing estate into new hands, while a sublease creates an entirely new estate. *Collins* v. *Hasbrook*, 15 Am. Rep., 407.

If the instrument is of such character by its terms and conditions that a reversionary interest by construction remains in the grantor, he becomes the landlord and the grantee the tenant. The tenant who parts with the entire term embraced in the lease becomes an assignor of the lease and the instrument is an assignment but where the tenant, by the terms, conditions or limitations of the instrument, does not part with the entire term granted him by the landlord, so that there remains a reversionary interest in him, the transaction is a subletting not an assignment. *Davis* v. *Vidal*, supra.

Covenants against subletting are restraints which courts do not favor. They are construed with the utmost jealousy and easy modes have always been countenanced for defeating them. *Gasby* v. *Williams*, 147 Fed., 678; *Presby* v. *Benjamin* (N. Y.), 62 N. E., 430; Taylor, Landlord and Tenant, sec. 403; McAdam, Landlord and Tenant, sec. 141.

Thus a covenant not to assign does not prevent subletting, *Jackson* v. *Silvernail*, 15 Johns., 278; and a covenant not to sublet the premises is not broken by a sublease of a part of the premises. *Roosevelt* v. *Hopkins*, 33 N. Y., 81.

Even under a liberal construction of the covenant against subletting, to constitute a violation of the lease, lessee must have put in possession of the premises a new tenant, not merely a new occupant. To be a tenant a person must have some estate, be it ever so little, such as that of tenant at will or on sufferance. A person in occupation of real estate as a servant or licensee is not a tenant. *Kerrains* v. *People*, 60 N. Y., 22; *Presby* v. *Benjamin*, supra. The granting of a license with respect to the demised premises is not a subletting. Notes, 117 A. S. R. 93; Notes, 19 Ann. Cas. 954.

It could not be argued that the contract between defendant and Waterville Theatres, Inc., constituted an assignment of the lease. Certainly, defendant did not part with his entire estate in the premises and we do not understand that plaintiff seriously claims an assignment but relies upon a subletting. This being so, the cases *Fayette* v. *Fayette*, 44 Que. Super., 536, and *Emery* v. *Hill*, 67 N. H., 330, relied upon by plaintiff, are not in point, as these cases relate to assignments and not subletting. *Clifford* v. *A. & K. Ry. Co.*, 121 Me., 15, turned on the construction and effect of a specific clause in the lease which provided that an assignment by process of law should work a forfeiture, an entirely different proposition from that presented here.

Plaintiff here claims that the contract between defendant and Waterville Theatres, Inc., was equivalent to defendant's forming a partnership with another, not a party to the original lease, and that such action amounts to a subletting and hence creates a forfeiture. Assuming that his premise is correct, the conclusion does not necessarily follow. There is a conflict of authority on this point arising from the fact that some courts construe the provision

strictly against the lessor while others do not. Generally speaking, the American courts follow the rule laid down in *Riggs* v. *Pursell*, 66 N. Y., 193, and favor a construction liberal to the tenant. In *Boyd* v. *Fraternity Hall Association*, 16 Ill. App., 576, the court, relying on the authority of *Roe* v. *Sales*, 1 Maule and Selwyn, 297; *Roosevelt* v. *Hopkins*, 33 N. Y., 81 and *Margrave* v. *King*, 5 Ired. Eq., 430, declared that "Where the tenant without license from the landlord, takes a third person into co-partnership with him and lets such person into joint possession of the premises, it is not a breach of a condition in the lease against subletting." To the same effect are *Maloney* v. *Smith* (Ala.), 80 So., 169; *Spangler* v. *Spangler* (Cal.), 104 Pac., 995.

But we are not called upon to decide that precise question here. We think that this case falls more within the line of *Boston Elevated Railroad Co.* v. *Grace and H. Co.*, 50 C. C. A., 239, and *Markowitz* v. *Greenwall Theatrical Circuit Co.* (Texas), 75 S. W., 74.

In the former case, the lessee who had agreed to erect and maintain a chute and other amusement structures contracted with a third party to build the chute agreeing that such third party should have exclusive possession of the chute and a lien on its income until the amount owing it was paid, after which it should have a one-third interest in the chute and its earnings. The court held that this third party was an agent of the lessee and that the contract was not one of subletting.

In the latter case, discussing a situation in many respects similar to that presented here, the court said, "The lease of the premises to appellee did not carry with it the obligation to conduct therein a theatrical enterprise, but only conferred the privilege to do so. We are unable to perceive the force or reasonableness of the contention that one, for instance, who procures a lease of a building for the purpose of conducting therein a mercantile business, may not take with him into the business a partner, and yet retain the absolute ownership of the lease."

The relation of landlord and tenant between the defendant and Waterville Theatres, Inc., or between the defendant on the one hand and a combination of himself and Waterville Theatres, Inc.,

on the other, was not created by the contract in question. Such a relation must exist in order to assume a subletting.

The purpose of the contract was to turn over the management of defendant's moving picture business to Waterville Theatres, Inc., subject to certain limitations and conditions. If a contract had been executed between the parties hereto, exactly similar to that which appears here, excepting that the party of the first part should receive one hundred dollars per month for services rendered by it, it is not conceivable that anyone would have regarded it as an assignment of the lease or a subletting. The situation is no different because instead of a stated sum, the party of the first part is compensated by being paid a percentage of the net profits of the business, nor does it matter that the party of the first part also operates another theatre and that as a part of the arrangement defendant is to share in its profits.

Defendant was not, under his lease, obligated to personally manage his theatrical business. He could not assign his lease or sublet the premises or any part thereof but he could employ whom he chose to manage his business and the matter of how such manager was to be compensated was something with which his landlord is not concerned.

We find no violation of the provisions of the lease relating to assignment or subletting and no other cause for forfeiture is assigned by plaintiff.

Judgment for defendant.

INHABITANTS OF BIDDEFORD *vs.* ANDREW ALLEN.

York. Opinion February 22, 1928.

WEIGHT AND SUFFICIENCY OF EVIDENCE.

In a given case a jury may, out of a mass of testimony, find much, sufficiently probable and consistent with the circumstances, that, if believed, furnishes sufficient foundation on which to base a verdict.

In the case at bar a full and careful scrutiny of the evidence discloses nothing to convince the court that the jury failed in its duty, or that it erred in its finding.

Action on the case to recover money paid to a road builder in excess of the amount earned by him under several contracts with the city.

At the trial plaintiff recovered a verdict for $4,250.00.

The case comes up on defendant's motion for a new trial; and is stated with sufficient fullness in the opinion.

Motion overruled.

Willard & Ford, for plaintiff.

Emery & Waterhouse,

Joseph R. Paquin, for defendant.

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

BARNES, J. During four seasons ending with the year 1925, the defendant did construction work in resurfacing streets and sidewalks for the plaintiff city. From time to time he was paid.

In its writ plaintiff alleges that overcharges, charges for work that was not done by defendant, were made, and that upon nine different dates it paid the defendant sums of money not due him.

At the trial no testimony was offered supporting the ninth count

in the writ, so that services paid for on eight occasions are subjects of scrutiny.

On these eight occasions, between July 21, 1922, and February 17, 1926, defendant received $45,940.50, and plaintiff contends that $4,273.50 of this total are overcharges and sues to recover that sum.

In all counts in the declaration, except the eighth, the measurements are claimed to be erroneous; in the eighth count plaintiff alleges that the charge, for patching, to the amount of one thousand dollars, was wholly without foundation, and that no amount was at that time due for patching.

From the printed testimony the jury would be warranted in believing that defendant had done, in each of the years specified in the bills that are alleged to be excessive, work on public ways of plaintiff to the value of fifty thousand dollars. It seems that he had apparatus sufficient in quantity and kind to do work to this amount.

He claimed to have been a contractor for thirty years, and yet he had no books of account or record from which he could produce data in defense. He claimed that about all he could do through education was to read and write, that he always had some one to help him in computing in figures; that he had bookkeepers and assistants on his contracts with plaintiff, but that he had none of the books at the time of the trial.

His defense was, in brief, that the Street Commissioner would designate a certain job, and, when he reported it done, the latter, in some instances under the eye of the Mayor, measured the work and computed its area. The figures were then submitted to the City Clerk, and in all but one instance a check was delivered him on the same or the succeeding day.

In passing it may be noted that neither Street Commissioner, City Clerk, Mayor, Committee of Accounts nor Treasurer, had any of the data upon which computations of street areas had been made.

The last payment was made on February 17, 1926, for work completed on October 31 of the preceding year.

All the payments were made during the official years of one Mayor.

After the election of another Mayor, in 1926, surveys of de-

fendant's work were made, and overcharges were deemed found for work charged and payed for on areas varying from fourteen square yards to seven hundred fifty-five square yards, and totalling an area of sixteen hundred ninety-one and four-ninths square yards, which work plaintiff says was never done.

The work on different streets was of varying kinds, and at different prices, but there is no contention as to the quality of the work done, nor as to unit prices.

Plaintiff sued for $4,273.50, the amount paid on the several areas which it found not covered; the jury returned a verdict for $4,250.00.

Defendant's bills for the several jobs, with checks issued in payment thereof, were introduced in evidence.

Three of the bills bear no signatures of the City Committee of Accounts, but the others seem to have passed through regular channels.

In the nature of things proof of what work plaintiff had done could be produced only after surveys, in 1926, of the jobs under suspicion.

The men who surveyed the various areas, for the City, were two, one a graduate civil engineer, of twelve years' experience, and the other an engineer's assistant, who for eight years had been employed by a civil engineer in making measurements, and had five or six years' experience in handling a transit instrument.

These men worked independently, and in some cases surveyed the same areas.

In addition to the testimony of these men, the jury heard that of a Street Commissioner of the City who served during some of defendant's working time, the defendant himself, and also a civil engineer from Portland, who measured certain areas shown him in 1926 by the defendant. There was variance in the findings of all who measured on the same streets. The defendant testified that on all jobs he was allowed by the City officials for less work than he actually had done.

A surveyor who, at the request of the defendant, measured a section for which defendant had been paid, as though it were five thousand square yards in area, testified that when defendant asked

him as to the area found here, "he made a statement he had five thousand yards he had got to find somewhere."

A bill presented to the City on September 2, 1925, "To patching Western Ave. and Upper Main St., $1,000.00," one of the three that do not bear the approval of the Committee of Accounts, was testified to by defendant. He said in answer to a question how much patching was done on Western Ave. and Main Streets, "I must have done twenty or twenty-five hundred dollars worth." At one time he testified that pretty near a thousand dollars' worth of patching was done on each street; and again that that thousand dollar patching was mostly on Western Avenue.

And when pressed as to the yardage, and why he made no record of it, left it with the jury with this statement, "I think it was kind of a lump sum."

The jury had before them another bill of defendant, also paid, of the selfsame date, for $1,035.03, "Western Ave. to Railroad."

There was testimony as to business connection between defendant and the Mayor of these fruitful years. This testimony was given by defendant.

Out of the mass of testimony a jury may find much that, if believed, furnishes sufficient foundation on which to base a verdict.

We can find nothing in the record to convince us that this jury failed in its duty, or that it erred in its finding.

Motion overruled.

INHABITANTS OF PHIPPSBURG PETITIONERS

vs.

COUNTY COMMISSIONERS OF SAGADAHOC COUNTY.

Sagadahoc. Opinion March 8, 1928.

CERTIORARI. POWERS OF COUNTY COMMISSIONERS. JURISDICTION IN LAYING OUT TOWN WAYS.

County Commissioners may correct their records at any time, in accordance with the facts, supplying omissions therein.

This is so, even though the personnel of the board may have changed in the meantime, the board of County Commissioners being a continuing body.

The jurisdiction of County Commissioners in the matter of laying out town or private ways is appellate only.

It is settled law in this state that a petition to County Commissioners, asking them to reverse the decision of municipal officers refusing to locate or alter a town way, must state clearly and directly every fact necessary to give them jurisdiction.

Failure to allege in such petition that selectmen unreasonably *neglected or refused to lay out such a way is fatal. An allegation of neglect or refusal alone is insufficient. The fact that such neglect or refusal is unreasonable is the basis of the right of appeal.*

Without such allegation, Commissioners have no authority to act on a petition.

An order that a town be allowed three years to open and make a way is unauthorized. The statute limits such period to two years.

Neither the jurisdiction nor the powers of County Commissioners can be enlarged by this court in its exercise of discretionary power.

In the instant case, not only was the order issued by the County Commissioners without warrant of law, but the board was without jurisdiction to take any action in the premises.

On exceptions. This case came to the Law Court on plaintiff's exceptions to the decision of the presiding justice denying the is-

suance of a writ of certiorari, as prayed for by the petitioners, for the purpose of quashing the records of the County Commissioners of Sagadahoc County purporting to authorize the laying out of a highway in the Town of Phippsburg. The presiding justice held that the question of jurisdiction of the County Commissioners was the only one necessary to discuss or determine, and that all the other objections raised in the petition were subject to his discretionary powers. To his finding of jurisdiction, and to his denial of the writ, the petitioners filed exceptions.

Exceptions sustained. Petition granted. Writ to issue.

The case appears fully in the opinion.

George W. Heselton,

Edward W. Bridgham, for plaintiffs.

Walter S. Glidden,

Arthur J. Dunton, for defendants.

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

PATTANGALL, J. On exceptions. Petition for writ of certiorari to quash the record of county commissioners of Sagadahoc County, authorizing the laying out of a highway in the town of Phippsburg. Hearing was had before a single justice who denied the prayer of petitioners and the case comes forward on exceptions.

It appears that on July 21, 1924, petitioners, described as "resident and non-resident taxpayers of the town of Phippsburg," addressed the selectmen of that town, requesting the laying out of a highway at Popham Beach. Hearing was had on September 3, 1924, and the petition denied. On July 20, 1925, a petition addressed to the county commissioners and signed by certain persons described as "inhabitants and land owners of the town of Phippsburg" requested the laying out of the way, under the provisions of Chapter 24, R. S. 1916, and acts amendatory thereto.

Hearing was had on this petition on September 5, 1925, and on January 5, 1926, a return of the findings of the county commissioners was made and filed, the case then being continued to the March Term for final action. On March 2, 1926, the case was closed; judgment being in favor of petitioners. On May 6, 1927,

the selectmen of Phippsburg petitioned the county commissioners asking a reversal of their order of January 5, 1926, and after hearing, were given leave to withdraw. Petition for certiorari followed.

Petitioners contend that the county commissioners were without jurisdiction in the premises. It is also urged that their proceedings were not conducted in accordance with law and that the final order issued by them was not authorized by law.

The trial judge found jurisdiction in the commissioners and, having so found, ruled that the issuance of the writ was a matter of judicial discretion, in the exercise of which discretion the writ was refused.

The objection to jurisdiction is based on the proposition that neither in the petition addressed to the county commissioners nor in the original record of their adjudication of the matter is there allegation or finding that the selectmen "unreasonably" refused to lay out the way.

The petition alleged that the selectmen "refused" but does not allege that the refusal was "unreasonable." The original record of the county commissioners contained no reference to the fact of refusal and, hence, no record of any adjudication as to an "unreasonable" refusal.

A hearing was had before the county commissioners on September 5, 1925, at which all of the members of the board were present. Their return, dated January 5, 1926, and the record showing the final disposition of the case, dated March 2, 1926, were signed by George M. Stinson and Walter M. Mallett, who constituted a majority of the board. The third member, Charles B. Randall, was in Florida on these two latter dates.

On August 2, 1927, the board, then consisting of George M. Stinson, Charles B. Randall and Charles J. Dain, amended the record of the county commissioners' court relating to the hearing of the petition by inserting the words "and adjudicate and determine that the selectmen of said town of Phippsburg did unreasonably neglect and refuse to lay out said town way, as set forth in the petition of said Stacey et al."

Petitioners here strenuously argue that allegation of the necessary jurisdictional fact that the refusal of the selectmen to lay out the way was "unreasonable" not appearing in the petition ad-

dressed to the county commissioners and not appearing in the record of the case as originally made up by the commissioners and the personnel of the board having changed by the substitution of Mr. Dain for Mr. Mallett, the records were illegally amended and the action of the county commissioners is, on its face, illegal for want of jurisdiction.

On the authority of *Chapman* v. *County Commissioners*, 79 Me., 270, *Dresden* v. *County Commissioners*, 62 Me., 367, and *Levant* v. *County Commissioners*, 67 Me., 249, the presiding justice permitted the record of the county commissioners to be amended in accordance with the facts, and we think that his action in this respect was justified. Nor is the argument sound that this amendment could not be made because of a change in the personnel of the board. The county commissioners' court is a continuing body and its record may be changed in accordance with facts no matter when or how the facts may be ascertained. Had there been, in 1927, an entirely new board than that which acted in 1925 and 1926 and had it appeared to the satisfaction of that new board that the earlier board actually took the action indicated by the amendment, the new board could and should have amended the record so as to show what really happened on the earlier date.

The omission, in the petition addressed to the county commissioners, of the allegation that the refusal of the selectmen to lay out the road was an "unreasonable" refusal, raises a more serious question. The court below, on the authority of *State* v. *Pownal*, 10 Me., 24, and *White* v. *County Commissioners*, 70 Me., 317, decided that the county commissioners had jurisdiction of the matter before them notwithstanding the omission of this necessary jurisdictional fact from the petition presented to them, provided that they did actually adjudicate and determine the fact at the hearing on the petition. Commenting on this ruling, the learned justice, in his findings, said "The acquisition of jurisdiction by the county commissioners upon a petition that did not contain the jurisdictional facts is somewhat incompatible with the ordinary rules of law, but it is nevertheless the fact that our court in *State* v. *Pownal* did by implication, if not by direct phraseology, hold that the county commissioners could obtain jurisdiction by finding the

omitted jurisdictional facts and making such finding a part of their record."

An examination of the authorities bearing upon this question discloses opportunity for confusion. In *State* v. *Pownal*, supra, the petition to the county commissioners did not contain the allegation of unreasonable refusal, nor did the adjudication of that question appear in the records of the court. Speaking through Chief Justice Mellen, our court said, "From a view of these provisions, it is evident that the jurisdiction of the Court of Sessions of the laying out of town or private ways is of an appellate character only. It has no original jurisdiction in such cases. Neither has the court appellate jurisdiction in laying out such roads except in the two specified cases; that is, when the selectmen shall unreasonably delay or refuse to lay out such way, or the town shall unreasonably delay or refuse to approve or allow the same. . . . It is nowhere stated in the record and proceedings of the court in their adjudication that the selectmen of Pownal had unreasonably delayed or refused to lay out the road; that is, it nowhere appears on such record and proceedings of the court that it had any jurisdiction whatever in the premises. If the court were really satisfied, from an examination of the facts of the cause while under their consideration, that the selectmen had unreasonably delayed or refused to lay out the road, that fact should have been stated by the court as the evidence of their jurisdiction and of the reason for exercising such jurisdiction and proceeding to lay out the road. The omission or absence of this record evidence of jurisdiction is fatal."

It is to be noticed that in this opinion the court did not directly pass upon the question of whether or not the omission of the allegation of the jurisdictional fact in the petition would be fatal, but, as found by the court below, the implication is clear that that defect might have been cured by adjudication of the fact by the county commissioners and a record showing that adjudication.

In *Bethel* v. *County Commissioners*, 42 Me., 480, both the petition and the record of the commissioners failed to show that the petition had been presented to the commissioners within the time fixed by law, and the court said, "It does not appear that the County Commissioners had any jurisdiction, there being no allegation in the petition presented to them, nor anything appearing in

their record that shows the application to have been seasonably made, and nothing is to be inferred."

In *Goodwin* v. *County Commissioners*, 60 Me., 330, Judge Walton, speaking for the court, said, "It is well settled that the petition to the county commissioners must state directly such facts as are necessary to give them jurisdiction. Nothing can be left to inference. Whatever is necessary to give the county commissioners jurisdiction of the case must be stated clearly and distinctly. In this case, there is no such averment in the petition nor any adjudication of the fact. At least no such adjudication appears in the record. The original petition neither avers, nor do the subsequent adjudications establish, this vital jurisdictional fact."

In *Brown* v. *County Commissioners*, 68 Me., 537, the court ruled that the commissioners were without jurisdiction because "it is not alleged in the petition to the commissioners nor does it appear in their proceedings that the petitioners were inhabitants of the town or owners of taxable property therein or that they had any interest whatever in the subject matter or were in any way connected with the prior proceedings."

In *Hayford* v. *County Commissioners*, 78 Me., 156, the court said, "Being an inferior tribunal, nothing is presumed in favor of the commissioners' jurisdiction, but it must appear by their record. A general jurisdiction merely, given by the statute over the subject matter, is not enough; they can only have it in the particular case in which they are called upon to act, by the existence of those preliminary facts which confer it. *Small* v. *Pennell*, 31 Me., 267, 270. Moreover, while generally no particular form of words is required in the petition, nor is strict technical accuracy expected therein (*Windham* v. *Co. Cmrs.*, 26 Me., 406, 409), their jurisdiction generally depends upon whether sufficient jurisdictional facts are set out, as they always should be, in the petition which forms the foundation of their action; although in some classes of cases concerning which the statute does not prescribe what facts the petition shall set out — such as those seeking an abatement of taxes — if the whole record when completed shows actual jurisdiction, notwithstanding one or more of the jurisdictional facts were wanting in the petition, the court may, if substantial justice

has been done by the commission, rightfully refuse to grant the writ. *Orland* v. *Co. Commrs.*, 76 Me., 462."

In *Orland* v. *County Commissioners*, supra, a case relating to abatement of taxes, the court permitted an amendment of the commissioners' record in accordance with the facts, and said, "The only cause of error assigned and relied on in argument, is that the application did not set forth upon what property the applicant desired abatement. To be sure, the application is quite general in its terms, alleging that the assessors 'assessed the petitioner at a higher value than the property was worth on the first day of April, 1883.' Under this general allegation, the commissioners would probably order a specification, if requested. And it seems the reason for not making such a request, is disclosed by the following clause in their record, to wit, 'That in the application to the assessors requesting an abatement, is a list setting forth on what property he desired an abatement, . . . and was produced at the hearing before the county commissioners, on notification of Buck.' While all of these jurisdictional facts ought to be set forth in the application, and the commissioners might properly decline to receive and order notice upon an application which did not contain all these allegations, still, if without objection all these facts be proved, the application might be entertained, for it is the whole record which is to be examined."

It will be noticed that the question directly at issue, namely whether or not the omission of a jurisdictional fact from the petition, would in and of itself be fatal, is not directly decided in any cited case relating to the laying out of a way, although the implication appears to be that such might not be the case. But, in *Newcastle* v. *County Commissioners*, 87 Me., 227, the court, speaking directly to that point, said, "It is settled law that a petition to county commissioners, asking them to reverse the decision of the municipal officers of the town refusing to locate or alter a town way, must state clearly and directly every fact necessary to give the commissions jurisdiction. . . . But the county commissioners, in their answer to this petition for a writ of certiorari, say that before making their report they permitted these two errors to be corrected. In other words, that, after having taken jurisdiction and acted upon the petition, they allowed it to be altered in two essen-

tial particulars. It has been held that such an alteration makes a new petition of the instrument, and exonerates such of the signers as do not consent to the alteration from all liability for costs. *Jewett* v. *Hodgdon*, 3 Me., 103. We do not doubt the authority of county commissioners to amend the record of their own doings. Nor do we doubt that such an amendment, when made, is conclusive, and that oral evidence is inadmissible to impeach or contradict the record so amended. *Levant* v. *Co. Com.*, 67 Me., 429. But they have no right to amend a petition, signed by others, after it has been acted upon by them, and thus confer upon themselves a jurisdiction which they did not possess when the petition was presented. It is perfectly well settled that, in a case like the one now under consideration, the original petition, when presented, must contain such a statement of facts as will give the county commissioners jurisdiction, or they will have no right to accept it, or to take any action upon it whatever. In the present case, the petition, when presented to the county commissioners, did not contain such a statement. The county commissioners had no authority to accept and act upon such a petition, and it is the right of the town of Newcastle to have their proceedings quashed."

This case appears to be the last word of our court on the subject and in view of its definite, explicit and emphatic declaration of the law applicable to the instant case, we are obliged to conclude that any action of county commissioners based on a petition which fails to set out necessary jurisdictional facts is void, notwithstanding the implication of earlier cases that such a defect in the petition might be cured by a finding of the omitted jurisdictional facts by the county commissioners, provided that such finding was incorporated in their record.

It may also be noted that the final order of the county commissioners fixing the time within which the way should be completed was not in accordance with the statute.

Section 9 of Chapter 24, R. S. 1916, provides that, "A time not exceeding two years shall be allowed for making and opening the way."

The order of the county commissioners was "that the town of Phippsburg be allowed three years from said time within which to open and make said road, and safe and convenient for travelers,

and also that the laying out, making and opening said road be done one-third distance, within twelve months from date and start at the beginning of the above described road; that the next adjoining third part of said road be finished within twenty-four months from date, and that the last third part of said road be finished within thirty-six months from date."

Such an order finds no warrant in law. The powers and duties of county commissioners are defined and limited by statute. These powers may not be exceeded nor has this court discretionary power to enlarge them. The order above quoted cannot be subdivided. A way was prayed for with definite termini. The commissioners found that "convenience and necessity" required such a way. By their amended record, it appears that they found that the selectmen "unreasonably neglected and refused" to lay out such a way. These findings related to the whole way, not to two-thirds of it. And it may well be that different findings might have resulted had two-thirds only, of the way, been under consideration. The order to lay out the way must be taken in its entirety and when so taken it is without authority and void. *Kingman* v. *County Commissioners*, 53 Me., 431.

Exceptions sustained.
Petition granted.
Writ to issue.

INHABITANTS OF LEEDS

vs.

MAINE CRUSHED ROCK AND GRAVEL COMPANY.

Androscoggin. Opinion March 8, 1928.

TAXATION. PERSONALTY. "PERSONAL PROPERTY EMPLOYED IN TRADE" AND "MACHINERY EMPLOYED IN ANY BRANCH OF MANUFACTURE," CONSTRUED. "LANDING PLACE" DEFINED.

Employment in trade under paragraph I, Sec. 14, *Chap.* 10 *R. S. means trade in the town where it is prepared for market. Where the evidence does not disclose any local market or any intent or expectation to sell locally and the things, when prepared for market, are to be sold, not where prepared, but in the town where the owner's main business is located, the property is not "employed in trade" in the town where it is when prepared, and is not there taxable.*

The chattels, if claimed to be a mill when taken together, cannot serve at the same time as property employed and as the place in which employed. The property which may be taxed under paragraph I, Sec. 14, *Chap.* 10 *R. S. is movable property wholly distinct from the "mill" or "landing place" occupied.*

A landing place is a place where logs (and it may be other things) are collected and deposited for transportation or shipment from that place, whether it be by water or rail. The phrase connotes both collecting and depositing. Machinery used to prepare rock and sand for shipment cannot be said to be "collected and deposited" within the meaning of the Statute.

To make an article manufactured, the application of the labor must result in a new and different article with a distinctive name, character or use. Crushing, grinding and preparing rock, gravel and sand for market is not manufacturing, and machinery used for such purposes is not "employed in any branch of manufacture."

In the instant case, no new article was produced. Raw material created by the process of nature was broken for use and sale into convenient sizes, which were raw material no less than when excavated, and, no labor having been expended in fashioning the pieces, than when they left the breaker. Such crushing does not constitute manufacturing in the ordinary sense.

Held:—the "machinery" was not taxable by Leeds under R. S. Chap. 10, Sec. 14, Par. 1 as "personal property employed in trade — or in the mechanic arts" by an owner who occupied a "mill" or "landing place" in that town, nor was it taxable by Leeds under paragraph III, Sec. 14, as being "machinery employed in any branch of manufacture."

On Exceptions. An action of debt for the collection of $533 tax on personal property assessed against the defendant, a non-resident corporation.

Defendant corporation conducted a sand and gravel and stone crushing business in the town of Leeds, using in connection therewith, a steam shovel, locomotive, stone crushers and other chattels which were the personal property assessed under the word "machinery." Defendant contended that the property was not subject to taxation in the town of Leeds.

Hearing was had before the presiding justice of the Superior Court for the County of Androscoggin, who ruled that the action could not be maintained.

The plaintiff took exceptions to the rulings.

Exceptions overruled.

The case appears fully in the opinion.

Tascus Atwood, for plaintiff.

Frederick J. Laughlin,

Harry Manser, for defendant.

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

BASSETT, J. Action of debt by tax collector of the town of Leeds to collect a tax assessed on personal property described as "machinery" and employed by the defendant, a Maine corporation located at and with its principal place of business at Portland, in its gravel and sand pit in the town of Leeds. Case comes up on exceptions to the ruling of the presiding justice that the action could not be maintained.

It is admitted that the usual statutory requirements for assessing a tax and bringing a suit were complied with. The only question is, was the property taxable in Leeds.

The "machinery" included these chattels, a steam shovel, narrow gauge locomotive, two stone crushers, two conveyors, six dump carts, hoist and attachments, screen and attachments, dynamos and one Ford ton truck. The process of getting out sand and gravel is this. The material is excavated in the pit by the steam shovel, loaded into small yard cars, hauled to a hopper, from which it is taken up by a small car and dumped on a grating, where rocks exceeding two and one-half inches in size are projected to a crusher. This "oversize," as it is called, is there crushed to two and one-half inches and, upon an occasional order for stock smaller than that, there is recrushing to the smaller size. Not over twenty-five per cent of all the rock material excavated is crushed. The remainder passes through the screen into bins, into which the crushed rock is also conveyed, and thence is passed into railroad cars of the Maine Central Railroad on a spur track connecting with the main line and shipped to customers on orders received at the Portland office. The sand excavated is screened, washed and finally loaded into Maine Central cars and shipped on similar orders to destination.

The general provision of the statute for the taxation of personal property is that it "shall be assessed to the owner in the town where he is an inhabitant on the first day of each April." R. S. 1916, Chap. 10, Sec. 13, as amended by Chap. 82 of the Public Laws of 1919.

Section 14, which follows, provides certain exceptions, among which are,

"I. All personal property employed in trade, in the erection of buildings or vessels, or in the mechanic arts, shall be taxed in the town where so employed on the first day of each April; provided, that the owner, his servant, subcontractor or agent, so employing it, occupies any store, storehouse, shop, mill, wharf, landing place or shipyard therein for the purpose of such employment."

"III. Machinery employed in any branch of manufacture, goods manufactured or unmanufactured, and real estate belonging to any corporation, except when otherwise expressly provided, shall be assessed to such corporation in the town or place where they are situated or employed:"

The plaintiff claimed that the chattels were taxable under paragraph III as "machinery employed in any branch of manufacture" and under paragraph I as "personal property employed in trade" by an owner who occupied a "landing place." The presiding justice ruled they were not taxable under III nor under I, "the assessment being specifically upon this machinery."

We think the chattels were not taxable under either paragraph.

Arguments of counsel and the ruling of the presiding justice were first and chiefly concerned to determine whether the property came within the description of paragraph III and secondarily within the description of paragraph I.

This case does not raise the question, which one of two towns has the right to tax under one or the other paragraph, *Boothbay* v. *duPont deNemours Company*, 109 Me., 236, but whether a given town had any right to tax at all under either paragraph. Two towns might contend for the right to tax property which might be within the description of more than one paragraph. The proper way to determine under which paragraph of the enumerated exceptions property is to be taxed was set forth by the court in *Boothbay* v. *duPont deNemours Company*, supra, as follows. "It was the intention of the Legislature to provide by the enumerated cases in Section 13 (Section 14 of present statutes) for the taxation of personal property not taxable under Section 12 (Section 13 of present statutes). To determine under which paragraph of the enumerated cases in Section 13 property shall be taxed, it should be ascertained if the property, its condition, and situation are such as are described in paragraph I of said Section. If not, are they such as are described in paragraph II, and so on until the property is described in one of the paragraphs of Section 13. When it is included within one of the paragraphs of Section 13, it is taxable as therein stated, and all similar property similarly situated must be taxed under that paragraph, and cannot be taxed under any other. It being the intention of the Legislature by each paragraph to provide for the taxation of the property therein mentioned, it follows that when the property is included within the cases mentioned in one of the paragraphs, it shall be taxed under that section and cannot be taxed under any other."

We therefore turn first to paragraph I.

The word "machinery" which is expressly found in paragraph III does not determine that the property was assessed under that paragraph. Machinery may be actually articles of "trade" of the owner. It was "personal property" as appears here.

But the chattels were not "employed in trade." The property taxed here was not the stone and gravel which was sold but machinery for putting it into condition to be sold. If it could be said that the machinery thereby was "employed in trade," it would not be, under paragraph I, as regards taxation, in any different position from the sand and gravel. Our court has repeatedly held, *New Limerick* v. *Watson*, 98 Me., 379; *McCann* v. *Minot*, 107 Me., 393; *Morton* v. *Watson*, 115 Me., 70; *Lumber Company* v. *Machias*, 122 Me., 304, that employment in trade under this paragraph means trade in the town where it is when prepared for market. Where the evidence, as here, does not disclose any local market or any intent or expectation to sell locally and that the things, when prepared for market, are to be sold, not where prepared but in the town where the owner's main business is located, the property is not "employed in trade" in the town where it is when prepared.

It is not necessary to decide whether these chattels were employed "in the mechanic arts" for, if they were, the owner did not occupy any "mill" or "landing place" in Leeds within the meaning of the statute. If it be claimed that the chattels, some or all of them taken together, were a "mill," they cannot "at the same time serve as personal property employed and as the building or place in which it is employed." "The personal property which may or may not be subject of taxation under the exception is movable property wholly distinct from the 'store, shop, mill, wharf, landing place or shipyard' which by virtue of the proviso must be occupied." *Norway* v. *Willis*, 105 Me., 54.

Nor was there a "landing place" within the meaning of the statute. The words were defined in *McCann* v. *Minot*, supra, a log case. "A landing place is a place where logs (and it may be other things) are collected and deposited for transportation or shipment from that place, whether it be by water or rail." In *Lumber Company* v. *Machias*, supra, also a log case, use of the word "include" (p. 307) would imply that landing place includes logs but is not confined to them.

But the machinery was not the things "collected and deposited" in the alleged landing place here. The rock and sand were what corresponded to the logs which, in the cases cited, were the property in the landing place and taxed. The alleged landing place was a part of defendant's premises, the so-called pit, where the work went on and where the sand and gravel at the completion of the preparation were deposited. They were landed in that remote sense in which the finished product of any process conducted in a given place is there deposited pending further movement in its disposition. They were deposited but not collected in the meaning of the statute which for landing place connotes both collecting and depositing.

We therefore decide this machinery could not be taxed under paragraph I and turn to paragraph III.

There was no contention that the word "machinery" did not cover all of the different chattels, and it is not necessary therefore to raise such question. For this decision, we assume it does include all. But we do not think that the machinery was "employed in any branch of manufacture." The meaning of the word "manufacture" has been before the courts in various applications including provisions of statutes for taxation. This line of distinction has been drawn which we think to be correct. Application of labor to an article either by hand or mechanism does not make the article necessarily a manufactured article. To make an article manufactured, the application of the labor must result in a new and different article with a distinctive name, character or use.

It was therefore held that a corporation quarrying, crushing, preparing, and marketing limestone in different sizes was not a "manufacturing" corporation. "No new article was produced by the relator. It simply took raw material which had been created by the process of nature and broke it into convenient sizes for use and sale. The reduced sizes were the raw material no less than when blasted in rock from the cliff. The relator expended no labor in fashioning the pieces. When sold they were in precisely the conditions in which they left the breaker. Had the existence of the stone been due to the agency of the relator, or an article have been created by its labor or the addition of other substances producing an article having a different character and use, a very different ques-

tion would be presented." *People ex rel. Tompkins Cove Stone Co.* v. *Saxe et al*, 162 N. Y. Supp., 408, 176 App. Div. 1, reaffirmed on appeal, 221 N. Y., 601.

So it was held a corporation engaged in quarrying, crushing, preparing, and marketing stone by breaking it into pieces and sorting by screens was not engaged in manufacturing. "The rock still remains rock. The only difference is in the size of the portions and in this natural condition without the application of any art or process to change the form or appearance of the broken pieces, the same are sold in the market." *Commonwealth* v. *John T. Dyer Quarry Co.*, 95 Atl., 797 (Pa.).

So crushing and grinding rock into sand of specified grades of fineness sometimes colored by admixture of clay and used for molding in steel trade and for concrete in building was held not "manufacturing." "The pieces are sold as they come from the crusher without any attempt to remove the irregularities of the edges or make the pieces of uniform shape. . . . The fact that clay is sometimes added to the sand when colored silica is desired does not in our opinion change the situation." *Commonwealth* v. *Welsh Mountain Mining, etc., Co.*, 108 Atl., 722.

So it was held that cleaning off the outer layer of shells by acid and grinding off the second layer by an emery wheel so as to expose the inner layer and all intended to be sold as shells for ornament was not a "manufacture of shells." "They were still shells. They had not been manufactured into a new and different article having a distinctive name, character or use from that of a shell." *Hartranft* v. *Wiegmann*, 121 U. S., 609.

And so machinery employed in the business of quarrying and breaking stone, to be used in macadamizing roads and for similar purposes was held not to be taxable as being "employed in manufacturing." "Quarrying and dressing granite could hardly be said to be manufacturing it, though molding clay into different sizes and shapes and then burning it fairly may be said to be manufacturing brick. Still less could simply crushing granite into smaller and smaller pieces be said to constitute manufacturing, as that word is ordinarily used, though there is a remote sense in which it may be true." *Wellington* v. *Belmont*, 164 Mass., 142. This case is quite on all fours with the instant case.

We therefore decide this machinery could not be taxed under paragraph III.

The exceptions to the ruling of the presiding justice were not well taken. The entry must therefore be

Exceptions overruled.

WILLIAM O. FROTHINGHAM *vs.* ALTON C. MAXIM.

Oxford. Opinion March 14, 1928.

ACTIONS. ATTACHMENTS. IDEMNITY BONDS. CONTRACTS. TRESPASS. RELATION OF SHERIFF AND DEPUTY.

When a contract is under seal the legal title is in the obligee, and action must be brought in his name even though the covenant is expressed to be with him for the actual benefit of another.

While the sheriff is required to serve all civil precepts committed to him, he has the right to require indemnity before proceeding with the attachment or levy in case he reasonably anticipates that he may subject himself to some liability by proceeding.

If, however, the attachment or levy involves the intentional and known commission of a trespass, crime or wrong, such a bond of idemnity is void as against public policy.

If, on the other hand, the act against the consequences of which the idemnity is given, though in fact illegal, is performed under a claim of right and a belief on the part of the indemnitee that it is a legal act, the indemnity is valid and enforceable.

A barn connected by a shed to a house is a part of the "dwelling house," and the breaking of the outer door of such barn, against the will of the owner, for the purpose of making an attachment in a civil suit, is a trespass.

A deputy sheriff is the servant or agent of the sheriff; his acts are in law the acts of the sheriff, and the latter is liable for his deputy's tortious acts done colore officii.

One who seeks to take advantage of a contract, either simple or under seal, made for his benefit by another, takes it subject to all legal defenses and all inherent equities arising out of the contract, unless the element of estoppel has entered.

In the instant case the action, though clearly for the benefit of the deputy, was properly brought in the name of the sheriff, as he was the sole obligee named in the bond. The sheriff when he made the contract of indemnity knew that the contemplated act of his deputy was a trespass. The contract was therefore, on the ground of public policy, void both as to the sheriff and his deputy.

On Report. An action of debt on a bond.

Defendant in this suit brought action in trover against one M. J. Marshall. Plaintiff in this suit was sheriff of Oxford County. One of his deputies declined, without the execution of an indemnity bond, to make attachment under defendant's (then plaintiff's) writ of a truck in a barn on premises of M. J. Marshall. Such bond was given and the attachment made. Marshall thereafter brought suit in trover (*Marshall* v. *Wheeler*, 124 Me., 324) against the deputy and recovered judgment for $1000. This judgment was satisfied before the instant suit, and plaintiff as obligee in the bond brought action against defendant the obligor on his refusal to pay. By agreement of the parties the cause was reported to the Law Court.

Judgment for defendant.

The case appears fully in the opinion.

Matthew McCarthy, for plaintiff.

Frederick R. Dyer, for defendant.

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

STURGIS, J. Action of debt on a contract of indemnity under seal in the form of a bond given to the sheriff of Oxford County, indemnifying him and one of his deputies from all cost or damage in consequence of making an attachment. The case comes forward on Report.

January 23, 1924, the defendant in this suit began a trover action against M. J. Marshall of Bethel, and delivered the writ through his attorney to the plaintiff's deputy, Fred E. Wheeler, with instructions endorsed upon the process to "attach truck and also attach real estate." The truck was then in a barn connected with the house occupied by Marshall and his family, the doors to

the barn being fastened on the inside, and the door to a connecting shed padlocked on the outside. The deputy upon reaching the Marshall premises discovered this situation, and failing to obtain permission from the caretaker of the property to enter the barn and make the attachment, called the sheriff and the attorney of this defendant upon the telephone, informed them that the barn was locked, and stated his unwillingness to force an entry and make the attachment without an indemnity bond. A conference between the sheriff and the plaintiff in the trover action followed, with the result that the idemnity contract here in suit was executed, and the deputy through the sheriff was instructed by the plaintiff in trover to break into the barn and make the attachment. He did so, breaking the padlock on the door of the shed which connected the house proper and the barn. For these acts, in *Marshall* v. *Wheeler*, 124 Maine, 324, judgment was recovered against the deputy with damages fixed at $1000. This judgment was satisfied before the instant suit was begun, and the failure of the defendant in this action to pay that judgment is the breach of the covenant of indemnity here charged.

The contract of indemnity is in form of a bond, the condition of which is "that whereas said Frothingham has a deputy sheriff, Fred E. Wheeler, who is to serve a civil process and attachment against M. J. Marshall in favor of Alton C. Maxim in Bethel, Maine, and to attach a truck in the barn of said Marshall, now therefore if said Maxim shall protect said Frothingham and said Wheeler from all cost or damage in consequence of making said attachment, then this bond shall be null and void, otherwise remain in full force & effect." This action, therefore, is clearly for the benefit of the deputy. The plaintiff, however, is sole obligee named in the writing and the suit is properly brought in his name.

The rule is that when a contract is under seal, the legal title is in the obligee and action must be brought in his name. This is true although the covenant is expressed to be with one person for the benefit of another. *Hoxie* v. *Weston*, 19 Maine, 322, 329; *County of Washington* v. *Brown*, 33 Maine, 442; *Packard* v. *Brewster*, 59 Maine, 404; *Farmington* v. *Hobert*, 74 Maine, 416; *Carleton* v. *Bird*, 94 Maine, 182. No question is raised as to the

sufficiency of the pleadings in the matter of a statement of the interest of the deputy for whose benefit the suit is brought. If raised it could not avail. In a suit upon a covenant for the benefit of a third person, the statement of the beneficiary's use is not a material part of the pleadings, but merely to enable the Court to know who is equitably entitled to control the suit. 9 Corpus Juris, 94; *Shott* v. *Youree*, 142 Ill., 241.

At common law a sheriff was bound at his peril to do his duty and to judge both the law and the facts, but in modern times the responsibility of the sheriff in this respect has been much modified, in some jurisdictions by statute, but in this State as in others by judicial decision. And while the sheriff is directed by statute (R. S., Chap. 85, Sec. 10) to serve all civil precepts committed to him, he is now given the right to require indemnity before proceeding with attachment or levy in case he reasonably anticipates that he may subject himself to some liability by proceeding. *Sibley* v. *Brown*, 15 Maine, 185; *Gower* v. *Emery*, 18 Maine, 79; *Lothrop* v. *Arnold*, 25 Maine, 136.

On the other hand, it is a well established principle that a bond given to indemnify an officer for a known violation of duty or against the consequences of intentional and known commission of a trespass, crime or wrong is void as opposed to public policy and cannot be enforced. The rule is stated by Mr. Freeman in his treatise on the Law of Executions, Vol. II, Sec. 275a, in this language: "It must be remembered in considering all contracts of indemnity, however expressed, that the law will not tolerate any agreement having for its object the commission of a known wrong. Hence, it is essential to the validity of every bond or other agreement for indemnity that there was no doubt respecting the validity of the act in question, for if the parties knew, or were chargeable with knowledge, that it was criminal or unlawful, or necessarily constituted a trespass or an invasion of the just rights of another, there can be no contract, whether expressed or implied, that the agent shall, by his principal, be indemnified for the doing of such act."

Thus indemnity given to an officer for neglecting to make an arrest on an execution is void, *Hodsdon* v. *Wilkins*, 7 Maine, 113; or against permitting a voluntary escape, *Ayers* v. *Hutchins et*

al, 4 Mass., 370; or for wrongfully releasing a defendant from arrest, *Webber* v. *Blunt*, 19 Wend. (N. Y.), 188. So, too, indemnity given an officer against the consequence of a wilful trespass in entering a dwelling-house to make a levy is void. *Griffith* v. *Hardenburgh*, 41 N. Y., 464.

On the other hand, where the act against the consequences of which the indemnity is given, though in fact illegal, is performed under a claim of right and a belief on the part of the indemnitee that it is a legal act, as for instance an apparently legal act which proves to be a trespass, the indemnity is valid and enforceable. A correct statement of this exception is found in *Jacobs* v. *Pollard*, 10 Cush. (Mass.), 287, wherein that Court says: "No one can be permitted to relieve himself from the consequences of having intentionally committed an unlawful act, by seeking an indemnity or contribution from those with whom or by whose authority such unlawful act was committed. But justice and sound policy, upon which this salutary rule is founded, alike require, that it should not be extended to cases, where parties have acted in good faith, without any unlawful design, or for the purpose of asserting a right in themselves or others, although they may have thereby infringed upon the legal rights of third persons. It is only when a person knows, or must be presumed to know that his act was unlawful, that the law will refuse to aid him in seeking an indemnity or contribution. It is the unlawful intention to violate another's rights, or a wilful ignorance and disregard of those rights, which deprives a party of his legal remedy in such cases." The general rule and this exception are discussed at length, with the citation of numerous authorities, in the editorial note to *Ives* v. *Jones*, 3 Ired. (N. C.), 538, reported in 40 American decisions, 421, as also in the note in 86 American State Reports, 554.

Included within the foregoing rules, it is to be inferred, is the principle that although the promisor may have contemplated a wilful trespass that fact will not avoid the indemnity contract if the act was not palpably illegal and the promisee proceeded in the belief that he was entitled to perform the act for which indemnity is given. 16 Am. & Eng. Encyc., 2d Ed., 172; *Jacobs* v. *Pollard*, supra; *Avery* v. *Halsey*, 14 Pick. (Mass.), 174; *Stone*

v. *Hooker*, 9 Cow. (N. Y.), 154; *Coventry* v. *Barton*, 17 Johns. (N. Y.), 142.

As stated in *Illsley* v. *Nichols*, 12 Pick. (Mass.), 269, it is clear from all the authorities and wholly undisputed as a rule of law that the act of breaking the outer door of a dwelling-house for the purpose of making an attachment against the will of the owner is unlawful. It is a trespass. The primary question, therefore, here is, was the indemnity contract in suit entered into in anticipation of a trespass known to be such?

Both the shed and the barn were part of the dwelling-house. In *Marshall* v. *Wheeler*, supra, this Court passed upon the question of the legality of the entry of the deputy into the shed, and there held that the shed was part of the dwelling-house "which an officer may not enter by force or against the will of the owner or tenant to serve a civil process . . ." In reaching that conclusion this Court there reviewed the common law, defining and construing the rule that "a man's dwelling-house is still his castle which may not be invaded against his will except by the State in search of violators of the law or upon certain processes of which a writ of attachment is not one." The court there drew upon the analogies found in the criminal law for its definition of a dwelling-house, and that opinion must be read as determining, in civil cases involving service of a writ of attachment, that the term "dwelling-house" embraces the entire cluster of buildings, main and auxiliary, used for abode. In the instant case we think the dwelling-house included not only the connecting shed but also the barn joined by it to the house.

The sheriff, who made the contract of indemnity with the defendant, knew that the proposed entry by his deputy for which he demanded indemnity was a trespass. His testimony is:

"Q — You knew that your deputy had no right to break into a dwelling house?

A — Yes, nor in any building.

Q — Was it your assumption that an attachment couldn't be made of an automobile truck locked in a barn?

A — Yes, sir.

Q — When you took this bond, according to your interpretation of the law you knew he was going to commit an illegal act?

A — I felt that he was."

A deputy sheriff is the servant or agent of the sheriff. *Smith* v. *Wadleigh*, 18 Maine, 95. The acts of the deputy are in law the acts of the sheriff, *Smith* v. *Berry*, 37 Maine, 298, and the latter is liable for his deputy's tortious acts done *colore officii.* R. S., Chap. 85, Sec. 8; *Harrington* v. *Fuller*, 18 Maine, 277; *Kendrick* v. *Smith*, 31 Maine, 165. Persons aggrieved by the deputy's acts have a remedy either against the sheriff or the deputy at their election. *Walker* v. *Foxcroft*, 2 Maine, 247, 249; *Severy* v. *Nye*, 58 Maine, 246.

In his contract with the defendant the sheriff sought to protect both himself and his deputy from the consequences of a known trespass. His contract was clearly void. The deputy's rights under it are those of a beneficiary under a contract made for his benefit by another. Unless there was a valid, binding contract no right arose in his favor. Williston on Contracts, Vol. I, p. 737; Pollock on Contracts, 3rd Am. Ed., 271. One who seeks to take advantage of a contract made for his benefit by another, takes it subject to all legal defenses and to all inherent equities arising out of the contract, unless the element of estoppel has entered. *Jenness* v. *Simpson*, 84 Vt., 127; 71 Am. St. Rep., 202 n.; 6 R. C. L., 886; 13 C. J., 699. To use the often quoted words of the Court in *Dunning* v. *Leavitt*, 85 N. Y., 30, "it would be contrary to justice or good sense to hold that one who comes in by . . . 'the privity of substitution' should acquire a better right against the promisor than the promisee himself had."

We are convinced that these rules apply whether the action be by the beneficiary in his own name on a simple contract or in his behalf by the promisee on a contract under seal. And in the instant case the bond given to the sheriff to indemnify him and his deputy against the consequences of a trespass, known to be such by the sheriff, upon the grounds of public policy is void both as to the sheriff and the deputy.

This conclusion renders a determination of other questions of law and fact involved in the case unnecessary. Under the rules of law stated the defendant must prevail, and the mandate is,

Judgment for defendant.

AMERICAN LUMBER SALES COMPANY *vs.* FIDELITY TRUST COMPANY.

Cumberland. Opinion March 14, 1928.

BANKS AND BANKING. PRINCIPAL AND AGENT. DUTY OF BANK TO DEPOSITOR. DUTY OF PRINCIPAL IN SUPERVISING WITHDRAWALS BY AGENT.

The receipt of a deposit from an agent to the credit of his principal establishes the relation between the bank and the principal of depositor and banker, and the bank becomes the debtor of the principal to the amount of the deposit. The deposit belongs to the principal even though its existence is unknown to him.

Having accepted such deposit a bank is protected in paying it out, only upon an order from the owner of the deposit himself or some one authorized to act for him.

While in the absence of notice to the contrary, the district manager of a local branch of a non-resident corporation, exercising supervision of its local business, is presumptively possessed of the powers of a general agent, his principal has the right to limit his authority, and the bank, to the extent of its knowledge of these limitations, is bound by them.

The bank is chargeable with the knowledge of its chief clerk and treasurer of such limitations.

A defense of negligence on the part of the principal in supervising the withdrawals from a deposit cannot be availed of unless a duty of taking care can be shown, and this presupposes on the part of the principal, knowledge or its equivalent.

There can be no neglect to perform a duty unless the person sought to be charged with negligence has knowledge of the condition of things which requires performance at his hands.

Authority of an agent or manager to indorse checks for deposit in his principal's account extends only to indorsement for the purposes of the principal's business, and not to a transfer of the checks to agent personally or for his individual use.

In the instant case the chief clerk and treasurer of the Trust Company knew of the character of the commercial deposits of the Sales Company at the bank in which they were formerly placed, and the manner in which the account had been there conducted. No modification of these banking arrange-

ments, which vitally limited the authority of the general manager, was communicated to the Trust Company's employees. Withdrawals of the "special account" by the district manager were not authorized.

The defense of negligence on the part of the Sales Company cannot prevail. Its failure to supervise the "special account" was attributable to its ignorance of the existence of the account.

The checks payable to the Sales Company which its district manager endorsed and deposited in his personal account with the Trust Company, on their face bore evidence that they were the property of the plaintiff.

The irregularity of deposit should have put the Trust Company on sharp inquiry. The Trust Company held liable to plaintiff by reason of its conduct of the "special account" in the sum of $5406.79, and by reason of its conduct with reference to deposits of plaintiff's funds in the district manager's personal account, in the sum of $1614.30; a total of $7021.09 with interest from the date of writ to date of judgment.

On report. An action of assumpsit for recovery of moneys deposited in the defendant bank and withdrawn without plaintiff's knowledge by its district manager acting fraudulently, and in excess of his authority from plaintiff.

Action was brought in the Superior Court for the County of Cumberland and the cause was first referred to an auditor for certain findings. Hearing was later had before the Justice of the Superior Court, without jury and by agreement of the parties the cause was reported to the Law Court. Judgment for plaintiff.

The case fully appears in the opinion.

Woodman, Whitehouse & Skelton, for plaintiff.

Cook, Hutchinson & Pierce, for defendant.

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

STURGIS, J. Assumpsit for recovery of moneys deposited in and withdrawn without authority from the defendant Bank by the plaintiff's district manager. The case was first sent to an auditor and comes before us on Report of the evidence below. By the terms of the Report the record includes the auditor's report, admissions of counsel, oral testimony and numerous exhibits. The case is to be determined, however, upon so much of the evidence as is legally admissible.

The American Lumber Sales Company (hereinafter referred to as "the Company"), with its home office in Philadelphia, was organized to dispose of the property of the Emergency Fleet Corporation. In February, 1920, it opened a branch office at Portland, Maine, and installed there as its district manager Fred O. Schoeppe.

Under authority from the Company, on February 11, 1921, the district manager opened an account with the defendant Bank and deposited therein from time to time thereafter moneys advanced to him by the home office for expenses of the local branch, together with checks received by him from the local sale of wood. The account was opened and carried under the title, "American Lumber Sales Company, Fred O. Schoeppe, District Manager." This account is termed by counsel on the brief as the "impressed fund," and that designation is here adopted.

On the same day, February 11, 1921, but without authority from the Company, the district manager opened a second account with the defendant Bank under the title, "American Lumber Sales Company, Fred O. Schoeppe, District Manager, Special Account." The original deposit in this "Special Account" was a draft from the Maine Central Railroad Company, payable to the American Lumber Sales Company in the sum of $2215.08, indorsed by Mr. Schoeppe as district manager.

It appears that prior to February 11, 1921, the Company had carried its local accounts with the First National Bank of Portland. The district manager, under authority from the home office, had conducted in the First National Bank an "impressed fund account," subject to his own check, and the Company itself had carried in the same Bank a "Special Account" subject only to checks drawn by the executives at the home office. While these accounts were so carried at the First National Bank, one Mr. Crory, a clerk in the employ of that institution, entered the employ of the Fidelity Trust Company, the defendant, and prior to February 11, 1921, introduced Mr. Schoeppe, the Company's district manager, to the treasurer of the Trust Company, and informed the latter of the nature and history of the Company's accounts with the First National Bank. The statement of the present treasurer of the defendant Bank is in part as follows:

"Q — Do you know whether the Fidelity knew that this Company had two accounts at the First National?

A — We knew they had had two accounts.

Q — The exact nature of those two accounts you didn't know I suppose?

A — We knew somewhat of the nature of the accounts. We knew that one of the accounts was controlled entirely by the Philadelphia office; the other account was subject to withdrawal by the district manager. We knew that a duplicate statement of the district manager's account was forwarded regularly to Philadelphia, and that the original statement on the Philadelphia account went to Philadelphia presumably monthly."

"Q — When did you get this information about the way the accounts were conducted at the First National?

A — I am not certain of the time. We were acquainted with the way the accounts were conducted at the First National due to the fact that our chief clerk at that time, Mr. Crory, had just recently returned to us from the First National.

Q — You got this information somewhere about the time these accounts started?

A — We must have at about that same time." (And) "As I recall, Mr. Norton, then treasurer, talked with Mr. Crory about the accounts, as Mr. Crory introduced Mr. Schoeppe to Mr. Norton."

The opening of these two accounts which we have thus reviewed, took place on February 11, 1921. On the next day, February 12th, the then treasurer of the defendant Bank, wrote the plaintiff Company the following letter:

"Fidelity Trust Company
Portland, Maine,

February 12, 1921.

American Lumber Sales Company,
Philadelphia, Pa.

Gentlemen:

We have been favored with an account of the American Lumber Sales Company, Fred O. Schoeppe, District Manager.

That our files may be complete, will you kindly furnish us over an authorized official signature a letter authorizing Mr. Schoeppe

to conduct the account in that capacity and such other information as it may occur to you that will facilitate the proper handling of the account.

Assuring you of our appreciation of this account and of our earnest desire to serve you, we beg to remain,

Very truly yours,
(Signed) W. P. Norton, Treasurer."

The Company's reply came by early return mail:

"February 14, 1921.

W. P. Norton, Esq., Treas.,
Fidelity Trust Company,
Portland, Maine
Dear Sir:

In response to your letter of February 12, I beg to advice that Mr. F. O. Schoeppe, District Manager of this Company at Portland, Maine is authorized to conduct an account with your good bank.

All checks on this account will be drawn by Mr. Schoeppe as 'District Manager.'

Yours very truly,
American Lumber Sales Company
(Signed) J. B. Clement, Jr.,
JBC/McC Secretary.
cc. to Mr. Fred O. Schoeppe, Dist. Mgr.
260 Forest Ave., Portland, Me."

It is upon this correspondence that the Bank seeks justification for its subsequent conduct of the two accounts involved in this action. It seeks to establish in these letters authority for payment of the moneys of the Special Account upon the check of the district manager, but we are not convinced that its contention in this regard can be sustained.

The letter to the Company from the treasurer of the Bank of February 12, 1921, informed the Company of the reception of "*an* account of the American Lumber Sales Company, Fred O. Schoeppe, District Manager." It failed to disclose to the Company that the Bank had been "favored" with a second account to the credit of the Company marked "Special Account." The contents of this letter can only be fairly construed to refer to a sin-

gle account. It calls for reply and statement of authority in the district manager to conduct "the" account bearing the title designated in the letter, not of authority to conduct two accounts nor an account of like title but designated expressly "Special Account."

The reply of the Company was likewise limited. The limitations of the letter of inquiry of the Bank, we think, necessarily limit the scope of the letter of the Company in reply. The two must be read together, and so read confer upon the Bank the right only to accept a single account from the district manager and permit his withdrawal thereof by his check as "District Manager." And in the light of the knowledge then possessed by the officers of the bank as to the authority previously conferred upon the district manager to conduct the accounts at the First National Bank, we are of the opinion that the bank accepted the "special account" and permitted the district manager to conduct it at its peril.

Upon receiving the deposit from the district manager for the credit of the plaintiff Company, the relation between that Company and the defendant was that of depositor and banker, and the defendant became the debtor of the plaintiff for the amount of the deposit placed to its credit. *Heath* v. *New Bedford Safe Deposit etc. Co.*, 184 Mass., 481. The deposit was the plaintiff's property even though its existence was unknown. *Brown* v. *Daugherty*, 120 Fed., 526. Having accepted the deposit, a bank is protected in paying out the deposit only where it has an order from the owner of the deposit himself or one authorized to act for him. 3 R. C. L., 540; 7 C. J., 675, and cases sited. And while Mr. Schoeppe as district manager was in fact general agent for the local branch of the Company's business over which he exercised supervision, and in the absence of notice to the contrary was presumptively possessed of the powers of a general agent, *Wood* v. *Finson*, 89 Maine, 459, his principal had the right to limit his authority to conduct its bank deposits; and the bank, to the extent of its knowledge of these limitations, is bound by them. *Bryant* v. *Moore*, 26 Maine, 84; *Barnard* v. *Wheeler*, 24 Maine, 412, 418; 21 R. C. L., 908; 2 C. J., 569; Mechem on Agency, 191.

It is clear from the testimony of the defendant's treasurer that at the time the "impressed fund" and "special account" were opened the then treasurer of the defendant and its chief clerk knew of the established method under which the plaintiff's bank accounts had been conducted in this district, and no modification of this arrangement was communicated to them. They knew of the existing limitations upon the authority of the district manager, and the Bank is chargeable with their knowledge. *Hale et als* v. *Windsor Savings Bank et als*, 90 Vt., 487, 494; *Lowndes* v. *City National Bank*, 82 Conn., 8. The Bank knew that the "special account," to use the words of its treasurer, was "controlled entirely by the Philadelphia office," and that "the original statement of the Philadelphia account went to Philadelphia presumably monthly." It must be held to have known that withdrawal of this account by the district manager had never been authorized.

The defendant, however, invokes the rule that a bank depositor is under obligation to examine within a reasonable time and with reasonable care the account of the deposit rendered by the bank, together with vouchers or cancelled checks returned, and report within a reasonable time any errors discovered. 3 R. C. L., 533. It calls attention to the diversity of opinion existing in different jurisdictions as to the effect of delegating authority to an unfaithful employee to examine accounts evidencing his own wrong doing, but argues that under either of these rules the plaintiff was negligent.

In *First National Bank of Birmingham* v. *Allen*, 100 Ala., 476 it is held that knowledge of the dishonest employee is imputed to the depositor.

In *Critten* v. *Chemical National Bank*, 171 N. Y., 219, that Court takes the ground that the depositor is chargeable with such information as an honest employee unaware of the fraud would have acquired from an examination of the accounts.

In *Leather Manufacturers National Bank*, v. *Morgan*, 117 U. S., 96, 116, in a consideration of the delegation of the depositor's duty to examine his accounts to an employee who misappropriates the deposit, the Court holds that "while no rule can be laid down that will cover every transaction between a bank and

its depositor, it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relation of the parties and the established or known usages of banking business."

This measure of duty placed upon the depositor by the United States Court accords with the concept of due care generally embodied in the term "negligence," and with the settled rules of law of this State determining liability for that wrong.

In the instant case, however, neither this rule nor the varying rules of other jurisdictions discussed, can apply. The plaintiff had no knowledge of the existence of the deposit. It did not authorize its district manager to open the account. It clearly did not delegate to him the duty of examining statements or vouchers. Its failure to supervise the deposit or the bank's account of it, upon the record, is attributable to its ignorance of the existence of the "special account."

Negligence presupposes a duty of taking care, and this in turn presupposes knowledge or its equivalent. *Smithwick* v. *Hall & Upson Co.*, 59 Conn., 261; 20 R. C. L., 14. There can be no neglect to perform a duty unless the person sought to be charged with negligence has knowledge of the condition of things which requires performance at his hands. *State* v. *Smith*, 65 Maine, 257, 266.

A careful examination of the evidence here reported fails to disclose facts upon which actual or constructive knowledge of the "special deposit," or its conduct by the district manager and the Bank, can be attributed to the plaintiff, or upon which a negligent omission to examine or supervise the defendant's accounts of it can be justly founded. The defense of negligence cannot avail.

The auditor's report shows deposits of checks in the "special account," all belonging to the Company, aggregating $6,664.37. The report shows withdrawals, upon checks of the district manager, for purposes foreign to the Company's business, of amounts aggregating $2135. Admissions of record establish further improper withdrawals aggregating $3271.79. Moneys equal in amount to the balance of the account were admittedly expended by Mr. Schoeppe in the Company's behalf. In an audit filed and made part of the record, the plaintiff attempts to show that some

part of these expenditures for the Company were made with moneys obtained from sources outside the "special account." This allocation of moneys thus admittedly expended for the Company is by no means clear. Upon the proof submitted we think the amount for which the defendant Bank can here be held chargeable by reason of the conduct of the "special account" must be fixed at $5406.79 and for that amount the Bank held liable.

In addition to the foregoing peculations, the district manager misappropriated $1,614.30 by means of a personal account opened in the defendant Bank under his own name. Into this account on June 22, 1921, he deposited a check for $600 made by the McDonald Mfg. Co., payable to the order of the plaintiff Company, bearing the indorsement, "American Lumber Sales Co. By Fred O. Schoeppe District Manager. Deposit in Special a/c Fred O. Schoeppe." On July 9, 1921, a check of the Maine Central Railroad Co., payable to the Company in the amount of $1,014.30, was indorsed in substantially the same form and accepted for deposit by the Bank in the district manager's personal account.

These checks on their face bore evidence that they were the property of the plaintiff, not of its district manager. Assuming that Schoeppe had authority to indorse the checks for deposit in his principal's accounts with the Bank, (which in case of the "Special Account" he did not have), such authority extended only to indorsement for the purposes of the Company's business and not to a transfer of the checks to himself personally or for his individual use.

A closely analogus state of facts appears in *Schmidt* v. *Garfield Nat. Bank*, 19 N. Y. Supp., 252. In that case, in the absence of the plaintiff, his clerk gained possession of checks payable to the plaintiff's order, indorsed each "C. A. Schmidt. Geo. Langard.", deposited them in the defendant bank in his personal checking account, and by subsequent withdrawals misappropriated the proceeds. The bank was held liable.

In *Wagner Trading Co.* v. *Battery Park Nat. Bank*, 228 N. Y., 37, the facts seem to bring the case directly in point. There the president of the Trading Company indorsed fifteen checks

payable to the Company, "Wagner Trading Company, C. J. Wagner, Pres.", and deposited them to the credit of his personal account with the defendant bank, which made collection in the usual course and paid out the proceeds from time to time on the personal check of Wagner. The Court says, citing as authority *Ward* v. *City Trust Co.*, 192 N. Y., 61, (recently cited with approval by this Court in *Gilman* v. *Carriage Co.*, 125 Maine, 108): "When it (the bank) accepted the checks payable to the plaintiff and indorsed by Wagner as president of the plaintiff for deposit to the account of Wagner himself, it did so at its peril to ascertain whether Wagner had authority to indorse them and by his indorsement transfer the money to be paid thereon to his personal account." And again: "If Wagner had no such authority, title to the money in question never passed to the defendant and if it received it, it did so without authority and must account and make payment to the owner."

In *The Standard Steam Specialty Co.* v. *Corn Exchange Bank*, 220 N. Y., 478, the Court says: "Any person taking checks made payable to a corporation, which can act only by agents, does so at his peril and must abide by the consequences if the agent who indorses the same is without authority, unless the corporation is negligent . . . or is otherwise precluded by its conduct from setting up such lack of authority in the agent."

An extended discussion of decisions bearing on the question here at issue is found in the note in L. R. A. 1918 B, 576, and of more recent date in the note in 9 A. L. R., 346.

If authority be necessary, the foregoing seem to abundantly justify the conclusion that in the case at bar the defendant should reimburse the plaintiff for its losses through the Bank's acceptance of its checks for deposit on Schoeppe's personal account. The transaction was irregular on its face. Already two Company accounts were running with the Bank, one unknown to and unauthorized by the Company but of record in the Bank. For Schoeppe to offer for deposit in his personal account paper on its face payable to the Company, when there were in that institution Company accounts regularly receiving its deposits, was so contrary to the usual course of business that we think it should have put the Bank on sharp inquiry. The language of the Court in

Knoxville Water Co. v. *East Tennessee Nat. Bank*, 123 Tenn., 364, is pertinent.

"We think this is true whether the employee so offering such checks be president, manager, treasurer, or any other officer or agent of an employing corporation. And we think a bank, which under these circumstances accepts such a deposit to the individual credit of an employee, subject to his individual check and disposition in this way, has little ground upon which to urge that such an employee was thus acting within the apparent scope of his authority."

The aggregate amount for which the Bank can be here held is $7,012.09. Here, as before the auditor, demand prior to suit lacks proof. The plaintiff is entitled to interest from the date of the writ.

Judgment for plaintiff for $7,021.09 *with interest thereon from the date of the writ to the date of judgment, the same to be computed and added by the Clerk below.*

ROSWELL A. FITTS *vs.* DENNIS N. MARQUIS.

DENNIS N. MARQUIS *vs.* ROSWELL A. FITTS.

Penobscot. Opinion March 15, 1928.

MOTOR VEHICLES. RIGHT OF WAY AT INTERSECTING PUBLIC WAYS.

The statute providing that, "all vehicles shall have the right of way over other vehicles approaching at intersecting public ways from the left, and shall give the right of way to those approaching from the right," does not grant or establish an absolute right of way.

It prescribes a road regulation and not an inflexible standard by which to decide questions which arise over collisions at intersections of roads. The law does not confer the right of way without reference to the distance of the vehicles from the intersecting point, their speed, and respective duties. Pre-

cedence is not given under all circumstances to a vehicle on the right against a vehicle on the left.

The driver of a motor vehicle approaching an intersection must use reasonable watchfulness and caution to have his vehicle under control.

If a situation indicate collision, the driver, who can do so by the exercise of ordinary care, should avoid doing injury, though this involve that he waive his right of way. The supreme rule of the road is the rule of mutual forbearance.

A right of way, like a burden of proof, will establish precedence when rights might otherwise be balanced.

When a reasonably prudent man driving a vehicle on a public street, and approaching another street on which is a vehicle coming from his right, might otherwise be in doubt whether his or the other vehicle should go through the intersection first, the injunction of the statute operates that he yield to that other.

In the instant case, whether or not Mr. Marquis proceeded ahead on his own street and into Union Street negligently and without due regard to the intersection-way statute, thus causing the collision; whether the driver of the Fitts car was driving at excessive speed and failed to exercise common skill and prudence to avoid collision; which, if either, of the drivers, independent of any fault contributory to damage on the part of the other, was guilty of negligence; or whether both drivers failed to exercise the care that the circumstances justly demanded; were proper questions for the jury. Their findings were reasonably warranted.

On general motions for new trial. Cross actions to recover damages sustained in collision between automobiles of the parties at the intersection of Union and Fourteenth Streets, Bangor. On trial of the actions together in the Superior Court in Penobscot County Mr. Marquis won both cases.

A general motion, on behalf of Mr. Fitts was filed in each case.

Motions overruled.

The cases fully appear in the opinion.

George E. Thompson,

Ross St. Germain, for Roswell A. Fitts.

William S. Cole, for Dennis N. Marquis.

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

DUNN, J. Union street in Bangor, it approximates accuracy to say, runs northwest and southeast. Fourteenth street, which crosses Union, runs generally northeast and southwest.

On November 6, 1926, about four-thirty in the afternoon, the automobile of Roswell A. Fitts, then being driven for him by his son, was going northwesterly along Union street, bound toward and beyond Fourteenth. Dennis N. Marquis was driving his own automobile in a northeasterly direction on Fourteenth street, approaching Union which entered at his right. The two automobiles collided at the intersection of the streets and were damaged.

Mr. Fitts sued Mr. Marquis, and Mr. Marquis sued Mr. Fitts. On trial of the actions together in the Superior Court in Penobscot County Mr. Marquis won both cases.

Motions for new trials, each on the ground that the verdict offends law and is against evidence, have been argued to the Law Court in behalf of Mr. Fitts.

The law of the road has this provision:

"All vehicles shall have the right of way over other vehicles approaching at intersecting public ways from the left, and shall give the right of way to those approaching from the right; . . ." (1923 Laws, chap. 9).

This right of way is not absolute. The statute is a road regulation and not an inflexible standard by which to decide questions which arise over collisions at intersections of roads. The law does not confer the right of way without reference to the distance of the vehicles from the intersecting point, their speed, and respective duties. Precedence is not given under all circumstances to a vehicle on the right against a vehicle from the left. No driver, and especially no driver of an automobile, has leave to approach an intersection without using reasonable watchfulness and caution to have his vehicle under control. When approaching a highway crossing, as elsewhere on the public ways, eternal vigilance is essential to the practical matter of driving automobiles. If a situation indicate collision, the driver, who can do so by the exercise of ordinary care, should avoid doing injury, though this involve that he waive his right of way. The supreme rule of the road is the rule of mutual forbearance. *Mark* v. *Fritsch*, 195 N. Y., 282, 283, 284.

What is the purpose of the statute? Care, commensurate with the necessity for care, for the assurance of safety.

A right of way, it has been said, like a burden of proof, will establish precedence when rights might otherwise be balanced. *Ward* v. *Clark*, 232 N. Y., 195.

When a reasonably prudent man driving a vehicle on a public street, and approaching another street on which is a vehicle coming from his right, might otherwise be in doubt whether his or the other vehicle should go through the intersection first, the injunction of the statute operates that he yield to that other.

Moreover, if a driver, approaching a road on his right on which a vehicle is coming, neglect to observe that injunction, and in consequence an accident follow, an explanation of the occurrence must begin with presumption against him. *Dansky* v. *Kotimaki*, 125 Maine, 72.

In the cases at bar there was substantial conflict in the facts.

One of the witnesses for Mr. Fitts said that the Fitts motor car, on its proper side of the way, and to the extreme right of such way, had almost made the intersection when the Marquis car crossed Union street diagonally from Fourteenth, to the left, and struck the Fitts car.

Mr. Marquis told a different story. He testified that when, as his eye measured the distance, he was one hundred and fifty to two hundred feet from the intersection he looked to the right and saw Union street clear fully as far as he himself was from it; that "close to the corner" — the movements of other cars having occupied his attention meanwhile — he looked again to his right and for the first time saw the Fitts automobile, sixty or seventy-five feet away, moving straight for the intersection at the rate, which the witness estimated, of thirty to thirty-five miles an hour; that he (Marquis) immediately put on the foot brakes, turned his automobile about in the area of intersection it had but entered, and stopped the car short, leaving a ten-foot clearance to the right and like unoccupied space to the left, in the very street on which the Fitts car was coming. That car, continued the witness, took neither clearance but came on in undeviating line and with undiminished speed until it "sideswiped my automobile on its right side, about half way of the car."

There was testimony on each side by other witnesses from which the jury could have found corroboration, although corroboration was not in law necessary, for certain details testified to by the principal witnesses, but it would suffice no useful purpose to abstract that testimony.

Was Mr. Marquis negligent? Did he proceed ahead on his own street and into Union street in disregard of the intersection-way statute which he was bound to obey, and thus cause the collision? Did he take a chance which resulted in disaster? Or was Mr. Fitts' son guilty of neglect, attributable to driving at excessive speed (1921 Laws, chap. 211, sec. 62), to failure to exercise common skill and prudence to avoid collision, or otherwise? Which, if either, of the drivers, independent of any fault contributory to damage on the part of the other, was guilty of negligence? Or did both drivers fail to exercise the care that the circumstances justly demanded? All these were jury questions.

It is difficult from the printed record to say how the accident occurred. The "here" and the "there" of witnesses, in pointing to the plan of the scene of the accident, to supplement speech and to illustrate meaning, may have had significance not discernible to the seekings of the reviewing mind.

To the jury, no doubt, counsel argued appropriately to their opposite contentions. By the jury the credibility of the witnesses was tested, the accepted evidence was weighed, its effect and probative force determined. The triers of fact decided that Mr. Marquis was not liable for the injury to Mr. Fitts' automobile, and that negligence for which Mr. Fitts was responsible was solely the cause of the property damage sustained by Mr. Marquis.

Looking at the whole matter fairly the findings of the jury were reasonably warranted.

Motions overruled.

SHERMAN D. PAGE *vs.* CHARLES E. MOULTON.

Androscoggin. Opinion March 19, 1928.

EVIDENCE. NEGLIGENCE.

While the Appellate Court does not pass on the credibility of witnesses, the testimony to sustain a verdict must be credible to a reasoning mind and consistent with reasonable probabilities and with the circumstances proven by uncontradicted testimony.

The plaintiff's testimony in the case at bar is not consistent with or credible in view of the facts proven by all the disinterested witnesses in the case. It is clear from the overwhelming weight of the evidence that the plaintiff must have contributed to his injuries by his own want of due care and can not recover.

As his own negligence must have continued up to the moment of the accident, the doctrine of the last clear chance can not be invoked.

On exceptions and general motion for new trial. An action to recover damages for personal injuries alleged to have been sustained by plaintiff as a result of being struck by the automobile of defendant near the intersection of Main and Sabattus streets, Lewiston, on April 29, 1926. At the first trial of the cause the jury returned a verdict for the plaintiff in the sum of $3500. This was set aside by the Law Court as "grossly excessive," and a new trial granted. At the second trial the jury returned a verdict for the plaintiff in the sum of $3000. The defendant seasonably filed exceptions and a motion for new trial.

Motion sustained. New trial granted.

The case fully appears in the opinion.

Berman & Berman, for plaintiff.

Ralph W. Ferris, for defendant.

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

WILSON, C. J. An action to recover damages for injuries received in a collision with the defendant's automobile. The jury awarded the plaintiff damages in the sum of three thousand dollars. The case comes up on exceptions to the admission of evidence and a refusal by the presiding Justice to direct a verdict for the defendant and on motion for a new trial on the usual grounds.

At a previous trial, a jury awarded the plaintiff a verdict for thirty-five hundred dollars, and on motion this Court set it aside as "grossly excessive." It also intimated that the jury must have failed to fully appreciate the testimony as bearing on the defendant's liability.

There were no disinterested witnesses who saw the entire occurrence. The plaintiff and defendant alone were in a position to know what actually transpired. The story of either could hardly be accepted as an accurate account of what actually occurred. What took place happened within a few seconds. The plaintiff testified that he has no recollection of what occurred after he was struck. It may be only fair to the plaintiff, therefore, to infer that, in the excitement of the moment and in a position of peril, he may not have remembered after the accident what really happened.

If the jury were warranted, in view of the other evidence in the case, in accepting the plaintiff's story of the accident, he was entitled to a verdict. He was not guilty of negligence as a matter of law in attempting to cross the street at this point instead of going by way of the cross walk one hundred and forty-five feet away. His negligence under the circumstances became primarily a question of fact for the jury. *Shaw* v. *Bolton*, 122 Me., 234; *Tooker* v. *Perkins*, 86 Wash., 567; *Henessey* v. *Taylor*, 189 Mass., 583.

But if it occurred in the manner described by the defendant, while the jury could well have found the defendant guilty of negligence for not giving a warning when he saw a pedestrian walking across the street looking in the other direction, the plaintiff was also under such circumstances clearly guilty of contributory negligence and could not recover.

The plaintiff testified that, on leaving his place of employment

at the Buick Station on the corner of Sebattus and Main Streets in Lewiston, he started diagonally across the street to visit a fruit store on the other side; that he saw an electric car approaching three or four hundred feet behind him, or to his left, but kept on a diagonal course until across the car tracks in the center of the street which was forty-three feet wide at that point. Before reaching the car tracks, he saw the defendant's car coming toward him at least sixty or seventy feet away. He then, according to his testimony, crossed the car tracks to what he considered a position of safety, two feet beyond the tracks, and stopped to let the defendant's car pass, but as the defendant's car approached within twenty-five or thirty feet of his position it swerved to its left and came directly toward him, and not daring to retreat for fear of the approaching electric car from behind him, or to cross in front of the defendant's car, he adopted what he considered the safest course, of standing still, expecting the defendant would swing his car back toward the right hand curb and thus avoid him. He was struck, he said, on the right knee by the bumper at a point on the left hand side of the car near the left mud guard and after that he knew nothing more of what occurred.

The defendant's version was that he saw the plaintiff before he reached the car tracks, that he did not stop at all, but was apparently watching other cars that were ahead of the defendant; and without looking to his right continued on in front of the defendant's car; that he did not realize the plaintiff was not going to stop to let him pass until too late to avoid the accident, and although he applied his brakes, the plaintiff, just as the defendant's car was about to come to a standstill, was struck by the bumper on the right side of his car and fell over the right mud guard and landed on the pavement on the right hand side of the street near the curb and was picked up just opposite his front wheel.

It is true there are some improbabilities in both stories. It is improbable that a man would drive his automobile against another standing still in the middle of the street with abundant room to pass on the right. The distance between the rail and the curb on Sabattus Street at the point of the accident is nine-

teen feet. It is also somewhat improbable that a man in these days would deliberately walk across a much traveled street, and continue to look to his left, without once glancing to his right as he passed the center of the street.

We must, therefore, consider the other evidence in the case and determine whether it so overwhelmingly outweighs the plaintiff's testimony as to render the jury's verdict clearly wrong. A verdict based on improbable and unsupported testimony of one interested witness, if clearly outweighed by all the evidence in the case, can not stand.

The position in which the plaintiff was found after the accident, both with reference to the curb and the defendant's car, is in itself almost conclusive testimony in corroboration, in part at least, of the defendant's version. *Res ipsa loquitur.* It is almost inconceivable that the plaintiff standing still could have been struck by the bumper at a point just inside of the left mud guard of a car, just about to come to a stop, with force enough to have thrown him clear over the right mud guard to the street on the right hand side of the car.

That the car stopped almost at the moment of impact is the only conclusion that could be drawn from the uncontradicted testimony of several disinterested witnesses as to the relative position of the plaintiff and the front wheel of the defendant's car after the accident.

Not only does the undisputed testimony as to the position of the plaintiff and the car immediately after the accident alone almost conclusively outweigh the plaintiff's testimony as to how the accident occurred, but it is supported by all the witnesses who were in a position to see any part of the accident. There is no supporting evidence of the plaintiff's version. A disinterested witness walking along the sidewalk, three young ladies in the defendant's car, the motorman on the approaching electric car and a truckman who was just behind the defendant's car all corroborate in some degree the defendant's story, or at least that part of it, that the plaintiff was struck, not by the left side of the bumper, but by the right side and that he was not standing still by the railroad track but was attempting to cross the street between passing cars. Regardless of the defendant's negligence in

not sounding a warning with his horn or in not applying all means at his command to stop his car when he finally realized that the plaintiff was going to cross in front of him, the plaintiff was also clearly negligent if he attempted to cross a much traveled street without keeping watch at his right for approaching cars, and equally so, we think, if he saw the defendant's car approaching within twenty-five feet, and attempted to cross through traffic as congested as the evidence discloses it was at this point at that time of day. There is no reasonable conclusion to be drawn from the testimony other than that he took a chance of crossing between two passing automobiles that were approximately thirty feet apart and travelling at the rate of fifteen miles per hour.

If injured while attempting to cross in front of the defendant's car, there is no adequate ground, we think, upon which the rule excusing what might otherwise constitute negligence, when confronted by an impending danger, can be applied, or the doctrine of "last clear chance." There is no evidence in the case that would have warranted the jury finding that he finally attempted to cross to escape from a perilous position, and he denies it; and even if the jury was warranted in finding that when the defendant discovered that the plaintiff was going to continue across the street, he did not use such means as he had to stop his car, the negligence of the plaintiff in attempting to cross in the midst of traffic either without looking or without due consideration of the proximity and speed of defendant's car, continued up to the moment of the collision. *Ward* v. *Railroad Co.*, 96 Me., 136.

While this Court does not attempt to pass on the credibility of witnesses, the testimony to sustain a verdict must be credible, reasonable, and consistent with probabilities and with the circumstances proven by uncontradicted testimony. *Moulton* v. *S. & C. P. R. R. Co.*, 99 Me., 508, 510; *Cawley* v. *La Crosse R. R.*, 101 Wis., 150; *Hall* v. *Power Co.*, 123 Me., 202. The jury in the case at bar must have misunderstood the law or drawn inferences from the evidence that were unwarranted. The verdict is clearly wrong.

Motion sustained.
New trial granted.

THE MORTON MOTOR COMPANY *vs.* LEON W. PILLSBURY.

Franklin. Opinion March 21, 1928.

EVIDENCE. WEIGHT AND SUFFICIENCY OF TESTIMONY.

The verdict of a jury will not be set aside, when the testimony is conflicting, if it is found that the verdict is supported by evidence that is credible, reasonable, and consistent with the circumstances of the case, so as to afford a fair presumption of its truth.

In the case at bar a thorough and painstaking review of the entire record, giving full credence to all pertinent inferences that a reasonable mind might draw therefrom, determines that defendant's story is not credible. The findings of the jury were not warranted.

On plaintiff's motion. An action in replevin of a motor truck, claimed forfeited for non-payment.

Defense, payment. The case is stated fully in the opinion.

Verdict for defendant. Motion sustained.

New trial granted.

Currier C. Holman, for plaintiff.

Cyrus N. Blanchard, for defendant.

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

BARNES, J. The Plaintiff is a corporation, doing, at Farmington, the business of selling motor vehicles, and the defendant a farmer who resides at Rangeley and retails milk.

In the spring of 1927, defendant owed a final payment on a truck, bought of the plaintiff a year before, and due on May 31.

On May 28, he purchased and received from plaintiff a second truck, paying $241.00 down, and agreeing to pay the further sum of $504.00 in equal monthly installments.

Both sales were "financed by the General Motors Acceptance Corporation," of Boston, Mass., which, so far as affecting this

case, advanced to the plaintiff the unpaid balance of the purchase price of the cars, received assignments of the sales contracts, made demand for payments as they fell due, furnished a representative to confer with plaintiff regarding deferred payments, and charged back to plaintiff accounts uncollectable. The contracts, signed in triplicate by both plaintiff and defendant, were of conditional sales and were recorded in Rangeley.

Both seller and assignee had originals of the contracts, the seller retaining the notes until paid.

On June 22, defendant drew a check payable to the Acceptance Corporation for the balance due on the truck purchased in 1926 and mailed it to the Acceptance Corporation, by whom it was received on the 24th.

As was its custom, the latter, within three weeks of this date returned its copy of sale contract of 1926 to plaintiff, and, on July 16, plaintiff's bookkeeper, as she testified, intending to mail him his 1926 note, sent him, by mistake, the 1927 note, marked "paid," together with a letter of plaintiff's treasurer informing him the note was "duly paid."

In the latter part of July, the Acceptance Corporation notified plaintiff that defendant had paid nothing on his 1927 note, and plaintiff discovered in its file the 1926 note and not that of 1927. The situation was immediately discussed by the parties to the sale and it was found that defendant claimed he had paid the 1927 note.

A replevin writ was promptly made and the truck repossessed by the plaintiff. Upon trial a verdict was returned for the defendant, and the case came to this court on the general motion.

It is said that the verdict of a jury will not be set aside, when the testimony is conflicting, if it is found that the verdict is supported by evidence that is credible, reasonable, and consistent with the circumstances of the case, so as to afford a fair presumption of its truth. No questions of law are here involved. The issue is simple, and confined to the one question, was the 1927 contract performed by payment of $504.00?

This contract specified that the balance of $504.00 was "payable at the office of General Motors Acceptance Corporation, in six installments of $84.00 each," but defendant furnished testi-

mony that the balance was paid in full by him, on July 11, in bills placed in an envelope, stamped but not registered, addressed to the plaintiff and deposited in the post office at Rangeley.

Defendant must go further and present evidence that by itself, aided by inferences properly to be drawn therefrom, tends to prove that some official of plaintiff corporation or one of its servants actually received the money from the post office officials at Farmington. Of this essential step in the performance of his contract defendant furnished no direct evidence.

He testified to making up the package of money, and that he mailed it. His wife testified to aiding him in making up the package. Two young men who were employed in the delivery of milk testified to seeing in the milk room at defendant's farm, on the morning of July 11, an envelope addressed to Morton Motor Co., and that defendant then said he was going to Rangeley and would mail it.

On this presentation defendant argues that men of ordinary prudence should infer that the money was delivered to plaintiff, or to some one whose possession would be considered that of the plaintiff.

Regarding payment, the testimony is short, and as follows:—

Miss Cunningham, the bookkeeper, testified that the man in the store brought in the mail, and that Mr. Lloyd Morton, or J. C. Morton, opened the mail. Further that she kept the cash account, and that defendant was not credited with any money from the 11th to the 16th of July, 1927.

Mr. Lloyd Morton, treasurer of plaintiff corporation, testified that payment on the 1927 sale contract was never made by defendant to plaintiff; that Miss Cunningham, "immediately after this trouble came up about Mr. Pillsbury's not paying," reported that she had sent Pillsbury the 1927 note by error, and that he at once talked with Mr. Pillsbury, by telephone.

His testimony reads: "I asked Mr. Pillsbury if he had paid the note, and he said he had, and I asked him in what manner. He said by money order he thought. At first he said he paid it by money order. Then he said, "I am not sure, might have been cash or check. I am not sure about it. Those are practically the exact words."

"Q. Did you have any further talk with him?

"A. Not at that time. He said he would look it up, and let me know.

"Q. He claimed at that time it had been sent to Farmington?

"A. That was what I implied from what he said.

"Q. That it had been paid to you?

"A. Yes, but before he got done talking he wasn't sure whether he paid it at Farmington or not."

On cross-examination, this witness was very positive that defendant said at first that he had mailed to plaintiff a money order; then that he had sent by cash, or by check, and finally that he was not sure how he had sent the payment, but that he would look it up.

Mr. J. C. Morton, president of plaintiff corporation, testified that when the matter was brought to his attention he called defendant by telephone, and asked him if he claimed he had paid the 1927 note, and that defendant replied, "No, I haven't. I thought I had and told your son I had, and found I haven't. The money order lays here in the house, and hasn't been mailed."

He testified that he stated the circumstances of the error by which defendant had received the wrong note, and that defendant promised to return it; that it was not returned, and that when he again talked with defendant, the latter replied, "What are you trying to do? I have paid that in full, and I have the cancelled note, and let's see what you can do about it, if you can."

A third witness, Mr. Marshall, field representative of the Acceptance Corporation, testified to a conversation with defendant before suit was brought. Mr. Marshall testified: "He told me he had sent the bill in full to the General Motors Acceptance Corporation in Boston. I asked him how he had sent it. He said by money order, and I requested a receipt number, as is usually the case. He said he was in the field, and couldn't get it, and would go back to the house and would get it."

When the sheriff testified, he said that, at the farm, before service of the writ, defendant said: "I sent the $504.00 by mail," and when asked if he had registered the envelope, replied "No, sir, I did not."

Defendant testified that on the 11th of July he sent the $504.00, in cash, by mail, addressed to plaintiff and not registered.

He admitted having a telephone call from plaintiff the first of July, but denied any conversation about payment due on the 1927 contract. He admitted being called by the president of plaintiff corporation; claimed he then said the first truck was paid for by check, and the latter in cash, and denied any statement about a money order. In cross-examination he denied ever having any talk with Mr. Marshall, and said he did not know that plaintiff got the money, except that he had received the cancelled note.

He claimed he was producing and selling the milk of 30 cows; that he was paid by checks and by cash; that he kept a checking account with a Skowhegan bank, and had banked in Rangeley; that he paid some of his bills by check.

As to the payment of $504.00, he testified the pile of bills consisted of two or three fifties, some large and some small bills, "fifties and twenties and tens and fives and ones."

His wife testified that she placed the money in an envelope, and that she counted it twice. Under cross-examination she testified the money was made up of one fifty dollar bill, ten twenties, and the rest fives and ones. This she said she put in a large white envelope that she had bought at Oquossoc about three years before, not a government envelope, an unstamped envelope.

Here we have a defense, detailed, precise, particular, and convincing, if credible, reasonable, and consistent with the circumstances of the case.

But to believe defendant's testimony is to regard that of plaintiff's witnesses as wilfully false.

Here is not a case where the different versions of the opposing parties can be reconciled and harmonized. This is a case of the class, fortunately rare, wherein one party or the other takes refuge in perjury.

Under the circumstances which is to be accepted as true?

It seems neither credible nor reasonable that a man of even slight business experience would drop into the current of the postal department an unregistered parcel containing so large a

sum of money; that one who had for years maintained and checked against a bank account, without availing himself of the safeguards that his testimony shows this defendant was familiar with, would have mailed a package of money of the bulk that the claimed payment must have assumed, when ordinary prudence would demand payment by check.

A circumstance of appealing force, and seemingly effective in our search for the truth, is that an envelope containing money, in bills, to this amount would be so distended as to attract notice.

Defendant and his wife are the only witnesses as to the contents of the envelope. The testimony of his employees, as summarized above, has but trifling probative effect. One says he saw an envelope, the other an extra-large envelope, addressed to plaintiff.

If the wife's story be true, the envelope contained sixty-five or more bills, and since they had been taken in trade they must have bulked large.

If the jury thought of this at all, some of them surely must have known, and it would be their duty to convince any who might not know it, that a pile of used bank bills, sixty-five in number, would be a package of very considerable thickness, and would swell almost beyond the capacity of any ordinary large envelope.

But, further, if her story is true, it seems that a thinking man must conclude that either her husband, or one of the post office employees, or the man who carried the mail to the Morton office, yielded to love of money while handling the tempting envelope, and diverted the money. If any but the last carrier stole the envelope, the payment was not made. On the other hand, if the Mortons, their bookkeeper, Mr. Marshall and the Sheriff are to be believed, the nicely calculated defense falls.

After a thorough and painstaking review of the entire record, giving full credence to all pertinent inferences that it seems to us a reasonable mind might draw therefrom, we conclude that defendant's story is not credible; that the statements of plaintiff's witnesses contain the true version of the matter, more convincing because not reported in exactly similar, unvarying phrases.

The jury must have found that plaintiff mailed the money. To us it seems rather that, fortified by what he considered a receipt in full, defendant fell before temptation.

We find no payment proved.

Motion sustained.
New trial granted.

HENRY GILMAN

vs.

F. O. BAILEY CARRIAGE CO., INC.

No. 5353

No. 5354

Cumberland. Opinion March 30, 1928.

BILLS AND NOTES. CORPORATIONS. AGENCY. BANKS AND BANKING. INSTRUCTIONS TO JURY.

A promissory note executed by the treasurer of a corporation in the name of the Corporation and payable to the treasurer, as an individual, carries on its face a danger signal which a discounter or purchaser disregards at his peril.

Under the Uniform Negotiable Instruments Act, P.L. 1917, Chap. 257, such note is not "regular upon its face," a purchaser is not "a holder in due course," and "the paper is subject to the same defenses as if it were non-negotiable." The rights of the purchaser depend upon the transaction being or not being, in fact, for the corporate uses and benefit.

So long as a corporation is solvent, it may borrow money from, or otherwise contract with, an officer or director, and may pay him, just as it may pay or secure any other creditor.

A board of directors may establish a mutual understanding that the treasurer shall be the active agent of the board in the management of the financial affairs of the corporation. Such an understanding need not be created by a formal vote, it may be inferred from the situation and conduct of the parties

An officer may acquire the power to bind the corporation by the habit of acting with the assent and acquiescence of the board, and his unauthorized acts may be confirmed by the approval and acquiescence of the board. Previous authority and subsequent ratification may be shown by circumstances and conduct.

Unless the principal is legally entitled in any event to what he received, ratification may be implied from the receipt and retention, by the principal, of the benefits of an unauthorized act of an agent.

Where a contract is made by an agent in behalf of a corporation, but without authority, and the corporation, after knowledge of the facts attending the transaction receives and retains the benefit of it without objection, and without in any event being legally entitled to receive the same, it thereby ratifies the unauthorized act and estops itself from repudiating it.

A bank is not bound to pay a check on presentation unless it has on deposit sufficient funds of the drawer to cover the same. In the absence of an arrangement authorizing overdrafts the depositor has no ground to expect that this rule of banking will be violated. A withdrawal from a bank by a depositor of his funds there on deposit, after the making and delivery of a check on such bank, excuses the payee's failure, in an action against the maker, to prove presentment and notice.

The court is not required to give its instruction to the jury in words selected by excepting counsel. It is enough that they are correct as applied to the issues of the case.

In the case at bar, upon the conflicting evidence the jury was warranted in drawing the inference either (1) that W. A. Gilman, the treasurer of the defendant corporation, had acquired authority "to bind the corporation by the habit of acting with the assent and acquiescence of the board" to the extent of making the loans in question and issuing the corporate notes therefor, or (2) in the first instance having no authority to do so, subsequently his unauthorized acts were ratified by the receipt and retention of the moneys by the defendant corporation. The jury was likewise warranted in finding that the plaintiff advanced moneys to the corporation to the amount of the checks involved in this suit, and that the acts of the treasurer in these transactions were authorized, or subsequently ratified.

No loss caused by delay in presentment of the checks for payment appearing, the defendant's liability remained.

No manifest error can be found in the conclusion of the jury in each case, in the refusal of the presiding Justice to direct a verdict for the defendant, in his refusal to give instructions asked by the defendant, or in the instructions given.

On general motions and exceptions by defendant.

Two actions of assumpsit tried together and brought forward in a single record.

The jury found for the plaintiff in both suits. The defendant seasonably filed general motions in each case, and exceptions to denial of motion for directed verdict, to rulings on evidence during the trial, and to instructions given and refused in the charge to the jury. Motions overruled. Exceptions overruled.

The cases fully appear in the opinion.

Clifford E. McGlauflin, for plaintiff.

Clement F. Robinson,

Forrest E. Richardson, for defendant.

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

STURGIS, J. Two actions of assumpsit tried together in the court below and brought forward in a single record.

In No. 5353 the defendant is sued as maker of seven promissory notes, and as indorser of four customer's notes so called, all of which the plaintiff holds as indorsee. In No. 5354 the plaintiff seeks to recover upon seven checks drawn by the defendant and transferred to the plaintiff by the payee.

Verdict was for the plaintiff in both suits, and the cases come before this Court on general motions and exceptions to denial of motion for directed verdicts, rulings upon evidence during the trial, and instructions given and refused in the charge to the jury.

The F. O. Bailey Carriage Company, Inc., the defendant in this suit, was incorporated in 1913 as a reorganization of the F. O. Bailey Carriage Company. The board of directors consisted of five members, but from the date of incorporation through the period here involved Neal W. Allen, Charles W. Phinney, and William A. Gilman, were the active members of the board, other directors giving little if any attention to the management of the Corporation. Mr. Phinney had general charge of merchandise. Mr. Allen was actively interested in another business, and while he kept a general contact with this business, he was not regularly engaged in its affairs. Mr. Gilman was treasurer and financial manager.

On August 30, 1913, the board of directors voted that "the treasurer of this corporation be and hereby is empowered and authorized in the name and on behalf of this corporation to sign and indorse any and all notes, checks or drafts." That vote remained unrescinded, and the entire financial management of the corporate affairs was left to the treasurer apparently without interference on the part of the board, except as upon the treasurer's reports the board at their monthly meetings discussed and acted upon corporate matters.

Our consideration of the cases will follow their numerical order and be of necessity subdivided as varying issues require.

No. 5353

GENERAL MOTION.

EXCEPTION TO REFUSAL TO DIRECT VERDICT.

The plaintiff's claims in this action are based upon corporation notes made or transferred by the treasurer without the knowledge of the other directors. He is a brother of the treasurer and asserts that he paid value for all these notes and that the Corporation is liable to him for these moneys.

Group I.

The treasurer of the Corporation, W. A. Gilman, was a witness for the plaintiff. He testifies that on September 13, 1914, the Company was short of ready money, and to enable it "to get through the day" he drew his personal check for $145 and deposited it in the checking account of the Corporation. Again on October 2d of the same year he advanced $200 to meet the Company's note due on that day to the Excelsior Carriage Company, and on September 17, 1915, he advanced $300 to pay the corporation note payable to the Boston Harness Company. He says these advances were not repaid, and at the end of the fiscal year, January 31, 1916, there being an unpaid balance of salary amounting to $160 due him, he issued to himself a corporation note for $805, dated February 1, 1916, which is the note declared upon in the first count of the plaintiff's writ. In support of these statements extracts from the books of the Company were read into the record showing minutes upon the books evidencing the issuance and existence of this note to W. A. Gilman.

The note was signed "F. O. Bailey Carriage Company (Inc.) By W. A. Gilman Treas." It bore notation on its face that it was for cash loaned in "1914 — $345" and in "1915 — $300", and for "salary due (Bal.) 1915 — $160." It was on demand with interest, and according to the testimony of the plaintiff and W. A. Gilman, sometime in 1917 was sold to the plaintiff for full face value. Interest was paid on it up to January 31, 1921.

At the end of the next fiscal year, W. A. Gilman testifies the Corporation owed him $470. He says that he advanced to the Corporation on February 1, 1916, $70 to meet a Harness Company note; February 24th, 1916, he put his own check for $125 into the Company's cash; and later, in a settlement of his personal accounts with James Bailey Company for which he acted as part time bookkeeper, that Company's debits against the defendant were set off to the amount of $79. These sums, with unpaid salary of $160, and balance due for interest on the note which he had taken the preceding year, made up the $470 due him on February 1, 1917, and he issued the Company's note payable on demand to himself for that amount. The plaintiff and W. A. Gilman concur in the statement that this note was also sold to the plaintiff for full face value, and interest paid as per indorsements until January 31, 1921. This note bears notations on its face indicating the consideration for which it was issued, and bookkeeping entries recording its existence are in the record.

An important fact concerning these notes is in evidence. Both Mr. Allen and Mr. Phinney, who with the treasurer were the active directors of the Corporation, admit that they had knowledge of the existence of these notes, but deny knowledge of the transfer to the plaintiff. Furthermore, it is undenied that an audit made of the Company's affairs included a statement of the existence and amounts of these notes, and that a copy came into the hands of the several directors.

Both notes were executed by the treasurer in the name of the Corporation and payable to the treasurer as an individual. And while such a note is a danger signal which the discounter or purchaser disregards at his peril, and under the Uniform Negotiable Instruments Act, P.L. 1917, Chap. 257, each is not "regular upon its face" (Sec. 52), the plaintiff is not "a holder in due course"

(Sec. 52), and "the paper is subject to the same defenses as if it were non negotiable" (Sec. 58), *Gilman* v. *Carriage Company*, 125 Maine, 108, and cases cited, it is not absolutely void. In such a case it is not a question of purchase in good faith. The purchaser takes with notice given on the face of the instrument, and his rights depend upon the transaction being or not being in fact for the corporate uses and benefit.

"The officer may in good faith lend money or credit to the corporation on the same terms as a stranger, and take and enforce security for the payment of the debt." 2 Thomp. on Corp., 2d Ed., Sec. 1412.

"So long as a corporation is solvent, it may borrow money from, or otherwise contract with, an officer or director, and may pay him or mortgage or pledge property to secure him, just as it may pay or secure any other creditor . . . In other words, if there is an indebtedness owing a corporation officer from the corporation and the corporation is solvent, there is no question but that the corporation may give its officer security for the debt, such as a note, mortgage or pledge of corporate bonds, or the like . . . " Fletcher on Corp., Vol. IV, 3570.

As already noted, the directors by vote had given the treasurer a general authority "to sign and indorse any and all notes, checks or drafts." It is unquestioned that in the general trading business of the Corporation the treasurer arranged and negotiated all commercial loans and discounts. The active members of the board left this part of the corporate business to the treasurer's sole care and management, giving it only a general supervision. The treasurer's reports showing the existence of these two notes payable came before the board at repeated monthly meetings, the reports stating by abbreviation that the notes were payable to the treasurer. They were also included in "notes payable" in the auditor's report. There was no objection to the treasurer's acts in these matters and no repudiation of the notes issued.

The Court has stated and affirmed the rule that a board of directors may establish a mutual understanding that the treasurer shall be the active agent of the board in the management of the financial affairs of the corporation. Such an understanding need not be created by a formal vote, it may be inferred from the situa-

tion and conduct of the parties. An officer may acquire the power to bind the corporation by the habit of acting with the assent and acquiescence of the board, and his unauthorized acts may be confirmed by the approval and acquiescence of the board. Previous authority and subsequent ratification may be shown by circumstances and conduct. *Johnson* v. *Johnson Brothers*, 108 Maine, 272, 279; *York* v. *Mathis*, 103 Maine, 67, 79; *Pierce* v. *Morse-Oliver Co.*, 94 Maine, 406; R. S., Chap. 51, Sec. 72. See also *Murray* v. *Nelson Lumber Co.*, 143 Mass., 250; *Sherman* v. *Fitch*, 98 Mass., 64; *Blake* v. *Domestic Mfg. Co.*, 64 N. J. Eq., 480.

Ratification may also be implied from the receipt and retention of the benefits of an unauthorized act of an agent. Where a contract is made by an agent in behalf of a corporation, but without authority, and the corporation, after knowledge of the facts attending the transaction, receives and retains the benefit of it without objection, it thereby ratifies the unauthorized act and estops itself from repudiating it. "The reason is that it must exercise its option of affirming or disaffirming in whole, not in part; that it cannot disaffirm so much of the unauthorized act as is onerous while retaining so much of it as is beneficial; that it cannot keep the advantage while repudiating the burden; that it cannot disaffirm the contract while keeping the consideration." 2 Thomp. on Corp., 2d Ed., Sec. 2020.

The principle is stated in *Bryant* v. *Moore*, 26 Maine, 84, in these words: "There is no doubt that if one person knows that another has acted as his agent without authority, or has exceeded his authority as agent, and with such knowledge accepts money, property or security, or avails himself of advantages derived from the act, he will be regarded as having ratified it."

Conforming to this principle, in *Wayne Title & Trust Co.* v. *Schuykill etc. Ry. Co.*, 191 Pa. St., 90, the use by a corporation of money received on notes executed by its treasurer without authority, was held to be a ratification.

In *Ry. Co.* v. *K. & H. Bridge Co.*, 131 U. S., 371, Mr. Justice Gray, speaking for the Court, says: "When the president of a corporation executes in its behalf, and within the scope of its charter, a contract which requires the concurrence of the board of di-

rectors, and the board knowing he has done so does not dissent within a reasonable time, it will be presumed to have ratified his act. . . . And when a contract is made by any agent of a corporation in its behalf and for the purpose authorized by its charter, and the corporation receives the benefit of the contract without objection, it may be presumed to have authorized or ratified the contract of its agent."

In Re Eastman Oil Co., 238 Fed., 416, the president of the corporation, who was also its treasurer, loaned his personal moneys from time to time to the Company, taking corporate notes therefor, each payable to himself and drawn by him as president. The notes were carried in the corporate bills payable account, and were brought to the attention of the directors in the financial statements furnished by the president and by audits which were made of the Company accounts. That Court held that notes executed as the ones involved in the case were not absolutely void but only presumptively void, a presumption which may be rebutted and the notes shown to be the act and deed of the corporation by proof of express or implied authority, or of ratification or estoppel on the part of the corporation; and upon the authority of the *Ry. Co.* v. *The K. & H. Bridge Co.*, supra, concludes that although the president's acts were not authorized, the retention and use of the benefits procured from the transaction, with the knowledge possessed by the directors, amounted to a ratification of the unauthorized acts and bound the corporation.

The defendant questions the purported loans of W. A. Gilman, its treasurer, which the plaintiff sets up as a consideration of the two notes now under discussion. To the defense of lack of authority is added a claim that the money paid into the Corporation by the treasurer for which, he says, these notes were later issued, was in fact only a replacement of money which he had previously improperly withdrawn. If this fact is established no ratification could result from the retention of this money by the Corporation. Ratification cannot be predicated on the receipt and retention of the benefits of the unauthorized act of an agent when the principal is legally entitled in any event to what he received. *Goss* v. *Kilby*, 112 Maine, 323; *White* v. *Saunders*, 32 Maine, 188; *Crooker* v. *Appleton*, 25 Maine, 131.

In cross-examination of the defendant's accountant, however, and in subsequent rebuttal, the apparent discrepancies and lack of entries in the books were explained in behalf of the plaintiff by the treasurer of the corporation, and the audit of the defendant's accountant was sharply attacked, the accountant finally admitting that he had no evidence that the treasurer "received any cash that should have gone into that Company that did not go into the Company."

Upon conflicting evidence the jury found for the plaintiff. We cannot say their verdict was clearly wrong. There is sufficient evidence, we think, to sustain a finding that W. A. Gilman advanced moneys to the Corporation to the amount of these notes in Group I for which the plaintiff paid full value, and to warrant the jury in drawing the inference either (1) that W. A. Gilman had acquired authority "to bind the Corporation by the habit of acting with the assent and acquiescence of the board" to the extent of making these loans and issuing these corporation notes therefor, or (2) in the first instance having no authority to do so, subsequently his unauthorized acts were ratified by the receipt and retention of these moneys by the Corporation. Under the rules of law above stated, the verdict must stand.

Group II.

In addition to the notes already passed upon the treasurer made four other corporate notes payable to himself, all of which he indorsed and turned over to the plaintiff. The notes are as follows:

(1) March 11, 1922, on demand with interest — $700
(2) March 11, 1922, on demand with interest — $800
(3) July 27, 1922, on demand with interest — $950
(4) Sept. 17, 1923, on demand with interest — $301.50

These notes, the plaintiff says, were drawn to repay loans which the plaintiff himself had made from time to time to the Corporation. The treasurer confirms this claim. His statement is that acting for the Corporation he had borrowed from his brother, the plaintiff, various sums of money, each time stating that the loan was to the Corporation and not to himself personally. He says he made the notes to himself and indorsed them over to his brother. He carried a record of the notes in the cash book and ledger account of notes payable and reported them in his monthly reports

to the directors. He did not inform the other corporate officers of the fact that the loans came from the plaintiff, but permitted the records to indicate that the notes were payable to himself.

A substantially similar situation obtains as to the fifth note. The treasurer testifies that he had borrowed moneys for the Corporation from time to time from the W. A. Gilman Company, Inc., a corporation of which his wife was the active head and he the treasurer and custodian of its funds. He had also borrowed, he says, further sums of the plaintiff and had himself made small advances, and to evidence or repay these corporate debts he made a corporation note for $970 on August 7, 1924, to the W. A. Gilman Company, Inc., which, upon payment of the amounts of the Gilman Company and W. A. Gilman interests in the note, was immediately transferred to the plaintiff. This note was on demand with interest.

Within the proper limits of this opinion it is not possible to detail the evidence offered to show the consideration of these notes. W. A. Gilman gives dates and amounts of the loans alleged to have been made by the plaintiff and by W. A. Gilman Company, Inc., and in many instances states the specific corporate uses to which these moneys were applied. The plaintiff's evidence is that he made his advances in cash, and the treasurer testifies that in order to preserve a record of the transaction he deposited such moneys in his personal account and drew his own check in favor of the Corporation. He supports his statements by the introduction of such checks.

The defendant claims that these notes were also made without authority and were without consideration. It says the claim of the plaintiff is unfounded, and that the checks paid into the corporate treasury by W. A. Gilman were, as in the case of the first two notes, only refunds of his previous misappropriations. It points out that its cash book and ledger kept by the treasurer disclose only the notes with no record of the advances, and that W. A. Gilman's personal bank account fails to show deposits in amounts corresponding to alleged advances by the plaintiff.

The treasurer explains the lack of record of the plaintiff's advances by saying that these loans were carried on memorandum or petty cash books, now lost, and are in fact represented in the

books by disbursements entered under their specific heads. He charges the apparent shortage to losses on return of goods, or failure of the auditor to check original slips and a misinterpretation of records. The inconsistencies between his statements and personal bank account records are attributed to his errors of memory.

The plaintiff relies on his special counts on these notes, and the case was evidently submitted to the jury upon these pleadings. The issues of irregularity of the paper and of the treasurer's authority, originally conferred or acquired through acquiescence or ratification, are in all material respects the same as upon the notes sued upon in the first two counts and are governed by the rules of law already fully discussed. Except for the fact that here the plaintiff claims that he advanced the consideration for these notes *directly* to the Corporation, these notes could have properly been included in Group I.

Upon conflicting evidence in which the credibility of witnesses was an important factor the jury found for the plaintiff on these notes. The credibility of witnesses and the weight to be given testimony is peculiarly within the province of the jury, and their finding cannot be set aside unless manifest error is shown or the verdict appears to result from bias or prejudice. None of these grounds of reversal are found.

Group III.

The remaining notes involved in No. 5353 were received by the Corporation from customers in course of trade and discounted with the plaintiff. The evidence is plenary that the treasurer was fully authorized to discount customer's notes. Mr. Phinney of the board of directors testifies that the discount of trade paper was left entirely with Mr. Gilman with no restrictions upon his discretion. W. A. Gilman testifies that his discount of customer's notes was a frequent and regular occurrence, and says that these notes were discounted with the plaintiff as a result of notice from the bank that the Corporation's credit on discounts of customer's paper had reached its limit. We are convinced that the indorsement of these notes to the plaintiff was for the corporate benefit and fully authorized, as was the waiver of presentment, demand and notice which the treasurer executed.

For the reasons stated, the defendant's motion for a new trial and exceptions to the refusal of the presiding Justice to direct a verdict in its favor must be overruled.

No. 5354

The plaintiff is also the holder of seven checks drawn in behalf of the defendant Corporation by W. A. Gilman, its treasurer, and all payable to "W. A. Gilman." Four checks were admittedly issued in payments of dividends duly declared and owing to W. A. Gilman and were transferred to the plaintiff for value. The apparent irregularity on the face of the paper arising out of the identity of the payee is thus fully met.

Three checks are claimed to have been issued as payment for loans and other advances made to the Corporation by the plaintiff under circumstances sufficiently similar to those incident to the advances for which the notes in Group II, Case 5353, were given to make a review of the evidence unnecessary. The jury by their verdict found that the plaintiff advanced moneys to the Corporation to the amount of the checks, and that the acts of the treasurer in these matters were authorized in the first instance or subsequently ratified. The evidence, we think, warrants this finding.

Presentment and notice of dishonor of the checks, however, was not made, and the defendant seeks to escape liability on this ground. This defense cannot prevail. The record of the Corporation's bank deposit shows that subsequent to the making of these checks (the smallest of which amounted to $103.50), the defendant withdrew substantially all its funds from the bank, reducing its balance on December 31, 1924, to $25.73, at which figure it remained until after this suit was begun. A bank is not bound to pay a check on presentation unless it is in full funds. It is not obliged to pay or accept to pay if it has partial funds only. In Re Brown, 2 Story, 502, 4 Federal Cases, No. 1985. In the absence of an arrangement authorizing overdrafts the depositor has no ground to expect that this rule of banking will be violated. No "reasonable expectation" on the part of the defendant that any of these checks would be honored appears. Its withdrawal of its funds, therefore, excuses the plaintiff's failure to prove presentment and notice. Sec. 79, Uniform Negotiable Instruments

Act; *Emery* v. *Hobson*, 63 Maine, 33; *Beauregard* v. *Knowlton*, 156 Mass., 396; *Usher* v. *Tucker Co.*, 217 Mass., 441; *Savings Co.* v. *Weakley*, 103 Ala., 458; *Culver, Admr.*, v. *Marks*, 122 Ind., 554; 2 Daniels Negotiable Instrument, Secs. 1596, 1597.

No loss to the defendant caused by the delay in presentment appearing, the defendant is not discharged thereby from its liability on the checks (Sec. 186, Uniform Negotiable Instruments Act, P.L. 1917). The verdict and the refusal of the presiding Justice to direct a verdict for the defendant must be sustained.

EXCEPTIONS.

Exceptions to the charge of the presiding Justice remain to be considered, objections to the admission of evidence being withdrawn. Forty-eight requested instructions were presented by defendant's counsel and all refused except so far as covered in the charge as given. Counsel admit on the brief, however, that the refusal to give many of these instructions "may well have been harmless."

The instructions given by the Court present a clear, concise and correct statement of the law material to the many issues involved in these two cases. Some of the instructions requested are but repetition and elaboration of principles already stated by the Court but couched in the language of counsel or quoted from decided cases. The Court is not required to give its instructions in words selected by excepting counsel. It is enough that they are correct as applied to the issues of the case. *Godfrey* v. *Haynes*, 74 Maine, 96; *Young* v. *Insurance Co.*, 80 Maine, 244, 250. Several instructions refused are in effect requests for nonsuits on certain counts in the plaintiff's writs. It is settled that exceptions do not lie to the refusal to give an instruction which amounts to a nonsuit. *Morneau Lt.* v. *Cohen*, 122 Maine, 543; *Hoyt etc. Co.* v. *Atlantic Ry.*, 111 Maine, 108. Others calling for a directed verdict for the defendant on certain counts, are based upon a part only of the issues involved and for that reason were properly refused. *Caven* v. *Granite Co.*, 99 Maine, 278.

A further discussion of the exceptions is unnecessary. In view of the conclusions of the Court upon the general motions it is immaterial, we think, whether the rulings of the court below as

abstract principles of law might on closest scrutiny disclose some technical error. If there be any erroneous ruling it did not, we think, affect the truth of the result, and should not be regarded as a sufficient reason for overturning a fair and honest judgment. *Mencher* v. *Waterman*, 125 Maine, 178; *Gordon* v. *Conley*, 107 Maine, 291.

The mandate in both cases is,

Motion overruled.
Exceptions overruled.

HAROLD O. CADY ET ALS TRUSTEES

vs.

LIZZIE M. TUTTLE ET ALS.

Cumberland. Opinion April 4, 1928.

WILLS. TRUSTS.

The plaintiffs as trustees under a will seek to obtain the approval of the Court sitting in equity under sections 10 *and* 11 *of chap.* 73 *R. S. of a disposition of the trust funds to which all the trustees and the* cestui que trustent *assent, the* cestui *having entered into an agreement in the alternative by which one of the* cestui *will receive a portion of the trust fund upon a release of her interest therein before the expiration of the trust. By the first proposal the will of the testator is clearly thwarted in that it is proposed that the trustees shall refuse to receive a portion of the trust estate which will then be distributed to the* cestui *in question as intestate property.*
Held:

That the Court will not approve of action by testamentary trustees that will obviously change the provisions of the will, especially a course of action that would result in a portion of the testator's estate becoming intestate property.

That a Court of Equity will only give its sanction to such procedure as the trustees and the cestui *may take under the terms of a will as drawn.*

That when, however, a testator has placed no restrictions upon the right of alienation by the cestui que trust, *a* cestui *may alienate his interest to any person legally qualified to purchase, even though it may change the disposition*

or course of the trust estate from that contemplated by the testator. Having placed no restrictions upon the alienation of the interests of a cestui, *the testator must be held to have contemplated that such alienation might take place, or if he did not, it can not be prevented.*

That having placed no restrictions upon a trustee as to the nature of the investment of the trust fund, a trustee is left free to invest the trust fund in any form that will receive the approval of a Court of Equity.

That a trustee may when the interests of all the remaining cestui *are promoted thereby, and especially with their consent, invest a portion of the trust fund in purchasing the interest of one of the* cestui *and holding it as a part of the trust estate, provided the purpose and result is not to terminate the trust before the time fixed by the testator, and the action of the trustee is such as will receive the approval of the Court and no advantage is taken of the* cestui *whose interest is purchased.*

That a contingent lapse of the interest of all the cestui *may be so remote as to render a possible reverter of the trust fund to the estate of the testator so improbable as to require no consideration by the Court in approving the action of the trustees, especially when, in case of a reverter, one of the* cestui *assenting to the proposed action of the trustees is the next of kin of the testator.*

On report. A bill in equity by the executors and trustees of the will of Henry B. Cotton deceased, seeking instructions as to the construction of the will and in relation to the administration of a trust created thereunder. By agreement of the parties the cause was reported to the Law Court, the report consisting of copy of the will and the testimony of certain witnesses.

Bill sustained. Decree to be entered below in accordance with opinion.

The case fully appears in the opinion.

Clarence W. Peabody, for complainants.

Benjamin G. Ward, for respondents.

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

PHILBROOK, DEASY, STURGIS, JJ., non-concurring.

WILSON, C. J. A bill in equity seeking instructions as to the construction of a will and in relation to the administration of a trust created thereunder. The case is here on report, which consists of a copy of the will and the testimony of certain witnesses as

to relationship, age, and circumstances of one of the *cestui que trustent.*

The testator, Henry B. Cotton, residing at the time of his death in Cape Elizabeth in Cumberland County, died July 19, 1924, possessed of property amounting to approximately one hundred and twenty-five thousand dollars. His nearest relative was a niece, Lizzie M. Tuttle, one of the defendants and beneficiaries under the trust, who at the time of the making of his will in 1921 was nearly sixty years of age, and at the time of his death was sixty-two.

By his will, the testator, after a small bequest for the maintenance of a cemetery at North Conway in the State of New Hampshire where he formerly resided, gave all the rest and remainder of his property to the North Conway Loan & Banking Co., to be held in trust, the trustee to pay annually to the beneficiaries named the income on certain stipulated sums for a period of twenty years, the remainder of the income to accumulate and at the end of the twenty year period, the trust fund and its accumulation to be distributed, in the same proportion as the sums named on which each was to receive the annual income, among such of the individual beneficiaries as were then living, and to such of the charitable institutions named as beneficiaries as were then in existence, the will providing that should any of the persons named as beneficiaries of the trust die before the end of the twenty year period, which now has nearly seventeen years to run, or any of the institutions or corporations named as beneficiaries cease to exist within the trust period, the income formerly paid to them should thereafter revert to and become a part of the trust fund, to be divided among those living or in existence at the end of the trust period.

The principal sum named on which his niece Mrs. Tuttle was to receive the income was ten thousand dollars, which was double the amount on which any other beneficiary was to receive income. The will further provided that in case her proportionate share of the income on the entire trust estate thus determined should in any year fall below four per cent of the amount stipulated, or four hundred dollars, a sum sufficient to make up the deficiency should be taken from the principal. Mrs. Tuttle was the only beneficiary whose minimum annual income was fixed at four per cent.

It is estimated that in excess of the sums named on which income is to be paid annually to the beneficiaries named, there will be nearly one hundred thousand dollars in the trust fund at its inception, the income on which will accumulate during the entire trust period.

It is also estimated that Mrs. Tuttle's shares of the accumulations of the trust estate at the end of the twenty year period will, if she survives, exceed the sum of seventy thousand dollars.

All the beneficiaries of the trust named in the will have entered into an agreement, with alternative proposals, the purpose of which is to enable Mrs. Tuttle to receive at once a certain portion of the trust fund, namely twenty thousand dollars, by releasing her interest in the balance, and to one of which alternative proposals the trustee seeks the approval of the Court sitting in equity. We think this Court has jurisdiction under secs. 10, 11, Chap. 73 R. S., and the trustees are entitled to instructions as to the administration of the trust under the circumstances presented. *Elder* v. *Elder*, 50 Me., 535, 541. *Mann* v. *Mann*, 122 Me., 468.

The alternative proposals contained in the agreement entered into are: first, that the trustee with the consent of all the beneficiaries shall refuse to accept the entire trust fund leaving twenty thousand dollars in the hands of the executors, which under the will of Mr. Cotton would become intestate property and descend to Mrs. Tuttle as his next kin; or, second, that Mrs. Tuttle release to the trustee all her interest in the trust fund upon the payment to her of the sum of twenty thousand dollars.

The purpose of the parties is entirely commendable, and from the testimony in the case under the present circumstances very likely the result would not be displeasing to the testator, though not in accordance with his expressed intention in his will. This Court, however, can not make a new will for the testator. From the record, it is clear that he must have been aware of Mrs. Tuttle's age, her conditions in life, and for some reason best known to himself desired to have his property disposed of in the manner provided. A Court of equity, therefore, can give its sanction only to such procedure as the trustee and the parties interested may legally take under the will as drawn.

In case of passive trusts, courts may at any time decree their

termination, *Kimball* v. *Blanchard*, 101 Me., 383, 390; *Sears* v. *Choate*, 146 Mass., 395, or in case of active trusts when their purpose has been accomplished *Kimball* v. *Blanchard*, supra; *Dodge* v. *Dodge*, 112 Me., 291; or when all the beneficiaries shall release their rights thereunder and there is no good reason for its further continuance, *Dodge* v. *Dodge*, supra; *Paine* v. *Forsaith*, 86 Me., 357; *Smith* v. *Harrington*, 4 Allen, 566; Perry on Trusts, Sec. 920; *Angell* v. *Angell*, 28 R. I., 592; *Tilton* v. *Davidson*, 98 Me., 55, 59; *Inches* v. *Hill*, 106 Mass., 575.

We find no authority, however, for the rejection by a trustee under the circumstances existing here of a portion of a trust fund. The testator has provided that the entire remainder of his estate shall be disposed of in trust. This Court can not sanction a course of action by the trustee, even with the consent of all the beneficiaries, that will result in a portion of his estate becoming intestate property and thus circumvent his clear intentions.

The disposition of his property must stand as provided in the will. The testator, however, placed no restrictions upon the trustee in the investment of the funds or upon the beneficiaries' right of alienation. Either of the beneficiaries may, therefore, assign his interest in the trust fund without thwarting the will of the testator. Having laid no restriction upon them, they may alienate their interest at will, Pomeroy Eq. Juris. 1st Ed., Vol. II, Sec. 989; *Haley* v. *Palmer*, 107 Me., 314; *Buck* v. *Swasey*, 35 Me., 50; *Lawry* v. *Spaulding*, 73 Me., 33; *Young* v. *Snow*, 167 Mass., 287, 288, 23 R. C. L., 573, 575; *Ricker* v. *Moore*, 77 Me., 294; and the trustee may invest the trust funds in such form as the Court will approve.

Mrs. Tuttle, therefore, may alienate her interest as *cestui que trust* by assignment or release. She may release it to the other beneficiaries or to the trustee so long as no advantage is taken of her, and the transaction is in good faith. *Coates* v. *Lunt*, 210 Mass., 314, 318; *Brown* v. *Cowell*, 116 Mass., 461; Perry on Trusts, 5th Ed., Vol. I, Sec. 195; *Farnam* v. *Brooks*, 9 Pick., 212.

From the record in this case, an assignment or release by Mrs. Tuttle to the trustee of her interest in this trust fund for the sum of twenty thousand dollars would probably be for her interest. No advantage would be taken of her, it appearing from her

testimony that she fully understands her rights in the premises, and the sum she will finally receive if she survives the trust period. On the other hand, it can not be said that it may not also inure and perhaps greatly to the benefit of the other beneficiaries. We think the trustee has the power to, and is warranted under the circumstances in acquiring Mrs. Tuttle's interest in the trust fund on these terms, but for the benefit of the remaining beneficiaries. *A fortiori*, if all the other beneficiaries named assent. In effect it is an investment of a portion of the trust fund in the rights of Mrs. Tuttle in the fund under the will.

To what extent a trustee may invest the trust funds in acquiring the interest of one of the *cestui que trustent* must always be subject to the approval of the Court. Any agreement by all the *cestui* that would in effect result in a termination of the trust before the time fixed by the testator or that was contrary to the intent of the testator as expressed in his will, would, of course, not receive the approval of the Court. Each case must rest on its own facts. Cases may well arise in which it would be for the interest of the remaining *cestui* that the interest of one should not be disposed of to a stranger or when for some other sufficient reason it would be for the interest of all for the trustee to acquire it with the trust funds and hold it for the benefit of the other *cestui*. Such we conceive to be this case. Beyond that the approval of the Court should be withheld.

While the will contemplates a possible lapse of some of the bequests of the trust fund and provides that it shall be divided among those surviving, it makes no provision for its disposition in case of failure of all the *cestui* to survive the trust period. However, the possibility of a reverter to the estate of the testator by reason of the death of Mrs. Tuttle and the other individual beneficiaries before the end of the trust period, and the failure of all the charitable institutions, six in number, all being old and well established, to continue in existence until the end of the trust period, and such contingency not being expressly provided for in the will, is so remote as to require no consideration in the administering of the trust estate, Welch et al Trustees v. Trustees et als., 189 Mass., 108, if indeed, in the event of such a failure of all the *cestui que trustent* the trust fund under the will on becoming

intestate property would not descend to the next of kin of the testator at the date of his death, *Miller* v. *Miller*, 10 Met., 393, 400; *Roberts* v. *Wright* (R. I. 1927), 136 Atl., 486, 488, who was Mrs. Tuttle.

In such a case, no one of the beneficiaries named is injured, as their interest is contingent upon their surviving and continued existence. Whether the release by Mrs. Tuttle of all her interest in the trust estate would in any way affect the rights of her heirs, in the event of its becoming intestate property, it is not necessary to consider.

Bill sustained. The Court below may enter a decree authorizing the trustee to acquire by assignment or release the interest of Mrs. Tuttle in the trust fund for the sum of twenty thousand dollars, said interest to be held by the trustee as a part of the trust fund for the benefit of the other beneficiaries, named in the will in accordance with their agreement already entered into, and to be divided among those surviving the trust period, if any, and the charitable institutions in existence at the end of the trust period, if any, in accordance with the provisions of the will.

Reasonable counsel fees and disbursements of plaintiffs may be allowed by the Court below.

So ordered.

HECTOR MCINNES, ET AL *vs.* JAMES A. MCKAY.

Cumberland. Opinion April 11, 1928.

CONSTITUTIONAL LAW. ATTACHMENT.

The right to attach and hold property of a defendant to satisfy a judgment which a plaintiff may recover rests solely on statute, explained by a usage founded on the Colonial Ordinance.

The presumption that all acts of the Legislature are constitutional is one of great strength. Unquestioned usage and custom over a long period of time afford added ground for determining the constitutionality of a method of procedure.

An attachment is a part of the remedy provided for the collection of a debt. To what actions the remedy of attachment may be given is for the Legislature to determine.

An attachment is not an absolute right, but creates a lien upon the estate which may be made available to the creditor after judgment. It does not destroy title or right to sell subject to that lien.

Property in legal conception is the total of the rights and powers incident to a thing, rather than the thing itself. Deprivation does not require actual physical taking of the thing itself but may take place when the free use and enjoyment of the thing or the power to dispose of it at will are affected.

While an attachment may within the broad meaning of the preceding definition, deprive one of property, yet conditional and temporary as it is and part of the legal remedy and procedure by which property of a debtor may be taken in satisfaction of the debt, if judgment is recovered, it is not the deprivation of property contemplated by the constitution.

It is not deprivation without "due process of law" for it is a part of a process which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal.

In the case at bar the procedure of the plaintiff was in strict accordance with the provisions of the Statutes of this State. Such procedure did not deprive the defendant of property without due process of law. The Statute does not contravene the provisions of the Fourteenth Amendment to the Constitution of the United States.

On exceptions. An action on the case brought in the Superior Court for the County of Cumberland, to recover for services and disbursements. The real estate and shares of stock of the defendant were attached in the manner prescribed by the Statutes of Maine. Defendant pleaded unconstitutionality and illegality of plaintiffs' process as being in contravention of the Fourteenth Amendment to the Constitution of the United States.

The evidence consisted of an agreed statement of facts. The presiding Judge overruled defendant's plea, to which the defendant seasonably excepted.

Exceptions overruled. The case appears fully in the opinion.

Sidney St. F. Thaxter,

Carl W. Smith, for plaintiffs.

Bradley, Linnell & Jones,

Locke, Perkins & Williamson, for defendant.

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

BASSETT, J. Action on the case to recover $969.50 for alleged services and disbursements and interest from agreed date of demand. The defendant appeared specially to object to the jurisdiction of the court and filed a plea and motion that the writ and summons be declared null and void. The evidence, presented in support of the plea and motion, was an agreed statement of facts. The presiding justice overruled the plea and motion and the defendant seasonably excepted. The case comes up on the exceptions and agreed statement.

The plea and motion raised this single issue of law that the statutes of this state providing for attachment are unconstitutional and void because they deprive the defendant of property without due process of law as guaranteed by the Fourteenth Amendment of the Federal Constitution.

The procedure in this case in all its details from the purchase of the blank writ in the office of the Clerk of Cumberland County Superior Court to the entry of the writ in court on the return day is set out in the agreed statement. The attorneys of the plaintiff filled out the writ in the usual way, attached by a duly authorized officer all the defendant's real estate in Washington County, a few days later attached all the defendant's share interest in a corporation, served the defendant with summons in usual form and within the required time and entered the writ in court on the return day.

The value of the real estate and stock attached was admittedly many times in excess of the amount of the ad damnum of the writ, but no question is raised that the attachment was excessive and illegal.

The one issue is the unconstitutionality of the attachment statute, the defendant contending that an attachment deprives an owner of many rights comprised in the term "property" and that the statutes of Maine authorize general attachment without first filing an affidavit of the cause of the attachment or setting out prima facie proof of good faith and giving bond or security, which are necessarily reasonable requirements to protect the defendant;

that the statues of practically all the states excepting Massachusetts, New Hampshire, Connecticut and Maine require both affidavit and bond, a very few one or the other; that the statutes of the four named states, which are the same as Maine, permit attachment without affidavit or security and thereby go to an extreme never contemplated by the framers of the Constitution; that such general attachment, in advance of judgment, it being in essence a judgment in advance, is depriving the defendant of property without due process of law.

To determine the answer to these contentions, we will first examine what is the foundation of the practice and procedure of attaching the property of a defendant and holding it to satisfy a judgment which the plaintiff may recover, when, perhaps, judgment may be for the defendant.

It rests solely on statute, *Bradford* v. *McLellan*, 23 Me., 302. It is given expressly by our statutes. Rev. Statutes, Chap. 86, Sec. 2 provides "All civil actions, except scire facias and other special writs shall be commenced by original writs; which, in the Supreme Judicial Court, may be issued by the clerk in term time or vacation, and framed to attach the goods and estate of the defendant, and for want thereof to take the body, or as an original summons, without an order to attach goods and estate." Other sections follow providing for attaching personal property or real estate and Section 69 provides that such attachment shall continue for thirty days and no longer after final judgment in the original suit with certain exceptions.

The statutes since the first revision in 1840 have expressly provided for the commencement of civil actions by original writs thus framed and for the continuation of attachment for thirty days after judgment.

Between 1820, when Maine separated from Massachusetts and became a sovereign state, and 1840, our statutes were "but reenactments of those contained in the Statute (Massachusetts) of 1784 and their construction should be received," *Maine Charity School* v. *Dinsmore*, 20 Me., 278, reënacted by our first Legislature in 1821, Laws of Maine 1821-1834, Chapters 59 and 60, pages 328, 383.

The Massachusetts Statutes of 1784 with intervening acts were

published in 1801 and 1807 and were "the statutes now in force" when in *Bond* v. *Ward*, 7 Mass., 128 (1810), Chief Justice Parsons said "The practice of attaching the effects of a defendant and holding them to satisfy a judgment which the plaintiff may recover when perhaps judgment may be for the defendant is unknown at the common law and is founded on our statute law explained by a usage founded on the ordinances in force under the colonial charter." For some time under that charter attachment was, as it was at common law, merely a distress, a seizing of his chattels, to compel the defendant to appear when he did not appear on summons and answer, his chattels being restored to him when he appeared and forfeited when he did not. But Colonial Ordinances (Colonial Laws of Mass. Reprinted from Edition of 1660, page 124) provided that a plaintiff could take out either a summons or attachment against the defendant and, (page 144) since, if the goods were released on appearance, the plaintiff, recovering judgment, might not find them to seize on execution, that the attachment should remain until judgment was satisfied, provided the execution was sued out and satisfied in thirty days after judgment. This practice was sanctioned by the provincial Act of 13 Will. 3 C. 11 (1701). Although there was no express provision that an attachment could go before summons, it became under the ordinances and the statute established usage and procedure and was, as the Chief Justice said, "now law by the statutes in force."

The usage and practice therefore of instituting suit by either attachment without affidavit or bond or by summons and, if by attachment, one that remained until satisfaction of judgment if execution were taken out within thirty days of judgment, had become fully established in Massachusetts, part of which Maine was at the time of the adoption of the Federal Constitution.

All acts of the Legislature are presumed to be constitutional and it is a presumption of great strength. "That a statute, or rule of law, or custom, has so long existed unquestioned, and has been so often invoked and universally approved, and has become ingrained like this in the jurisprudence of a state, is a strong, if not conclusive reason, for pronouncing it constitutional and a

part of the 'law of the land.'" *Eames* v. *Savage*, 77 Me., 212, 216, 218.

We do not find that the constitutionality of these statutes of Massachusetts and Maine have been once questioned during all these years in the courts of either state. This case is the first to suggest their unconstitutionality. If there had been doubt it would certainly have been raised before this. All doubt ought now to be considered at rest. *State* v. *Simpson*, 78 Vt., 124; 62 Atl., 14.

But we think it is clear that the attachment statute does not deprive the defendant of property without due process of law.

An attachment creates a lien upon the estate which may be made available to the creditor after judgment by a levy of the execution thereon. *Bachelder* v. *Perley*, 53 Me., 415. Its purpose is simply to secure to the creditor the property which the debtor has at the time it is made so that it may be seized and levied upon in satisfaction of the debt after judgment and execution may be obtained. *Crocker* v. *Pierce*, 31 Me., 183. It is not an absolute right. *Bowley* v. *Bowley*, 41 Me., 545. It does not destroy title or the right to sell. Until a sale on execution, the debtor has full power to sell or dispose of the property attached without disturbing the possession (in case of personalty) or rights acquired by the attachment. *Richardson* v. *Kimball*, 28 Me., 474.

An attachment is a part of the remedy provided for the collection of the debt. *Bangor* v. *Goding*, 35 Me., 73. And it is so held in Oregon, where a summons must issue before or at the time of the issuance of the writ of attachment, which is issued, when plaintiff has no security, upon affidavit and bond. "An attachment in this state as elsewhere is regarded as a quasi proceeding in rem and is known under the statute as a 'provisional remedy' the purpose of which is to acquire a lien upon the property of the debtor, temporary in its nature, to await the final judgment of the court touching the action, in connection with which the proceeding is brought into requisition. The court is empowered through the allowance of a provisional remedy thereafter to take whatever action may seem necessary to the acquirement, preservation and perfection of the lien. The proceeding is simply auxiliary to the main case." *White* v. *Johnson*, 40 Pac., 514 (Ore.).

So too in Indiana, where affidavit and bond is required. In

Flourney v. *Jeffersonville*, 79 Am. Dec., 472, the court held that the taking possession of property before the right to it has been judicially determined in cases of attachment and replevin is a "ministerial act" and is a matter in the discretion of the legislative power in creating remedies.

To what actions the remedy of attachment may be given is for the legislature of a state to determine and its courts to decide. *Rothschild* v. *Knight*, 184 U. S., 334, 341; 46 Law. Ed., 573. "Until the lien is perfected by levying execution, until that is done the remedy by attachment is in the control of the legislature which created and might lawfully modify or abrogate it according to their discretion." *Poor* v. *Larrabee*, 58 Me., 555.

The defendant contends that the attachment deprived him of his property. Property in legal conception is the total of the rights and powers incident to a thing rather than the thing itself. The legal right to use and derive a profit from land or other things is property. *Inhabitants of York Village Corp.* v. *Libby*, 140 Atl., 382, 385 (Me.). And the power of disposition at the will of the owner is property. Deprivation does not require actual physical taking of the property or the thing itself. It takes place when the free use and enjoyment of the thing or the power to dispose of it at will are affected.

But, although an attachment may, within the broad meaning of the preceding definition, deprive one of property, yet conditional and temporary as it is, and part of the legal remedy and procedure by which the property of a debtor may be taken in satisfaction of the debt, if judgment be recovered, we do not think it is the deprivation of property contemplated by the Constitution. And if it be, it is not a deprivation without "due process of law" for it is a part of a process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal. The requirements of "due process of law" and "law of the land" are satisfied. *Bennett* v. *Davis*, 90 Me., 105; *Randall* v. *Patch*, 118 Me., 303; *Inhabitants of York Village Corporation* v. *Libby*, supra; 6 R. C. L., Sec. 447, page 451.

In *Rothschild* v. *Knight*, supra, it was held that, the situs of a debt being the residence of a debtor, attachment of a debt due to a non-resident creditor at the place where the debtor resides

in accordance with the law of that state did not deprive the debtor of property without due process of law.

The ruling of the presiding justice was correct. The mandate must therefore be

Exceptions overruled.

DOROTHY V. BOND *vs.* CHARLES W. BOND.

Kennebec. Opinion April 12, 1928.

DISQUALIFICATION OF JUDGE. DIVORCE. EVIDENCE. PRIVILEGED COMMUNICATIONS.

On exceptions to the denial of a motion to transfer a case from the Superior Court for the county of Kennebec to the Supreme Court in that county under sec. 98 of chap. 82 R. S. on the ground that the judge of the Superior Court was disqualified by reason of "interest, relationship and other lawful causes," and on exceptions to the exclusion and admission of testimony and to a decree granting the libellant a divorce, it is held:

That "interest" within the meaning of the statute is pecuniary interest; and neither such interest or a disqualifying relationship exist in this case;

That while it does not appear whether the rules of the Superior Court for the county of Kennebec require such a motion to be supported by an affidavit, under the general practice in the courts of this state it is a proper course of procedure;

That a supporting affidavit is not required in the interest of the moving party. The libellant in this case was not aggrieved by the detaching of it from the motion by the presiding justice in the court below or by his refusing to receive it as evidence of the facts alleged in the motion, since the libellee was permitted to offer such oral evidence as he saw fit in support of the motion;

That the ruling of the court below that the libellant was interested in and had a right to be heard on the motion was not error;

That the words in the statute "or other lawful cause" as a ground of transfer of a case are construed to include such prejudice or bias as would prevent a judge from impartially presiding in the case;

That interest or relationship are the only grounds on which disqualification of a judge is conclusively presumed. In all other cases it must be shown.

That intimate social relations with the family of one of the litigants is not alone sufficient as a matter of law to disqualify a judge from sitting. There must be such deep seated bias or prejudice in favor or against one of the litigants that the judge is unable to lay it aside and decide impartially between the parties;

That the justice presiding must himself in the first instance determine whether such disqualifying bias or prejudice exists; and unless it clearly appears or its presence is the only inference which can be drawn from the testimony in support of a motion to transfer, it can not be said on exceptions that there is error in law in a denial of the motion;

That to sustain exceptions to the exclusion or admission of testimony it must appear that the excepting party was aggrieved;

That while parties to a libel for divorce are by statute now permitted to testify, it does not render admissable strictly privileged communications between husband and wife, but to be privileged the communication must have been of a confidential nature and induced by the marital relations;

That the findings of fact by a justice below sitting without a jury are not reviewable by the Appellate Court. A judge sitting without a jury is the exclusive judge of the credibility of witnesses and the weight of the evidence. Only when he finds facts without evidence, or contrary to the only conclusion which may be drawn from the evidence, is there any error of law in his findings;

That, unless inherently improbable, the Appellate Court must assume that the judge below accepted as the more credible the testimony in behalf of the party in whose favor the decision is made;

That the rule that conscious motive to cause a libellant mental suffering is essential to establish cruel and abusive treatment is not adopted. It is sufficient if a libellee knew the effect of his acts upon the libellant or should have known it;

That the legislature of this state has directed the courts to grant an absolute divorce whenever it is shown that the acts of one spouse have so affected the other that his or her health is seriously jeopardized;

That there being evidence, if believed, from which the court below might have found that the health of the libellant was seriously affected and a continuance of the marital relations might result in more serious consequences; and that it was due to treatment which the court might also have found the libellee knew, or should have known, was affecting the health of the libellant, especially in the delicate condition in which she then believed herself to be, and of which he was cognizant, it is sufficient to satisfy the statute.

On exceptions by the libellee. A libel for divorce on which hearing was had before the Judge of the Superior Court for the county of Kennebec, and a decree made by him granting a divorce

to the libellant. The case came to the Law Court on exceptions by the libellee raising issues as to the sufficiency of the evidence to warrant a divorce; to the admissibility of certain evidence objected to by the libellee as "privileged communications"; to the legal right of the Presiding Judge to hear the case, and to the sufficiency of the bill of exceptions. Exceptions overruled.

The case appears fully in the opinion.

Locke, Perkins & Williamson, for libellant.

Frederick G. Katzman,

John H. Vahey,

Frederick J. Laughlin,

Jacob H. Berman, for libellee.

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

WILSON, C. J. A libel for divorce on which a decree was made by the Judge of the Superior Court for the county of Kennebec granting a divorce to the libellant. It comes to this Court on exceptions by the libellee to the decree granting the divorce and to numerous rulings made by the justice below.

Prior to the hearing, the libellee filed a motion under section 98, chapter 82 R. S., that the cause be transferred to the Supreme Judicial Court, assigning as the ground, in the language of the statute, that the judge of the Superior Court was disqualified by reason of "interest, relationship, and other lawful causes."

To this motion was attached an affidavit of the libellee setting forth specifically the grounds constituting the alleged disqualification. Prior to the hearing on the motion, the Judge detached the affidavit from the motion, on the ground that it contained matters that were irrelevant, inadmissible in evidence, false, and scandalous, and refused to receive it or permit it to be placed upon the files of the Court.

Counsel for the libellee then offered the affidavit as evidence bearing on the motion. The affidavit was thereupon excluded as evidence. To the rulings of the Court that the affidavit was not properly a part of the motion and that the libellant had a right to be heard upon the motion, exceptions were taken by the libellee

and allowed. Exception was also taken and allowed to the refusal to receive the affidavit as evidence and to a refusal to strike out certain evidence and to the denial of the motion.

During the hearing on the libel, exceptions were also taken to the admission of evidence describing the wedding and the class of people attending and to the admission and exclusion of certain testimony and to the refusal to strike out certain answers as unresponsive. None of these exceptions, however, are strenuously urged.

The only exceptions seriously argued before this Court were the exceptions above noted taken at the hearing on the motion to transfer the cause to the Supreme Judicial Court; the exceptions to the admission of certain conversations or statements by the libellee to the libellant when no one else was present upon the ground that they were privileged; and an exception to the decree granting the divorce.

We have examined all the exceptions taken to the admission and exclusion of evidence and to the refusal to strike out certain testimony and find no error in the rulings of the Court below, or if technical error appears in any instance, it does not appear that the libellee was aggrieved thereby.

The exceptions to the rulings of the judge in connection with the hearing and refusal to grant the motion to transfer the cause must be overruled.

The Superior Court of Kennebec county is a local court with a single presiding justice. Upon its creation, P. L. 1878, chapter 10, the Legislature provided that in the event of the disqualification of the judge to hear any case by reason of "interest or any lawful cause, the case shall be transferred to the Supreme Judicial Court for that county." This provision has been retained and with the insertion of the word "relationship" as a ground, is now found in Sec. 98 of Chapter 82 R. S. under which the motion in this case was filed.

The statute does not prescribe the proceedings by which the question of disqualification may be raised. In many states, as in Kentucky, the filing of an affidavit is required by statute, and, if sufficient on its face to disqualify, the judge can not sit. *Powers* v. *Com.*, 114 Ky., 237; also see *People* v. *Compton*, 123 Cal., 403;

Henry v. *Spear*, 201 Fed. R., 869. Whether the rules of the Superior Court for Kennebec county require such a motion to be supported by an affidavit does not appear from the record. On general principles, it would seem to be a proper procedure. *Gifford* v. *Clark*, 70 Me., 94. If the motion or accompanying affidavit contained irrelevant, false, and scandalous matter tending to improperly bring the presiding justice into disrepute, we have no question of the authority of the judge to order the irrelevant and scandalous matter to be striken out, leaving only such statement of facts as might properly be considered in support of the petition.

However, if a supporting affidavit is filed under the rules of court, or in accordance with a general practice in case of motions based on facts outside the record, it is not done in the interest of the moving party, but to show his good faith and apprise the Court and the other party of the grounds on which the motion is based. To detach it from the motion, therefore, could not prejudice the moving party in the case, no advantage being taken of the lack of it, and when, as in the case at bar, he was permitted to offer presumably all evidence in his possession in support of the motion. It is only by virtue of a statute that an affidavit is alone held a sufficient ground for recusation in other jurisdictions.

Nor do we think the libellee was aggrieved by the ruling of the Court that the libellant had a right to be heard on the issue raised by the motion, or the refusal to receive the affidavit as evidence. It contained matter obviously based on hearsay, and inasmuch as all the oral evidence the libellee offered in support of the facts contained in the affidavit was received, in no event was he aggrieved by its exclusion. Every litigant is interested in the tribunal before which his cause shall be heard. The libellant in this case had selected, as she had a right to do, one of two courts having jurisdiction in the county. She also had a right to be heard on an issue, which if the motion was well grounded, involved her own good faith.

The issue raised by the exception to the dismissal of the motion is whether the facts proven by the evidence offered in support of the motion, as a matter of law, disqualified the presiding justice from hearing the cause. The grounds for disqualification

now named in the statute are "interest, relationship, or other lawful cause." The "interest" referred to in such a statute is some pecuniary interest in the outcome of the case. It is not claimed that either interest of this nature or disqualifying relationship exist here. The only question, therefore, is what disqualifying grounds are included in the phrase, "other lawful cause"; and whether any such grounds so clearly existed as to render a ruling to the contrary by the judge below error in law.

At common law, the only ground for recusation of a judge was pecuniary interest or relationship. Bias or prejudice was not sufficient. 3 Blackstone Com. *p361; *Fulton* v. *Longshore*, 156 Ala., 611, 613; *Bryan* v. *State*, 41 Fla., 643, 658-9; *in re* Davis Est. 11 Mont. 1, 18; *People* v. *Compton*, 123 Cal., 402, 413; *McCauley* v. *Weller*, 12 Cal., 500; *Clyma* v. *Kennedy*, 64 Conn., 310; *Elliott* v. *Hipp*, 134 Ga., 844, 848; *Turner* v. *Com.*, 59 Ky., 619, 626; *Russell* v. *Belcher*, 76 Me., 501.

"By the laws of England in the time of Bracton and Fleta," says Blackstone, "a judge might be recused for good cause, but the law is now otherwise; and it is held that judges and justices can not be challenged, for the law will not suppose a possibility of bias or prejudice in a judge who is sworn to administer impartial justice."

"The presumption is that the court will not be influenced by the animosities of the *judge*, if such he has," *Allen* v. *Reilly*, 15 Nev., 452.

In California in 1859, the only grounds fixed by the statute as sufficient to disqualify a judge were: "(1) when the judge were a party or interester; (2) when he was related to one of the parties within the third degree; (3) when he had been attorney or counsel for either party." In *McCauley* v. *Weller*, supra, the Court said: "These are the only causes which work a disqualification of a judicial officer. The exhibition by a judge of partisan feeling or the unnecessary expression of opinion upon the justice or merits of the controversy, though exceedingly indecorous, improper, and reprehensible as calculated to throw suspicion upon the judgments of the court and bring the administration of justice into contempt are not under our statute sufficient to authorize a

change of venue on the ground that the judge is disqualified from sitting."

The modern trend has been to add by legislation other grounds of recusation to those recognized at common law, *Johnson* v. *State*, 31 Tex., Crim. Rep., 456, 467-8, and cases above cited and in a few cases the courts have held other grounds than those recognized at common law sufficient to disqualify, *Moses* v. *Julian*, 45 N. H., 52, 56.

In the latter case, the court laid down in addition to interest and relationship the following as sufficient grounds for disqualification: (1) when the judge has received important benefits or donation from either party, (2) when the relation of master and servant or guardian and ward existed; (3) when a lawsuit was pending between the judge and one of the parties or he had indicated enmity by declarations or threats shortly before the suit; any one of which would be clearly sufficient for a judge to refuse to sit.

In some cases when a judge has himself found that he had a bias or prejudice for any reason, it has been held sufficient to authorize a substitute to hear the case. *Williams* v. *Robinson*, 6 Cush., 333.

In *Lovering* v. *Lamson*, 50 Me., 334, however, this court held that an attorney who had advised a poor debtor, was not thereby, as a matter of law, disqualified from acting as a justice on his disclosure under the statute.

In re Cameron, 126 Tenn., 615, 649, the Tennessee Court says: "Several of the states have statutes upon this subject laying down the rule that this (personal prejudice) will make a judge incompetent. We have no such statute. Moreover, we doubt the policy of such legislation. It is entirely conceivable that an upright and honored judge may decide justly and impartially as between his bitter personal enemy and his warm personal friend, administering the rules of law without fear or favor."

The above cases disclose the general trend of legislation and judicial decisions. The statutes defining the grounds of recusation have in many states added to "interest and relationship" such additional grounds as "or otherwise disqualified," "can not properly preside," "otherwise unable," "other disability" "or any legal cause"; and such general phrases have generally been held to in-

clude bias or prejudice as a sufficient ground. *In re* Peytons Appl., 12 Kan., 311; *Turner* v. *Com.*, supra; *Williams* v. *Robinson*, supra; *Gill* v. *State*, 61 Ala., 169.

While at the time of the enactment of the original act, now found in Sec. 98, Chap. 82 R. S., this Court had not recognized in addition to that of pecuniary interest, except that of relationship, any "other lawful cause" as a conclusive ground for recusation of a judge, we think the Legislature, in view of the trend of legislation on this subject and the inherent right of litigants to have their cases heard before an impartial tribunal, *Russell* v. *Belcher*, supra, by retaining the phrase "other lawful cause, in addition to the recognized grounds of disqualification at common law, must have intended that bias or prejudice on the part of the presiding judge such as, if established, would deprive a litigant of this fundamental right, was a sufficient ground for transfer of the cause.

We shall not attempt to define all the conditions that would disqualify a judge on this ground. Each case must rest on its own facts. Bias or prejudice is a personal matter with the judge. He may have bias or prejudice against or in favor of one of the parties, and still hold the scales of justice evenly. Only in cases where pecuniary interest or relationship within the prohibited degree are shown does the law conclusively presume disqualification. In all other cases where disqualification is alleged, it must be shown that a disqualifying bias or prejudice actually exists. The presiding judge must himself determine, unless by statute otherwise provided, whether such bias or prejudice exists and to such a degree that he can not lay it aside and impartially preside between the parties. Unless clearly shown by acts or declarations, only he can search his own mind and determine that fact.

Our government is a "government of laws and not of men." In addition to their legal learning, judges are presumably selected because of their ability to lay aside personal prejudices and to hold the scales of justice evenly. The presumption is that they will do so.

A local judge of necessity must have embarrassing situations arise by reason of his acquaintance in the community in which he resides. Judges can not be selected from cloisters nor compelled to live in seclusion. It is their duty unless disqualified to hear

every case brought before them. He can not refuse to discharge that duty simply because he happens to know more or less intimately one of the parties. Social relations *ipso facto* do not disqualify, as do pencuniary interest or relationship; and no case should be transferred unless such bias or prejudice actually exists on the part of the judge that he can not lay it aside.

If conscious of any such prejudice, a judge ought not to sit, and should withdraw *suo motu;* but unless it clearly appears from the evidence that he is disqualified by such a deep-seated bias or prejudice that he could not impartially preside, or that the presence of such bias or prejudice is the only inference which can be drawn from the evidence in support of a motion to transfer, it can not be said on exceptions there is error in law in his denial of the motion.

The evidence in the case at bar in support of the motion only goes to show intimate social relations between the family of the libellant and that of the presiding justice, as indicated by occasional dinner parties at the homes of each, social calls, automobile trips with an exchange of autographed photographs of the presiding justice and of the libellant, whom he and his wife had favorably known since childhood, all of which was admitted by the parents of the libellant and the libellant herself upon being called to the stand by counsel for the libellee. The libellee did not take the stand or offer any evidence in support of any of the other allegations contained in the affidavit. We must, therefore, assume that they could not be substantiated.

Notwithstanding the close friendship admitted to exist between the two families, the presiding judge must have found in denying the motion that he was not conscious of any such bias or prejudice in favor of the libellant or against the libellee as would prevent him from impartially presiding in the case.

It can not be said that a disqualifying bias or prejudice as a matter of law must necessarily have existed from such relations, or that the only inference arising from the evidence offered in support of the motion is that the presiding justice could not eradicate from his mind any friendly feeling he might have for the libellant or her family by reason of their close social relations and impartially decide the case; nor do we think it follows from the result that he did not so decide.

The exceptions to the admission of the evidence classed as private conversation between the libellant and libellee must also be overruled.

At common law, no person interested, whether a party or not, was permitted to testify. In 1855, chap. 181, the Legislature of this state lifted the ban on other "persons interested," but left the parties to the cause still disqualified. In 1856, chap. 266, the ban was removed on the parties; and in 1859, chap. 102, a husband or wife of a party was permitted to testify, but only with the other's consent. While these statutes might seem to permit both parties to a divorce action to testify, it was held in *Dwelly* v. *Dwelly*, 46 Me., 377 that, while it removed the ban as to parties, there were other grounds for excluding a husband and wife as witnesses for or against each other, viz., that of public policy by reason of its tending to cause marital friction and domestic strife. This was confirmed in *Walker* v. *Sanborn*, 46 Me., 470, 472. The cases of *Drew* v. *Roberts*, 48 Me., 36 and *Thompson* v. *Wadleigh*, 48 Me., 66 are not *contra* to the rule laid down in *Dwelly* v. *Dwelly*. Both recognize the rule excluding the testimony of husband and wife for or against each other as grounded on public policy, and hold that, while the statute of 1859 removed the latter ground, it was applicable only where the other assented, and only one was a party.

Whether the rules of disqualification on the ground of public policy should be applied in cases where the interests of husband and wife are hostile, see Spitz Appl., 56 Conn., 184, is now a moot question in case of a libel for divorce. The ban has been expressly removed by the statute of 1863, chap. 211, and now found in section 2, chapter 65 R. S., permitting either party to the libel to testify.

These statutes do not in terms, however, reach the point now in issue, viz., whether they also removed the ban on what in the law of evidence are termed privileged communications, which has nothing to do with the competency of the husband or wife as witnesses. While the exclusion of the husband and wife as witnesses and of privileged communications between them are both based on public policy, one rule excludes the testimony because of the source from which it comes, the other, because of its nature.

Attorneys and clients, and pastor and parishioner, when parties, are all competent witnesses under the acts of 1855 and 1856, but that does not make their confidential communications admissible. The removal of incompetency of husband and wife as witnesses in divorce cases does not permit either to disclose confidential communications induced by the marital relations. Ex parte Belville, 58 Fla., 170; *McCormick* v. *State*, 135 Tenn., 218; *Williams* v. *Beltz.*, 29 Del., 554; 27 L. R. A. (N. S.) 273 note.

Some states in removing the ban of incompetency from husband and wife have made express exceptions of such communications. The statute in Massachusetts excludes all "private conversations" between husband and wife. *Fuller* v. *Fuller*, 177 Mass., 184; 29 A. L. R. 412, 422. The common law rule of privileged communications, however, does not go so far as to exclude all conversations between husband and wife when no one else is present.

Marital secrets induced by the relations thus existing, confessions and admissions confidential in their nature and all communications that can be said to be induced by the confidence presumed to be inherent to the marital relations are privileged and can not be disclosed by either without the consent of the other, *Myers* v. *Myers*, 158 Mo. Appl., 299; Greenleaf Ev. Vol. 1, sec. 254; yet conversations may be had between husband and wife which are in no sense confidential or induced by the marital relations, 28 R. C. L. 526, 527; *Owen* v. *State*, 78 Ala., 425; *Toole* v. *Toole*, 112 N. C. 152; 29 A. L. R. 412. Even the Massachusetts court holds that abuse on the part of one, if not in conversation, is admissible. *French* v. *French*, 80 Mass., 186.

It would seem like a strained construction, however, if one party continually indulges in abusive language and the calling of vile names and the other remains silent under it, it is admissible; but if he or she replies and conversation takes place, it becomes inadmissible.

Abuse with the tongue, whether in the course of conversation or otherwise and whether in the presence of others or not, is not warranted or induced by the marital relations, is not ordinarily of confidential nature, and as an act of cruelty is, therefore, admissible in support of an allegation of cruel and abusive treatment.

Applying these rules to the evidence objected to, surely an invitation by the husband to the wife to drink liquor saying it would brace her up after a long journey is not a communication of a confidential nature, induced in any degree by the ties, which in this case had just been assumed, but rather a communication that might be addressed to any guest or traveling companion. Nor was an invitation on a boat during their honeymoon to go to the bar room, where he was enjoying himself in the company of congenial spirits and have a "good time" instead of remaining alone on deck, of the nature of a confidential communication that would be addressed only to a wife by reason of their confidential relations, or which appears from the evidence to have been addressed to her in confidence.

The only other statement or communication, to the admission of which on this ground an exception was taken and included in the bill of exceptions, was a statement or statements of his that he had "great power over women."

We can conceive of an admission of this kind in excuse of some conduct of the husband, if made in the course of a family conference in which confidential matters of this nature were under discussion, which would and ought to be held to be privileged; but the statement in this case clearly appears from the libellant's testimony to have been made not as a confidential communication to the wife, but in the spirit of boasting of his attractions for the other sex, and of conquests he had won, or for the purpose of taunting his young wife. Such assertions made in such a spirit as the libellant's testimony shows the statements included in the bill of exceptions were made, clearly were not made in confidence or induced by their relations of husband and wife, and were properly admitted. None of the statements set forth in the bill of exceptions were of a confidential nature or such as might not have been made to any friend or companion.

We now come to the final question as to whether, taking the evidence of the libellant to be true, the decree granting the divorce was erroneous as a matter of law. *Michels* v. *Michels*, 120 Me., 395. The question here on exceptions is not what conclusion this Court might have reached upon all the testimony, but whether

there was any evidence to warrant the findings of facts for which the legislature of this state has said a divorce shall be decreed.

This Court can not review the findings of a single justice on questions of facts. He is the exclusive judge of the credibility of witnesses and the weight of the evidence; and only when he finds facts without evidence or contrary to the only conclusion which may be drawn from the evidence is there any error of law. *Chabot & Richards* v. *Chabot*, 109 Me., 403; *Costello* v. *Tighe*, 103 Me., 324; *McLeod* v. *Amero*, 111 Me., 216; *Ayer* v. *Harris*, 125 Me., 249.

Unless inherently improbable, this Court must assume that the Judge below accepted as the more credible the testimony in favor of the party in whose favor his decision is made. In the case at bar, the evidence was conflicting, but it can not be said that the evidence of the libellant and her witnesses on any material point was inherently improbable. The same can not be said of that of the libellee, who testified that a bride of a year who had made no complaints whatsoever of his treatment, except on one occasion, and indeed was without any ground for complaint, but had joined him in his pleasures of drinking and smoking, had expressed pleasure at the prospect that she was within the coming months to become a mother in which he also joined; and that in a confidential conference just before her leaving home, in which any errors either may have made during the period of their married life were frankly discussed and a mutual agreement entered into to avoid them in the future, with mutual expressions of satisfaction so far with their married life, followed by the closest of marital relation, and yet within three days abandoned the home without any apparent change in their relations occurring, and without assigning any reason whatsoever, except that she no longer loved him.

If the court below accepted at its face value the essential parts of the libellant's testimony and that of her supporting witnesses, as this Court on exceptions must assume he did, *Michels* v. *Michels*, supra, he could have found as facts: that the libellant was a young girl twenty-one years old at her marriage and the libellee twenty-nine, that she had been accustomed to a home life of refinement where the practice of drinking intoxicating liquors and of

smoking by women was not tolerated; that she was a girl of intelligence; healthy and normal in her physical functions, except on one or more occasions during her school days she had experienced a suppression of her menses for two months; ambitious to make a success of her married life, well educated, of excellent social standing and her parents of abundant means; that, on the other hand, the libellee was a graduate of the school of experience, matured by business cares since the age of fifteen and by service in the World War; without means, or special social standing; that immediately upon their marriage, he began to encourage the libellant to drink intoxicating liquors with him, which she always refused to do, it being well known to him that it was contrary to her home training; that he continued his efforts in this respect by inviting and taking her to places where men were drinking and subjected her to more or less annoying attentions from them and finally went so far as to surreptitiously insert liquor in a harmless beverage they were accustomed to drink in their own home; that, notwithstanding he was paid a much larger salary by the company, of which her parents were the sole owners, that he had ever before received, viz., at the rate of six thousand and later seventy-two hundred dollars per year, and the libellant was allowed in addition by her father fifteen, and later, eighteen hundred dollars a year for her personal and household expenses, yet the libellee continually complained of the need of more money and demanded that she obtain more from her parents, turn over to him her personal bank account, and prevail on her parents to purchase a very large and expensive residence; and when his efforts to obtain more funds from this source failed, became indifferent, and finally in the presence of her parents told her that their marriage was a failure, that she had not profited by his teachings during the year of their married life, and then later taunted her with the fact that her parents did not openly take her part during his criticism of her conduct in their presence, and following this and three days before she left gave her in their own home another "lacing," as he described it to one or more of his business associates, and told her "where she got off," that he was through, and if she did not like it she could get out, that he did not propose longer to live with her as man and wife, although she had already previously informed

him that she was probably pregnant, a communication which he received with the brutal remark, "Well that's a H—l of a mess," as a result of which she left the room in tears and spent a sleepless night.

It is unnecessary to review the testimony in all its details or comment on other annoyances, some of a trifling nature, except as adding in some degree to the effect of the more serious ones above enumerated. The effect of all of which, as the libellant testified, was to cause her to have frequent spells of crying, sleepless nights, severe headaches, a supression of menses for a period of four months, and produced a state of nervousness, and undermined her health to the point where, as she expressed it to her mother when announcing her decision after nearly a year of uncomplaining endurance, she must leave or she would become a physical wreck, a conclusion corroborated by the testimony of her family physician who had known and attended her since childhood, and to which conditions the physician attributed the suppression of the menses, she having resumed her normal functions after two months freedom from the treatment described.

The only other question involved is whether such treatment as she has testified to amounts in law to cruel and abusive treatment within the meaning of the statute.

It is urged by counsel for the libellee that there is no evidence of conscious motive or intent to cause the libellant any mental pain, that if his personal habits did cause her mental suffering it was one of those consequences of marital life which each spouse must endure and overlook, citing in support of this rule *White* v. *White*, 105 Mass., 325; *Freeborn* v. *Freeborn*, 168 Mass., 50; *Armstrong*, v. *Armstrong*, 229 Mass., 592; *Ring* v. *Ring*, 118 Ga., 183.

This Court, however, has never adopted this rule and we do not deem a literal application of it consonant with the intent and purpose of this class of legislation. The purpose of the legislature in authorizing divorce is not to punish the guilty party for an offense in which his motive is essential but to relieve the other party from an intolerable position if it threatens his or her life or health. A course of treatment so brutal or bestial as to seriously endanger the health of a wife is none the less cruel, regardless of the motive with which it is done, if a husband knows the effect of his treat-

ment upon his wife or should have known it. He must be presumed to have intended its consequences, if he continues it. *Fleming* v. *Fleming*, 95 Cal., 430, 435; *Pardy* v. *Montgomery*, 77 Cal., 326; *Carpenter* v. *Carpenter*, 30 Kan., 712; *Goff* v. *Goff*, 60 W. Va., 9, 17; 73 Am. Dec. 624, note.

Practices or habits that may annoy a wife or husband and even cause mental pain and suffering, but not to the extent of endangering health may have to be borne. The law does not ensure perfect marital bliss, but the legislature has directed the courts of this state to grant an absolute divorce when a continued course of treatment has so affected the other party that his or her health and perhaps eventually life is jeopardized. *Holyoke* v. *Holyoke*, 78 Me., 404. The language of the court in this case has apt application to the facts in the case at bar:

> "Deplorable as it is, from the infirmities of human nature, cases occur where a wilful disregard of marital duty, by act or word, either works, or threatens injury, so serious, that a continuance of cohabitation in marriage can not be permitted with safety to the personal welfare and health of the injured party. Both a sound body and a sound mind are required to constitute health. Whatever treatment is proved in each particular case to seriously impair, or to seriously threaten to impair, either, is like a withering blast, and endangers 'life, limb, or health,' and constitutes the (6) cause for divorce in the act of 1883. Such is the weight of authority."

Pidge v. *Pidge*, 44 Mass., 257, 261; *Bailey* v. *Bailey*, 97 Mass., 373; *Downy* v. *Downy*, 135 Mich., 265; *Reinhard* v. *Reinhard*, 96 Wis., 555.

There being evidence, therefore, from which the court below could have found that the health of the libellant was seriously affected and a continuance of the marital relations would probably result in even more serious consequences, and that it was due to a course of treatment which the court could have also found the libellee must have known was seriously affecting his wife, especially if in the delicate condition in which she believed herself to be in and of which he had been apprised, it is sufficient to satisfy the statute.

It is true a woman of different training or of less refinement or sensitiveness might not have been affected by the treatment described, but the court below may have found from the evidence that this libellant was; and it is her case we are considering.

Exceptions overruled.

RALPH A. MACDONALD ET AL *vs.* MACK MOTOR TRUCK COMPANY.

Washington. Opinion April 13, 1928.

SALES. WARRANTY.

An affirmation by the seller that the goods are his, or that he is the owner, constitutes an implied warranty of title.

A purchaser of chattels may have satisfaction from the seller if he sells them as his own and the title proves deficient, without any expressed warranty for that purpose.

Where the seller declares that the title and ownership of the motor vehicle, parts and accessories called for, and to be furnished under the terms of the contract of sale, shall remain in the vendor until full and final payment therefor shall have been made by the purchaser, such language fairly amounts to an assertion of title by the vendor.

In the case at bar the second paragraph of the contract of sale clearly set forth an assertion of title on the part of the seller, which assertion of title constituted a warranty thereof.

On exceptions. An action on the case for breach of warranty of title in personal property sold plaintiffs by defendant. To the instructions given the jury by the Presiding Justice and to his direction to them to bring in a verdict for the defendant, the plaintiff seasonably excepted.

Exceptions sustained.

The case appears fully in the opinion.

R. J. McGarrigle, for plaintiffs.

Frederick Wingersky,

H. J. Dudley, for defendant.

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

DUNN, J., concurring in the result.

PHILBROOK, J. This is an action brought by the plaintiff to recover damages for a breach of warranty of title in the sale of a used motor vehicle sold for cash by the defendant to the plaintiff. The plaintiff claims that under a certain written agreement or contract entered into by the parties there was a warranty of title as to the automobile in question. The presiding justice instructed the jury that there was no warranty of title contained in the contract or agreement and directed the jury to bring in a verdict for the defendant. To this ruling and instruction the plaintiff seasonably excepted and the case is before us upon exceptions.

It is unnecessary to rehearse all of the contract but the essential parts thereto are contained in the first two paragraphs, viz.:

"1. The company makes no warranty whatever in respect to this used motor vehicle or any part thereof and the purchaser proposes to buy such used vehicle as it stands without any guarantee whatever.

"2. The title and ownership of the motor vehicle, parts and accessories called for and to be furnished under the terms of this contract, shall remain in the company until the full and final payment of cash therefor shall have been made by the purchaser. In case of default in any of the payments above provided for the company may repossess itself of the above mentioned motor vehicle, parts and accessories wherever found."

The defendant urges that the language of the first paragraph "makes no warranty whatever" exonerates the defendant from any claim that there was a warranty of title. In examining the entire contract we are satisfied that the intention of the parties was that the defendant in making the sale made no warranty whatever in regard to the condition of repair or running condition of the automobile, or other elements in that line.

The question of warranty of title, however, is quite a different proposition. This depends upon the interpretation of the second paragraph above quoted. Under the authority of 35 Cyc. 389, and cases there cited, an affirmation by the seller that the goods are his, or that he is the owner, constitutes a warranty of title.

In *Balte* v. *Bedemiller*, 37 Ore. 27, 60 Pac. 601, 82 Am. St. Rep. 737, and supported by a citation from *Benjamin on Sales*, Sec. 627, it is held that in the sale of an ascertained, specific chattel, an affirmation by the vendor that the chattel is his is equivalent to a warranty of title and in 2 Blackstone, 3rd Edition, Star page 451 that learned author says, "A purchaser of goods and chattels may have satisfaction from the seller if he sells them as his own and the title proves deficient, without any expressed warranty for that purpose. In a long and learned note by Judge Freeman in *Scott* v. *Hix*, 62 Am. Dec., at page 465, it is said that when a purchaser of a chattel relies upon the vendor's assertion of ownership, and it is intended that he should do so, he is relying upon a warranty. In *Pasley* v. *Freeman*, 3 T. R. 58 it is said that an affirmation of title to a chattel by a vendor, at the time of sale, is a warranty whether the vendor is in or out of possession. In *Huntingdon* v. *Hall*, 36 Me. 501 Mr. Justice Appleton says that if the seller was possessed of the article, and he sells it as his own, and not as the agent of another, and for a fair price, he is understood to warrant a title. But the case which seems to be decisive of the principle involved in the exception is *Pierce* v. *Banton*, 98 Me. 553. The controversy in that case arose under the terms of a written agreement, as in the case at bar. For convenience in comparison between the latter case and the instant case we submit the following parallel statements:

Pierce v. *Banton*, supra	*Case at Bar*
Said grantee hereby agrees that the said grantor shall reserve and retain full and complete ownership and control of all lumber which shall be cut and removed from the aforementioned premises until all matters shall be settled and the agreed stumpage paid.	The title and ownership of the motor vehicle, parts and accessories called for, and to be furnished under the terms of this contract, shall remain in the Company (Defendant) until the full and final payment of cash therefor shall have been made by the purchaser.

In *Pierce* v. *Banton* the Court, speaking through Mr. Justice Strout, and without dissenting opinion, stated that this language fairly amounts to an assertion of title by the licensor to the timber on the permitted lands. They could not "reserve and retain

complete ownership" of that to which they had no title. The expression is equivalent to saying — we now own this timber and we retain such ownership till payment is made. Such assertion of the title is a warranty of title.

If we correctly understand the court in *Pierce* v. *Banton*, and the rule there laid down is still the rule in this state, the case not having been overruled, we cannot escape the conclusion that there is an assertion of title in the contract between the parties in the instant case, which assertion of title is a warranty thereof.

Accordingly we hold that the mandate must be

Exceptions sustained.

FERRY BEACH PARK ASSOCIATION OF UNIVERSALISTS

vs.

CITY OF SACO.

York. Opinion May 11, 1928.

TAXATION. USE OF PROPERTY OF CHARITABLE INSTITUTIONS DEFINED. R.S., Chap. 10, Sec. 6, Par. 111, Secs. 77-82.

A corporation carrying on, along lines of its own election, the diffusion and inculcation of the Christian religion is primarily a benevolent and charitable institution, and falls within the class of institutions included "within the realm of public charities."

The fact that it may carry on social and vacational activities along with its educational and devotional meetings does not deprive it of this primary character.

The real property of such corporation, when occupied for its own purposes, is exempt from taxation. Taxation is, however, the rule and exemptions the exception. When the property of an institution is by legislative grant exempted from taxation, the exemption applies only to such property as is occupied by the institution for its own purposes.

Property of such institution from which a revenue is customarily derived, cannot be considered to be occupied by the institution for its own purposes within the meaning of the Statute, and such property is taxable.

In the case at bar, held: the Pavilion of the Association and that portion of the Grove used for holding its outdoor meetings were occupied for "its own purposes" and not taxable. The remainder of its property was clearly business property and taxable.

On report. An appeal from the refusal of the Assessors of the City of Saco to abate the tax for the year 1925 upon certain property of the appellant situated in Saco. At the conclusion of the evidence by agreement the cause was reported to the Law Court. Judgment for appellant for $32.40 with costs.

The case appears fully in the opinion.

Strout & Strout, for appellant.

John P. Deering, City Solicitor, for appellee.

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

STURGIS, J. Appeal under R.S., Chap. 10, Sections 77-82, from the refusal of the assessors of the City of Saco to abate the tax of $699.14 assessed for the year 1925 upon the real estate of the appellant. The case is certified to this Court upon Report for rendition of such judgment as the legal rights of the parties require.

The Ferry Beach Park Association of Universalists was incorporated by certificate dated November 20, 1909, under Chap. 62 of the Revised Statutes. The purposes of the Corporation, as stated in its certificate of organization, are "religious, educational, moral and social, viz: THE GENERATING OF MISSIONARY POWER THROUGHOUT THE UNIVERSALIST CHURCH, and for the furtherance of its principal purpose, the following purposes, viz:

1. To carry on religious, educational and social institutes, lectures and concerts and to conduct services of a religious nature and of moral character.

2. To erect and maintain a hotel or hotels for the conveniences of its members and guests and to engage in all business incidental to and essential to such erection and maintenance and in all business requisite for the health and welfare of its members and guests while there resident."

The history of this Association since incorporation indicates that its activities have been in substantial accord with the purposes for which it was given charter. Primarily it is a Missionary Society, carrying on along lines of its own election, the diffusion and inculcation of the Christian religion. The fact that it carries on social and vacational activities along with its educational and devotional meetings does not deprive it of this primary character. If the stern and rigid limitations of Puritanism are relaxed to permit the inclusion of some of the recreational pleasures of life in the gatherings of this Association, none the less these are but incidental to the main purposes, promoting and renewing interest it may be, but clearly subordinate to its general aim and purpose of "developing the missionary power of the Universalist Church."

Secondary also are the business affairs of the Association. Its charter authorizes the erection and maintenance of hotels for the accommodation of its members and guests, and its conduct of "all business requisite for the health and welfare of its members and guests while there resident." These purposes are by the terms of the charter in furtherance of its principal purpose, and in practice they seem to remain so.

This Association clearly falls within the class of Missionary societies which this Court has included "within the realm of public charities." *Prime* v. *Harmon*, 120 Maine, 299, 301; *Straw* v. *East Maine Conference*, 67 Maine, 494; *Maine Baptist Missionary Convention* v. *Portland*, 65 Maine, 92. The Association, we think, is a "benevolent and charitable institution incorporated by the State," the real property of which occupied for its own purposes is exempt from taxation. R.S., Chap. 10, Sec. 6, Par. III.

The crucial question to be here determined is, what are the purposes for which the land and buildings of the Association are used and occupied? And the question must be answered by the application of the settled rules established by this Court in its numerous decisions interpreting the statutory exemption under which the Association claims relief.

It is a fundamental rule of the law of taxation that "taxation is the rule and exemptions the exception." And all doubts and uncertainties as to the meaning of a statute are to be weighed against exemption. Out of this rule springs the doctrine that "when the

property of an institution is by legislative grant exempted from taxation, the exemption must be held as applying only to such property as is occupied by such institutions for their own purposes." *Auburn* v. *Y. M. C. Association*, 86 Maine, 244.

In this state this doctrine has been written into the tax statute, appearing as a limitation or exception appended to the general exemption granted benevolent and charitable institutions. It reads: "But so much of the real estate of such corporations as is not occupied by them for their own purposes shall be taxed in the municipality in which it is situated." R.S., Chap. 10, Sec. 6, Par. III.

The application of this statutory limitation is aptly illustrated in the case of *Foxcroft* v. *Straw*, 86 Maine, 76, and *Foxcroft* v. *Campmeeting Association*, 86 Maine, 78, cases in which the use and occupation of the property sought to be exempted from taxation were markedly similar to those of the appellant. In these cases it appears that the Piscataquis Valley Campmeeting Association owned and maintained a campground so called, consisting of ten acres of land, a part of which was used for an auditorium where religious meetings were held, a part for lots let to members for the erection of cottages, a part used for a stable and stable yard where horses were stabled for hire, and a part let for an eating house or victualing purposes. In *Foxcroft* v. *Straw* the Court, considering a tax assessed upon a lot let for cottage erection, said: "We are of opinion that the lot was not exempt from taxation, as it was not occupied by the corporation for its own purposes, within the meaning of (the statute)." In *Foxcroft* v. *The Campmeeting Association*, in a consideration of taxes assessed upon other property of that Association, the Court reaches the conclusion that "the property used for the stabling of horses for hire, let for victualing purposes and for the use of cottages is clearly not occupied by the association for its own purposes within the meaning of (the statute). It is property from which revenue is derived — just as much business property as a store or mill would be.

"That part used for an auditorium or tabernacle,— used for the accommodation of the association, where its meetings are held, is used for a common purpose — 'its own purposes' within the meaning of the statute and is exempt from taxation."

Examining the Report before us, we find that the appellant Association owns and maintains a meeting-ground at Ferry Beach, an Atlantic seashore location within the limits of the City of Saco. The exact acreage of its holdings is not made clear. With a frontage on the beach it owns back to and across the main highway, including a fourteen acre tract of standing pine timber and 4 1/10 acres of marsh land adjoining.

Some of its shore lots are vacant land, but on part of the six lots into which the shore property is laid out the Association has erected or acquired a hotel accommodating seventy guests, called The Ferry Park House. It has built an annex to the hotel. It has a dormitory close by called The Belmont, formerly in part a bowling alley. Near by it has a rooming house which is called Cottage Annex. It also has a men's dormitory, in which is located a bowling alley still used by its members. Finally, between the Boston & Maine Railroad tracks (which run through the property) and the sea is the Pavilion so called. This list includes the substantial buildings of the Association.

In the tract of pine timber across the road from the buildings described, a grove has been cleared and a pulpit erected, with benches and settees grouped around within hearing distance. The balance of the timber-land is unoccupied by buildings, but in part let to members and occasionally to motorists as tenting grounds.

The Association occupies the Park for only a few weeks during the summer season, holding daily, during that brief period, schools of instruction and education and devotional exercises along chosen religious lines. Study and instruction in missionary work holds an important place in the Association's program. The attendance at these sessions is made up of pastors and parishioners with their families of the Universalist denomination. The hotel and its annex and the boarding-houses are all run and operated for hire and return a small margin of profit to the Association. The beach is used by the members and guests for bathing. The timber-land outside of the grove proper is used as a camping-ground or unoccupied.

The Pavilion which has been described appears to be devoted exclusively to the purposes of the Association, it being its indoor meeting-place, and undoubtedly, with the land upon which it

stands, is exempt from taxation. So, too, we think is such portion of the pine timber tract as is used as an outdoor meeting-place. Upon the record it is occupied solely for the Association purposes, and it may be fairly inferred is generally so used when weather permits. Its extent or value, however, is not made clear.

The only information as to the area of the timber-land actually occupied by the Association for "its purposes" comes from the secretary and the president of the Association. Unfortunately both of these gentlemen are very indefinite in their statements as to the size of the grove which the Association uses. Their estimates of area are confessedly made without actual knowledge, and admitting that only a small part of the pine tract is so occupied, the measurements and comparisons which they furnish give it an area equalling or exceeding the entire acreage of the tract.

We have carefully sought in the record facts from which the extent of the exempt meeting-place of the Association in this pine grove might be determined and valued. The facts are not here, and we are unable to determine the excess of tax which has been levied upon this exempt property. The burden is upon the appellant to prove facts showing error or injustice in the assessment appealed from by competent and satisfactory evidence. The assessment upon appeal is assumed to be correct. We can here only point out as indicated that the Association's meeting-place in the grove is exempt, but in this proceeding upon this record cannot grant abatement of the tax assessed thereon in the year 1925.

The properties of the Association other than the Pavilion and the "grove" are subject to taxation. They are properties "from which revenue is derived," and "clearly not occupied by the Association for its own purposes." *Foxcroft* v. *The Campmeeting Association*, supra.

Upon these conclusions, it being stipulated that all statutory requirements necessary for the perfection of this appeal have been complied with, the tax assessed by the City of Saco upon the real property of the appellant Association for the year 1925 must be abated in the following particulars:

Lot land between B. M. R. R. and Sea,	400.00	16.20
Pavilion on above, Plan 10	400.00	16.20
Total		32.40

And it appearing that the appellant has paid under protest the taxes assessed upon its property for the year 1925 (including such as are here abated), judgment must be rendered against the City of Saco for $32.40, with costs which are here awarded.

Judgment for appellant against the City of Saco, appellee, for $32.40 *with costs.*

JAMES H. KERR

vs.

STATE OF MAINE.

Kennebec. Opinion May 14, 1928.

CONSTRUCTION CONTRACTS. LEGALITY OF SUPERVISING REQUIREMENTS. RESPONSIBILITY FOR CHANGED CONDITIONS.

A provision in a building contract made by the State that the chief engineer of the State Highway Commission or his assistant shall have supervision of the work during progress, and that the decision of the chief engineer as to the quality or sufficiency and the quantities of performance and other practical questions in the execution of the contract shall be final and conclusive is valid and binding, subject to the limitation that the law writes into a provision of such nature that the engineer must exercise his honest judgment.

Expectations of a contractor as to the physical conditions involved in and surrounding his work, of whatsoever nature, unproduced by fraud, nor brought about by conduct so gross as to imply bad faith, cannot relieve a contractor from contractual obligation.

A contractor under contract to excavate to a specified grade at a cubic-yard price is not entitled to recover for excavation incidental to the performance of the contract.

In the case at bar the contractor must be held to have accepted the situation as it was at the time of contracting; natural and contemplated changes were for him to accept and it was for him to be responsible for and bear any condition he might create in connection with the work he had undertaken to do. It was for the State to leave the situation within the contemplation of the contract. Nothing in the evidence presented disclosed any remissness on

the part of highway commissioner and his assistants, nor any conditions changed by the State or its agents beyond what might be naturally contemplated as within the scope of the contract. The contractor was therefore entitled to no additional remuneration.

On report. Action brought by James H. Kerr against the State of Maine under authority of Chapter 237 of the Resolves of the State of Maine of 1927.

Action was based on a contract entered into by James H. Kerr with the State of Maine for the construction of the substructure of a highway bridge known as the Hancock-Sullivan Bridge. Plaintiff claimed that because of incompetence, mistakes, neglect and improper instructions received from the Engineer of the Highway Department he was obliged to do extra work and furnish extra material, etc., amounting in all to $195,753.93 more than he was paid.

As provided in the Resolve authorizing the suit the evidence was taken before a single Justice of the Supreme Judicial Court and the case reported to the Law Court for final determination. Judgment for plaintiff for $2,481.50, the amount remaining unpaid under the original contract. The case appears fully in the opinion.

George L. Emery,
Walter L. Gray, for plaintiff.
Raymond Fellows, Attorney General,
Sanford L. Fogg, Deputy Attorney General, for the State.

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

DUNN, J. In making the State of Maine to be suable at the instance of James H. Kerr, the Eighty-third Legislature annexed the limitation that decision of the case be by the Law Court on report of the evidence. 1927 Resolves, Chap. 237.

According to familiar canons of construction, the meaning already judicially affixed to the phrase "on report" was carried into the legislative enactment.

So the resolve is construed to contemplate that, without reference to matters of purely technical pleading, this Court shall determine from the reality of the record, that is, from the admissible

evidence and the warrantable inferences, whether, in law, the plaintiff, who having the affirmative of the issue has the burden of proof, has sustained such burden, and if he has sustained it, to what extent.

Five Hancock county towns, meaning by that the territory and inhabitants within these towns, comprise the Hancock-Sullivan Bridge District. 1921 P. & S. L., Chap. 120.

Invoking in virtue of charter right the provisions of the Bridge Act (1915 Laws, Chap. 319 as amended), the Hancock-Sullivan trustees petitioned the Hancock county commissioners and the State highway commission to meet with the trustees and as a board determine if the convenience and necessity of the public might require the spanning of the tidal waters called Taunton bay or Sullivan river, between the town of Hancock and Sullivan, with a bridge.

When it had been decided to build the bridge, the district trustees, upon which body the Legislature had imposed the task, made a preliminary survey of the intended location.

Then the highway commission prepared plans, specifications and estimates. And, on December 15, 1922, the commission invited proposals for the construction of the substructure of the bridge, the substructure to consist of two abutments and seven piers, to be filed by January 2, 1923.

The advertisement stated that plans and specifications had been made available to intending bidders at the office of the commission and pamphlets distributed by the commission afforded information concerning the character, nature, and amount of work to be performed. One of the pamphlets, entitled "Proposal Requirements," mentioned that in respect to the contour of the river bed, the soil and its depth, and the elevations of the rock surfaces, the plans, which had been based upon the survey made by the district, should not be regarded as even approximating accuracy; bidders, read the pamphlet, must examine the location of the proposed work for the purpose of becoming familiar with the conditions to be encountered.

Plaintiff signed and submitted his proposal. It recites that the bidder has examined at the site where the bridge is to be and informed himself as to conditions there. Besides, that the bidder is familiar with the terms of the proposal requirements.

He bid to furnish and supply at unit prices — subject to allowances if the estimates of quantities were increased or diminished — the materials, tools, plant and labor requisite, and to construct and complete the substructure.

His bid having been accepted, plaintiff entered into a written contract with the State of Maine, wherein he absolutely undertook to perform all that he had proposed to do, and to have the work done within three hundred days from the date of the direction to commence it; the chief engineer of the State highway commission, or his assistant, to have supervision of the work during progress, and the decision of the chief engineer as to the quality or sufficiency and quantities of performance and other practical questions in the execution of the contract to be final and conclusive, this being the language of the clause clothing the engineer with authority:

"Should any discrepancies appear or difference of opinion, or misunderstanding, arise as to the meaning of the Proposal Requirements, Plans or Specifications or as to any omission therefrom, or misstatements therein, in any respect, or as to the quality or dimensions, or sufficiency of the materials, plant or work, or any part thereof, or as to the due and proper execution of the work, or as to the measurement or quantity or valuation of any work executed under the contract, or as to additions thereupon, or deductions therefrom, or as to any other questions or matters arising out of the contract, the same shall be determined by the Chief Engineer and his decision shall be final and binding upon all parties concerned; and the Contractor shall immediately when ordered by the Chief Engineer proceed with and execute the work or works, or any part thereof, forthwith, according to such decision."

Such a provision in a building contract is binding. *Norcross* v. *Wyman*, 187 Mass., 25; *Herbert* v. *Dewey*, 191 Mass., 403; *Handy* v. *Bliss*, 204 Mass., 513, 520; *Cook* v. *Foley*, 152 Fed. 41; *Jacques* v. *Nelson Company*, 119 Maine, 388. The principle is applied in analogous situations in other Maine cases. *Veazie* v. *Bangor*, 53 Maine, 50; *Bucksport* v. *Brewer*, 67 Maine, 295, 302; *Seretto* v. *Rockland, etc., Railway*, 101 Maine, 140. See also the Massachusetts case of *Walker* v. *Orange*, 16 Gray, 193. The law

writes into a provision of such nature that the engineer must exercise his honest judgment. 6 R.C.L., 965.

Order to begin work issued March 26, 1923. Work was begun in April next following, but not completed until September, 1926, when the substructure was accepted and utilized.

Without going into all the details of the contract, which is muffled up in a phraseology such as engineers and contractors employ, it may be emphasized that the plaintiff is not claiming that the prices on which he and the State agreed proved inadequate and unjust; he does not advance that the commission, or the engineer, deliberately made deceptive representations within the inclusiveness of the generic expression "fraud"; he does not assert that the engineer was partial, that he erred in his measurements, was wrong in his classifications, or that he reduced prices. Nothing of the sort. Plaintiff virtually concedes that in strict accordance with the terms of his contract he has been paid from time to time all that is his due, except the sum of $2,481.50 certified latest by the engineer, the certificate being in evidence.

What then is the position of the plaintiff?

In the first place, plaintiff presents the mental picture that it turned out to be far more difficult to make the excavation for abutment number one — the abutment on the Hancock shore — and the excavations for three piers, counting from that abutment, than at the time of bidding he had anticipated. It is contended that the additional work necessarily done in making the excavations is not covered by the contract, and that there should be extra compensation for its performance.

The digging was soft, testifies the plaintiff, except that at the third pier there was ledge at the depth of seven feet, and, as the vertical planes defined on the plans and in the specifications did not allow angles of repose sufficient to keep the sides or walls from slumping, areas essential were excavated. The claim is that allowance should be figured therefor and for the riprap and fill and other things entailed, on the theory of an implied contract arising of necessity out of the express contract.

Despite the statement in his proposal to the contrary, plaintiff swears that in bidding he had no knowledge of conditions below the river bed, and no intimation of what he might come upon,

save from the plans, the specifications, and the pamphlet. His testimony is that, although he went to the river, he made no soundings or investigations because to have done so would have involved his expending one thousand dollars.

He, perhaps, when bidding and in contracting, expected that he would strike a different stratum than he did. But any such expectation, in view of the admonitory notice which he admits had been brought to his attention, needs must have been the child of a mind resolved to chance adventures subjacent the river bed. But expectations, of whatsoever nature, unproduced by fraud, nor brought about by conduct so gross as to imply bad faith, cannot relieve a contractor from contractual obligation. That is obvious when one thinks a little.

There is more to be said. The contract in this case has the provision that for excavation sides or slopes, no allowance shall be made to the contractor. The provision is not novel. *Bowers Hydraulic Company* v. *United States*, 211 U. S., 176, 53 Law ed., 136. Moreover, it but declares the already well settled legal proposition that a contractor under contract to excavate to a specified grade at a cubic-yard price is not entitled to recover for excavation incidental to the performance of the contract. *Norton* v. *University of Maine*, 106 Maine, 436.

Coming to consider another phase of the case.

It is told in the evidence, argues counsel for the plaintiff, that the incompetency or negligence of the chief engineer, supplemented by the inefficiency of the inspector on the job, compelled the contractor, after much protestation, to incur expense in building the aforementioned abutment and piers, and the fourth or next successive pier, greater than it was reasonable to require. Unreasonable superintendence, is the argument, forced the contractor to the very precipice of financial ruin. Still, continues counsel, the contractor, though he objected, did not refuse to go on with the work as he had been directed, nor did he leave the substructure unfinished.

Contention is that the contractor was not allowed enough "seal." "Seal" is simply and solely what the word, when the sense in which it is used is apparent, implies: concrete placed within the walls of a construction to form the floor and thereby

make a water-tight box or chamber within which submarine construction may be carried on.

Testimony on the plaintiff's side is that ample seal, that is, so he contends, seal sufficiently deeper or thicker than was had, would have tended materially to the counteracting of buoyancy and the resisting of the tide and thus obviated the occasion as well as the expense of weighting the tops of the caissons with stone to keep the caissons in position.

There is more or less confusion in the record, but lying below it all is the fact, not gainsaid and meriting stress, that the contract into which the plaintiff entered was not to make caissons, but to build the substructure for the bridge, and in relation to this the caissons were within the contract.

To speak further. The bid or proposal, which is incorporated in the contract, in naming prices for concrete, sets forth that certain concrete is to be placed in unwatered forms, the price being the highest in the schedule. A single exception is then made by these words, pen written after printed words: "except seal * * * 5 ft. thick." The exception proposes that the first five-foot thickness of concrete, though placed through water in what the contract calls a watered form, shall be paid for at the same rate as though placed in a form from which the water had been pumped. The exception, which was in the nature of a concession to the contractor, did not limit him to a five-foot seal — the contractor might have made the seal deeper — but he was limited to an unwatered-form price for a watered-form seal beyond five feet in thickness.

Still another claim is that bad directions by the inspector caused enormous difficulty and tremendous expense in the emplacement of each of the five foundations, and especially that of the third pier.

As to this claim, as to the others thus far, the plaintiff adheres to the theory of an implied liability until he is carried beyond the border-line of quasi contracts, whilst on the evidence his case is unsupported, because of the application of the contract.

The claim next made is not free from complexity. It is that the change by the State in the location of a ferry-slip or landing-place, upon which the fill from abutment number two, on the Sul-

livan shore, encroached, caused the river current to come against work in process of construction, to the contractor's pecuniary loss.

The lane or path of a chartered ferry lay between the termini legislatively designated for the bridge, and this without repealing the ferry charter or providing for change of the ferry location. True, the contract contains a clause requiring the contractor not unduly to interfere with water traffic, but in fair interpretation the clause is inclusive only of traffic up and down the river and not of traffic by the ferry.

In excavating the abutment number two the contractor dumped the earth on the shore and made a ridge or elevation, said in testimony to have been of inconvenience to ferry travelers and even dangerous, wherefore the State through its highway commission caused another slip or landing-place to be built for the use of the ferry.

The contractor must be held to have accepted the situation as it was at the time of contracting; natural and contemplated changes too were for him to accept and it was for him to be responsible for and bear any condition he himself might create in connection with the work he had undertaken to do. It was for the State to leave the situation within the contemplation of the contract. Indeed, the State impliedly agreed that it would so do. If the State made the current of the river to flow in a different course, to the disadvantage of the contractor, the loss sustained might be a proper element for damages. Where one contracting party fails to afford the other party that to which by the terms of the contract he is entitled there may be reparation. *Murray Brothers Company* v. *Aroostook Valley R. Co.*, 109 Maine, 350.

But, if there were disadvantage to the contractor, because of the change in the location of the ferry-slip, the extent thereof is so inseparably intermixed with and so indistinguishable from the other claims as to leave no basis for measuring actual damages in terms of money. When the current was changed, how long it remained changed, and the amount of damage done are undefined in the pages of the record.

In this situation, where the Court may not take further proof, nor discharge the report — because there is no other judicial court to which to send the case — it is believed to comport with

the spirit of this controversy, authorized by the Legislature between citizen and State, to leave the particular claim undecided for lack of full evidence. If the Legislature wills that the claim have further attention it can make its will known.

Defendant has introduced evidence of tendency to show consequential damages from delay in the performance of the work. Much delay is deemed to have been excused. However, if there be delay unexcused and inexcusable, then in such relation the contract provision is of this tenor:

"The Contractor failing to complete the work on or before the date set for completion in the contract, or, if an extension of time is granted, the date set by reason of such extension, shall be liable and accountable for the cost of engineering and inspection incurred after the date of completion, not as penalty for non-completion, but instead as liquidated damage for non-use of the structure, and the State of Maine through its Highway Commission shall make such deductions from the moneys due or that may become due the Contractor."

and the record lacks evidence within the compass of the provision.

This opinion might well stop here, but because of the charges of remissness which the plaintiff lays against the highway commission engineer and his assistants, and lest silence may give rise to misconception, it seems becoming to add that beyond the letter or nomination of the contract the contractor has been allowed and indulged, and not merely in respect to seal. Diligence and good faith on the part of the supervisors and the arbiter, in discharging duty as it was given each in intellectual honesty and fairness to see it, held the contractor to the complete performance of his contract.

Aside from possible loss growing out of the change in the location of the ferry-slip — which question to repeat the Court feels that it must leave undetermined — it is the conclusion of the Court that within the purview of the contract the contractor is paid for all the original work and all the extra work which he has done except, as stated above, in the sum of $2,481.50.

The mandate will be:

Judgment for plaintiff for $2,481.50.

MARY B. CHASSON

vs.

THE SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD.

Penobscot. Opinion May 14, 1928.

LIFE INSURANCE CONTRACTS. VALIDITY OF BY-LAWS. RIGHTS AND OBLIGATIONS OF MEMBERS OF MUTUAL SOCIETIES. CONDITIONS OF WAIVER.

Failure to pay assessments and dues at the time required by the constitution and by-laws of a fraternal beneficiary association, automatically works a suspension of membership without notice to the member, and after suspension re-instatement can follow only upon the terms and provisions of the certificate.

In a mutual society each member has financial obligations to perform, and is protected by the constitution and laws of the society from having his own interests jeopardized by keeping a member on the rolls, when by virtue of the contract of insurance, that member is no longer entitled to the benefit of his certificate, and his beneficiary has no further right to demand that mutual members shall contribute to the payment of an obligation which no longer exists.

The right of a member of such society to re-instatement is a purely personal right which does not survive nor pass to his representatives or beneficiaries under the certificate.

Forfeiture or suspension of rights under a certificate of insurance in such society can only be waived by the society on receipt of full knowledge of all facts connected with the member and the certificate.

One cannot waive that which he does not know.

In the case at bar the insured, Chasson, had failed for some months previous to his death to pay his dues and assessments so that he became automatically suspended from membership. Payments made by his camp clerk in disobedience and disregard of the certificate were of no legal avail.

Attempt was made after the death of the insured to re-instate the policy and payments were made by interested parties and forwarded through the camp clerk to the home office of the defendant, and kept by the defendant

without knowledge of the fact that the insured, Chasson, was dead. Such attempt was fruitless and no rule of waiver or estoppel prevented the Society from defending the suit.

On report. An action on a contract of life insurance brought in the Superior Court for the county of Penobscot. After presentation of the evidence, the cause was, by agreement of the parties, reported to the Law Court for its determination on so much of the evidence as is legally admissible. Judgment for defendant.

The case appears fully in the opinion.

George E. Thompson,

Ross St. Germain, for plaintiff.

Gillin & Gillin,

James G. O'Connor, for defendant.

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

PHILBROOK, J. This case comes from the Superior Court of Penobscot County and by agreement of counsel is reported to the law court for its determination upon so much of the evidence as is legally admissible.

It is an action brought to recover the sum of $1,000 which the plaintiff says is due by reason of a contract of life insurance entered into between Ceril Chasson and the defendant. The latter declines to pay on the ground that the insured failed to comply with the obligations resting upon him by the terms of the contract whereby the policy lapsed and the obligation to pay the beneficiary ceased.

It is admitted that the plaintiff was the wife of the insured at the time when the policy of insurance was issued by the defendant, that the insured died February 22, 1923, that at the time of bringing the action the plaintiff was the widow of the deceased, and that she is the person named as beneficiary in the policy.

The defendant is a fraternal beneficiary association located at Omaha, Nebraska, organized and incorporated under the laws of that state, duly and regularly admitted and licensed to transact

business as a fraternal beneficiary association in the State of Maine.

The right of the plaintiff to recover is contractual, depending upon the terms of the contract of insurance and the fulfillment of those terms by the insured and the insurer.

A contract of insurance, in common parlance, is denominated an insurance policy but in the case at bar it is called a certificate. The defendant obligated itself to pay the sum of $1,000 to the beneficiary upon satisfactory proof of the death of the insured while in good standing. It is distinctly set forth in the contract of insurance that the certificate is issued by the insurance company, and accepted by the insured, subject to all the conditions set forth therein and the provisions of the constitution and laws of the company in relation to membership on the second and third pages of the policy. The articles of incorporation, the constitution and laws of the company, all amendments thereof, the application for membership, the medical examination signed by the applicant, denominated in the policy as "member," constitute the agreement or contract between the defendant and the insured. On the face of the policy is a provision that should said certificate be forfeited for any cause, acceptance of any payment for or from the member or other act by any camp officer or member of the society after said forfeiture shall not operate as an estoppel or as a waiver of the terms of the policy. Among the conditions found on the third page of the policy are these: that the member shall pay the clerk of his camp certain assessments and camp dues, as required by the by-laws of his camp, and if he fails to make any such payment on or before the last day of the month he shall stand suspended, and during such suspension his beneficiary certificate shall be void; that no camp shall pay the sovereign camp dues or assessments of any member unless the same is actually transferred from the camp's fund into the hands of the clerk on or before the last day on which such assessment is due and payable, and the clerk shall enter such payment upon his records, showing the day when it was paid by the camp; that the clerk of the camp shall not by acts, representation, waivers or by vote of his camp have any power or authority to bind the sovereign camp except as provided in the policy; that the clerk

of the camp shall not pay the assessment or dues of any member with camp funds or his own funds unless the same is paid on or before the last day on which such assessment is due and payable, and must make a record of the time of such payment, which payment cannot be made by the clerk or the camp after the member becomes suspended.

There are provisions in the policy for the reinstatement of suspended members among which is a provision that if the suspended member should pay all arrearages and dues to the clerk of his camp within ten days from the date of his suspension, and if he be in good health at the time and continues in good health for thirty days thereafter (not citing provisions in regard to the excessive use of intoxicants or narcotics) he shall be reinstated and his beneficiary certificate again become valid; but any attempted reinstatement shall not be effective for that purpose unless the member be in fact in good health at the time and continue in good health for thirty days thereafter.

It is also expressly stated in the certificate that no officer, employee, or agent of the sovereign camp, or of any camp, has the power, right, or authority to waive any of the conditions upon which the beneficiary certificate is issued or to change, vary or waive any of the provisions of the constitution and laws of the society, nor shall any custom on the part of any camp or any number of camps with or without the knowledge of any sovereign officer have the effect of so changing, modifying, waiving, or foregoing such laws or requirements.

Neither the certificate nor any provisions of the constitution or by-laws of the defendant require notice from it to the insured as to the time when assessments and dues become payable and as to that time the member is therefore obliged to take due notice and govern himself accordingly. The failure to pay these assessments and dues at the required time automatically works a suspension of membership without notice to the member and after suspension reinstatement can follow only upon the terms and provisions of the certificate.

At the time of his application for membership the insured was a resident of Bridgeport, Connecticut. Plaintiff testified that she and her husband lived in Bridgeport not quite a year after the

certificate was issued; that she personally paid the assessments and dues to the camp clerk or collector while they lived in Bridgeport. From Bridgeport they moved to Old Town, Maine. The plaintiff further testified that after she and her husband came to Old Town she took the receipt book, issued by the defendant, to the post office, had a money order made, sent the book and money order to the Clerk of the camp at Bridgeport who returned the book to her.

The receipt book for the year 1922, Plaintiff's Exhibit 4, shows no payment of assessments and dues for the months of September, October, November and December of that year. Receipt book for 1923, Plaintiff's Exhibit 5, indicates that assessments and dues for January, February and March of that year were received by the camp clerk at Bridgeport but the dates of such payments do not appear although the clerk's signature acknowledging payment is written in such form as would seem to indicate that these three payments last named were received at one and the same time.

In January and February of 1923 the insured was supported by the city of Old Town as an Orono pauper. His wife, the beneficiary, was in Canada at that time. She testified that she had paid nothing by way of assessment or dues on the policy for the three months just prior to her husband's death. On being asked if she paid any assessment on the policy after July, 1922, she answered "I know I made some payments, but I don't remember when they were."

It appears that on the very day of the death of the insured Mr. Llewellyn F. Crane, Chairman of the Board of Selectmen at Orono, and one of the overseers of the poor, wrote to the defendant company inquiring as to the membership of the insured at that time but later correspondence would seem to indicate that Mr. Crane's letter contained no information as to the health of the insured at that time or whether he was living or dead. On the week following the death of the insured Mr. A. G. Averill, a practising attorney in Old Town, on request of the plaintiff, wrote to the camp collector to ascertain if the policy or certificate was still in effect. His letter, Plaintiff Exhibit 6, was dated March 1, 1923, and reads as follows:

"The assessment of Ceril Chasson under Woodmen policy, Bridgeport Camp No. 95, number of Policy R213656B, as I understand is in arrears for a few months. Kindly let me know whether you have kept the assessment up yourself or whether you have dropped him from the rolls. If you have kept him I will send you the money if you will let me know how much."

Here again there was a careful omission to state the fact that Chasson was dead at the date of Mr. Averill's letter.

In reply to Mr. Averill the camp clerk said:

"I am thankful that some responsible person is interesting themselves in this Woodman insurance which is as good as a Government bond. I must say to you that I have had lots of trouble and annoyance trying to keep this protection in force during the last few years. My books shows the last payment made was for July 1922. There is now due for August, September, October, November, December, 1922, January, February, and March 1923, $2.70 per month amounts to $21.60 now due to April 1, 1923. Kindly get that money at once. The reason I speak this way is because I lapsed the business a few days ago upon giving up all hope of hearing from anyone in Old Town again, believing that they had left for parts unknown to me. All this money was paid out of my pocket but the last month. I have thirty days to revive the business back into full force so please be prompt in your remittance."

In answer to this letter from the camp clerk Mr. Averill wrote on March 6, 1923, as follows:

"Yours of the third received and in answer am forwarding you my check for $21.60 to reimburse you for the amount you have put in, as per your letter, in keeping up policy number R213656B, Ceril Chasson. You state that this policy has not been dropped by you and we are glad to reimburse you for what money you have put in. Kindly forward receipt to April first."

It is still a notable fact that Mr. Averill's letter written more than a week after Chasson had died contained no statement or information that Chasson was dead and it was not until June 15, 1923, that Mr. Averill wrote to the home office of the defendant giving the date of the death of Chasson.

The testimony of Mr. Farley, the local camp clerk, could not

be obtained for use at the trial below because of his death.

The whole record discloses, among other things, three distinct and decisive facts:

First. The failure of the insured for some months previous to his death to pay his dues and assessments so that he became automatically suspended from membership.

Second. That the camp clerk attempted to keep the assessments and dues of Chasson paid, in strict disobedience and disregard of the certificate, paying the money out of his own pocket.

Third. That in the attempt to reinstate the membership of Chasson, his beneficiary, after his death, tendered payment of the debt which was owed to the camp clerk individually which payment was forwarded to the home office of the defendant and in part kept by the defendant without knowledge of the fact that Chasson was dead.

From the evidence in the record, and in view of the provisions of the certificate already referred to, the first fact would seem to be so fully established, and control of that fact so distinctly provided for in the certificate, that further discussion upon this point is quite unnecessary.

Relative to the second fact it should be observed that not only does the certificate forbid a camp clerk, out of his own pocket, to pay assessments and dues of any member, but such a rule is in harmony with the policy and provisions of mutual benefit associations. Being a mutual society each member has financial obligations to perform, and is protected by the constitution and laws of the society from having his own interests jeopardized by keeping a member on the rolls, when, by virtue of the contract of insurance, that member is no longer entitled to the benefit of his certificate, and his beneficiary has no further right to demand that mutual members shall contribute to the payment of an obligation which no longer exists. It must be quite clear, therefore, that the payment of assessments and dues by a camp clerk out of his own funds, in behalf of the insured, cannot avail the plaintiff in her attempt to collect the beneficial payment.

The third fact seems to be controlled by decisions already made in this and other states.

In *Gifford* v. *Workmen's Benefit Association*, 105 Me., 17,

questions arose similar to those in the case at bar. It was there held that the failure of the insured to pay his assessments caused a suspension of the insured from all right, benefit, and privileges of the association, without notice or other action on the part of the insurance company, because the provision for suspension was self executing, and the failure of the insured to pay the assessments having worked his suspension, and forfeiture of the benefit certificate, such suspension continued until the member did the act required for his reinstatement. Being dead he could do no act to reinstate himself and the act of another could not reinstate him after his decease. It was also there held that the right of a member to reinstatement was a purely personal right which did not survive nor pass to his representatives or beneficiaries under the certificate.

In the case to which we have been referring it was claimed, and the plaintiff here claims, that the insurance society waived forfeiture by receiving overdue assessments from another person after, but without knowledge of, the death of the insured. "A waiver is a voluntary relinquishment of some known right, benefit or advantage and which, except for such waiver, the party other wise would have enjoyed. Knowledge of the existence of the right, benefit or advantage, on the part of the party claimed to have made the waiver, is an essential prerequisite to the relinquishment." *Gifford* v. *Benefit Association*, supra. One cannot be said to waive that which he does not know. *Marcoux* v. *St. John Baptist*, 91 Me., 250. When a portion of the money advanced by Averill was received and retained by the defendant it had no knowledge of the death of Chasson. Having no knowledge of that fact it cannot be said to have waived the suspension; *a fortiori* it cannot be said that it waived such suspension when payment of the assessments and dues were made, or attempted to be made, by some one in behalf of the deceased who alone had the right to seek reinstatement.

In L.R.A. (N.S.) Vol. 38, at page 576, it is said that in most instances in which the element of death of the member entered into a decision of the question of waiver of forfeiture, death precludes waiver. In *Brown* v. *Knights of Protected Ark*, 43 Colo., 289, 96 Pac., 540, it was held that acceptance of arrearages in ignorance of a member's death will not constitute a waiver of forfeiture

where they are promptly returned upon learning of the fact, although the tender and acceptance was within the time during which the member, if alive, would be entitled to reinstatement, the rule being that there can be no reinstatement after death. In *Catholic Order* v. *Lynch*, 126 Ill. App., 439, it was held that where a suspended member dies before the acceptance of overdue assessments, such acceptance will not constitute a waiver of forfeiture where the laws of the order (as in the case at bar) require good health as a condition of reinstatement. In a case somewhat more akin to the case at bar, *Bagley* v. *Grand Lodge*, 31 Ill. App., 618, (although reversed on other grounds) it was held that where the constitution of a mutual benefit society provides that the beneficiary's certificate, suspended by reason of non-payment of assessments, may be renewed if the member be alive, upon certain conditions, the receipt of overdue assessments by an officer of a subordinate lodge does not waive the forfeiture, if the member is not living when the money is paid, especially where, when the money is paid, the death of the suspended member is concealed from the officer who takes the money. In *Knights of Columbus* v. *Burroughs*, 107 Va., 671, 17 L.R.A. (N.S.), 246, 60 S. E., 40, the effect of the by-laws limiting the power of a local council of a beneficial association was very carefully considered. In that case the member had failed to pay his assessments as required by the constitution and by-laws, and had ipso facto forfeited his membership. The subordinate or local council undertook to make good his delinquincy without complying with the by-laws of the society. Upon careful consideration and examination of many authorities it was held that the local council, in its undertaking to make good the delinquincies of its members, was acting without authority; that in so doing it was the agent of its members and not of the society; and that the society, having received the money in ignorance of the facts, had not waived the forfeiture, and was not by its conduct estopped to set it up as a defense to the action. In *Modern Woodmen* v. *Tevis*, 54 C.C.A., 293, 117 Fed., 369, the powers and duties of the clerk of a local camp in receiving arrearages from a suspended member, and the effect of his action, in receiving such arrearages in violation of the by-laws, upon the rights of the society or head camp are con-

sidered; and it was there held that the authority of the clerk was limited by the by-laws, that the members and beneficiaries are charged with knowledge of these limitations, because they are a part of the contract; and that the clerk of the local camp had no authority by contract, estoppel or waiver to bind the society to its members or beneficiaries, either by extending the time of payment of a benefit assessment, or by waiving default in its payment, or by reinstating a suspended member without a warranty of good health.

In Am. & Eng. Ann. Cas., Vol. 17 at page 1175, will be found an annotation of *Gifford* v. *Benefit Association*, supra, where it is stated that the case is in accord with the views generally expressed that the right of a member of a beneficial association to be reinstated to the privileges of the society does not survive his death. A note upon earlier cases along the same line may be found in Am. & Eng. Ann. Cas., Vol. 6, page 698, where by a number of cases there cited it is held that the right of reinstatement after suspension from a beneficial association is a right that is personal to a member and does not survive his death. In a more recent case, *Grand Lodge* v. *Taylor*, 44 Colo., 373, 99 Pac., 570, it was held that a member of a beneficial association who was suspended by reason of non-payment of assessments and dues cannot be reinstated after his death and a tender of the overdue assessment does not restore his beneficiary to the privileges of the society. In *Brown* v. *Knights of Protected Ark*, supra, the court held that the regulations contemplating payment and acceptance of assessments and dues must be availed of by the member himself during his life time and that his beneficiary could not, after his death, take advantage of any reinstatement clause.

In view of the authorities which we have cited we hold that Chasson was suspended from membership in the defendant order at the time of his decease by reason of the non-payment of assessments and dues in accordance with his certificate and the constitution and by-laws of the society; that any attempt to reinstate him after his decease was fruitless and that there is no rule of waiver or estoppel which prevents the society from defending as it has done.

Judgment for the defendant.

PEJEPSCOT PAPER COMPANY

vs.

TOWN OF LISBON.

Androscoggin. Opinion May 14, 1928.

CONTRACTS. PUBLIC UTILITIES.
MEANING OF TERMS IN A SCHEDULE OF RATES OF A WATER COMPANY OR WATER DISTRICT DEFINED. EXCEPTIONS.

"Office" rate applies to office water solely. The word "office" must be given an exclusive sense or it has no operation at all.

"Domestic" in its application to water furnished by a public utility has been enlarging as consideration for the well being of man has increased.

While primarily "domestic" relates to home life, to household or family, yet it has a broader significance which must be determined with reference to the relation in which it appears.

The fact that the building to which water is supplied is used for industrial purposes is not the criterion to determine whether the water supplied is used for domestic purposes. The test is an intended use which in its nature is domestic. It is the character of the purpose, and not the character of the place of user.

Water used for a purpose common to all domestic establishments is used for domestic purposes though such use may be ancillary to a trade, manufacture or business.

Water rates are water rents, and as in computation of rents in which the "day" as a fixed period of time is the standard of measurement, every intervening day — secular days, Sundays, holidays, all — must be included and counted in the reckoning.

In the case at bar though all the water used in plaintiff's plant was brought into the plant through one pipe, it became in the plant, in consequence of its appropriations through different pipes to different uses, chargeable accordingly. Water furnished by defendant to plaintiff's rest-rooms, for the personal convenience of the employees of the plant, was for uses domestic in nature and chargeable at the domestic rate.

There appears no manifest error in the findings of the jury.

When the excepting party must fail in the end upon what are equivalent to undisputed facts, exceptions will not be sustained.

On exceptions and motion for new trial. An action for money had and received by way of overpayments of water rates. Plaintiff claimed overpayments amounting to $3,306.81. Trial was had before the Supreme Judicial Court holden in Androscoggin county and a general and special verdict rendered for the defendant. To certain rulings and instructions given by the presiding Justice the plaintiff seasonably excepted, and also filed a general motion for a new trial. Motion overruled. Exceptions overruled. The case appears fully in the opinion.

Robinson & Richardson, for plaintiff.

Frank A. Morey, for defendant.

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

BARNES, J., concurring in the result.

DUNN, J. In this case the plaintiff, the proprietor of a pulp and paper manufacturing plant, brought its action for money had and received against the town of Lisbon, where the plant is, to recover overpayments claimed to have been made for water in the years 1920-1926.

Before furnishing the water the plaintiff town, which in effect had been made a water district (P. & S. L., 1903, chap. 241), had filed its schedule of rates with the Public Utilities Commission (R. S., Chap. 55, Sec. 25).

The schedule makes several classifications. One is for dwellings, boarding and lodging houses, stores, shops, offices, * * * * "and all domestic purposes" at twenty-five cents a hundred cubic feet, with a seven-dollar-a-day minimum charge. Next are rates for hotels, and for laundries. Then comes the fourth classification. It sets an industrial rate thus:

"A $4.00 per day minimum charge for 4000 cubic feet or any part thereof. All excess of the 4000 cubic feet per day shall be at the same rate of 10 cents per 100 cubic feet, the same to be reckoned at the end of each quarter, beginning Jan. 1. Providing however the water supply be in sufficient quantity for this purpose, and that it shall not be detrimental to domestic uses,

and which provision shall be at the judgment and discretion of the town through its Board of Water Commissioners."

The water which had been supplied to the office and rest-rooms in the plant for drinking, washing and toilet had been measured through the meter provided by the town for that purpose and billed periodically as a single item under the "office" and "all-domestic-purposes" classification of the schedule of rates. All the other water was billed as "industrial."

Compulsion, fraud, or extortion, of the species at times applied to public utility exactions, there was none. On the one hand was honesty of purpose in claiming that which was believed to be justly due; on the other, the payment of charges based on schedule rates of which, until April, 1924, the customer had only that knowledge imputed by the law from the fact that the schedule had been filed. In April, 1924, the town commissioners gave an official of the plaintiff company, who had inquired about the "average" of the rates, a copy of the schedule. After having the schedule, plaintiff continued for several years to pay the bills when and as presented, but eventually, on concluding that it had overpaid for water, plaintiff brought this action.

On the trial no material conflict developed concerning cubic feet consumption of water or the amounts charged and paid therefor. The controverted issue was the interpretation as a matter of law of the schedule of rates.

Plaintiff contended that the industrial rate, restricted to days on which the plant was operated, Sundays and holidays being excluded, if as a fact manufacturing operations at the plant were suspended on those days, should apply as the only standard by which to make the charges for all the water.

There was tacit assent that, if the plaintiff were correct in contention, excessive payments aggregated $2,653.21.

Defendant contended that the water, although one pipe had brought it into the plant, became in the plant, in consequence of its appropriation through different pipes to different uses, chargeable accordingly. Hence the contention of the defendant that the office or domestic rate should apply to the water which had been so supplied, and the industrial rate, with minimum for natural or calendar days, to the other.

The jury was instructed that "day" as used in the schedule meant a calendar day on which water, much or little, was used from the public utility.

Verdict was for the defendant.

Motion for a new trial, on the ground that the verdict is violative both of law and evidence, has been argued by the plaintiff's counsel. And its counsel has argued exceptions to rulings and instructions by the presiding Justice, and to refusals to rule and instruct. No exception goes to the exclusion of evidence.

The "office" rate, which is fixed at the same amount as the "domestic-uses" rate, plainly applies to office water. The word "office" must be given an exclusive sense or it has no operation at all. If there were no specific office rate — if "domestic" alone were the term of the schedule — such term might well apply to the office drinking water and to that water supplied for the office lavatories and water-closets.

The term "domestic" in its application to water furnished by a public utility has been enlarging as consideration for the convenience and well-being of man has increased. *Kimball* v. *North East Harbor Water Company*, 107 Maine, 467. While primarily "domestic" relates to home life, to household or family, yet it has a broader significance which must be determined with reference to the relation in which it appears.

The schedule of rates involved in this controversy contemplates the using of water for health, comfort, and sanitary conveniences in buildings other than dwellings — "all domestic purposes" following the schedule enumeration of dwelling and other houses.

The fact that the building to which water is supplied is used for industrial purposes is not the criterion by which to determine whether the water supplied is used for domestic purposes. The test is an intended use which in its nature is domestic.

"What is the character of the purpose, not what is the character of the place of user." *Metropolitan Water Board* v. *Avery*, (1914) A.C. 118, Ann.Cas. 1914D, 556.

"If the water is used for a purpose which is common to all domestic establishments it is none the less used for domestic purposes because it is ancillary to a trade, manufacture, or business." *Metropolitan Water Board* v. *Avery*, supra.

Water supplied to a factory for the mere personal convenience of men employed in the factory is supplied for domestic purposes, and not for any trade purpose at all. *Colley's Patents* v. *Metropolitan Water Board,* (1912) A.C. 24, Ann. Cas. 1912B, 617.

The water furnished by the plaintiff to the defendant's rest-rooms, for the personal convenience of the employees of the plant, was for uses domestic in nature.

One matter more. This point was saved on exception. The exception, though not argued, has not been waived; the brief so states. The point may be considered here as congruously as later. Ought the jury to have been instructed that "day" in the schedule meant a day on which the plant was operated, and that kind of a "day" only? In order to determine the question the connection in which "day" is used must be borne in mind. The schedule is not defining the day on which an industrial plant may be operated, nor limiting the use of water to operating-days, though it may limit the minimum rate to days on which water is used.

The schedule fixes water rates. Water rates are water rents. In the computation of rents in which the day as a fixed period of time is the standard of measurement, every intervening day — secular days, Sundays, holidays, all — must be included and counted in the reckoning. *Pressed S. C. Co.* v. *Eastern R. Co.,* 121 Fed., 609.

The ruling of the trial court, that the schedule "day" meant a calendar day on which there had been user of the public utility water, while adverse to the plaintiff certainly left the plaintiff without room for exception.

Turning back more directly to the motion for a new trial. On finding that there had been no compulsion, actual, present, potential, in inducing the payments, the jury, under an instruction applicable to the general doctrine of waiver, found that the plaintiff in paying more than it owed for water had voluntarily renounced or waived the lower rate to which it was entitled. In the particular case this instruction may or not have been appropriate. The jury verdict, however, not only is not obviously against law and evidence but chords with law and evidence.

And now, the point of this exception having been so considered, what of the remaining exceptions?

The ruling of the inclusiveness of the industrial rate moulded and shaped the course of the trial to the question of whether the payments had been "voluntary" or "involuntary"; the Justice ruling and instructing that the payment of money, where there is no mistake of fact, though under the mistaken belief that the payer was bound to pay it, is voluntary and cannot be revoked.

First in this way, and again in that, to compress the residuum of the case into a compact presentation, the exceptions aimed to demonstrate ultimately that, in a legal sense, the payments, or some of them at least, had not been "voluntary."

From the premises from which certain exceptions were saved, these exceptions may have had merit, but the industrial rate was not inclusive of all the water supplied and the verdict, as before stated, is not manifestly wrong.

No exception, as above noticed, goes to the exclusion of evidence. It therefore must be presumed that were there to be another trial the facts would to all intents and purposes be the same as now.

In this situation it remains but to say that exceptions will not be sustained when the excepting party must fail in the end upon what are equivalent to undisputed facts. *Orr* v. *Old Town*, 99 Maine, 190; *Stachowitz* v. *Barron Anderson Company*, 121 Maine, 534.

Motion overruled.
Exceptions overruled.

MAUD I. DAVIS

vs.

MARTIN V. CASS ET ALS.

HARRY S. NEWCOMB

vs.

MARTIN V. CASS ET ALS.

Cumberland. Opinion May 28, 1928

ACTION. ATTACHMENT, RULES OF COURT. JUDGMENT.

Where an action has been dismissed for want of prosecution under a rule of court and final judgment has been entered dismissing the case, the case can not be restored to the docket at a subsequent term either by the court or by agreement of counsel, especially when the rights of third parties are affected. The judicial power of the court has been exhausted.

Where an action on which an attachment has been made, but no service made on the defendants, and no appearance of defendants at the first term, nor order of service issued, and an entry of "dismissed for want of service" is made at the end of the first term, it can not be restored to the docket at a later term by the court even with the consent of the parties, especially when the rights of third parties are affected.

The records of the court import verity and regularity.

An entry by the clerk of a court of record implies anthority from the court, unless the contrary be shown. It does not appear from the report in the case that the entries of dismissal in each action were not made by authority of the court.

On report. Actions of debt brought in the Superior Court for the County of Cumberland and transmitted to the Law Court under Sec. 47, Chapter 82 R. S., and argued together. Judgment for the defendants in both actions.

The cases fully appear in the opinion.
Jacob H. Berman,
Benjamin L. Berman,
Edward J. Berman,
David V. Berman, for plaintiffs.
Harry C. Wilbur, for defendants.

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

WILSON, C. J. These cases were certified to this Court from the Superior Court for the County of Cumberland under Sec. 47, Chapter 82 R. S., and have been argued together. The issues involved are sufficiently similar so that they may be disposed of by one opinion.

DAVIS CASE

On July 12, 1922, Maud I. Davis sued out her writ of attachment against Martin V. Cass et als returnable at the September Term of said Superior Court, on which writ an attachment of real estate of the defendants was made. At the return term, an appearance was entered for the defendants and pleadings of the general issue filed. On September 24, 1923, a statute bond for the release of the attachment of real estate was furnished the plaintiff by the defendants with the Fidelity & Deposit Co. of Md., one of the defendants in the case now at bar, as surety, which bond was approved by the plaintiff's attorney and the attachment released.

Nothing having been done toward the prosecution of this action for a period of more than a year, under a rule of the Superior Court, according to the report of the case, the action, at the December Term, 1923, was marked "dismissed" by the clerk, the docket entry being the usual one of "dismissed."

At the February Term, 1925, by agreement of counsel for the plaintiff and the defendants, but without notice to the surety on the bond, the entry of "dismissed" was stricken off and the case restored to the docket and referred by "agreement of counsel" to a referee. No hearing was had before the referee, but by agree-

ment of counsel the referee filed a report that judgment should be entered for the plaintiff for a sum agreed upon which was less than the amount claimed in the writ. Judgment was entered at the March Term, 1925, and execution issued and returned unsatisfied. Whereupon this action was brought on the bond given for the release of the attachment. The principals in the bond make no defense in the action now at bar; but the surety contends that the case having been finally disposed of at the December Term, 1923, by dismissal under a rule of the Superior Court, it must be considered as having gone to judgment at that term so far as the original action was concerned and the power over it in the Court below exhausted; and the surety was thereby relieved of liability on the bond.

This contention is sustained. It is true a court has power over its records to strike off entries made through error or mistake, even if made at a previous term, so long as the record of the case remains incomplete; or at the same term, by consent of the parties, an entry though duly made and finally disposing of the case; or under some circumstances the Court may on motion of one party strike off an entry of judgment, if made by mistake, though made at a previous term. *Lothrop* v. *Page*, 26 Me., 119; *Stetson* v. *Corinna*, 44 Me., 29; *West* v. *Jordan*, 62 Me., 484; *Priest* v. *Axon*, 93 Me., 34; *Meyers* v. *Levenseller*, 117 Me., 80; *Hersey* v. *Weeman*, 120 Me., 262; *Sawyer* v. *Bank*, 126 Me., 314.

When, however, a valid and final judgment disposing of the pending action has been entered on the record, and the parties are out of court, the judicial power of the court ceases, and it does not lie in the discretion or power of the court at a subsequent term to bring the action forward. Judicial power has been exhausted. *Meyers* v. *Levenseller*, supra; *Shepherd* v. *Rand*, 48 Me., 244; *Priest* v. *Axon*, supra.

In the original action against the principals in the bond, the action was dismissed, according to the report, under a rule of court. The rule under which this action was taken is not made a part of the report. This court can not take judicial notice of the rules of another court, but the docket entries in the case which are made a part of the report, and which of necessity are an abbreviated history of the proceedings, expressed in terms having a

well established meaning, of themselves import verity, *Gardner* v. *Butler*, 193 Mass., 96, 100, and regularity of procedure, and though the report contains a further statement that the dismissal was by the clerk, it also states it was done under a rule of court.

The only presumption from this is that the dismissal was done with the sanction of the presiding justice and by his authority, *Leeds* v. *County Com's* 75 Me., 533, 535, and that the result was a final disposition of that action, which is borne out by the fact that no steps were taken to restore it for more than a year or until the February Term, 1925. *Cheney* v. *B. & M. R. R.*, 246 Mass., 502.

Final judgment in the original action, therefore, having been entered, as we must presume it was, on the last day of the December Term, 1923, *Chase* v. *Gilman*, 15 Me., 65, and it not appearing to have been done by error or mistake but under a rule of court, the power of the Court over this action was exhausted. It could neither be restored to the docket at a later term by agreement of counsel or by the court, especially where the rights of third parties were involved, *Shepherd* v. *Rand*, supra; *Priest* v. *Avon*, supra; *Davis* v. *Nat. Life Ins. Co.*, 187 Mass., 468; *Pierce* v. *Lamper*, 141 Mass., 20.

NEWCOMB CASE

In the case of *Newcomb* v. *Cass et als*, a writ of attachment against *Martin* v. *Cass et als* was sued out by the plaintiff from the same court on August 20th, 1923, returnable at the September Term following, on which an attachment of real estate was made. At the same time the bond was given in the Davis case *supra* for the release of the attachment, a similar bond was given in the Newcomb case and the attachment was released.

No service, however, was made in the Newcomb case on either of the defendants in the action; nor did defendants appear at the return term, either personally or by counsel; nor was any order of service asked for or issued at the return term, as required under Sec. 23, Chap. 86 R. S. On the last day of the September Term, the docket of the Superior Court shows an entry: "Dismissed for want of service." It was the only disposi-

tion of the case which could be made, unless the defendants voluntarily appeared.

Whether it was intended by the language of the report to suggest that it was dismissed by the clerk without the authority of the court is not clear. From the docket entry, however, the presumption is, at least after a lapse of fourteen months, that it was dismissed in due course by order of court and with the knowledge of counsel, nothing appearing in the report to the contrary. A bare statement in the report that "it was dismissed by the clerk for want of service" is not sufficient to overcome the presumption arising from the docket entry and the presumption attending acts of public and especially of court officials, that such acts are regularly and duly performed. *Leeds* v. *County Com's*, supra.

Having been so dismissed and final judgment so disposing of the case having been made at the September Term, 1923, as in the case of *Davis* v. *Cass et als*, supra, the power of the court to restore it to the docket had been exhausted, nor could it be revived by agreement of counsel.

As to whether it could in any event have been restored to the docket without notice to and knowledge of the surety on the attachment bond we do not decide; but the case is clearly not governed by the case of *Sawyer* v. *Bank*, supra, where the entry of "neither party" was made upon a misunderstanding and the court at the same term before a final judgment was entered in the case ordered the entry stricken off, in which case the lien of an attachment in the action was held to be in no way affected.

Judgment for the defendants in both actions.

L. L. CADWALLADER, ASSIGNEE

vs.

CLIFTON R. SHAW, INC.

Kennebec. Opinion June 5, 1928.

ASSIGNMENT. MOTOR VEHICLES. BONA FIDE PURCHASER DEFINED. BAILMENT. UNIFORM SALES ACT, P. L. 1923, CHAP. 191. ESTOPPEL.

In the absence of a statute authorizing public record of a common-law assignment a record of such assignment in the office of the Register of Deeds, or in the office of a city clerk is not constructive notice of the assignment.

Registration of an automobile made in the office of the Secretary of State, is not constructive notice as to the ownership of the car, the Statutes of this State not requiring that the applicant for registration shall be the owner of the car.

A bona fide *purchaser is one who at the time of his purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside, and purchases in the honest belief that his vendor had the right to sell, without notice actual or constructive, of any adverse rights, claims, interests or equities of others in or to the property sold.*

At common law it is well settled that one having possession of personal property as an ordinary bailee can give no title thereof to a purchaser although the latter acts in good faith, parts with value, and is without notice of the want of title in his seller.

So long as the possession of the goods is not accompanied with some indicia of ownership, or of right to sell, the possessor has no more power to divest the owner of his title, or affect it, than a mere thief.

The Uniform Sales Act, P. L. 1923, *Chap.* 191, *Sec.* 23, *re-affirms the above, subject to the condition that the owner of the goods be not precluded by his conduct from denying the seller's authority to sell.*

The mere surrender of possession is not sufficient to estop the party surrendering it from subsequently asserting title as against a purchaser from the person to whom possession is surrendered.

In the case at bar the acts of the plaintiff, as assignee of Violette, in allowing Violette to take the automobile, were not such as would permit a bailee to

convey title to an innocent purchaser, and the neglect of the defendant to make inquiries and its reliance on the word of Violette, a stranger, and on his registration of the car were not acts of a reasonably prudent man. No title passed to the defendant.

Nothing in plaintiff's conduct precluded him from denying the seller's authority to sell.

On report on an agreed statement. Plaintiff, a common-law assignee for benefit of creditors of one Violette sought to recover from defendant in an action of trover the value of an automobile which was among the properties assigned, and later wrongfully sold by Violette to defendant who purchased without notice. In accordance with the stipulation as to amount of recovery, judgment for plaintiff for $300 with costs and interest.

The case appears fully in the opinion.

James L. Boyle, for plaintiff.

F. Harold Dubord,

Roy Sturgis, for defendant.

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

PHILBROOK, J. This is an action of trover. The parties raise no question as to the pleadings and agree that demand was made and refusal had.

The case comes before this court on report based upon an agreed statement of facts, together with the stipulation that if the plaintiff is entitled to judgment the same shall be entered in the sum of $300, otherwise judgment for the defendant, with costs in either instance.

The agreed statement of facts discloses the following. Plaintiff is the common-law assignee of Albert Violette, of Waterville, Maine. Defendant is a corporation, dealing in automobiles, with establishments in Portland and Lewiston, in said state. In January, 1926, Violette, a contractor and builder, was in serious financial difficulties and could not complete his contracts. He called a meeting of several of his creditors and at his request these creditors appointed the plaintiff as the person who should take an assignment of all his goods, property and contracts. On the

twenty-third day of January, 1926, Violette executed this assignment to Cadwallader, and an attached exhibit shows that all real and personal property and rights and credits of Violette were assigned. The assignment was delivered on or about the first day of February, 1926, and the assignee then received and took possession of all the property of Violette, including the automobile in question, although the same was not specifically mentioned or described in the assignment. This written transfer of title and interest was recorded in the office of the City Clerk in the city of Waterville on February 8, 1926, and was recorded in the Kennebec Registry of Deeds February 10, 1926.

In the late spring or early summer of 1926 Violette, while endeavoring to gain a livelihood by the sale of some form of merchandise which required him to go beyond the limits of the City of Waterville, approached Mr. Cadwallader with the request that the latter grant him the use of the automobile which had been taken over by the assignment. Between the parties it was understood that Violette could have the car for a few days only but the same must be returned soon as there were several prospective purchasers interested in it. Cadwallader gave Violette the necessary fees to have the car registered in his (Cadwallader's) name, but instead of doing so Violette had the car registered in his own name, used it for a time, and on July 1 went to the defendant company, at its Lewiston Branch, advised them that he was from Waterville, Maine, was engaged as a travelling salesman, and desired to exchange this car for another one, giving references to reliable persons in Lewiston who were well known as such to the defendant company.

On the strength of these references to people in Lewiston, without making any inquiries in Waterville or in Kennebec County, or examining any public records in Waterville or in Kennebec County, defendant purchased the car from Violette, in exchange gave him another one, and in due course of trade sold to other parties the car thus bought from Violette.

Shortly after that, when Cadwallader endeavored to locate Violette, and the automobile in question, he ascertained that the latter had sold the car to the defendant and left for parts unknown.

When the plaintiff made demand upon the defendant for the car

he was advised that it had been sold in the regular course of trade, that relying upon the Lewiston references given by Violette they considered him the rightful owner of the car, and as a consequence could not deliver the car to the plaintiff and refused to pay the value thereof. After making further demands on the defendant this action was instituted.

At the outset the plaintiff claims that these records made in Waterville and Kennebec County were "notice to the world" of the fact of assignment, and the right, title and interest arising therefrom, and that the defendant was bound by notice given by the record. The defendant claims that it is a bona fide purchaser for value, without notice, and that the record of the assignment in the city clerk's office in Waterville or the Kennebec Registry of Deeds, constituted no notice to it.

Constructive notice by record. We here observe that a debtor may make an assignment of his property for the benefit of his creditors under bankruptcy laws, insolvency laws, common-law authority, or statutory authority. Constructive notice of such assignment depends upon the course pursued in making the same. Prior to 1878, as shown by R.S. 1871, Chap. 70, we had provisions for a statutory assignment for the benefit of creditors. Constructive notice under that statute was effective by having the assignee, within ten days after the execution of the assignment, file an attested copy of the same, and a certain inventory, in the probate office. When the so-called insolvency law came into being, Chap. 74, P.L. 1878, it repealed the statutory assignment law of 1871, *Lewis* v. *Latner*, 72 Me., 487; *Pleasant Hill Cemetery* v. *Davis*, 76 Me., 289; *Rowell* v. *Lewis*, 95 Me., 83. The case at bar does not come under any provision as to constructive notice arising from the National Bankruptcy Act, and the State Insolvency Law is superseded by the Bankruptcy Law so far as the person and subject matter falls within the provisions of the bankrupt act, *Littlefield* v. *Gay*, 96 Me., 422. The record provided by R. S. Chap. 114, Sec. 8, has no application to this case. *Thomas* v. *Parson*, 87 Me., 203; *Manufacturing Co.* v. *Brooks*, 95 Me., 146.

The place of record of mortgages of personal property, and their validity as to third parties arising from such record, are shown by R.S. Chap. 96, Sec. 1. The object to be obtained by

requiring the record of mortgages of personal property is the same as that in providing for the registration of mortgages of real estate. The same general principles are alike applicable in each case. The design is to give notice to the public of all existing incumbrances upon real or personal estate by mortgage. *Griffith* v. *Douglass*, 73 Me., 534. But the instrument executed by the assignor to the assignee in the case at bar is not a chattel mortgage and as to it, therefore, provisions for the record of chattel mortgages are not applicable.

When an instrument is not entitled by law to be recorded, placing it on record cannot operate as constructive notice, *Glenn* v. *Davis*, 35 Md., 208, 6 Am. Rep., 289.

Where parties have desired to give as much publicity as possible to the fact of the transfers of property to themselves, and in seeking to give such publicity may have selected the filing of the instrument of transfer for record in one of the principal offices of the county as a means thereto, they did not thereby create a new law in respect to notice. Parties in interest have a right to rely upon the law of the state as enacted by its legislature and are not bound by any constructive notice other than such laws provide. Actual notice must be given in the absence of a statute providing some means for constructive notice. *Burck* v. *Taylor*, 152 U. S., 634; 132 A. S. R., 412.

It is therefore plain, since there is no provision requiring or providing for record of this assignment under the common law, or by statute in this State, that the record made in the case at bar has no effect upon the rights, liabilities or protection of third parties which would arise under the provisions for a record of mortgages of personal property. The first claim of the plaintiff that the record made in city clerk's or register of deed's office, was "notice to the world" cannot be sustained.

Since defendant claims that it is a bona fide purchaser of the automobile for value and without notice of defect in title we deem it proper to discuss the effect of registration of motor vehicles in the office of the Secretary of State and whether such record is evidence of ownership or title.

Courts of last resort are not in complete harmony upon this proposition but their differences in most cases arise from the terms

regarding registration used in the statutes of their respective states. In some states, in order to register a car, the applicant must be the actual owner thereof. It is not so in other states. In our state application for registration of a motor vehicle, made to the Secretary of State upon blanks prepared by him under statutory authority, do not restrict the application to the owner of the vehicle, for the application for registration furnished by him declares that the motor vehicle thus registered "is owned or controlled by the applicant."

The General Laws of Massachusetts, Ed. 1921, Chap. 90, Sec. 2, declare that "application for the registration of motor vehicles and trailers may be made by the owner thereof."

In *Temple* v. *M. & B. St. Railway Co.*, 241 Mass., 124, although recognizing that application for registration of a motor vehicle must be made by the owner thereof, the court interprets the word "owner" as including "not only persons in whom the legal title is vested but bailees, mortgagees in possession, and vendees under conditional contracts of sale, who have acquired a special property which confers ownership as between them and the general public for the purposes of registration." See also *Downey* v. *Bay State St. Railway*, 225 Mass., 281; *Hurnanen* v. *Nicksa*, 228 Mass., 346.

In *Brown* v. *New Haven Taxi Cab Co.*, 102 Atl., 573, the Supreme Court of Errors of Connecticut held that the word "owner" is often used to designate the person having an interest in property under a special title, and was so used by the statute of that state in provisions relating to motor vehicles. In that case the court further held that the word had different meanings and must have its proper significance in each case in view of the subject, the object, and the provisions of the statute in which it is found; hence a bailor may have a general ownership and a bailee a special ownership in the subject of the bailment.

In the *Downey Case*, supra, Mr. Justice Braley called attention to the earlier statute providing for registration of motor vehicles which could be done by the owner or "person in control thereof," and in that connection said, "The words 'person in control thereof' found in the earlier enactments, obviously embrace a class of persons who may have no general or special property in

the motor vehicle they are operating while the word 'owner' includes not only persons in whom the legal title is vested but bailees, mortgagees in possession, and vendees under conditional contracts of sale who have acquired a special property which confers ownership as between them and the general public for the purposes of registration."

But in *Windham* v. *Newton*, 76 So., 24, the Supreme Court of Alabama said, "The fact, if it was a fact, that defendant applied for a license to operate an automobile, was a circumstance to which the jury might look in determining the fact of ownership."

In some states it has been held that registration of a motor vehicle in the name of a given person raises a presumption that he is the owner of the machine, *Patterson* v. *Millican*, 66 So., 914.

Under the statutes of Minnesota, Gen. St. 1913, Sec. 2643, registration is prima facie evidence of ownership. *Uphoff* v. *McCormick*, 166 N. W. (Minn.), 788.

In *Hatter* v. *Dodge Bros.*, 167 N. W., 935, the Michigan court held that proof of a license number upon an automobile, and of the person in whose name such registration occurs, is prima facie evidence identifying both the vehicle and the owner.

In *Farris* v. *Sterling*, 214 N. Y., 249; 108 N. E., 406, it was held that the license number of a car, coupled with the evidence that the defendant held the license, was prima facie proof that the defendant was the owner.

But these expressions of the court arose in negligence cases, where the plaintiff was obliged to prove ownership of a car by the defendant. None of them attempt to establish a rule that registration of an automobile, in the office of the registrar, is constructive notice "to all the world" as to the true ownership of the car. In view of the provisions of our own statute, as to registration of automobiles by "an applicant" we hold that such registration does not constitute constructive notice as to ownership.

It follows that the defendant had no constructive notice, and no actual notice is claimed, as to title or ownership of the car concerned in this action.

The record fully discloses the fact that the defendant purchased the car for value, the fitness of which is not denied.

Was the defendant a bona fide purchaser, as well as for value and without notice?

The term "bona fide purchaser" means a purchaser in good faith without notice and for a valuable consideration. Words & Phrases, Vol. 1, Page 825, and cases there cited.

A bona fide purchaser is one who at the time of his purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside, and purchases in the honest belief that his vendor had a right to sell, without notice, actual or constructive, of any adverse rights, claims, interests, or equities of others in or to the property sold. The essential elements which constitute a bona fide purchaser are a valuable consideration, the absence of notice, and the presence of good faith, Words & Phrases, Vol. 1, Page 825. To constitute good faith there must be an absence, not alone of participation in the fraud or collusion with the vendee, but also the knowledge or even notice of the fraud, or of facts and circumstances, calculated to put an ordinary prudent man on inquiry so that he would ascertain the truth, *Wafer* v. *Harvey County Bank*, 46 Kan., 597, 26 Pac., 1032. Under these rules we think that the record of the case fully establishes the fact that the defendant was a bona fide purchaser.

The Validity of Sale. But the plaintiff claims that the only question necessary for decision is the validity of the sale to the defendant company; that is to say, could and did the defendant acquire title or right to possession from Violette, or could Violette sell or give title to an article he did not own.

When the automobile was loaned by the plaintiff to Violette there arose, as to these parties, a relationship of bailor and bailee. Reduced to more exact terminology, therefore, the question to be here considered, as plaintiff claims, is whether under any circumstances a bailee, while in possession of the bailed property, can convey title to an innocent purchaser, without notice, and for a valuable consideration.

It is well settled, as a general rule, that one having possession of personal property as a bailee can give no title thereof to a purchaser, although the latter acts in good faith, parts with value, and is without notice of the want of title in his seller. The mere

possession of chattels, by whatever means acquired, if there is no other evidence of property, or authority to sell from a true owner, will not enable the possessor to give a good title. So long as the possession of the goods is not accompanied with some indicia of ownership, or of right to sell, the possessor has no more power to divest the owner of his title, or to affect it, than a mere thief, 24 R. C. L., 375-6.

In addition to the common-law rule just above stated we should also observe that under the so-called Uniform Sales Act, P. L. 1923, Chap. 191, Sec. 23, statutory enactment has also added to the law these terms:

"Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

This raises the question whether in the case at bar the defendant may invoke estoppel against the plaintiff in his attempt to recover the automobile or its value.

The mere surrender of possession is not sufficient to estop the party surrendering it from subsequently asserting title as against a purchaser from the person to whom possession is surrendered. *Rodliff* v. *Dallinger*, 141 Mass., 1; *Com. Nat. Bank* v. *Bemis*, 177 Mass., 95.

Estoppel arising from any negligence on the part of the one against whom estoppel is claimed cannot avail in the case at bar because, so far as the parties to this case are concerned, it was not an act of negligence for the plaintiff to deliver the automobile to a third party. Title did not pass by so doing nor any authority to convey title. The plaintiff did nothing that the law can regard as sufficient to mislead this purchaser. No purchaser has a right to rely on possession alone as evidence of title and a right to convey.

If it should be urged that the plaintiff was guilty of a breach of trust as to the creditors, yet such breach of trust in no way contributed to mislead this defendant. Hence, unless the breach of trust, if any there were, in some way contributed to mislead the

defendant, other than by the mere possession of the bailee, the defendant was in no way injured by any supposed breach of trust as to the creditors.

It should also be noted that to claim estoppel on the ground of a wrong done that misleads, the party claiming estoppel must also be free from fault, 21 C. J., 1170. So far as the record discloses the defendant saw fit to rely on the possession of the bailee and took no steps even to inquire of his references in the defendant's home town. Such omission on its part to avail itself of references given and its decision to rely entirely on the bailee's word and possession, which omission and reliance were induced by nothing which the plaintiff did, was the cause of its loss.

Moreover, the plaintiff's breach of trust, if any there were, was not the proximate cause of the defendant's loss. The acts of the plaintiff, as assignee, were not such as would permit a bailee to convey title to an innocent purchaser, and the neglect of the defendant to make inquiries, and its reliance on the word of Violette, a stranger to the defendant, were not the acts of a reasonably prudent man.

Hence, it may be stated as a sound principle of law that a breach by a trustee of a duty owing to his cestui affords no ground for precluding the trustee from denying the authority of his bailee to sell property intrusted to him temporarily and for a special purpose.

Other arguments in behalf of the defendant have not been overlooked and the whole record has been given careful and repeated examination by the full court. From the examination of the record and the law governing this case we hold that the mandate must be

Judgment for plaintiff in the sum of $300 *with costs. This mandate also carries interest on the sum just mentioned, reckoned from the date of the writ to the date of the final judgment, the same to be computed and added to the judgment by the clerk of the court below.*

FRED T. GIBERSON

vs.

THE YORK COUNTY MUTUAL FIRE INSURANCE CO.

Aroostook. Opinion June 9, 1928.

FIRE INSURANCE. AGENCY. CONCEALMENT. PROOF. QUESTIONS FOR JURY.

In the absence of fraud, the acts of an agent of an insurance company in filling out the application for insurance are the acts of the company, and it is estopped from controverting the truth of the statements in the application in an action on the policy.

A broker procuring insurance is the agent of the insured, and the insured is chargeable with any fraudulent representations or concealment of acts material to the risk made by the broker on the strength of knowledge imparted to him by the insured.

Concealment, in the law of insurance, is the designed and intentional withholding of any fact material to the risk which the insured in honesty and good faith ought to communicate. A fraudulent concealment is tantamount to fraudulent misrepresentation.

But the mere failure of the insured to give information as to matters with reference to which no questions are asked is not necessarily a concealment which will avoid the policy. To have such effect the undisclosed matter must not only be material, but there must be a fraudulent intent to deceive.

The Statutes of this State do not prohibit extra-territorial insurance by domestic companies and non-compliance with the laws of another country regulating foreign insurance companies must be affirmatively proved. The court has no judicial knowledge of such regulations.

Whether or not a building insured as a dwelling house was used for the conduct of a liquor business, thereby altering the "situation and circumstances," and whether the risks were thereby increased, violating the terms of the policy, are questions of fact for the jury to determine.

In the case at bar the findings of the jury that there was no fraud or concealment in the plaintiff's application for insurance on property described as situated in "Limestone" when it was partially located across the boundary line in New Brunswick, and that the plaintiff had no knowledge of sales of liquor

on the premises which would increase the insurance risk, disclose no manifest error and must be sustained. The alleged exceptions thereby become immaterial.

On exceptions and general motion for new trial. An action of assumpsit upon a fire insurance policy. The jury found for the plaintiff for the sum of $1070. To certain instructions given to the jury by the Presiding Justice the defendant seasonably excepted, and after the verdict filed a general motion for a new trial. Motion overruled. Exceptions overruled.

The case appears fully in the opinion.

A. B. Donworth,

Archibalds, for plaintiff.

H. T. Powers, for defendant.

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

STURGIS, J. The plaintiff owned a dwelling-house with ell and shed attached located on the road leading from Limestone village in Aroostook County, Maine, to California Settlements in the Province of New Brunswick. All of the main house, except a narrow strip along the back, stood in Maine. This strip and a connecting shed were across the line in New Brunswick.

January 26, 1922, the plaintiff insured this property with the defendant Company, placing the insurance through the Company's agents, Lowery & Knight, of Fort Fairfield. The policy described the property as "a 1½ story frame dwelling-house and additions situated in said Limestone, California Road." The premium of $48.75 charged by the Company was paid.

November 9, 1924, two years and ten months after the policy was issued, the buildings burned with total loss, and this action is to recover on the policy.

By agreement of the parties submission to referees was waived, and the defendant's liability limited to $1000. On trial the verdict was for the plaintiff, and the defendant brings the case here on a general motion and exceptions.

At the outset of this opinion we must take occasion to deplore the absence of exhibits which may be of some importance in the determination of the issues here raised. The records of this court

fail to show their receipt in spite of the assurances of counsel and officials of the trial court that they were sent forward.

This court has often had occasion to admonish counsel that exhibits should be printed as a part of the case, and to send forward originals casts the responsibility for their loss on the parties who, for the sake of convenience or economy, so stipulate and agree. The wisdom of this rule of practice is here well illustrated.

We are limited in our consideration of this case to the record before us and the facts there to be found, except as counsel admit on the briefs material facts not printed. We think, however, there are sufficient facts before us to fairly present the issues involved in the controversy and permit a correct determination of the rights of the parties, and on this basis state this opinion.

MOTION.

The defendant seeks a new trial on the grounds that (1) the plaintiff through his agent fraudulently concealed from the insurer that part of the building was located in New Brunswick, (2) that the contract to insure property in New Brunswick was ultra vires and (3) the premises were used for the keeping and sale of intoxicating liquor by the tenant of the insured.

The record discloses that the plaintiff had no direct dealings with the Company's agents, his direct contact being with one Andrew L. Caswell, an insurance broker living in Limestone, who, at the plaintiff's request, made oral application for the insurance to Lowery & Knight by telephone. This oral application over the phone was supplemented by a written application in the form of what is called a farm survey, written out and the answers therein inserted by the agents, Lowery & Knight. It is denied that the plaintiff or the broker saw the application after it was written, signed it or knew of its contents, and no convincing evidence refutes this denial.

Upon these facts, in the absence of fraud chargeable to the plaintiff, the settled rule of insurance must apply. The acts of the Company's agents, Lowery & Knight, in filling out the application, were the acts of the Company, and it is estopped from controverting the truth of the statements in the application in this action on the policy. *Maxwell* v. *York Mutual Fire Ins. Co.*,

114 Maine, 170; *Guptill* v. *The Pine Tree Insurance Co.*, 109 Maine, 323; *Washburn* v. *The Casualty Co.*, 108 Maine, 429, 434.

The Company asserts that there was fraud on the part of the broker, chargeable to the insured, in placing the insurance with its agents. And it appearing that the plaintiff informed the broker, Caswell, that part of the property to be insured was or might be located in New Brunswick, and that Caswell failed to impart this knowledge to Lowery & Knight, this omission the Company says was a fraudulent concealment, chargeable to the plaintiff, which avoids the estoppel growing out of the agent's acts in filling out the application.

The broker was the agent of the insured, *Richmond* v. *Assurance Co.*, 88 Maine, 105, and the insured is undoubtedly chargeable with any fraudulent representations or concealments of facts material to the risk made by the broker on the strength of knowledge imparted to him by the insured.

Concealment, in the law of insurance, is the designed and intentional withholding of any fact material to the risk which the insured in honesty and good faith ought to communicate. *Daniels* v. *Hudson River Fire Ins. Co.*, 12 Cush. (Mass.), 416, 425. A fraudulent concealment is tantamount to fraudulent misrepresentation.

But the mere failure of the insured to give information as to matters with reference to which no questions are asked is not necessarily a concealment which will avoid the policy. To have such effect the undisclosed matter must not only be material, but there must be a fraudulent intent to deceive. *Washington Mills Mfg. Co.* v. *Weymouth Insurance Co.*, 135 Mass., 503; 26 C. J., 158.

A careful examination of the evidence in the record before us fails to disclose facts which establish fraudulent intent to deceive on the part of the broker. The conversation between the Company's agents and the broker at the time the oral application for the insurance was made is not in evidence. The farm survey, prepared by the agents upon which the policy was issued, described the property to be insured as "situated in Limestone," but there is no evidence that the broker furnished this description or any other. Geographically the Company's agents, Lowery & Knight,

were located in the town adjoining Limestone, and they may have been acquainted with the property insured to an extent that caused them to insert the description in the application of their own initiative and upon their own responsibility. The broker may not have been asked as to the location of the property insured, and his failure, if there was such, to give an accurate and true description may have been without knowledge of its materiality and with entire honesty of intention. The burden is upon the Company to prove the fraud charged. Fraud cannot be presumed, and upon this record is not proved. The Company is bound by its agents' description of the location of the property written into the application, and is here estopped to question its correctness.

The defense that the Corporation was not authorized to transact business in Canada, as stated by its president, cannot bar the plaintiff's recovery. The charter of the defendant Company was not put in evidence. The statutes of this State do not prohibit extra-territorial insurance by domestic companies, and the lack of authority to insure in Canada, which the president asserts, if it refers to non compliance with Canadian regulation of foreign insurance companies, involves legislation which is not before us and of which we have no judicial knowledge. On the record it does not appear that the contract was ultra vires.

The use of the premises for the sale of intoxicating liquors by the plaintiff's tenant, as charged by the defendant, raises a different question. In the policy, a standard form of policy as prescribed by R. S., Chap. 53, Sec. 5, appears the condition that the "policy shall be void if without the assent in writing or in print of the company, the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risk."

The plaintiff's building was insured as a dwelling-house, and undoubtedly its general use for the conduct of a liquor or other business, with the knowledge, advice, agency, or consent of the insured, would constitute an alteration of "situation and circumstances," and if the risks were thereby increased the policy provision would be violated. The defendant charges that the plaintiff's tenant, one Condon, made numerous sales of liquor in the insured property during the life of the policy, that the plaintiff

had knowledge of this fact, and that the risk was thereby increased. The plaintiff denies this charge, and the jury accepted his denial. On disputed facts, the question of increase of risk by change in situation or circumstances, as also the plaintiff's knowledge, etc., are for the jury. *Gilman* v. *Commonwealth Ins. Co.*, 112 Maine, 528; *Atherton* v. *British America Assurance Co.*, 91 Maine, 289; *White* v. *Phoenix Ins. Co.*, 83 Maine, 279; 26 C. J., 558. The verdict of the jury upon this issue discloses no manifest error and must be sustained.

EXCEPTIONS.

The exceptions here pressed are based on alleged errors in the instructions of the presiding Justice. They cannot be sustained. The conclusions of the Court upon the motion render the instructions objected to immaterial, and if as abstract principles of law they were wrong, they were harmless and worked no prejudice to the defendant.

Motion overruled.
Exceptions overruled.

FRED M. DAY *vs.* CARL H. SCRIBNER ET AL.

Penobscot. Opinion June 28, 1928.

CONTRACTS. PLEADING. EVIDENCE. NEW TRIAL.
R. S. CHAP. 87, SEC. 103.

In an action on a contract express or implied, individual liability of defendants may be established though the action is brought as on a joint liability. Discrepancy between the contract declared on, and that proved, constitutes no variance.

When a question of the sufficiency of the evidence to sustain a verdict is presented, the court will not weigh evidence, in the sense that triers of fact do, nor will it review conflicting evidence, but will consider only that evidence favorable to the party who gained the verdict.

In the case at bar while there may have been credible evidence which might have supported a verdict against one defendant alone, no fact in the evidence for the plaintiff, reading that evidence as a whole, nor inference from any proven fact, tended to indicate liability on the part of both defendants. The evidence failed to show any mutuality between the defendants and the findings of the jury were not warranted.

On general motion for new trial by defendant. An action to recover for labor and for goods claimed by plaintiff to have been furnished by him to defendants under a contract express or implied.

Trial was had at the January term of the Superior Court for Penobscot County. The jury found for the plaintiff against both defendants and assessed damages for the plaintiff in the sum of twenty-one dollars and forty-six cents.

After verdict, defendants filed a general motion for new trial.

Motion sustained. Verdict set aside. New trial granted.

The case fully appears in the opinion.

James G. O'Connor, for plaintiff.

Clinton C. Stevens, for defendant.

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

DUNN, J. The plaintiff sued these two defendants, as on a joint liability from contract, for the labor of himself and his horses and for goods sold and delivered. Joint plea of the general issue met the declaration in the writ and traversed the promise alleged, while specifications filed under a rule which the plaintiff had moved, apprised him of the grounds of defense.

Upon the trial of the action the plaintiff might have established by the preponderance of evidence that for the labor and the goods, or either, he had a right of action in virtue of a contract, express or implied, against the defendants jointly. Or, notwithstanding that plaintiff had sued as on a joint liability, he might have established the individual liability of either defendant, a statutory provision making this possible. R. S., Chap. 87, Sec. 103. The legal effect of the statute is that discrepancy between the contract declared on, and that proved, shall be deemed no variance. *Palmer* v. *Inhabitants of Blaine*, 115 Maine, 287.

Plaintiff prevailed on the theory of joint liability. The case is here on motion by the defendants for a new trial. The motion recites the usual grounds, but the brief of the defendants' counsel discusses not more than that, as the verdict is not sufficiently sustained by evidence, the verdict is legally wrong.

When a question of the sufficiency of the evidence to sustain the verdict is presented, this court will not weigh evidence, in the sense that triers of fact do, nor will it review conflicting evidence, but will consider only that evidence favorable to the party who gained the verdict.

While there may have been evidence, within the province of the jury to believe or disbelieve, which might have supported a verdict against one defendant alone, no fact in the evidence for the plaintiff, reading that evidence as a whole, nor inference from any proven fact, tended to indicate liability on the part of both defendants.

The second defendant, thus to make distinction between the two, was seen about the lumbering operation, for which it had been attested that the work had been done and the goods delivered, and plaintiff testified that the two defendants were they for whom he had worked, and that the camp in the woods was theirs, but the cross-questioning of the witness by the opposing counsel developed that concerning the work and the goods alike, plaintiff had dealt with but one of the defendants, and nothing in the dealing with this defendant involved or implied that the second defendant had relationship to the transactions. The statement made by the plaintiff, while on the stand, that the camp was that of the two defendants, cross-examination demonstrated to be a conclusion without basis. Testimony by the plaintiff's wife, which completed the evidence for the plaintiff's side, added nothing to the effect of the testimony which the plaintiff himself gave.

The jurors do not appear to have been unfaithful to their oaths, but to have been human. Besides testimony of the plaintiff in chief, the use in cross-examination of certain personal pronouns in manner to bear, in apparent rather than purposive meaning, reference to the defendants jointly, and to supplies and property as jointly belonging to them, seemingly led the jurors to overlook that at all

events the defendants were not tied into the cause, because of the lack of any showing of mutuality between them.

Let the mandate be,

Motion sustained,
Verdict set aside,
New trial granted.

WILLIAM G. MOREY *vs.* MAINE CENTRAL RAILROAD COMPANY.

Androscoggin. Opinion June 28, 1928.

FEDERAL EMPLOYERS' LIABILITY ACT. MASTER AND SERVANT. NEGLIGENCE.

A railroad is not an insurer of the safety of the place which it furnishes for the use of its employees. Its duty is to use due care to provide a reasonably safe place, and having done so it fulfills its legal obligation to its servant.

In safeguarding its employees from injury a railroad is bound to use due care to make its cars and their loads reasonably safe for the passage of its brakemen, but it is not bound to anticipate and guard against every possible danger, or such as no prudent person would reasonably expect to happen.

In the case at bar the plaintiff was familiar with his duties, the rules of the road, and the usual incidents of the run he was making. It was clear that the cars had passed through a snow storm. No rule of the road compelled him to go over the cars as he did. His own evidence failed to prove negligence on the part of the defendant, and justified the order of nonsuit.

On exceptions by plaintiff to nonsuit. An action of negligence under the Federal Employers' Liability Act, the plaintiff, a brakeman employed by the defendant, claimed negligence in failure to furnish a safe place in which to work. The case was before the Law Court (125 Maine, 272) and verdict for plaintiff set aside, motion for new trial by defendant being sustained.

Subsequently at the December term, Androscoggin Superior Court, 1926, a second count was added to the declaration. At the conclusion of the plaintiff's evidence the presiding Judge ordered a nonsuit, to which ruling the plaintiff seasonably excepted. Exceptions overruled.

The case fully appears in the opinion.
Locke, Perkins & Williamson, for plaintiff.
White & Carter,
Perkins & Weeks, for defendant.

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

STURGIS, J. The plaintiff, employed by the defendant railroad as head brakeman in a ring crew operating extra freight trains between Bangor and Waterville, on the morning of February 2, 1924, fell from a flat car loaded with lumber and received injuries which resulted in the loss of his left leg. The train was engaged in interstate commerce, and this action to recover damages for that injury is brought under the Federal Employers' Liability Act.

This case has already received the consideration of this Court on a general motion filed after verdict for the plaintiff at the first trial. *Morey* v. *Railroad*, 125 Maine, 272. At a new trial, upon the defendant's motion, the presiding Justice ordered an involuntary nonsuit, and the case is now here on exceptions taken to that order.

Upon the issues raised by the original pleadings, the evidence brought forward in this record is in all material respects the same as that considered upon the motion. No reason, therefore, appears for a reversal of the previous decision of this Court, *Bryant* v. *Paper Co.*, 103 Maine, 32, 35, and upon the first count of the declaration the ruling below must be sustained.

At the second trial, the plaintiff amended his declaration by the addition of a count in which he attributes his injury to the failure of the defendant to remove snow and ice from the lumber from which he fell, thereby failing (to use the language of the plaintiff) "to provide the plaintiff a safe place to work."

The defendant pleads the general issue, and in its brief statement sets up special pleas of contributory negligence and assumption of risk. The question here to be determined is whether, taking the evidence most favorably for the plaintiff, a verdict on the second count in the declaration could be permitted to stand. *King* v. *The Grocery Co.*, 126 Maine, 202; *Whittemore* v. *Merrill*, 87 Maine, 456.

At the trial the plaintiff introduced his own testimony and four photographs of the car from which he fell, and with certain admissions stipulated upon the record rested. The evidence thus limited supports a finding that on the morning of February 2, 1924, the plaintiff was employed as a brakeman by the defendant Company. He had been in their service since May, 1923, and was familiar with his duties, the rules of the road, and the usual incidents of the run which he was making on the morning he was injured. His crew arrived at Northern Maine Junction at about 6 A.M., and took charge of the west bound freight already made up. The train consisted of fifty or sixty loaded cars, including, near the forward end of the train, four flat cars of lumber, the last one being a Bangor and Aroostook car, No. 70131.

At Newport, the first station west of the Junction, as the train pulled out of the yards, the plaintiff left the engine and walked down the train to relay the conductor's signal to the engineer, climbed to the top of a box car, relayed the signal, and started forward over the cars. When he reached the lumber car 70131 he went along the top of the load and started down over the forward end, and says that in attempting to get down over the load of lumber he stepped on the end of a piece of timber which was covered with snow, slipped and fell beneath the car.

The photographs, Exhibits 1 and 4, portraying the car in question and the forward end of its load, show that the lumber was of varying lengths and sizes, with dimension stock piled at the bottom and boards on top, and was so loaded that a recess was left on the right forward end of the car where the hand-brake wheel stood. About half way down this end of the load two 2 x 4 joists projected forward, and on these timbers snow had accumulated. Above in two places there were patches of snow on the edges of joists and boards, but none of these patches appear to be in places where a person could find a foothold.

The car was loaded as the varying lengths and sizes of the lumber and the operation of the hand-brake made it necessary, and there is no evidence that the snow-covered lumber ends were purposely left projecting as a means of descent from the load. No rule of the road compelled the plaintiff, in the performance of his duties, to go forward to the engine over the cars. It was customary

for brakemen to do it and it was not forbidden, but it was not required. On this occasion it was not even necessary from a practical viewpoint, as the train was moving slowly and it was entirely possible for the plaintiff to drop down from the box car, run along the train, and catch the engine before the train picked up speed.

Upon these facts the Court is not of opinion that the evidence sent up in the record shows negligence on the part of the defendant carrier. A railroad is not an insurer of the safety of the place which it furnishes for the use of its employees. Its duty is to use due care to provide a reasonably safe place, and having done so it fulfills its legal obligation to its servant. *Morey* v. *The Railroad*, 125 Maine, 272; *Sheaf* v. *Huff*, 119 Maine, 469; *Elliott* v. *Sawyer*, 107 Maine, 195, 201.

The evidence brings this car of lumber from which the plaintiff fell, down from Northern Maine in February, a section of the State and season of the year marked by low temperatures and frequent falls of snow. Railroads are there operated subject to all the incidents of such climatic conditions, and open cars and their loads of necessity at times accumulate snow and ice. In safeguarding its employees from injury, the railroad is bound to use due care to make its cars and their loads reasonably safe for the passage of its brakemen, but it is not bound to anticipate and guard against every possible danger, or such as no prudent person would reasonably expect to happen. *Cowell* v. *The Woolen Co.*, 97 Maine, 543, 546.

The car or the lumber on it from which the plaintiff fell had undoubtedly passed through a storm and become partially covered with snow, and here and there in isolated spots patches remained, not in places of usual travel by train operatives, but in the recesses of the load where it could not be reasonably expected foothold would be sought. It was possible that a brakeman might seek it out, and in stepping on it slip, but that danger, we think, was beyond the realm of reasonable probability, and to impose liability upon the railroad for a failure to forsee and guard against so remote a possibility would be to charge it as an insurer, which under the law it is not. *Morey* v. *The Railroad*, supra; *Sheaf* v. *Huff*, supra.

The plaintiff's failure to prove negligence upon the part of the

defendant justified the order of nonsuit, and a discussion of the application of the doctrines of the assumption of risk and contributory negligence is unnecessary.

Exceptions overruled.

STILLMAN ARMSTRONG *vs.* BANGOR MILL SUPPLY CORPORATION.

Washington. Opinion July 7, 1928.

PLEADING. DEMURRER.

While it is necessary that all traversable facts should be laid on a particular day, it is sufficient if the definite date to be thus fixed appears once in the declaration. It need not be repeated in terms each time that it occurs.

Purely clerical errors do not furnish a sufficient ground for demurrer.

A declaration in contract alleging improper material used in construction and also alleging poor workmanship, in the same count, is not bad for duplicity.

On exceptions by defendant. An action of assumpsit for breach of agreement to properly repair certain machinery. A special demurrer was filed by the defendant. The presiding Justice overruled the demurrer, to which ruling the defendant seasonably excepted. Exceptions overruled.

The case sufficiently appears in the opinion.

H. J. Dudley, for plaintiff.

William S. Cole, for defendant.

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

PATTANGALL, J. This case comes before the Court on defendant's exceptions to the overruling of a special demurrer. So much of the declaration as is the subject of demurrer reads as follows: "In a plea of the case, for that the plaintiff on February 11th, 1927, was, and for a long time prior thereto had been, and still is engaged in the business of sawing lumber and laths at said Vanceboro; and on said February — the defendant pretend-

ing to be skilled in the work of repairing machinery, at Bangor, in the County of Penobscot, State of Maine, and in consideration that the plaintiff had then and there retained and employed the said defendant to repair a certain piece of machinery, to wit, a certain engine crank shaft, then and there used in and necessary for the said business of the plaintiff, for a certain reasonable reward to the said defendant in that behalf, to be paid by the plaintiff, the said defendant then and there undertook and faithfully promised said plaintiff to repair said crank shaft with good and proper material, and in a sound, substantial and workmanlike manner; and said defendant while pretending and undertaking as aforesaid, and not regarding his said last mentioned promise and undertaking, did carelessly and unskilfully perform its work, and did not use good and proper material, and did not perform said work in a sound substantial and workmanlike manner, but wholly refused and neglected so to do, in consequence of which the plaintiff was put to great expense, and suffered great damage," etc.

Defendant complains:

(1) That the declaration is insufficient in allegation of time;

(2) That the declaration is insufficient in allegation of place;

(3) That the declaration does not allege in what respect the machinery to be repaired was defective;

(4) That the declaration does not allege any particular material which the defendant used or failed to use which was not good and proper material;

(5) That the declaration does not allege in what respect the defendant failed to perform said work in a sound, substantial and workmanlike manner;

(6) That the declaration alleges two distinct breaches of duty, namely (a) that defendant did not use good and proper material and (b) that defendant did not perform work in a workmanlike manner, and that therefore the declaration is double.

Taking up the objections above stated in their order:

(1) It is of course true that it is necessary that all traversable facts be laid upon some particular day. "An indispensable rule of pleading requires that every traversable fact must be alleged as having occurred on some particular day, month and year." *Gilmore* v. *Matthews*, 67 Me., 517; *Platt* v. *Jones*, 59 Me., 232;

Shorey v. *Chandler*, 80 Me., 409; *Wellington* v. *Milliken*, 82 Me., 61. But the definite date thus fixed may be fixed by reference and if it sufficiently appears in any part of the declaration and is thereafter referred to, it need not necessarily be repeated in terms each time that it occurs. It is apparent that the date, which defendant complains is not definitely stated in the declaration and which is the important date in question, is February 11th, 1927. The declaration is sufficient on this point. Defendant's complaint in this respect is to a purely clerical error. "The intendment of the declaration is clearly discernible from the language used and that is all that the rules of pleading require. To give effect to a clerical error despite the proof that it is an error and against the true intent and meaning of the declaration as a whole would not only be repugnant to common sense but a refinement even of the theories of the old writers upon pleading." *Penley* v. *Record*, 66 Me., 414.

(2) The allegation as to place is obviously sufficient. "Then and there" plainly refers to "Bangor, in the County of Penobscot, State of Maine."

(3) The remaining alleged faults in the declaration may all be found in a form approved in 2 Chitty on Pleadings 266, Sixteenth Edition. The instant declaration is apparently based on that precedent.

This action is on a contract. Precedents relied upon by defendant, in so far as they appear to support his argument, relate to tort actions and are not applicable.

Exceptions Overruled.

STATE OF MAINE *vs.* HARRY A. WOOD.

Aroostook. Opinion July 9, 1928.

CRIMINAL LAW. AUTOPSY. EVIDENCE.

Supreme Judicial and Superior Courts of this state have authority, in criminal cases, to order the disinterment of bodies, for evidential purposes, on the request of either the state or the respondent, notwithstanding an autopsy has previously been made by a Medical Examiner, when it appears that such prior examination is inconclusive as to important matters of fact.

The granting or refusal of such a request is addressed to the sound discretion of the presiding justice to whom the petition is directed.

On exceptions by respondent.

Respondent was indicted for the murder of one Parker who died from the effect of a bullet wound. The trial resulted in a verdict of manslaughter. The cause came before the Law Court on exceptions to the ruling of the presiding Justice dismissing a petition filed by respondent, praying that an examination of the body of Parker might be made by order of court.

Exceptions sustained.

The case appears fully in the opinion.

J. Frederick Burns,

Herbert T. Powers, for respondent.

Raymond Fellows, Attorney General,

Cyrus F. Small, County Attorney, for the State.

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

PATTANGALL, J. On exceptions to the dismissed, for want of jurisdiction, of a petition requesting an order for the disinterment of a body for evidential purposes. The petitioner was indicted for the murder of one Parker, who died from the effect of

a bullet wound sustained by him. Trial was had, resulting in a verdict of manslaughter. Petitioner's defense was based on the proposition that the deceased met his death by an accidenal shot fired by a friend and companion. At the time of the shooting, petitioner was standing directly in front of Parker with a loaded rifle in his hands, which he claimed was never discharged. Parker's companion was standing directly behind Parker at the time of the shooting and admittedly fired at least two shots from his revolver.

Two questions became of vital importance. First, was death caused by a shot from a rifle or from a revolver. Second, was the fatal shot fired from a position in front of or from behind the deceased.

A careful autopsy might have enabled these questions to be answered intelligently and definitely. No such autopsy was made. The examination made by the medical examiner is correctly characterized in the petition as "superficial."

Prior to the trial, petitioner requested the State's Attorney for the County to permit the exhumation of the body in order that competent physicians and experts acting in his behalf might examine the wound sustained by Parker, which request was refused. Since the trial, he has again requested the State's Attorney for the County, the Attorney General and the Medical Examiner, to allow such exhumation for the purpose of making a complete and thorough examination of the fatal wound in order that the direction from which the bullet came might be determined and the nature of the wound revealed. This request was refused. Petitioner then filed, with the Justice presiding at the nisi prius term of the Supreme Judicial Court next held after the term at which trial was had, a petition setting forth the facts above stated and requesting the court to order the body of Parker exhumed for the purpose of full and complete examination and in order to obtain the important information which should be revealed by such examination. The State's Attorney for the County moved to dismiss this petition on the ground that the court was without jurisdiction to grant the prayer of the petitioner. On this motion and on the ground stated therein, the presiding Justice dismissed the petition, to which action the petitioner filed exceptions.

The only question before this court is as to the authority of the court to grant the petition.

Under certain circumstances, disinterment of the body of a deceased for evidential purposes may be ordered in civil cases. *Mutual Life Insurance Co.* v. *Griesa*, 156 Fed., 398; *Grangers Life Insurance Co.* v. *Brown*, 57 Miss., 308; 34 Am. Rep., 446; *State ex rel. Meyer* v. *Clifford Judge*, (Wash.) 139 Pac., 650; *Painter et al* v. *U. S. Fidelity and Guaranty Co.*, (Md.) 91 Atl., 160. In the latter case, the court said, "Courts have never hesitated to have a body exhumed where the application under the particular circumstances appeared reasonable and was for the purpose of eliciting the truth in the promotion of justice. There are several reported cases where the courts have refused such an examination while recognizing the right but deeming the application to have been made at too remote a period of time with no attendant circumstances to explain the delay."

Assuming the authority of the court to order the disinterment of a body for evidential purposes in a civil case, where property rights only are involved, it could not be reasonably argued that the court did not possess a like power in criminal cases where liberty and even life itself may be involved.

In *Salisbury* v. *Commonwealth*, 79 Ky., 425, the trial judge upon motion of the defendant ordered the coroner to exhume the body and to cause an examination of it to be made upon the condition that the defendant should pay the expenses thereof. The appellate court sustained the order, but refused to grant the request of the defendant that the expenses should be paid by the State or County.

In *Moss* v. *State*, (Ala.) 44 So., 598, the court denied a motion requiring the sheriff to produce the skull of the deceased at the trial, it appearing to the court that no good object could be attained by such undertaking; but refused the request of the petitioner as a matter of discretion and not for lack of jurisdiction.

"Where the question of the guilt or innocence of the accused cannot be determined except by exhumation and autopsy of the body of the deceased, the court may and should order the disinterment." 8 R. C. L., 697.

The leading case directly in point is that of *Gray, Appt.* v.

State of Texas, (Tex. Crim. App.) 114 S. W., 635, quoted as authority in 22 L. R. A., 513, and 14 Ann. Cas., 471. In upholding its authority to grant such a petition when it appeared that examination of the corpse might assist in ascertaining the guilt or innocence of the accused, the court in this latter case said, "Courts were instituted for the purpose of promoting justice, the ascertainment of the truth in all controversies pending in such tribunals, and for the protection of life, liberty, and property. To fairly and rightly accomplish these laudable purposes, the supreme desire and purpose is, and in every case should be, by every consideration and fair rule, to ascertain the very truth of the matter in controversy, and by such rules of evidence as will, in their nature, accomplish this result. It will be conceded, of course, that, if a body could not be exhumed when an indictment was pending, and the grave made to yield up its secret, and an examination made at the instance of the defendant, such exhumation and examination ought not to be made, in a similar case, at the instance of the state. To do so would not only be manifestly unfair, but would be such a partial discrimination against the defendant as would shock the moral sense of all fair-minded men. And yet to refuse to the state authority, on a proper showing and in a proper case, so to do, would, in many cases, permit the most abandoned criminal to go unwhipped of justice, and the law, in its weakness and impotence, to be made a by-word and pure mockery."

A trial before a jury is an investigation of matters of fact, its sole purpose being to ascertain the truth. All competent evidence tending toward that result should be produced. It is the plain duty of prosecuting officers to make every effort to present all of the facts and to assist the respondent in his effort to do the same. The state is not endeavoring to prove the respondent guilty. It is endeavoring to ascertain whether or not he is guilty.

It is not only within the power of the court to take such action as shall tend to bring before it all that may assist in the search for truth but it is its duty to do so. Any other theory of law, any different course of conduct on the part of the court, would cause judicial proceedings to receive and merit the contempt of all right-thinking citizens.

It is of course true that the action requested by the defendant in this case should only be taken after careful consideration and when such action seems essential to the administration of justice. The question of the wisdom and necessity of granting such a petition must lie in the discretion of the justice to whom the petition is addressed, but we do not hesitate to affirm that the court has power to grant the petition. The fact that a partial and unsatisfactory autopsy had, prior to the filing of the petition in this case, been made by the Medical Examiner of the County, the public official whose duty it was, under our statutes, to perform such an act, in no way affects the authority of the court to comply with petitioner's request.

Exceptions sustained.

BENJAMIN L. BERMAN

vs.

ROYAL W. BRADFORD.

Androscoggin. Opinion July 10, 1928.

DIVORCE. CONTRACTS.

A contract made by an attorney at law with a husband to begin and prosecute a libel for divorce in behalf of the latter's wife is against public policy and invalid.

Such contract, while not necessarily establishing collusion, is consistent with it, suggestive of it, and goes far toward proving it.

On exceptions. An action of assumpsit on an account annexed. The case was heard by the Justice of the Superior Court for the County of Androscoggin without jury, with the right of exceptions properly reserved. No issues of fact were involved. Certain rulings were requested by the defendant. The presiding Judge rendered a decision denying all of these rulings and giving judg-

ment for the plaintiff for Forty-Three Dollars and forty cents with interest.

To the rulings and refusals to rule the defendant seasonably excepted.

Exceptions sustained.

The case sufficiently appears in the opinion.

Benjamin L. Berman, David V. Berman, Jacob H. Berman and Edward W. Berman, for plaintiff.

Ralph W. Crockett, for defendant.

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

DEASY, J. The defendant employed the plaintiff, an attorney at law, to begin and prosecute a libel for divorce against the defendant himself, alleging as causes cruel and abusive treatment and adultery. This action to recover for said services is defended on the ground that such a contract of employment is against public policy and, therefore, invalid. The defense must prevail.

The fact that the defendant and his wife had previously signed so-called articles of separation is of no importance.

Except for one cause, impotence, divorces are granted only upon proof of wrong doing by one spouse.

Before decreeing a divorce the Court must be reasonably satisfied that the libellant has been faithful to the marriage vows, that the libellee has been guilty of one or more of the grievous offenses against the marital relations specified in the statute, that there has been no condonation, and that there is no collusion.

The mere fact that both parties are desirous of judicial separation does not spell collusion. An agreement in good faith made pending a libel and subject to the Court's approval, relating to property matters or to custody of children, is not collusive.

Collusion may consist in an understanding, express or implied, that the Court shall be deceived by misrepresentation, exaggeration or suppression of facts. Such collusion is not indicated in the present case. But collusion, perhaps more commonly, takes another form: it sometimes happens that the innocent party deplores the disruption of the family, is desirous of reconciliation,

is ready to forgive and forget but yielding to the importunities, threats or bribes of the guilty party signs on the dotted line, comes reluctantly into court and tells her pitiful story.

The contract of employment involved in this case does not necessarily establish such collusion, but it is consistent with it, suggestive of it, and goes far toward proving it. Such a contract is violative of public policy. This court is not willing to set its seal of approval upon it.

No authority cited by counsel is opposed to the doctrine of this opinion.

Exceptions sustained.

CURTIS L. LYNCH

vs.

HARRY B. STEBBINS.

Hancock. Opinion July 10, 1928.

CONTRACTS. PERFORMANCE. RESCISSION.

When two parties make mutual promises the performance of one or both may depend upon a condition precedent, such condition being sometimes called a condition suspensory, because its non-fulfillment suspends the operation of the promise to which it is attached.

A promise by one party, for a consideration, to do or pay something on the happening of a certain event binds the promisor, though he is not liable to its performance while the condition is unfulfilled.

There can be no recovery in an ordinary common-law action for money not due at the institution of the suit.

A mere refusal to pay money, even when the money is due, is not the repudiation of a money contract and does not warrant a rescission.

In the case at bar from the testimony it was evident that the agreement, if any, contemplated pecuniary gains to be made by the parties from operations

to be carried on by the defendant upon wild or forest land acquired. The finding of the jury that at the time of suit there was, under the agreement, money due the plaintiff, was against the evidence and so contrary to law. There was therefore no occasion to consider the points saved by the defendant on exceptions.

On motion and exceptions by defendant. An action in general assumpsit on an account annexed for services rendered by plaintiff under an alleged express contract concerning purchase and profits from sale of certain real estate, later repudiated by the defendant.

Defendant pleaded the general issue. On quantum meruit for his services the plaintiff received a verdict of $10,375.

To certain instructions given, and to refusals to instruct as requested, the defendant seasonably excepted, and after verdict filed a general motion for a new trial.

Motion sustained. New trial granted.

The case sufficiently appears in the opinion.

Andrews, Nelson and Gardiner, for plaintiff.

Cook, Hutchinson, Pierce & Connell, for defendant.

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

DUNN, J. There were two counts in the declaration. The first, a count upon an account annexed, wherein the claim was for reimbursement for the plaintiff's services and expenses in connection with the acquisition by the defendant, through bond buying and under decree of foreclosure of the bond mortgage, of the title to the real estate of the Cherryfield Lumber Company, to the defendant's profit. In practice the count upon the account annexed is substituted for the money counts. *Levee* v. *Mardin*, 126 Maine, 133. Next came an omnibus count, with averment that this and the other were for the same cause of action, the averment affording a convenient way of referring to specifications. *Cape Elizabeth* v. *Lombard*, 70 Maine, 396, 400. And then, as an amendment to the declaration, the partial specific statement, that the defendant and the plaintiff entered into an (oral) agreement, whereby if, by the aid of the plaintiff, it should be made possible

for the defendant to acquire the aforesaid title at an advantageous price, the defendant would share with the plaintiff the profits to be derived; and notwithstanding full performance by the plaintiff of his special agreement, yet since coming into ownership in common tenancy of 105/140's of the realty, and though nothing remains for the defendant to do but to pay the plaintiff in money, the defendant has ever refused to pay him.

Defendant plead the general issue.

In the course of the jury trial, counsel for plaintiff announced that his reliance was the count upon the account annexed, but whether counsel meant he so relied solely is not of consequence, the plaintiff's own showing falling short of sustaining either count.

From the testimony it is evident that in the agreement, if any there were, the expression "profits to be derived" signified pecuniary gains which the parties expected to make from operations to be carried on by the defendant, or permitted by him to be carried on, upon the wild or forest lands acquired, allowance being made to the defendant for what he had paid therefor and for reasonable charges and expenses. Profit from selling the real estate may also have been within contemplation. This, however, is not now of concern.

In witnessing, the defendant denied the agreement testified to by the plaintiff, but the jury accepted the plaintiff's version and awarded him damages.

A condition may affect the performance of a promise. When two parties make mutual promises the performance of one or both may depend upon a condition precedent. Some writers call such a condition suspensory, because its non-fulfillment suspends the operation of the promise to which it is attached. Illustrations of conditions of this kind are to be found in promises dependent upon the act of a third party. Recovery for construction work may be made dependent upon the production of an architect's certificate (*Smith* v. *Brady*, 17 N. Y., 173), subject to the implied understanding that the certificate shall not be unreasonably or fraudulently withheld (*Nolan* v. *Whitney*, 88 N. Y., 648; *Chism* v. *Skipper*, 51 N. J., 1), and that its issue shall not be wrongfully prevented. *N. Y. &c. Sprinkler Company* v. *Andrews*, 173 N. Y., 25. A promise to pay an award is conditional upon the making of

the award, and the arbitration, or some sufficient reason for the want of it, is a condition precedent to right of action. *Hood* v. *Hartshorn*, 100 Mass., 117. No rule is better established than that a plaintiff can not recover in an ordinary common-law action for money not due at the institution of the suit. *Bacon* v. *Schepflin*, 185 Ill., 122; *Stitzel* v. *Miller*, 250 Ill., 72, Ann. Cas. 1912B, 412. All which tends to uphold, that if one man promise another that, for a consideration, he will do or pay something on the happening of a certain event, the promisor remains bound by his promise, though not liable to its performance while the condition is unfulfilled. Anson on Contract, 367.

There are instances, it is true, in which, if one party to an executory contract for the performance of labor, for the sale of goods, or similar undertaking, repudiates it, and acceptance of the renunciation works, in effect, a rescission, the injured party may at once sue for and recover the value of whatever has been done by him in performance of the contract. *Listman Mill Company* v. *Dufrense*, 111 Maine, 104; *Poland* v. *Thomaston &c. Company*, 100 Maine, 133.

But where one party has entirely executed his contract for services, while on the part of the other the contract remains executory in reference to the payment of money, the situation is somewhat different from the case of the acceptance of the repudiation of an executory contract for the sale of goods, for work done, or the like. A mere refusal to pay money, even when the money is due, is not the repudiation of a money contract and does not warrant a rescission. *Daley* v. *People's Association*, 178 Mass., 13, 18.

It being plain on the argument of defendant's motion for a new trial that the verdict is against the evidence and so contrary to law, there is no occasion to consider the points saved by the defendant on exceptions.

Motion sustained.
New trial granted.

MAMIE TAYLOR'S CASE.

Kennebec. Opinion July 11, 1928.

WORKMEN'S COMPENSATION ACT. QUESTIONS OF FACT. AUTOPSY.

In cases under the Workmen's Compensation Act, in the absence of fraud, the decision of the commissioner upon all questions of fact is final, provided there is some competent evidence to support a decree. It may be slender but it must be evidence, not speculation, surmise or conjecture.

The decision of the commissioner will not be reversed when the finding is supported by rational and natural inferences from proved facts.

An occurrence to be accidental must be unusual, undesigned, unexpected, sudden.

An internal injury that is itself sudden, unusual, unexpected is none the less accidental because its external cause is a part of the victim's ordinary work.

It is the unusual, undesigned, unexpected or sudden results of the strain, not necessarily the strain itself, which make the accidental injury necessary under the law.

Prior good health is evidence to be taken into consideration.

The Maine Workmen's Compensation Act has no provision for an autopsy. Refusal of the petitioner to consent to holding one is not a bar to receiving compensation.

In the case at bar the finding of the commissioner that there was some causal connection between the heavy lifting and the death of the petitioner's husband was based on some competent evidence and the inferences drawn by the commissioner therefrom were reasonable and rational.

On appeal from an affirming decree awarding compensation under the Workmen's Compensation Act. A petition of Mamie Taylor as dependent widow of Fred J. Taylor, an employee of Redington & Company, who died on January 10, 1925, from personal injuries alleged to have been sustained in an accident arising out of and in the course of his employment. Compensation was awarded by the Industrial Accident Commission and an affirming decree filed. Appeal dismissed with costs. Decree below affirmed.

The case fully appears in the opinion.

F. Harold Dubord, for petitioner.
Andrews, Nelson & Gardiner, for respondents.

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

BASSETT, J. Appeal from the decree of a single justice affirming the decision of the Chairman of the Industrial Accident Commission granting compensation for the death of the petitioner's husband, Fred J. Taylor.

The petitioner claimed that the death was due to a strain from lifting a slate slab while at work. The defendants contended there was no evidence of accidental injury or that death was caused by the strain.

The commissioner after hearing found, "It is obvious that the heavy lifting in question was a material factor in hastening his death, or else that there was no causal connection whatever between the two, and that his death, so soon following, was a mere coincidence at that time. Taking into careful consideration all the factors in this admittedly rather obscure case, it seems more probable than otherwise that some causal connection did actually exist and it is so found."

It is well settled law:

That in the absence of fraud the decision of the commissioner upon all questions of fact shall be final. *Maine Workmen's Compensation Act*, R. S., 1916, Chap. 50, Sec. 34, as amended by Public Laws 1919, Chap. 238; *Butts' Case*, 125 Me., 245.

That there must be some competent evidence to support a decree. It may be slender but it must be evidence, not speculation, surmise, or conjecture. *Mailman's Case*, 118 Me., 172; *Butts' Case*, supra.

That the decision of the commissioner will not be reversed where the finding is supported by rational and natural inferences from proved facts. *Mailman's Case*, supra; *Patrick* v. *Ham*, 119 Me., 510; *Hull's Case*, 125 Me., 135.

That an occurrence to be accidental must be unusual, undesigned, unexpected, sudden. *Brown's Case*, 123 Me., 424; *Brodin's Case*, 124 Me., 162, 171.

While the word accident is commonly predicated of occurrences external to the body, and such external accidents may or may not cause bodily injuries, yet an internal injury that is itself sudden, unusual and unexpected is none the less accidental because its external cause is a part of the victim's ordinary work. *Brown's Case*, supra.

Our court has therefore held that a strain or exertion of a laborer while at his work, which caused a cerebral hemorrhage, *Patrick* v. *Ham*, supra; *Hull's Case*, supra; or acute dilatation of the heart, *Brown's Case*, supra; were accidents arising out of and in the course of employment.

Turning now to the instant case, the record shows that Taylor had been for a number of years employed as a general laborer in a concern doing a furniture and undertaking business and was at work with a fellow employee, named Pooler, putting a slate vault into a grave. The bottom slab of the vault was seven and one-half feet long, thirty-two inches wide and an inch and one-half thick and weighed about four hundred pounds. It had been tipped up on edge at the side of the grave to slide down into it, but it took an angle and the upper corner of one end and the lower corner of the other stuck in the frozen ground, wedging the slab. Taylor got down into the grave and lifting at the level of his chest one end of the slab, pivoted it on the other until the slab straightened and, both ends clearing, slid down into the grave. He made no complaint, remark or exclamation indicating that anything had happened, and continued to work with Pooler putting together the pieces of the vault until noon when they went back to the store.

In *Patrick* v. *Ham*, supra; *Brown's Case*, supra; and *Hull's Case*, supra, the workman was engaged in ordinary work and there was no evidence of any unusual, undesigned, unexpected or sudden occurrence in the course of it. In this case there appears to have been such an occurrence and an attempt by the workman to overcome it, so that the strain itself could be called accidental. But if the strain were not accidental, it is the unusual, undesigned, unexpected or sudden results of the strain, not necessarily the strain itself, which make the accidental injury necessary under the law.

The finding of the commissioner that there was in fact a strain is supported by the evidence.

What evidence of its result was before the commissioner? Taylor was forty-six years old, of normal weight, had been in good health without indication of heart, chest or any other trouble. He went to work on the vault about eleven o'clock in the forenoon of Tuesday, December 30. As he and Pooler went into the store at noon, Taylor indicated to an employee there was a pain in his chest. At dinner at his home he complained of similar pain and of difficulty in breathing. When he got back to the store at one o'clock, he tried to put coal into the furnace but had to give up and sit in a chair, complaining of pain in the chest. He went back later to the cemetery and helped close the vault. He ate no supper and remained at home the following day, suffering from pain in his chest. The next morning Doctor Poulin, the family physician and a physician and surgeon of twenty years' experience, was called in. He found Taylor groaning and holding on to his chest and gasping for breath. Examination disclosed no trouble with heart, lungs or abdomen. The doctor gave treatment to relieve pain and any indigestion, strapped the chest, and on the same and the next two days made visits, by which time the difficulty in breathing had begun to subside. Taylor said he felt better and the doctor did not call again. During the following week he was about the house but complained of pain in the chest. On Saturday afternoon of that week, January 10, starting to rise from his chair, he fell and died instantly.

The petitioner refused to permit an autopsy.

Dr. Poulin testified that in his opinion Taylor's death was caused by pulmonary embolism, i.e., the blocking of the pulmonary artery or some of its branches by a thrombus or blood clot; that a thrombus may be formed by anything that slows up the circulation and might be formed by an injury to the blood vessels caused by severe strain due to heavy lifting or over exertion; a thrombus could form in the heart because of severe strain or acute dilation; that it was possible and probable that he died of pulmonary embolism and in his opinion the lifting was a material factor in producing it.

Doctor Risley, called as an expert by the defendants, testified that an embolism would have been disclosed by an autopsy and without an autopsy the cause of death could not be determined;

that without the evidence of an autopsy he would not say whether he thought there was or was not an embolism or express an opinion as to the cause of death; that the pain in the side would perhaps indicate an embolism; that a thrombus could possibly be formed by some injury, or by heavy lifting, and in the heart by such lifting under some circumstances.

The evidence of what was the actual injury or immediate cause of the death, as distinguished from the alleged initial cause, and of the period of time within which results appear varies with each case.

In *Patrick* v. *Ham*, supra, Patrick while lifting indicated there was something wrong, fell over, walked to the storeroom, became unconscious and died that evening without regaining consciousness.

In *Brown's Case*, supra, Brown while shovelling snow suddenly became dizzy, faint and short of breath and felt pain in the heart region, had to stop work and suffered some symptoms for three days when a doctor diagnosed the case as acute dilatation of the heart.

In *Hull's Case*, supra, Hull for several hours worked in a strained position turning jack screws under a heavy building. Immediately following his completion of the work he complained of not feeling well, worked on another job a half hour, collapsed, and three days later died of cerebral hemorrhage.

In these cases determination of the actual injury was based on diagnoses of physicians. In some of the cases, e.g. hernia, it has been based on an operation.

In *Frank* v. *Chicago, M. & St. P. Ry. Co.*, 207 N. W., 87 (S. D. 1926), the injury was a thrombus in the femoral vein in the upper part of the thigh resulting in varicose veins, the thrombus being due, as alleged, to the strain of work which required pushing a loaded wheelbarrow up an inclined plank. The court, while admitting that a distended blood vessel, if caused by strain and resulting in injury, is just as much an accident as a broken blood vessel so caused, held that the medical evidence did not bear out the conclusion of the arbitration board and industrial commissioner that the thrombus was due to the physical exertion as described. The court says, "The medical authorities say labor will

not cause a thrombus but that it results from infection. Even the lay mind knows that a clot of blood will not form suddenly from a strain . . . . The admissions of the doctors which appellant says support the findings of the board of arbitration and commission are (quoting) . . . . In the testimony of both it may be noted that the doctors say that work *might* cause the injury, neither express an opinion that it did . . . . In the light of common knowledge and all the circumstances of this case we do not feel that the findings of the board and the commissioner can be sustained."

The medical authority, as appears from the evidence of the cited and instant cases, concerning causation of a thrombus, differs. The cited case goes further in taking judicial notice of what "the lay mind knows" or of "common knowledge" than we can follow. Whatever may be the medical authority as to the causes of thrombus, and whether the evidence in the instant case or the cited case has the correct medical theory, the instant case must be determined upon the record before us and not upon the record before another court in another case. *Shaw's Case*, 126 Me., 572.

Prior good health is evidence to be taken into consideration and has been by this court. *Larrabee's Case*, 120 Me., 242, 245, *Ballou's Case*, 121 Me., 283, 285. So in *Poccardi* v. *Public Service Commission*, 84 S. E., 242 (W. Va.), L. R. A., 1916, 299.

A finding of the commission supported by the opinion of two physicians is based on some evidence. *Clark's Case*, 125 Me., 408, 410.

In the instant case there was an opinion of one doctor, not controverted by the other doctor. Nor was there any contradiction between them as to causes of thrombus. The opinion of the one physician in *Kelley's Case*, 123 Me., 261, as to whether the die had in fact struck the foot, was an entirely different opinion from that of Doctor Poulin in this case.

We think that the finding of the commissioner that there was some causal connection between the heavy lifting and the death of Taylor was based upon some competent evidence and the inferences drawn by the commissioner therefrom were reasonable and rational. *Martin's Case*, 125 Me., 49.

The defendants further contended that the petitioner prevented

the holding of an autopsy and so prevented the adduction of definite evidence as to the cause of death; that, while the Maine Compensation Act is silent as to autopsies, refusal to hold an autopsy is similar in principle to unreasonable refusal to submit to proper medical and surgical treatment. *Beaulieu's Case*, 124 Me., 83.

While in that case the court held that it must be a refusal to submit to proper medical or surgical treatment such as an ordinarily prudent man would submit to in like circumstances and whether or not there had been such an unreasonable refusal is a question of fact to be determined by the commissioner, and the finding of the commissioner that Beaulieu had not unreasonably refused was on the evidence justified; and while in the instant case the only evidence as to petitioner's refusal to permit an autopsy was her simple statement that she refused and there was no evidence as to whether her refusal was under the circumstances reasonable or unreasonable, a question which has arisen in some of the states where the Compensation act has provisions for autopsies, it is sufficient for this case to say that our statute has no provisions for an autopsy; and not permitting one to receive compensation for an injury which proper medical or surgical treatment would or might reasonably expect to terminate and not requiring a petitioner to consent to hold a post mortem examination to obtain evidence of the cause of death are not in principle the same.

Appeal dismissed with costs.
Decree below affirmed.

SYDE'S CASE.

Androscoggin Opinion July 17, 1928.

WORKMEN'S COMPENSATION ACT. OPINION EVIDENCE. MEDICAL TESTIMONY.

As held in Mamie Taylor's case (the preceding case), if the finding of the Commissioner is supported by rational and natural inferences from proved facts it is final.

A finding based on speculation, surmise or conjecture will not be sustained.

The value of opinion evidence is dependent on the reasons given for it. When based on supposition, or on conclusions at variance with rational deductions from undisputed facts it has no probative value.

While expert medical testimony is of great value and importance it is not absolutely essential in the establishment of truth, nor is it always essential to the making of sound deductions.

The conclusions of the Commissioner if natural and rational will be sustained notwithstanding its supporting evidence is not viseed by an expert.

In the case at bar the finding of the Commissioner that the strain caused the appendicitis was upon the evidence in the case and in the light of medical testimony a conclusion of speculation, surmise or conjecture and not based on competent evidence.

On appeal. Petition of Charles Syde for compensation for injuries alleged to be due to a strain received by him in lifting a motor from the floor to a display stand, which strain he alleged caused appendicitis and an operation therefor. After hearing, compensation was awarded by the Industrial Accident Commission, and an affirming decree filed. The cause comes before the Law Court on appeal from the affirming decree. Appeal sustained.

The case appears fully in the opinion.

Harold L. Redding, for petitioner.

Reginald H. Harris, for respondants.

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

BASSETT, J. Appeal from the decree of a single justice affirming the decree of the Associate Legal Member of the Industrial Accident Commission granting compensation.

The petitioner, an employee of a corporation dealing in automobiles, claimed that in lifting a motor from the floor to a display stand he received a strain, which caused appendicitis and an operation therefor.

The same principles of law apply to this case as to *Mamie Taylor's Case*, 127 Me., which was also a case of alleged injury due to strain. In that case the question was whether the strain caused an injury, the determination of the nature of which and whether such injury caused death being based on diagnosis. In the instant case the question is whether the strain caused an injury the nature of which was definitely determined by an operation.

The question for determination is whether there was some competent evidence upon which the finding of the commissioner, that there was causal connection between the strain and the appendicitis, can be based and can be "supported by rational and natural inferences from proved facts," or whether the finding was "speculation, surmise or conjecture." *Mailman's Case*, 118 Me., 172; *Butt's Case*, 125 Me., 245; *Strout's Case*, 126 Me., 579.

The alleged accident occurred in the early afternoon of Saturday, April 30. The motor weighed from three hundred and fifty to four hundred pounds. Syde at one end of the motor and a co-employee at the other lifted it from the floor to the display stand, which was of such height that Syde could not lift the motor up on to it, standing flat on his feet, but rose on his toes and lifted higher still with his arms and full strength. As he was about to set the motor down on the stand he felt a pain in his right groin and remarked to his co-employee he thought he had snapped something. The pain was so severe he was obliged to quit work, went home and laid down. He went to the garage the next day but did no work and, not feeling well, went home again in the afternoon. He was at the garage the most of the forenoon on the following day but did no work requiring lifting and felt so mean he consulted in the afternoon a doctor who made an examination and a few hours later operated for appendicitis. Syde was laid up four weeks.

Prior to the lifting Syde was apparently in good health and never had had appendicitis before to his knowledge.

The doctor, who operated and attended, testified that from the history of the case given him by Syde and from the fact that he had not had appendicitis before, he expected, as he began the examination to find hernia but all the symptoms found on the examination pointed to appendicitis, which conclusion was confirmed by a blood test that showed the necessity of immediate operation. He found the appendix acutely inflamed and distended to twice its normal size. He did not find in it any pus, fecal matter, gas or other content, nor did he find any adhesion indicating a prior attack. This appendix was on the inner side of the caecum, the sac which makes a connection between the small and large intestine, and its position therefore was about half way through the body. An appendix is a flexible, wormlike appendage from the lower end of the caecum, is composed of muscle and mucous membrane, and surrounded by flexible substances.

He was of the opinion that the inflammation had started within two days, the time since the lifting and was caused by a sudden severe strain in the lifting. "That is what I attribute it to. The position that the man was standing in and straining on his toes and bringing the abdominal muscles into play at that moment, I would call traumatism, that is, the injury to those parts below the contracted muscles, just like if the muscles were contracted tightly and the man should fall on the corner of the table or a chair. That is traumatism and to my mind that is the same thing and it weakened that place or brought congestion there and with the contents of the bowel, some of the material passed through the lumen of the appendix and appendicitis resulted."

He was carefully examined to ascertain the reasons for his opinion and to explain how the appendix, formed and located as it was, could be subject to contact from and be injured by tightened, contracted abdominal muscles, which would, as he admitted, give even pressure from such contraction. His answers showed that he assumed some facts which were different from the undisputed facts of the evidence, that the rational, natural conclusions to be drawn from some of the undisputed facts were contrary to the conclusions he drew and that some of his conclusions were, as

he said, "getting into the realm of supposition" and that no reason, which he gave, seemed a natural, rational inference and conclusion from the undisputed facts.

The value of an opinion may be much increased or diminished by the reasons given for it. *Palmer* v. *Blanchard*, 113 Me., 380. Its value may be diminished to the point where it has no probative value.

We think that was the result here and the opinion of the doctor was not of probative value to prove a causal connection between the strain and the appendicitis.

One other doctor, who had nineteen years' experience and had operated may times for appendicitis, called as an expert by the defendant, testified that while he would not "say it was out of the bounds of possibility," he had never met a case where the appendix was inflamed by a strain of the abdominal muscles. He had seen it caused by a traumatic blow which had ruptured some of the vessels.

Expert medical testimony is not absolutely essential to the establishment of truth. It is not always essential to the making of sound deductions. It is of very great importance and of value. The commissioner's conclusion, if natural and rational, must stand "notwithstanding its supporting evidence is not viseed by an expert." *Swett's Case*, 125 Me., 389, 391. We think that the medical testimony in this case was, as to the causal relation between the strain and the appendicitis, speculation, surmise or conjecture.

The commissioner in his decree found that "the strain was so bad as to cause immediate cessation of labor although employee tried to work after that and the operation came very shortly thereafter.....There appeared no other cause for the injury."

The strain either caused, or aggravated and accelerated, or coincidentally revealed the appendicitis.

There was no evidence of or claim that there was an existing condition at the time of lifting which was accelerated. See *Orff's Case*, 122 Me., 114.

We think that finding the strain caused the appendicitis was upon the evidence in the case and in the light of the medical testi-

mony a conclusion of speculation, surmise or conjecture and not based upon competent evidence.

In *Fritz* v. *Rudy Furnace Co.*, 118 N. W., 528 (Mich.), the evidence differed from that in the instant case.

Appeal sustained.

MARTHA F. WESTON

vs.

JESSIE E. MCLAIN.

Lincoln. Opinion July 18, 1828.

MORTGAGE FOR SUPPORT. POSSESSION. FORECLOSURE.

In a real action by a mortgagee to recover possession of the mortgaged premises after attempted foreclosure of the mortgage and expiration of the statutory period for redemption, the condition of the mortgage being to provide support on the premises for the mortgagee and her husband during their lives, the mortgagee must show a breach of the condition and that she is entitled to possession.

Where it is provided in a mortgage given for support that the support shall be furnished on the premises described in the mortgage, the implication is clear that it was the intention of the parties that the mortgagor should retain possession until a breach of the condition because possession is absolutely necessary for the performance of the condition and the mortgagee cannot maintain an action for possession, so far as it is based upon the mortgage, unless breach of the condition be shown.

The burden of proving the breach in such action by the mortgagee is on the mortgagee whether foreclosure has or has not been completed.

If the evidence shows that the condition has been broken and no foreclosure has been begun, conditional judgment may be awarded. If it appears that foreclosure has been begun before action was begun and conformably to R. S. Chap. 95 sections five and seven, judgment is entered at common law. If the foreclosure has been legally completed and the period of redemption

has expired, the mortgagee recovers judgment for possession as at common law and holds title free from right of redemption.

A mortgage given for support of the mortgagee upon the premises may be foreclosed by any of the statutory methods and the mortgagee's burden of proving breach is not shifted by the method adopted. The words "by any of the methods now provided by law" in the convenant of the mortgage in the case at bar are only declaratory of the rights given by the statutes.

On report. A real action to recover possession of certain real estate to which the plaintiff claimed title by virtue of a mortgage given by the defendant to her and her husband, foreclosure of said mortgage after her husband's decease and the expiration of the statutory period for redemption.

The case was reported to the Law Court on an agreed statement of facts with the stipulation that "if the plaintiff must show a breach of the condition of the mortgage, this action is to be remanded to the Court at nisi prius for trial of the cause." So ordered.

The case is fully stated in the opinion.

Emerson Hilton,

Weston M. Hilton, for plaintiff.

Harold R. Smith, for defendant.

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

BASSETT, J. Real action. The case comes before this court upon an agreed statement.

From it and the writ, pleadings, mortgage, notice of and record of the foreclosure, it appears as follows:

The plaintiff claims title and right of possession to the real estate described in the declaration by a mortgage from the defendant to her and her husband, foreclosure by her after her husband's decease, and expiration of the statutory period for redemption.

The defendant claims that the condition of the mortgage was to support the plaintiff and her husband upon the premises during their lives and that he is rightfully in possession to perform the

condition; that the plaintiff left the premises and refused to be supported thereon and there has been no breach of the condition.

The mortgage, of which the plaintiff and her husband were grantees, contained these provisions:

> "PROVIDED NEVERTHELESS, that if the said Jesse E. McLain, his executors and administrators shall at all times during the natural lives of the said Daniel S. Weston and Martha F. Weston, well and sufficiently support and maintain the said Daniel S. Weston and Martha F. Weston, upon the aforesaid premises and them provide with meat, drink, clothes, nursing, medicine and other things necessary for their comfortable support, and give each a proper and suitable burial, then this Deed shall be void, otherwise shall remain in full force. And the grantor covenants and agrees with the said grantees that the right of redeeming the above mortgaged premises shall be forever foreclosed in one year next after the commencement of foreclosure by any of the methods now provided by law."

After the death of the husband, the plaintiff, on September 13, 1924, served upon the defendant by attested copy notice of foreclosure for condition broken, and on September 23 recorded the original notice and officer's return, as provided by statute, and brought this action September 25, 1925, after the expiration of the period of redemption.

The defendant claims that the plaintiff must show a breach of the condition of the mortgage to maintain her action. We think this is correct.

To maintain the action she must be entitled to possession. R. S. 1916, Chap. 109, Sec. 5. *Hurd* v. *Chase*, 100 Me., 561.

Where, in a mortgage given for the support of the mortgagee, it is provided that the support shall be furnished upon the premises described in the mortgage, the implication is clear that it was the intention of the parties that the mortgagor should retain possession until a breach of the condition, because possession is absolutely necessary for performance of the condition, and the mortgagee cannot maintain an action for possession, so far as it is

based upon the mortgage, unless it be shown there was a breach of the condition. *Poland* v. *Davis*, 99 Me., 345; *Davis* v. *Poland*, 102 Me., 192, 195; *Powers* v. *Hambleton*, 106 Me., 217, 221.

The burden of proving the breach in such an action by the mortgagee is on the mortgagee. *Poland* v. *Davis*, supra.

The mortgagee must prove a breach of the condition, whether he brings the writ of entry to take possession for foreclosure or to get possession after foreclosure, because to obtain possession in either case he must prove that he is entitled to possession and that the condition had been broken when the action was commenced. R. S. 1916, Chap. 95, Sec. 9.

If the evidence shows that the condition has been broken and no foreclosure has been begun, conditional judgment may be awarded. If it appears "that the owner of the mortgage proceeded for foreclosure conformably to section five and seven before the suit was commenced," judgment is entered as at common law. *Mitchell* v. *Elwell*, 103 Me., 164, 169. If the foreclosure has been duly and legally completed and the period of redemption has expired, the mortgagee recovers judgment for possession as at common law and holds title free from the right of redemption.

The burden on the mortgagee of proving a breach is the same whether the foreclosure has or has not been completed; "it is immaterial whether the mortgage was foreclosed or not." *Poland* v. *Davis*, supra, page 347.

A mortgage given for support of the mortgagee upon the premises may be foreclosed by any of the statutory methods and the mortgagee's burden of proving a breach is not shifted by the method adopted. The words "by any of the methods now provided by law" in the covenant of the mortgage above noted are only declaratory of the rights given by statute.

The agreed statement contained the stipulation that "if the plaintiff must show a breach of condition of the mortgage, this action is to be remanded to the court at nisi prius for trial of the cause."

So Ordered.

CHARLES LEVENTHAL

v.

ABRAHAM LAZAROVITCH.

Cumberland. Opinion July 18, 1928.

CONTRACTS. MODIFICATION. RESCISSION.

In an action to recover for labor and materials furnished in doing the metal and roofing work in remodeling a building, a contract for the work having been entered into, but various changes and substitutions of items and materials having been subsequently made,

Held:

The plaintiff was bound by his contract to complete the items specified therein, unless modified or waived by agreement, at the contract price. The evidence does not disclose that the contract was rescinded or abandoned.

On the items claimed as extras and as to those in dispute, the jury found for the plaintiff, but it clearly failed to take into consideration that the contract, except as modified by the parties, was still in force.

On general motion for new trial by defendant. An action on the case to recover the sum of $1,114.17 alleged by plaintiff to be due him according to an account annexed.

A verdict of $1,060.83 was rendered for the plaintiff, and the defendant filed a general motion for new trial.

Motion sustained unless the plaintiff shall within ten days after receipt of the mandate from the Court file a remittitur of all over the sum of $713.72.

The case appears fully in the opinion.

Israel Bernstein, for plaintiff.

Harry S. Judelshon,

Edward J. Harrigan, for defendant.

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

WILSON, C. J. An action to recover for labor and materials furnished in doing the metal and roofing work in remodeling a large business block in the city of Portland into an apartment house. The declaration contains an account annexed setting forth labor and materials furnished to the amount of $3,314.17 with credits of $2,200.00, leaving a balance alleged to be due of $1,114.17; and also a money count in the usual form. The jury awarded a verdict for $1,060.38. The case is here on a motion for a new trial on the usual grounds.

The evidence discloses that a contract was entered into between the parties under which the plaintiff was to do the metal and roofing work for the sum of $2,200, which included certain specified items, and that the plaintiff also did certain other work admitted to be in addition to what was required in the contract, and for which he was entitled to extra compensation. While there was some controversy about certain small items claimed as extras, after a careful examination of the record this Court can not say the jury was clearly wrong in allowing the plaintiff compensation for substantially all the items charged in the account annexed in addition to those specified in the contract.

The main controversy arises over three items enumerated in the contract and whether the contract was violated by the defendant or abandoned by the parties and the plaintiff is entitled to compensation for the labor and materials furnished in completing the several items enumerated in the contract as though no contract had been entered into. The jury evidently disregarded the contract and allowed the plaintiff to recover under his account annexed.

The first item in dispute is connected with certain substitutes for ten ventilators furnished in place of those specified in the contract, which substitutes the defendant now claims are worthless. The plaintiff testified the substitution was done with the consent of the defendant and with his full knowledge, in which he was to a certain extent corroborated by his assistant. The jury evidently

accepted the plaintiff's version. They saw and heard the witnesses. We can not disturb the verdict on this ground.

The second item relates to a change in the ventilation or method of carrying out the fumes of seventy gas ranges in the several apartments. The contract provided for hoods over the ranges and connections with air shafts running to the roof. The building inspector of the city of Portland, however, refused to approve of this method and ordered eleven metal risers installed running up through the building to the roof to be connected directly with each gas range, and eliminating the hoods.

The defendant contended that the plaintiff agreed to make this change without extra charge, as he said the expense of installing the risers and connections would be less than the sum specified in the contract for the hoods and connections. The price specified in the contract for installing sixty-five hoods and connections was $325.

The plaintiff denied that he agreed to make the change without extra compensation and claimed that by reason of a relocation of the ranges at different points than indicated on the plans on which he based his bid for the hoods and connections, the expense of the risers with connections was much greater than for installing the hoods, and claimed in his account annexed the sum of $825.00 for making this change.

The jury must have again believed the plaintiff and found that not only he did not agree to make the change without extra charge, but that the expense was much greater than the sum for which the plaintiff had agreed in his contract to install the hoods.

If the jury believed the plaintiff's version as to this change, then the plaintiff was entitled to a fair compensation for installing the risers and connections regardless of what he agreed to install the hoods with connections for. The plaintiff claimed $825 for installing this item, or $500 in addition to what he agreed in his contract to install the hoods and connections.

The witnesses for the defendant directed their evidence chiefly to proving that the expense of installing the hoods and connections was much greater than a reasonable cost of installing the risers and connections, as supporting the defendant's contention that

the plaintiff agreed to make the substitution without additional expense. But the jury found against the defendant on this point. At least all the witnesses agreed that the expense of installing the metal risers and connections was considerably in excess of the price fixed in the plaintiff's contract for installing the hoods and connections; the defendant's witnesses estimating this extra cost as approximately $165.00 and the plaintiff's expert as $459.80.

It is impossible to compute what was a reasonable cost of this item from the record. The sum claimed by the plaintiff and the estimated cost of his expert seems large; but the jury must have accepted it, or at least the estimate of the plaintiff's witness, in place of the estimate given by the defendant's experts, who apparently did not make a thorough examination of the existing conditions. This Court can not say from the evidence that the jury was clearly wrong in rejecting the estimates of the defendant's witnesses; nor can it from the record by computation determine any sum between the estimates of the experts on each side as being the more nearly correct.

It is agreed that two certain items specified in the contract were not fully performed. The non-performance appears to have been waived so far as this case is concerned. As to the larger, for covering forty-four air shaft doors and frames, the plaintiff testified he did this work in part until stopped by the defendant, and before ordered to stop had done work thereon amounting to $78.00, for which the jury may have properly allowed him, if they believed his testimony. The balance of these two items amounting to $113 the defendant claimed should not be allowed. Evidently the jury did not allow it in their verdict; nor did the plaintiff claim it in his account annexed.

We think the plaintiff was clearly bound by his agreement to complete the items specified in his contract, for which he was entitled to receive $2,200, or if we omit the items for hoods, of $325 and for the air shaft doors, of $176.00, and elevator shaft flashings, of $15.09, he would be entitled to receive $1,684.00 under his contract.

The record does not show such a modification of the contract as would warrant its rescission or a claim of abandonment so as to

permit the plaintiff to recover on his account annexed for the items covered by the contract. He is still bound by it except as in respect to the gas range hoods and air shaft doors and elevator shaft flashings, it is shown to have been modified or waived by the parties.

The jury evidently failed to take this into consideration in awarding their verdict. The total claimed by the plaintiff for extra labor and materials, including such sums as the jury was warranted in awarding for the work done on the air shaft doors, and in constructing the metal risers and gas range connections could not have exceeded $1,229.72. If to this be added the amount due under the contract for the items completed of $1,684.00, the maximum amount the plaintiff was entitled under his contract and for extras could not, upon the record in this case, have exceeded $2,913.72. Of this amount he has received $2,200, leaving the maximum amount for which he was entitled to recover of $713.72. Unless the plaintiff shall, within ten days after receipt of the mandate of this Court, file a remittitur of all of the verdict in excess of $713.72, the motion for a new trial will be sustained.

EDWARD ILES

vs.

NICOLA PALERMINO.

Androscoggin. Opinion July 18, 1928.

MOTOR VEHICLES. LIABILITY OF OWNER. AGENCY.

In order to recover for damages sustained in an automobile collision where the defendant is not driving nor a passenger in the car, the plaintiff must show that the person driving the car at the time of the accident was the servant or agent of the defendant and in the performance of duties arising from such relationship.

In the case at bar although the car was registered in the name of the defendant, and he was a part owner thereof, the evidence failed to show any relationship of servant or agent between the defendant and the driver of the car at the time of the accident.

On motion by defendant for new trial. An action to recover damages done to the plaintiff's automobile as a result of a collision with an automobile partly owned by defendant, registered in his name and operated by his daughter.

Trial of the case resulted in a verdict for the plaintiff for Four Hundred and Twenty-eight Dollars. After verdict the defendant filed a motion for new trial on the usual grounds.

Motion granted.

The case sufficiently appears in the opinion.

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

Albert Beliveau, for defendant.

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

PHILBROOK, J. This is an action to recover compensation for damages sustained by reason of an automobile collision. Defendant was not in nor driving the car which caused the damage. The plaintiff was awarded a verdict and the case is before us upon defendant's motion to have that verdict set aside. The defendant relies upon the failure of the plaintiff to prove that the driver of the car was the servant or agent of the defendant when driving the same.

The car in question was registered in the name of the defendant, but as to its ownership the uncontradicted evidence shows that it was owned jointly by the defendant and the husband of the driver, the latter being the married daughter of the defendant, who, with her husband and children, lived in a rent other than that in which the defendant lived, and formed no part of the defendant's household. When the car was bought it was with the distinct understanding that either owner might use the car at his pleasure. Each had a key to the garage in which the car was housed.

On the day of the accident the married daughter was on her way

to attend a wedding, and some members of the defendant's family were accompanying her with the same intent. The record falls short of establishing any relationship of servant or agent between the defendant and the driver of the car at the time of the accident. The verdict is clearly wrong and the mandate must be

Motion granted.

JOHN BLACKER

vs.

OXFORD PAPER COMPANY.

Cumberland. Opinion July 18, 1928.

MASTER AND SERVANT. NEGLIGENCE. ASSUMPTION OF RISK. QUESTIONS FOR COURT AND JURY.

Whether or not an employer has fulfilled his obligation to exercise due care in furnishing a suitable place in which employees may do their work, depends, in a large degree, on the nature of the employment. The degree of safety provided must be consistent with the peculiar circumstances of each case.

When a place of work originally safe is rendered unsafe by the acts of employees, the employer is not liable.

The question of negligence of either plaintiff or defendant, ordinarily of fact, becomes a one of law and for the court, when the facts are undisputed and but one inference can properly be drawn therefrom.

In the case at bar the evidence disclosed no failure on the part of the defendant to exercise reasonable care in furnishing either a safe place in which to work or proper appliances with which to work. The plaintiff must be held to have assumed the obvious risk of that happening which did happen, and which any reasonably intelligent person would know must happen if the work was carried on as the plaintiff carried it on.

On exceptions and general motion for new trial by defendant. An action to recover for personal injuries sustained by plaintiff,

an employee of defendant, while engaged in loading pulp wood from a pile or stack that had been sluiced down a mountain side.

Plaintiff alleged failure on the part of the defendant to exercise reasonable care in providing a safe place to work, safe appliances for the work, and to properly instruct plaintiff in his duties. At the close of plaintiff's evidence, counsel for defendant moved for a directed verdict for the defendant. The Court overruled the motion and the defendant seasonably excepted.

The jury found for the plaintiff assessing damages in the sum of $2,200.

A general motion for new trial was filed by the defendant.

Motion granted. New trial ordered.

The case fully appears in the opinion.

Richard E. Harvey, for plaintiff.

Ralph T. Parker, for defendant.

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

PATTANGALL, J. Verdict for plaintiff. Case comes forward on exceptions to the refusal of the trial judge to order a verdict for the defendant and on general motion. Exceptions and motion involve the same question. The case may, therefore, be as well considered on the motion, the sole issue before this court being whether or not there is evidence sufficient to support the verdict.

This was a common law action brought to recover damages for injuries sustained by the plaintiff while engaged in loading pulpwood for the defendant. Owing to the nature of the employment, The Workmen's Compensation Act does not apply. Section 4, Chapter 50, R. S. 1916.

The facts may be briefly stated. The pulp wood in question lay in an irregular mass near the highway. The pile was about five hundred feet in length and two hundred in width, the average height being about four feet and the extreme height sixteen feet. The accident occurred in February when the wood was more or less covered with snow and the whole mass, to a considerable extent, frozen together. Alongside the road and to prevent the wood blocking the highway, a portion of it had been piled in tiers, which

operated as a retaining wall, keeping the remainder of the wood in place.

Plaintiff, with others, was engaged in taking wood from this pile and loading it on sleds on which it was to be conveyed to defendant's mill. During the first two days that he was so employed the outside and lower tiers were largely removed by him and those who worked with him. On the third day, the upper portion of the pile fell, plaintiff was caught beneath it and suffered serious injury.

On these facts plaintiff claims to recover, on the ground: First, that the defendant failed to use reasonable care in providing a reasonably safe place in which he could do his work; Second, that defendant failed to warn or instruct him as to the danger to which he was exposed, and, Third, that defendant failed to supply him with safe appliances with which to perform the duties incumbent upon him.

Defendant claims that it was free from negligence; that whatever danger there was in connection with the work was plainly observable; and that the plaintiff assumed the risk of such danger when he entered upon the employment and that defendant's own negligence was the cause of the accident.

It is, of course, the duty of the employer to exercise reasonable care in furnishing a reasonably safe place in which employees may do their work, but in determining whether or not an employer has failed in his duty in this respect, the nature of the employment must be taken into account.

There is very little manual labor performed under conditions which entirely eliminate the possibility of accident. The deck of a ship, the cab of a locomotive, the staging upon which the carpenter or painter stands, are all places of danger, yet they may be made as reasonably safe as the duty of the employer to the employee demands. Axemen in the woods, river drivers bringing logs to market, men employed in mills in which logs are manufactured into boards or wood made into pulp and paper are all engaged in more or less hazardous undertakings, and employers in providing places where employees are to perform their work are only required to use due care in providing for that reasonable degree of safety which is consistent with the nature of the employment.

The legal standard governing the master's duty is that of ordi-

nary care with the respect to the exigencies of the situation. The relation of master and servant does not impose on the master the obligation to guarantee that the servant will never sustain any injury in discharging the duties of his employment. *Snowdale* v. *Box Board and Paper Company,* 100 Maine, 300.

There is nothing inherently dangerous in an irregularly piled mass of pulp wood. To be sure if the bottom is disturbed, the top will fall, but that does not satisfy the proposition that one employed to move the wood was not provided with a reasonably safe place in which to work. If the place of work became unsafe, it was made so by the acts of the plaintiff and his fellow workmen. We cannot hold the employer negligent on this score. *Welch* v. *Bath Iron Works,* 98 Maine, 361.

Nor was there need of giving plaintiff warning or instructions concerning such danger as did exist. It was obvious to the most casual observer. It is urged that plaintiff was inexperienced in this class of work, but there was no need of expert knowledge here. The risk of the wood sliding down after the supporting and outer tiers were removed was apparent to any normal mind.

"An employee of mature age working at taking down tiers of pulp twelve feet high must be held to have known that there was danger of single tiers falling if deprived of the support of the adjacent tiers nevertheless he took down one tier and in consequence the next, being left without support, fell upon him, to his injury. The employer is not liable." *Leard* v. *International Paper Company,* 100 Maine, 59.

Plaintiff assumed the obvious risk of that happening which did happen and which any reasonably intelligent person would know must happen if the work was carried on as plaintiff carried it on.

There was no failure on defendant's part to furnish plaintiff with proper appliances with which to work. He was furnished with a hand hook to use in pulling the sticks of pulp wood, four feet in length, out of the pile. He needed nothing else and no appliances with which he might have been furnished would in any way have tended to avert the accident, provided the method employed in taking the wood from the pile had remained unchanged. The plaintiff's own negligence in pursuing that method is apparent.

"Although the question of negligence either of plaintiff or de-

fendant is one of fact for the jury, when the facts are in dispute or even when they are not, provided that fair minded and intelligent persons may reasonably differ as to the conclusions to be drawn from them, the question becomes one of law and for the court, when the facts are undisputed and but one inference can properly be drawn therefrom." *Blumenthal* v. *R. R. Co.*, 97 Maine, 255.

Motion granted.
New trial ordered.

ROBERT CHESEBRO ET AL

vs.

CHARLES D. CAPEN.

Lincoln. Opinion July 24, 1928.

JURY FINDINGS, WHEN CONCLUSIVE.

Where there is nothing in the record of the cause to indicate that the jury disregarded the law as properly given to them by the presiding Justice, or that they failed to weigh the evidence presented, or that they were swayed by prejudice or wrong motive, their findings should be conclusive.

In the case at bar, in addition to the evidence set forth in the printed record, the jury had the benefit of two plans. In view of all the evidence before them their finding as to the location of the boundary line was warranted.

On trial of a writ of entry, to determine title to land in Boothbay, plaintiff recovered a verdict and the case came up on general motion.

The question in issue was the location of a line extending east by marked trees to a mill pond. The jury accepted as the marked trees certain pines, now standing in a broken line.

Motion overruled.

George A. Cowan, for plaintiffs.

Locke, Perkins & Williamson, for defendants.

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

BARNES, J. This is an action to recover possession of and quiet title to a fringe of land which plaintiffs insist constitutes the southerly end of certain farm lots in the second tier from the seashore, in the town of Boothbay.

Defendant claimed the land as the rear or northerly end of a lot in the first or shore tier of lots.

At the trial the question left for the jury was the location of this line, which, extending in a generally east and western direction, forms the dividing line between the lots of the first and second tiers.

Defendant, himself a surveyor, in 1887, bought the shore lots, his northerly bound, as given in the deed, running from a known point, on the westerly side and common to both tiers of lots; "thence east by marked trees etc.," a hundred rods or more to Hodgdon's Mill Pond.

He testified that soon after this purchase he went on the land with a surveyor of the vicinity and ran the line now in dispute, his north line, due east from a point now confessedly in the true line to the Mill Pond, and that at that time there were "marked trees" on this due east line, but where they stood, how many were there, or what has become of them and whether or not their stumps are now to be found in this line he did not say.

The plaintiffs assert that by limiting defendant to the land south of a line run from the known point common to both tiers of lots, "thence east by marked trees" to the Mill Pond, defendant has all that he purchased, that they bought in 1924, all north of the line established by the position of the marked trees; have claimed title to it ever since, and brought this writ to determine the ownership.

Plaintiffs and their witnesses testified to the fact that for a space after moving easterly from the known point the boundary evidenced by the marked trees runs in a broken line, meandering so far southerly that at one point it crosses lots staked out by defendant, in a development of his land for residence purposes, and wavering now north, now south of east until it reaches the Mill Pond at a point 110 feet south of the due east line.

Much testimony is reported upon the respective contentions of the parties, and in particular to the location of the "marked trees."

The instructions of the presiding justice were ample and clear. He correctly stated the rule of the supremacy of monuments, when known or knowable, over courses and distances in construing deeds; directed the jury to decide whether, at the time of defendant's purchase, there were marked trees in the due east course, and if not to find and declare where were the marked trees called for in the deed.

There is nothing to indicate that the jury disregarded the law as given to them, or were swayed by prejudice or any wrong motive. The trial was conducted with the aid of two plans prepared from actual surveys and testified to by their authors.

From their study of the plans, as different witnesses directed their attention to them, the jury should have insight into the problem that the printed record does not furnish the court, and we cannot say the finding of the jury is wrong. They found the defendant's north boundary to be the broken, meandering line.

Motion overruled.

STATE

vs.

SMITH BUDGE.

Penobscot. Opinion July 30, 1928.

CRIMINAL LAW. TESTIMONY GIVEN AT FORMER TRIAL, WHEN ADMISSIBLE. ADMISSIBILITY OF STENOGRAPHIC NOTES. EXCEPTIONS. CONST. OF MAINE, ART. 1, SEC. 6. R. S. CHAP. 87, SEC. 171.

The introduction of the testimony of a witness who testified at a former hearing or trial under oath with full opportunity for cross-examination by the

accused, but who since the former hearing has died or left the jurisdiction of the court either permanently or for an indefinite period does not violate the provisions of Sec. 6, Art. I of the Constitution.

The rule permitting the introduction of the testimony of a witness who has since died given at a former trial under oath and subject to cross-examination, already recognized in this state, is extended to the testimony of a witness who since the former trial has left the jurisdiction of the court either permanently or for an indefinite period.

Whether a sufficient predicate for the introduction of such testimony has been shown is a question for the trial court. The Appellate Court will not disturb the findings of the trial judge on this question, unless there has been a clear abuse of judicial discretion.

Under Sec. 177, Chap. 87 R. S., the notes of the official stenographer of the court duly certified are competent evidence of the testimony given at a former trial and require no further identification than his official certification.

The Appellate Court will not sustain objections not specifically raised in the trial court, nor unless specifically stated in the bill of exceptions. It must appear that the trial court ruled on the question raised in the Appellate Court.

On exceptions. The respondent was indicted for manslaughter and trial was had at the May Term, 1925, of the Superior Court for Penobscot County. A verdict of guilty was rendered by the Jury. On respondent's exceptions the case was reported to the Law Court, which sustained the exceptions (*State* v. *Budge*, 126 Me., 223), and remanded the case for a new trial.

In the course of this trial the State offered in evidence the stenographic report of the testimony of one Charles A. Dwelley, as given at the first trial, duly certified as a true transcript of his stenographic notes by the official stenographer.

The respondent objected to the admission of this testimony and after the presiding Justice had ruled it admissible, excepted to the ruling. Exceptions overruled. Judgment for the State.

George F. Eaton, County Attorney for the State.

Benjamin W. Blanchard, for respondent.

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

WILSON, C. J. The respondent was indicted for manslaughter at the May term, 1925, in the Superior Court for the county of Penobscot and tried at that term, and a verdict of guilty rendered which was set aside. Upon a second trial, the state introduced under Sec. 171, Chap. 87 R. S., a duly certified copy of the stenographic notes of the official reporter of the trial court taken at the former trial of the testimony given by a witness, the state having first presented evidence upon which the trial judge found that since the former trial the witness had left the state and was then beyond the jurisdiction of the Court and the power of the state to compel his attendance.

To the admission of this testimony counsel for the respondent objected. While his objections were couched in the most general terms and a technical question might be raised as to whether they meet the rules of this Court as laid down in *McKown* v. *Powers*, 86 Me., 291, and the other cases there cited, it is perhaps clear from the colloquies between court and counsel and from the objections stated, that the counsel objected first on the ground that proof of mere absence from the state was not sufficient to warrant the introduction of such testimony, and secondly that the evidence did not warrant a conclusion that the witness had actually left the state or at least that his attendance could not have been compelled under a comity statute similar to Sec. 12, Chap. 134 R. S.

The issue raised by the first objection involves the best evidence and hearsay rule and also Sec. 6, Art. 1 of the Constitution of this state, which provides that in all criminal prosecutions the accused shall have the right to be confronted by the witness against him.

This provision in our constitution is a common and perhaps a universal one in the constitution of every state. A similar one is also contained in the Federal constitution.

It is held, however, and so far as we are advised without exception, not only in the state but in the Federal courts, and in both civil and criminal trials, that the admission of testimony, given under oath at a former hearing between the same parties, and where the same issue is involved, of a witness who has since died or who is absent from the jurisdiction by procurement of the accused or adverse party, when opportunity for full cross-examina-

tion was had at the prior hearing, does not violate the constitutional provision conferring upon an accused in criminal cases the right to be confronted by the witnesses against him; is an exception to the hearsay rule; and is admitted as the best evidence obtainable under the circumstances. *Mattox* v. *United States*, 156 U. S., 237; *Motes* v. *U. S.*, 178 U. S., 458; *West* v. *Louisiana*, 194 U. S., 262; *Reynold* v. *U. S.*, 98 U. S., 145; *Langham* v. *State*, 192 Ala., 687; *Dolan* v. *State*, 40 Ark., 455; *State* v. *Gaetano*, 96 Conn., 306; *Putnal* v. *State*, 56 Fla., 86; *Blackwell* v. *State*, 79 Fla., 709; *Barnett* v. *People*, 54 Ill., 325; *State* v. *Kimes*, 152 Ia., 240; *State* v. *Nelson*, 68 Kan., 566; *State* v. *Simmons*, 78 Kan., 852; *State* v. *Bollero*, 112 La., 850; *Com.* v. *Richards*, 18 Pick., 434; *People* v. *Case*, 105 Mich., 92; *People* v. *Gilhooley*, 95 N. Y. Sup., 636; *People* v. *Elliott*, 172 N. Y., 146; *State* v. *Walton*, 53 Ore., 557; *Brown* v. *Com.*, 73 Pa., 321; *Robertson* v. *State*, 63 Tex. Crim. Rep., 216; *State* v. *King*, 24 Utah, 482; *Jackson* v. *State*, 81 Wis., 127; Wigmore on Ev., Secs. 1397-9; Greenleaf Ev., Vol. 1, Sec. 1639.

The reason for the rule is stated by the Federal Supreme Court in *Mattox* v. *U. S.*, supra; "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against a prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection of the witness but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor on the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of these safeguards even by the death of a witness***. But general rules of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal after once having been convicted by the testimony of a certain witness should go scot free simply because death has closed the mouth of that witness would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the pub-

lic shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."

It is true that the courts at first were somewhat hesitant in extending the admission of such testimony beyond cases where the witness had died since the prior hearing or trail, or in cases where his absence was through the procurement of the accused in criminal cases or the adverse party in civil cases; and the view has been expressed in dissenting opinions that the admission of such testimony was in contravention of the constitutional provision requiring confrontation. At times the Texas court of Criminal Appeals has excluded such testimony altogether. *Cline* v. *State*, 36 Tex. Crim. Apps., 320; *Kemper* v. *State*, 63 Tex. Crim. App., 1.

In certain jurisdictions the admission of such testimony is still limited, at least in criminal cases, to instances where the witness is dead or out of the jurisdiction of the court through procurement of the accused. *Collins* v. *Com.*, 12 Bush. (Ky.), 271; *Owens* v. *State*, 63 Miss., 450; *State* v. *Lee*, 13 Mont., 248; *State* v. *Houser*, 26 Mo., 431; *Finn* v. *Com.*, 5 Rand. (Va.), 701; *State* v. *Wing*, 66 Ohio St., 407.

In Massachusetts and New Hampshire and in one instance in Connecticut the court in *dicta* intimates the admission of such testimony might be limited to cases where the witness was dead. *Com.* v. *McKenna*, 158 Mass., 207; *State* v. *Brauneis*, 84 Conn., 222; *State* v. *Staples*, 47 N. H., 113. No case in Massachusetts or New Hampshire has been called to our attention where the precise question here involved has been considered. In Connecticut, *State* v. *Gaetano*, 96 Conn., 306, the court, when the question was squarely raised, adopted the rule contended for by the state in the case at bar.

The trend of modern decisions, however, and the great weight of authority have extended the rule to cover cases in which the witness was permanently or for any indefinite period out of the jurisdiction of the court, and in some instances to inability to attend by reason of illness, insanity, or even a temporary absence from the state. *Vaughan* v. *State*, 58 Ark., 353, 370; *Pope* v. *State*, 183 Ala., 61; *Lowe* v. *State*, 86 Ala., 52; *Rogers* v. *State*, 136 Ark., 161, 172; *Putnal* v. *State*, 56 Fla., 86, 94; *Smith* v. *State*, 147 Ga., 689; *State* v. *Simmons*, 78 Kan., 852; *State* v.

Hefferman, 24 S. D., 1; *Wilson* v. *State*, 175 Ind., 458, 465, 466; *State* v. *Brown*, 152 Ia., 427, 432, 436; *State* v. *Gentry*, 86 Kan., 534; *People* v. *Bruno*, 220 N. Y., 702; *People* v. *Schepps*, 217 Mich., 406; *State* v. *Meyers*, 59 Ore., 537, 542; *State* v. *Walton*, 53 Ore., 557; *Robertson* v. *State*, 63 Tex. Crim. Rep., 216; *Modello* v. *State*, 85 Tex. Crim. Rep., 291; *State* v. *Hillstrom*, 46 Utah, 341, 366; *Meldrum* v. *State*, 23 Wyo., 12; *People* v. *Devine*, 46 Cal., 46; *State* v. *Nelson*, 68 Kan., 566; *Com.* v. *Ryhal*, 274 Pa. St., 401; *Spencer* v. *State*, 132 Wis., 509. Also see the discussion of the rule and authorities cited in Wigmore Ev., Secs. 1395-1418; Chamberlaynes Modern Ev., Sec. 1625; Greenleaf Ev., Vol. 1, Sec. 163g; 10 R. C. L., p. 468; 16 C. J., 757; Wharton Ev., Sec. 177; 1 Bish. Crim. Pro., Secs. 1194, 1195. A full discussion of the rule with a collection of authorities may also be found in an annotation in 15 A. L. R., 495, with additional citations in 21 A. L. R., 662.

That the tendency has been to extend the rule is indicated by the overruling of earlier cases which confined it to a deceased witness. See *Pittman* v. *State*, 92 Ga., 480, overruled by *Smith* v. *State*, 147 Ga., 689; *State* v. *Heffernan*, 22 S. D., 513; overruled in *State* v. *Heffernan*, 24 S. D., 1; *People* v. *Newman*, 5 Hill N. Y., 295; but see *People* v. *Fish*, 125 N. Y., 136, 149; *People* v. *Gilhooley*, 95 N. Y., Suppl. 636 affirmed 187 N. Y., 551; *People* v. *Bruno*, 220 N. Y., 702. In *Cline* v. *State*, 36 Tex. Crim. App., 320, the court of that state excluded such evidence even of a deceased witness, but in *Porch* v. *State*, 51 Tex., Crim. Rep. 7, it reversed itself. In *Kemper* v. *State*, 63 Tex., Crim. Rep. 1, it again reversed itself and excluded such testimony, but in *Robertson* v. *State*, 63 Tex. Crim. Rep., 216, it returned to the earlier rule which has been reaffirmed in the later decisions. *Modello* v. *State*, supra.

This state has not had the question of the testimony of an absent witness before it for a ruling. In *Watson* v. *Proprs. of Lisbon Bridge*, 14 Me., 201, *Emery* v. *Fowler*, 39 Me., 326, and *Lime Rock Bank* v. *Hewett*, 52 Me., 531, and *Chase* v. *Springvale Mills Co.*, 75 Me., 156, all civil cases, the testimony of a deceased witness was admitted under the general rule of the common law. While in the case last cited the court suggested that objections

to evidence of this nature applied with peculiar force in criminal trials, it referred to a criminal case not reported in our reports, *State* v. *Canney*, but found in 9 Law. Rep., 408, in which the testimony of a deceased witness was admitted. In *State* v. *Herlihy*, 102 Me., 310, this court, however, applied the rule to a criminal case when the witness was dead, citing in support of its ruling the discussion in Wigmore Ev., Vol. 2, Sec. 1395 *et seq* of the principles involved, which authority also extends the rule on principle to witnesses permanently or indefinitely absent from the jurisdiction and cites the authorities sustaining the author's conclusions. Also see *Edgeley* v. *Appleyard*, 110 Me., 337.

The same reasons which warrant the admission of the testimony of a deceased witness under such circumstances applies with equal force to a witness who is absent from the jurisdiction of the court either permanently or for an indefinite period. The interest of justice demands that, under such circumstances, testimony at a prior hearing between the same parties, when the same issues are involved and full opportunity for cross-examination was afforded the accused or adverse party, be admitted as the best evidence obtainable. To deny it might under some circumstances work great injustice to the accused if an important witness in his behalf on a second trial had left the jurisdiction and he was unable to secure his attendance.

And in accord with what is clearly the weight of authority and the trend of modern decisions this court also extends the rule to absent witnesses, when through no fault of the party offering the testimony, or through the procurement of the adverse party, the witness can not be compelled to attend because of his absence from the jurisdiction of the court permanently or for an indefinite period.

As to witnesses unable to attend by reason of illness or temporary absence from the jurisdiction we do not pass on or express any opinion at this time, it not being necessary to the determination of the case at bar.

Before such testimony can be admitted, however, certain conditions must be shown to exist by the party offering the testimony. The trial court should be clearly satisfied that the issues and parties are the same, that the witness was duly sworn and oppor-

tunity was afforded for full cross-examination and that the witness is now deceased or is beyond the jurisdiction of the court with intent to remain permanently or for an indefinite period and it is beyond the power of the party offering his testimony to compel his attendance by reason of such absence.

Whether the essential facts to its admission are shown must be first passed on by the trial court, the finding of which is conclusive on this court unless there has been a clear abuse of judicial discretion. *Vaughan* v. *State*, 58 Ark., 353, 371; *Railway* v. *Henderson*, 57 Ark., 402; *Wilson* v. *State*, 175 Ind., 458, 466; *People* v. *Bruno*, 220 N. Y., 702; *State* v. *Emory*, 116 Kan., 381, 386; *Levi* v. *State*, 182 Ind., 188, 192; *State* v. *Nelson*, 68 Kan., 566; *People* v. *Lewandowski*, 143 Cal., 574; *Huff* v. *Curtis*, 65 Me., 290; *Kidder* v. *Blaisdell*, 45 Me., 469; *Camden* v. *Belgrade*, 78 Me., 209.

In the case at bar there was sufficient evidence to warrant a finding by the trial judge that the witness in question had left this state and for at least an indefinite period, if not permanently; and the state was unable to compel his attendance.

Counsel for the accused now raises the question that the official stenographer's notes were not properly identified and also suggests that it did not appear prior to their admission that the witness was duly sworn at the former trial and a full opportunity for cross-examination was afforded the accused. But it nowhere appears that these contentions were ruled on by the court below, nor does it appear that any ruling on these issues is questioned by the bill of exceptions. Other objections are also intimated in the brief and in argument of counsel, but it nowhere appears that they were specifically raised at the trial.

The bill of exceptions does not merit commendation as "succinctly stating in a summary manner" the rulings excepted to and wherein the excepting party was aggrieved thereby according to the rules laid down in *McKown* v. *Powers*, supra, and many other cases since decided by this Court.

Exceptions to the admission of testimony will be sustained only when the specific grounds of the objections are stated in the trial court. As this court stated in *McKown* v. *Powers*, 86 Me., 291, 296: "Objections to offered evidence must be specific. The pre-

cise grounds on which they are made must be stated. The legal issue must be clearly presented." And in *Lee* v. *Oppenheimer*, 34 Me., 181, 187: "Every position respecting the admissibility of testimony should be distinctly stated to the presiding judge for decision before it can be made the subject of exceptions." Also see *Staples* v. *Wellington*, 58 Me., 453, 460. A general objection that testimony is "inadmissible or improper" is not specific.

In any event, whether the official stenographer's notes were identified by calling the stenographer to the stand is immaterial. If the evidence is admissible, the legislature has made the notes of the official stenographer of the court, duly certified, competent evidence to prove what the witness testified at the former hearing. In this instance they were relevant to the issue and were duly certified. He is an officer of the court. Nothing more is required, once the necessary predicate for their admission is shown.

Counsel does not stress the lack of evidence, prior to its introduction, of the former testimony being under oath and with full opportunity for cross-examination. If he relied on it, it could not avail him. While it is essential that these facts be proven to make the notes of the stenographer competent testimony no specific objection was raised at the trial to their admissibility on this ground. It cannot avail the accused now.

As the court said in *State* v. *Bowe*, 61 Me., 171, 174: "Had such a suggestion been made when the objection was interposed at the trial it could have been instantly obviated and the requisite proof would have been made before the record was introduced. The complaint is an idle one. The defendant suffered no wrong by the introduction of the record, which did in fact relate to him and to this case or by reason of the deficiency of merely formal proof of identity, which the defendant knew he could not successfully dispute and as to which he was, therefore, prudently silent.

In the instant case, the accused could not have been aggrieved on this ground by the introduction of this evidence, because it clearly appears from his former testimony that he was sworn and was cross-examined at length.

Where objection is made to testimony apparently relevant and competent upon ground capable of proof and which, so long as

it is undisputed, might be readily taken for granted, any objection on grounds well known to exist, but proof of which had been overlooked, must be specifically made or will be considered waived. *State* v. *Bowe*, supra.

Judgment for the state.
Exceptions overruled.

LINWOOD BISBEE

vs.

WILLIAM D. GRANT & PULP-WOOD.

Continental Paper and Bag Mills Corporation, Claimant.

Franklin. Opinion August 9, 1928.

ATTACHMENTS. LIENS. R. S. CHAP. 86, SEC. 27. R. S. CHAP. 96, SEC. 51.

An attachment of a portion of a large mass of material, leaving the mass exactly as found and without in any way designating the attached from the unattached and setting the one apart from the other, is not valid.

In the case at bar the thirty-five cords of pulp-wood described in the officer's return as attached were never in any way segregated from the whole mass of over three hundred cords which was left floating in the waters within the boom, exactly as the officer had found it. No valid attachment resulted from such proceeding.

On exceptions by claimant. An action brought under R. S. Chapter 96, Sec. 51, to recover wages of laborers on pulp-wood of Continental Paper and Bag Mills Corporation under contract with William D. Grant. The principal defendant was defaulted and Continental Paper and Bag Mills Corporation appeared and defended the actions against the pulp-wood, claiming upon the facts as set forth in an agreed statement, that the attachment was

defective. The court ruled pro forma that the attachment was good and ordered judgment in rem, to which ruling the claimant excepted. In accordance with a stipulation filed by the plaintiff and the claimant that if the exception should be sustained, judgment for claimant should be entered, exceptions sustained; So ordered.

The case sufficiently appears in the opinion.

Currier C. Holman, for plaintiff.

Ralph T. Parker, for claimant.

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

DUNN, J. This action was begun by attachment to enforce a statutory lien for labor done by the plaintiff on pulp-wood. R. S. Chap. 96, Sec. 51. The principal defendant made default. The claimant appeared in the proceeding for the purpose of establishing ownership to its property and of removing the cloud cast thereon by the attachment. Claimant moved the ruling that, the attachment being insufficient, there could be no lien judgment. The ruling was refused. An exception saved the point.

Attachment of the pulp-wood was as bulky personalty, R. S. Chap. 86, Sec. 27. The return of the officer making the attachment, so far as recital of the return is of importance, is in these words: "thirty-five cords of peeled pulp-wood in the second boom on Kennebago Lake."

Unfortunately for the attachment plaintiff the boom held not merely thirty-five cords of pulp-wood, but a mass of pulp-wood in excess of three hundred cords, from which whole lot the officer never did select or separate that portion which, though he returned it as attached, he left exactly as he had found it, floating in the waters within the boom.

To identify the particular wood against which, had it upon attachment been distinctively indicated, there might have been specific judgment for lien, has always been out of the question; so the attachment was not valid.

The case of *Wentworth* v. *Sawyer*, 76 Maine, 434, cited and relied on by the plaintiff, is not at variance from the conclusion here reached. There, from anything that appears, in attaching

seven tons of hay in a barn, it was not undertaken to attach a quantity less than the whole, without designating the attached from the unattached and setting the one apart from the other.

The claimant's exception is sustained. And, by authority of the stipulation filed by the plaintiff and the claimant, on the sustaining of the exception, judgment is awarded the claimant.

So ordered.

DILLINGHAM'S CASE.

Somerset. Opinion August 20, 1928.

WORKMEN'S COMPENSATION ACT. "ACCIDENT." "DISEASE." "INDUSTRIAL OR OCCUPATIONAL DISEASE."

Under the Workmen's Compensation Act "accident" is defined as an unusual, undesigned, unexpected and sudden event resulting in injury.

Disease to be compensable, must be interpreted both as an "injury" and an "accident."

An occupational or industrial disease is one normally peculiar to and gradually caused by the occupation in which the afflicted employee is or was regularly engaged, and to which everyone similarly working in the same industry is alike constantly exposed.

Under the statute in this State cases of occupational disease or industrial poisoning cannot be regarded as accidental since they lack the element of a sudden or unexpected event, and are hence as a matter of law non-compensable.

On appeal from an affirming decree awarding compensation under the Workmen's Compensation Act. Petitioner claimed an injury by accident, viz.: "leather poisoning" so-called, resulting from his handling sole leather in the regular course of his employment. After hearing before the Industrial Accident Commission, a decree was filed by the Associate Legal Member awarding compensation on the ground that the "leather poisoning" was an occupational disease and as such a "personal injury by accident"

within the meaning of the statute. From the decree of the single Justice affirming this decree of the Commission respondent appealed.

Appeal sustained. Decree below reversed.

The case fully appears in the opinion.

Bernard H. Dillingham, plaintiff pro se.

Robinson & Richardson, for respondent.

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

DUNN, J. Occupational disease was treated as personal injury by accident under the Workmen's Compensation Act and the question is whether this be error in law.

Some introductory definition and limitation seems desirable. On September 13, 1927, claimant began work in the shoe factory of Rowan & Moore, Inc., in Skowhegan, pulling from the soles of shoes the tacks that held the shoes on lasts. He continued in the employ of the corporation until the twentieth day of the same month, when he quit work that he might have medical care for his hands, which on that day, or a day or two before (the evidence in this connection being indefinite), and without any particular thing having happened to him, had broken out in blotches and were sore. In his petition to the Industrial Accident Commission the claimant alleged, what the answer of the respondent denied, namely, that on a day certain during the course of his employment and because of it, the claimant had been "poisoned by leather." "I had to wet the leather to soften it," witnessed the claimant, "and I used my hands a good deal to wet the soles with, so they would be soft, and that chapped it like." Not alone this attesting, but other competent testimony, some tending to show that the bad plight of the claimant's hands arose after his employment, and testimony by the physicians who attended him, and by another physician who had seen the case, that the patient suffered from irritation, and not from infection; that his ailment, which was cumulative and in their opinion referable as to cause to the work he had been doing, was eczema, contractable with less exposure on the part of some persons than others, depending on the susceptibility of the individual, afforded subordinate facts to warrant the finding of fact that, in and out of

his employment, the disorder which the testifying physicians called leather poisoning befell the claimant. Section eleven of the Compensation Act provides: "If an employee —, receives a personal injury by accident —, he shall be paid compensation." Accident has been defined, in cases under the act, as an unusual, undesigned, unexpected, and sudden event resulting in injury. *Patrick's Case*, 119 Maine, 510; *Brown's Case*, 123 Maine, 424. Disease, to be compensable, must be interpreted both as an "injury" and an "accident." An occupational or industrial disease is one normally peculiar to and gradually caused by the occupation in which the afflicted employee is or was regularly engaged, and to which everyone similarly working in the same industry is alike constantly exposed. It is not unlikely that the occupational disease this claimant had resulted from the continued chemical action of some poison, which produced the abnormal condition of his hands.

Cases of occupational disease, remarked Mr. Justice Philbrook in *Brodin's Case*, 124 Maine, 162, cannot be said to have arisen from accidental causes, since they lack the element of sudden or unexpected event. Obiter dictum and not adjudication was that remark, surely. But it served well to differentiate in the case where it was made, and in the present case it is entitled to, and does, receive respect, when for the first time the point necessarily arises whether disease caused by occupation, in the restricted sense of a disease which is not merely a risk of the particular employment, but also of gradual growth, may as matter of law be ruled to be personal injury by accident.

Without examining all the decided cases in states where the workmen's compensation enactments are in similarity to our own, apparently the weight of authority is to the effect that cases of occupational or industrial poisoning cannot be regarded as accidents, within the meaning of statutes which provide for money payments to workmen for injuries caused by accident arising out of and in the course of their employment. The ground fixed by the statute, says Mr. Justice Swayze in New Jersey, is the injury by accident, not the results of an indefinite something which may not be an accident. *Liondale Bleach, etc., Works* v. *Riker*, 85 N. J. L., 426, 80 Alt., 929. The following cases also support the rule that occupational poisoning does not constitute an "accident," or an "acci-

dental injury," within the meaning of acts so characterizing the injuries for which compensation may be had: *Jeffreyes* v. *Sager Company*, 233 N.Y., 535; *Adams* v. *Acme White Lead & Color Works*, 148 N.W., 485 (Mich.); *Jerner* v. *Imperial Furniture Co.*, 166 N. W., 943 (Mich.); *Thomas* v. *Ford Motor Co.*, 242 Pac., 765 (Okla.); *Industrial Commission* v. *Roth*, 120 N. E., 172 (Ohio); *Iwanicki* v. *State Industrial Commission*, 205 Pac., 990 (Or.); *Seattle Can Co.* v. *Department of Labor*, 265 Pac., 739 (Wash.); *Miller* v. *American Steel and Wire Company*, 90 Conn., 349. The Connecticut statute was amended in 1919 (Laws Conn., 1919, Chap. 142, Sec. 18), after the *Miller Case*, to include occupational diseases. In Massachusetts, where the statute is for personal injury without reference to accident, the court has said that "personal injury by accident" is not so broad in scope as "personal injury." *Madden's Case*, 222 Mass., 487.

It is the conclusion of this court that, as disability caused by personal injury by accident arising out of and in the course of his employment, is a statutory prerequisite for the payment of compensation to an injured employee, this claimant's injury, from what in a like situation some judge phrased the insensible progress of occupational disease, was not as matter of law received by accident. The appeal is sustained, and the decree below reversed.

So ordered.

FARWELL'S CASE.

Kennebec. Opinion August 22, 1928

WORKMEN'S COMPENSATION ACT. FINDINGS OF COMMISSION, WHEN CONCLUSIVE, WHEN REVIEWABLE.

Under the Workmen's Compensation Act when it appears that the Commission member based his conclusions on the evidence as it stood, to be or not to be believed by him, his findings are final and will not be disturbed except for fraud.

When it appears, however, that the member misunderstood or misstated the testimony in an important respect and upon that misunderstanding based his decision such determination may be reversed as legal error.

In the case at bar there was considerable undisputed evidence that the scope of the petitioner's employment was much broader than merely doing table work and might well include doing such tasks as she was requested to do by the manager or his subordinates.

The statements in the decree of the commission do not conform to the testimony presented.

A Workmen's Compensation Act case. Appeal by petitioner from an affirming decree denying petitioner compensation for injury alleged to have been received by her in the course of her employment.

The petitioner had been employed by the respondent hotel company as a waitress for a period of about six weeks prior to the accident. On the night of the accident she had completed her work in the dining room and had gone out on her own matters. Returning to the hotel after 10 P. M. she was sent by the manager to find the night watchman and give him a key. On her way to find the night watchman the petitioner fell into a coal chute and fractured her right leg. After hearing before the Industrial Accident Commission a decree was filed by the Associate Legal Member denying compensation on the ground that the injuries did not arise out of, or in the course of her employment, which decree was later affirmed and petitioner's appeal filed. Appeal sustained.

Decree below reversed and case remitted to the Industrial Accident Commission.

The case fully appears in the opinion.

Andrews, Nelson & Gardiner, for petitioner.

Arthur J. Cratty,

Robinson & Richardson, for respondent.

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

DUNN, J. The appeal in this case is by the claimant, to whom the finding of an Industrial Accident Commission member is adverse.

There was evidence tending to show, indeed the evidence was uncontested, that the claimant had been employed under an oral contract as a waitress in the respondent hotel company's hotel at Belgrade for about six weeks prior to the accident. There was also undisputed evidence that the scope of the occupation of waitresses at the Belgrade hotel was broader than merely doing table work. Examples of the expanded work there were those of shining silver, cleaning the floor of the dining room, preparing vegetables, picking flowers, carrying laundry, and doing errands; the hours of duty of waitresses being as long as those of chambermaids, but with intermissions for the waitresses in which they were free to go and come to suit themselves, after they had been excused from the dining room, unless there was something more wanted. The claimant testified that her engagement for services comprised as much; that she was bound contractually to do whatever she might have been asked to do, by the hotel manager, any subordinate of his, or for that matter any guest, whenever asked. A typewritten statement signed by the claimant while in the hospital may not be so comprehensive. This, however, is not now of moment.

On the fifth day of August, 1927, the claimant, on completing her work in the dining room about nine o'clock at night, went to her room in a cottage near the hotel, and from there to the drug store and post office. When returning to the room, between ten and eleven hours of the clock, and while passing the hotel, the manager called her to the piazza and requested that she find the watchman, give him in turn the key to the medicine closet, that he

might send a bell boy with bromo-seltzer to be used as a relief for headache. On her way to find the watchman the claimant fell into a coal chute and fractured her right leg.

An all-denying answer was filed against the petition for compensation.

In dismissing the petition, on the ground that the accident did not arise out of and in the course of claimant's duties within her contract of employment, the commission member in speaking of the claimant's testimony, says: "She stated that no mention of such work was made to her at the time of the employment." Obviously from the context the meaning of "such work," as the member used the words, was carrying the message to the watchman.

The situation is not one where the commission member concluded from the evidence as it stood, to be or not to be believed by him, that the accident arose outside the contract and therefore did not come within the benefit of the act, in which event the finding should not be disturbed, except for fraud, since the commission member is the sole judge and the "final" judge of the facts, but rather is the case that, amid the numerous matters heard, of necessity in a speedy, summary, and informal way, the member misunderstood and misstated the testimony of the claimant in an important respect, and upon the misunderstanding based his decision denying compensation. That is error of law. The Supreme Court of New York, Appellate Division, has held that in proceedings under the Workmen's Compensation Law, where the determination as to facts does not rest on the facts presented and admitted and the inferences reasonably deducible therefrom, such determination may be reversed as legal error. *Gardener* v. *Horseheads Const. Co.*, 156 N. Y. S., 899. On the point involved in this case that case is cited with approval.

Other aspects of the record need not be considered. Sufficient unto present purpose is it to say that the appeal is sustained, the decree below reversed, and the case remitted to the Industrial Accident Commission.

So ordered.

PARADIS CASE.

Aroostook. Opinion August 22, 1928.

WORKMEN'S COMPENSATION ACT. ASSENTING EMPLOYER.

SCOPE OF ASSENT AND EMPLOYMENT.

Under the Workmen's Compensation Act only an assenting employer, or the insurance carrier of such employer, is obligated to pay compensation.

If an employer is carrying on two clearly distinct kinds of business, and he does not desire to place both under the act, he can elect which business he desires so to place.

The assent of the employer is not to be extended beyond what in the usual course of the specified business is necessary, incident, or appurtenant thereto.

The assent as supplemented by the approved insurance policy and certified by constituted public authority may be said to define, with reference to the particular business or industry, the method of accident compensation on which the minds of employer and employee met.

In the case at bar the employee, in making kindlings while the traveling bag was being packed, did nothing that was necessary or incidental to or had natural connection with getting the bag. He was injured while doing work wholly apart from any that his employer's hardware and connected business called upon the employee to do. The contrary finding of the Commission was error in law.

On appeal from an affirming decree awarding compensation under the Workmen's Compensation Act.

Petitioner was employed as a chauffeur and handy man by the respondent at Caribou, Maine. At the residence of his employer, while breaking up an old box for kindling wood, a nail flew from the wood into his right eye destroying its sight.

The employer had subscribed to the Compensation Act and had filed written assent to cover employees engaged in the hardware business, tinsmithing and plumbing, but no other specific employment.

On hearing before the Industrial Accident Commission a decree was filed by the Associate Legal Member awarding petitioner compensation for his injury.

To the affirming decree respondent filed an appeal on the ground that he was not an "assenting employer" for the work in which the petitioner received his injury. Appeal sustained. Decree below reversed.

The case appears fully in the opinion.

Cyrus F. Small, for petitioner.

J. B. Roberts, for respondent.

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

DUNN, J. In assenting, as he requisitely did in writing, to the provisions of the Workmen's Compensation Act, this employer, without mentioning any other business, specified his business as that of general hardware, tinsmithing and plumbing in a store and shop at Caribou, which hereinafter will be called the store.

An employment of the injured employee came within that assent. He operated trucks, hauled freight, unpacked and delivered goods, did heavy work, and at times unloaded cars. His duties varied, however, and were divided between the store and the house of his employer. At the employer's house in the morning, again at noon, and still again towards evening (one-fourth to one-third of his time each day being thus occupied), he made the kindlings, prepared the fuel, tended the fires, worked about the grounds, took care of the horses and cow, and looked after the family automobile, which he occasionally drove.

The employee was paid at the store. His wage reflected in the premium exacted by the compensation insurer, though not differently from labor or services by any of the store employees. The wage included that done by the employee at the store and house both. But the manner in which an employee is paid is not necessarily a basis for the measurement of legal responsibility. *Olsen's Case*, 252 Mass., 108.

About mid-afternoon on January 25 in 1927, having been directed by his employer to fetch his traveling bag, the employee went from the store to the house for that purpose. While waiting for the bag to be packed, the employee began to break a box for

kindlings, to be used at the house. A nail flew from the box into the employee's right eye and injured it.

An appeal has been made from the decree, which confirmed the award of compensation.

The first issue, as raised by the answer, is decisive of the case. The issue is: Had the employer assented under the compensation act for the work in which the employee received his injury?

Only an assenting employer, or, virtually the same, the insurance carrier of such employer, is obligated to pay compensation. "If an employee ----------, receives a personal injury by accident arising out of and in the course of his employment, he shall be paid compensation --------- by the employer who shall have elected to become subject to the provisions of this act." R. S., Chap. 50 as amended by 1919 Laws, Chap. 238, Sec. 11.

It is settled that, if an employer is carrying on two clearly distinct kinds of business, and he does not desire to place both under the act, he can elect which business he desires so to place. *Oxford Paper Company* v. *Thayer*, 122 Maine, 201.

Whether the maintenance of his home were, within contemplation of the compensation act, a business of this employer, it is unnecessary to decide. If keeping his house were not a business, and the maintenance of a home is not ordinarily regarded as a business for pecuniary profit, then the employee was without the beneficial protection of the act. If keeping the house were a business, then, as to such business, that the employer be shown to have assented to the act is important.

The assent of the employer is not to be extended beyond what in the usual course of the specified business is necessary, incident, or appurtenant thereto. In cases of the type under discussion it is the assent of the employer, accompanied by an insurance policy in proper form, such as was here filed, which entitles the employer to a certificate that he has conformed to the provisions of the law. R. S. supra, Sec. 6. The assent, as supplemented by the approved insurance policy and certified by constituted public authority may be said to define, with reference to the particular business or industry, the method of accident compensation on which the minds of employer and employee met.

In making kindlings of the box, while the traveling bag was be-

ing packed, this employee did nothing that was necessary or incidental to or had natural connection with getting the bag. He did that which it might have been for him to do, not then, but at another time, in laboring at the house. Be this as it may, he was injured while doing work wholly apart from any that his employer's hardware and connected business called upon the employee to do. In finding otherwise the associate legal member of the Industrial Accident Commission found fact without any supporting evidence. Such finding is error in law. It results that the decree which confirmed the award must be reversed.

Appeal sustained.
Decree below reversed.

ADRIENNE MICHAUD

vs.

INHABITANTS OF ST. FRANCIS.

Aroostook. Opinion Sept. 4, 1928.

MUNICIPAL CORPORATIONS. SCHOOLS AND SCHOOL COMMITTEES. CONTRACTS. QUANTUM MERUIT.

To constitute a legal employment of a public school teacher, under the provisions of Sec. 7, Chap. 186, P. L. 1917, there must be a nomination by the Superintendent, an approval of the nomination by the School Committee, and an employment by the Superintendent of the teacher so nominated and approved.

The Committee has no authority to employ teachers and contracts of employment by it do not bind the town.

One teaching under contract with the Committee cannot recover from the town on a quantum meruit even though services were actually rendered and the price charged reasonable. Persons acting under the employment of town or city officers must take notice at their peril of the extent of the authority of such officers.

In the case at bar the evidence clearly showed that the plaintiff understood that she was not employed by the Superintendent, but that she relied implicitly

on the promise of the two members of the committee who did employ her that "they would see that she would be paid" and that she gave no thought and made no investigation as to their authority to bind the defendant. Their employment of her and their promise to pay for her services gave the plaintiff no legal claim against the town.

On report. An action of assumpsit brought by the plaintiff to recover for her services as a school teacher in the defendant Plantation during the school year beginning August 23, 1926, and ending June 10, 1927, in all thirty-six weeks at nineteen dollars per week, amounting to Six Hundred and Eighty-four Dollars.

The writ contained a count in quantum meruit as well as one on account annexed.

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.

A. J. Nadeau,

A. S. Crawford, Jr., for plaintiff.

Dana L. Theriault,

Herbert T. Powers, for defendant.

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

PATTANGALL, J. On report. Assumpsit to recover for services as teacher in the public schools during the school year of 1926-1927. It is agreed that the services sued for were satisfactorily performed and that the amount charged is reasonable.

Two questions are presented. (1) Was there a valid express contract made between plaintiff and defendant, under the terms of which plaintiff was employed to render the services charged for? (2) If not, may she recover therefor on a quantum meruit?

The evidence establishes the following facts. Defendant, with adjacent municipalities, constituted a school union under the provisions of Sections 55-62, Chapter 16, R.S. 1916. Catherine Ouellette was Superintendent of Schools of this union and acted as secretary of the local committee.

On June 5th, 1926, a meeting of the school committee of de-

fendant Plantation was held, at which Miss Ouellette was present. At this meeting certain changes were suggested relative to the teaching force for the succeeding year. The plaintiff was then, and had been during the previous year, employed in teaching a school known as the Nadeau School and a Miss Daigle had been employed in the school known as the Jones School. No change in these respects was suggested at this meeting.

At a meeting held on June 17th, it was urged by two members of the committee that plaintiff should be given the Jones School and Miss Daigle the Nadeau School. Miss Ouellette objected to the change, but at the close of the meeting agreed that the change might be made if plaintiff desired it. About two weeks later, a second meeting of the school committee occurred. Prior to that time one of the committee had resigned and at this meeting the vacancy was filled by the election of a new member who did not attend the meeting. Meanwhile, Miss Ouellette had talked the matter over with plaintiff, telling her that the committee desired that plaintiff should take the Jones School but that she preferred that plaintiff should remain where she was, which plaintiff agreed to do. Miss Ouellette had already employed Miss Daigle to continue teaching in the Jones School and so informed the committee at the second meeting. She also informed them that she had employed the plaintiff to teach the Nadeau School for another year.

Some time in July, the two members of the committee who had decided to bring about the change saw plaintiff and informed her that they wished her to teach the Jones School and that if she did not accept that position she would not be allowed to teach in town.

At a meeting held on July 22nd, attended by the entire committee and Miss Ouellette, Miss Ouellette was again urged to nominate the plaintiff as teacher for the Jones School but refused to do so.

On August 23rd, the date fixed for beginning the fall term, Miss Daigle went to the Jones School prepared to commence work, but was prevented from teaching by the two members of the committee heretofore referred to, and plaintiff was instructed by these members of the committee to take charge of the Jones School, being told that they would see that she was paid for her services. Plaintiff understood that this arrangement was in opposition to Miss Ouellette's plans, and soon after she began teaching was advised

by Miss Ouellette, by letter, that she had not been nominated by the Superintendent as a teacher for the Jones School. She continued, however, to carry on the work of the school and did carry on that work satisfactorily and without interruption during the entire school year. Miss Ouellette continued as Superintendent of Schools during all of that period, and nothing further was done by her with regard to plaintiff's employment.

The selection and employment of teachers in the public schools is governed by Section 7, Chapter 188, P. L. 1917, which provides that the Superintendent "shall nominate all teachers - - - - and upon approval of nominations by said committee may employ teachers so nominated and approved."

Section 38, Chapter 16, R. S. 1916, authorizes the superintending school committee, after due notice and investigation, to dismiss any teacher who proves unfit to teach or whose services they deem unprofitable to the school, but nowhere is there authority for the employment of a teacher by the committee nor is the Superintendent authorized to employ a teacher without the approval of the committee.

To constitute a legal employment, there must then be a nomination by the Superintendent, an approval of the nomination by the committee, and an employment by the Superintendent of the teacher so nominated and approved. It is not to be expected that boards of this kind act with great formality nor that their records are as full and explicit as those of a legislative body or of a court; and it undoubtedly often happens that the selection of teachers is made after a general discussion between the committee and the Superintendent in which all reach an agreement without a formal nomination having been made by the Superintendent and without a formal approval having been registered by the committee.

There is conflicting evidence as to just what occurred concerning nomination of plaintiff by the Superintendent and approval of her nomination by the committee. The Superintendent's conduct was not entirely ingenuous and the committee appear to have been insistent upon dictating the course which the Superintendent should follow, to the extent, at least, of encroaching upon her prerogatives, but we do not need to consider too minutely the details of that controversy.

After nomination and approval there still remains an important act to be performed. The teacher must be "employed." And the duty of employing teachers rests upon the Superintendent and upon no one else. The school committee has no authority to employ a teacher. It may, by refusing to approve a nomination, exercise a veto power over the employment of one or more of those who are nominated. It may, undoubtedly, approve a nomination conditionally and thereby exercise a large measure of control in designating the particular school in which a teacher shall be employed, or any other detail of employment which strictly speaking would not be within its jurisdiction. It may, as has been stated, under certain conditions, discharge a teacher. It may, indeed, discharge a Superintendent. Sec. 2, Chap. 188, P. L. 1917. But it may not employ teachers.

There is no dispute in the present case as to the employment of plaintiff. She was not employed by the Superintendent. She was employed by the committee.

This unauthorized action does not bind defendant. No valid express contract exists between plaintiff and defendant under the terms of which she can maintain her suit.

Nor can she recover on a quantum meruit. True she rendered the service for which she asks compensation and the price charged for the service is reasonable but "persons acting under the employment of town or city officers must take notice at their peril of the extent of the authority of such officers," *Goodrich* v. *Waterville*, 88 Me., 41; *Morse* v. *Montville*, 115 Me., 454; *Power Co.* v. *Van Buren*, 116 Me., 125; *Bangor* v. *Ridley*, 117 Me., 300. And employment by those acting without legal authority creates no liability on the part of the municipality.

The case indicates that plaintiff relied implicitly on the promise of the two members of the committee who employed her, that "they would see that she would be paid," giving no thought and making no investigation as to their authority to bind defendant.

Whether they are individually liable to her because of that promise is a matter not involved in the present case. In any event defendant is not liable.

Judgment for defendant.

SAMUEL ROSENBERG ET ALS

vs.

MOLLIE COHEN.

Cumberland. Opinion September 4, 1928.

REAL ACTION. MORTGAGES. FORECLOSURE RIGHTS. ASSIGNOR AND ASSIGNEE.

An assignee of a mortgage has a right to foreclose the same not only by virtue of the statutes of this State but at common law.

This is true although he holds the mortgage as pledgee and as collateral security.

The right of assignee to so foreclose is not exclusive.

The assignor may foreclose the same in his own name, even though the assignment is absolute in form, provided that (a) the mortgage debt is larger in amount than the note for which it stands as security; (b) with the consent of the assignee; (c) when the assignee unreasonably refuses to foreclose.

None of these conditions appearing in the instant case, plaintiff assignor was without right to foreclose and his writ of entry will not lie.

On exceptions. Real action. A writ of entry brought by plaintiffs as mortgagees to recover possession of certain premises therein described.

The case was presented on an agreed statement to a single Justice without jury. Both parties reserved the right of exceptions on questions of law. A motion by the defendant for a judgment was denied, and after consideration of the cause the Justice found for the plaintiffs and ordered execution for possession to issue. Exceptions were filed by the defendant. Exceptions sustained.

The case is fully stated in the opinion.

Emery G. Wilson, for plaintiffs.

Harry S. Judelshon,

Edward Harrigan, for defendant.

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

PATTANGALL, J. On exceptions. Real action. Case heard before single justice on agreed statement of facts. Verdict judgment for plaintiffs.

Defendant was in possession of demanded premises, holding record title thereto, subject to a mortgage given by a predecessor in title to "Rosenberg Bro's," the identity of the mortgagees so named and the plaintiffs being admitted. Prior to bringing this action, plaintiffs assigned their mortgage to a bank, as collateral security for a loan. That assignment still stands of record and the loan remains unpaid. Plaintiffs regularly and properly foreclosed mortgage by publication and seek to take possession of the property.

Defendant contends that plaintiffs are not the proper parties to maintain this action; that it must be brought by the bank or, at least, in the name of the bank, so long as the record remains as it now stands.

The case is silent as to whether or not the mortgage assigned to the bank was of greater or less amount than the note for which the collateral security was given. It is likewise silent as to whether or not plaintiffs' note to the bank was overdue and as to whether or not the bank objected to, consented to or knew of the foreclosure by plantiffs.

The issue, therefore, involves the broad proposition of whether or not a mortgagee, who has assigned a mortgage and endorsed the note secured thereby to a bank as collateral security for his own loan, by an assignment absolute in form, may properly foreclose the mortgage and maintain a writ of entry in his own name, in the absence of evidence that such action was taken by him with the knowledge or consent of the bank, or that the bank had refused to take action to protect his interests, or that the mortgage thus assigned was given to secure a note less in amount than that which mortgagee gave to the bank, or that mortgagee was not in default on his note thus given.

The actual facts in the instant case may not involve all of these questions, but on the record before us each becomes a part of the issue.

There is no question but that the bank might properly have foreclosed the mortgage and successfully demanded possession of

the premises covered by it. An assignee of a mortgage has a right to foreclose the same, not only by virtue of our statutes but at common law, as he is the real party in interest and the proceedings therefor may be brought in his own name. 20 Am. & Eng. Encyc. of Law, 1044. This is true although he holds the mortgage as pledgee, *Morgan et al* v. *Lake View Co.* (Wis.), 72 N. W., 872. As collateral security, *Holmes* v. *Turner Falls Co.*, 150 Mass., 535; *Jennings* v. *Wyzanski*, 188 Mass., 285; *Union Trust Co.* v. *Hasseltine*, 200 Mass., 414. In such cases the assignee or pledgee is trustee for the assignor or pledgor for any amount that may be due him as a result of the foreclosure.

But the right of the assignee to foreclose is not exclusive. The weight of authority is that where the owner of a mortgage has pledged it as collateral security for a debt of *less* amount than the mortgage, he still has such interest as entitled him to bring an action for the foreclosure of the mortgage. *Dickey* v. *Porter* (Mo.), 101 S. W., 591, and cases cited.

Simpson v. *Satterlee*, 64 N. Y., 657, is authority for the statement that "where the owner of a mortgage has pledged the same as collateral security for a debt *less* than the face of the mortgage, he has an interest in the same which entitles him to bring an action for the foreclosure of the mortgage."

In *Norton* v. *Warner*, 3 Edw. Ch. (N. Y.), 106, the court said, "Complainant had not divested himself of all interest or control over the mortgage. The assignment is but a partial one made to secure to the pledgee the payment of the loan, being less than the amount due on the mortgage. In equity he is still the owner, subject only to the lien or pledge for the loan. The pledgee might have filed a bill of foreclosure against the original mortgagor and in that case the pledgee would have been deemed a trustee for the mortgagee for the whole mortgage debt after satisfying his claim."

This doctrine has been repeatedly followed in New York. In *Ridgeway* v. *Bacon*, 72 Hun., 214, 25 N. Y. Supp., 651, it was said, "The fact that Smith holds the note and assignment as collateral to some promise or liability of Muller is not a good defense in favor of Bacon. It has long been settled that one who has assigned a lien as collateral security may, if he have an existing interest in it, maintain an action for its enforcement."

Brulingame v. *Pardee*, 12 Hun., 149, is of like tenor. The fact appearing that the mortgage having been transferred as collateral for an amount less than its face, the court in this case, affirming the doctrine of *Simpson* v. *Satterlee* and *Norton* v. *Warner*, supra, says, "Under such circumstances the pledgor ought certainly to have the right to protect himself, although the pledgee should not wish to foreclose and the pledgor ought not to be left to the remedy of tender and payment."

A pledgor of a note as collateral may obtain judgment thereon and take proceedings to enforce the same with the consent of the pledgee. *St. Paul National Bank* v. *Cannon* (Minn.), 24 A. S. R., 189; *Gilman* v. *Heitman* (Iowa), 113 N. W., 938.

It would appear, then, that a mortgagee who has assigned his mortgage and the note secured thereby to a third party as collateral, may maintain foreclosure proceedings and a writ of entry in his own name, provided that such proceedings are brought with the consent of his assignee, and that even without such consent he may proceed in his own name if the pledged security is larger in amount than the note for which it is given, as collateral, he then being clearly a party in interest; and it may well be that, under certain circumstances, a refusal on the part of the pledgee to foreclose a mortgage even of less amount than pledgor's debt to him might give pledgor the right to proceed rather than to rely upon an action against pledgee for not having complied with his request, if damage would result from failure to do so.

The agreed facts in this case do not place the plaintiffs in either of these positions. We cannot assume the consent of the bank. Nor that the amount of the collateral note was less than the amount of the original mortgage. Nor that the note of the mortgagee to the bank is not in default. Nor that plaintiff had requested the bank to foreclose and that the bank had unreasonably refused to do so.

The absence of evidence establishing any of these important propositions, necessarily involved in determining whether or not the plaintiff is a party in interest, entitled the defendant to judgment in the court below.

Exception sustained.

NAPOLEON LANDRY

vs.

O. J. GIGUERE.

Kennebec. Opinion September 4, 1928.

REAL ACTION. ADVERSE POSSESSION.

One who seeks to overcome a record title by a claim of adverse possession assumes the burden of proof.

One who by mistake occupies for twenty years, or more, land not covered by his deed, with no intention to claim beyond his actual boundary wherever that may be, does not thereby acquire title by adverse possession to land beyond the true line.

The intention of the possessor to claim adversely is an essential ingredient to disseizin.

In the case at bar the defendant, himself, unqualifiedly testified that he only intended to occupy to the true line wherever that line might be. He could gain no title by such occupation.

On exceptions by plaintiff. A real action brought by plaintiff, with plea of nul disseizin by the defendant, to recover a rectangular piece of land adjacent to the rear and west wall of the brick building of the defendant situated at the corner of Main and Silver Streets in Waterville.

Trial was had before a sitting Justice without a jury. Judgment was rendered for the defendant. Exceptions were thereupon filed by the plaintiff. Exceptions sustained.

The case fully appears in the opinion.

J. A. Letourneau,

F. Harold Dubord, for plaintiff.

Harvey D. Eaton, for defendant.

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

PATTANGALL, J. On exceptions. Real action. Plea nul disseizin. Case tried before single justice. Judgment for defendant. The premises in dispute consist of a rectangular piece of land adjacent to the rear and west wall of the brick building of the defendant, situated at the corner of Main and Silver Streets in Waterville and on the south side of Silver Street.

Next south on Main Street of the defendant's building is a brick building, called now the Paganucci and formerly the Parent building. The south wall of the defendant's building for its length is a party wall for the north wall of the Parent building but this last wall extends westerly of the defendant's building ten feet.

Next west on Silver Street of the defendant's building is a wooden building of the plaintiff, which runs back southwesterly from Silver Street at right angles to the street. The east wall of the plaintiff's building and the west wall of the defendant's building are for about twenty-seven feet back from Silver Street in contact with each other, or practically so, but from this point the west wall of the defendant's building turns towards the south and continues to the Parent building, striking it at right angles.

There is therefore made by the west wall of the defendant's building, by that part of the Parent building which extends ten feet beyond the defendant's building, and in part by the east wall of the plaintiff's building, a triangular space, the latter wall being part of the line of the hypothenuse. Between the south end of the plaintiff's building, including a piazza about five feet wide built on in 1925, and the west end of the Parent building is an open space about six feet.

Leading into the basement of the defendant's building is a rollway, housed over, five feet wide north and south and five and a half feet deep east and west. Between this rollway and the Parent building is a space of the same depth as the rollway and 5.75 feet wide north and south, for the greater part covered by a wooden elevator. The land in suit as described in the writ is that part of the triangle included within the measurements of the rollway just stated and of the space between the rollway and the Parent building and a little more, by reason of the rollway being located, according to the description of the writ, six inches further to the

north and also being made one foot deeper, i.e., six and a half feet, east and west.

With the exception of these structures, the triangle is open space.

Both plaintiff and defendant claim title to all of the triangle. Their claims arise in this way: September 5, 1866, Elah Esty and Thomas G. Kimball conveyed to the Waterville National Bank the lot at the corner of Main and Silver Streets with the description, "bounded thus, beginning at Ticonic Land Mark, thence running westerly on the southerly line of Silver Street to land of Jeremiah Furbush; thence southerly on the easterly line of said Furbush and the same course continued to land occupied by David Shorey; thence easterly on the north line of land occupied by said Shorey (it being the J. M. Crooker Store lot) to the west line of Main Street; thence northerly on the west line of Main Street to the point begun at."

The defendant claims that the east line of the Furbush lot, at the time of this deed, was located where the east line of the wall of the plaintiff's building now is and that that line extended would strike the land of David Shorey, owned by him at the date of the deed, and which he had purchased November 25, 1865, and on which the Parent building was erected in 1909; and so the triangle was included in the Bank's lot and conveyed to the defendant by the successive deeds of the lot.

The plaintiff claims, on the other hand, that the east line of the Furbush lot was the line of three lots which together made up one lot formerly owned by Cynthia Ellis and that the descriptions in deeds given by predecessors in title to Furbush definitely located that line; that the west wall of the defendant's building was erected by the Bank in 1877, about ten years after it acquired title by the above deed and that the wall was built over on the Furbush lot; that the Furbush lot, except as occupied by the wall, is now owned by the plaintiff and that it included the northerly part of the triangle; that the rest of the triangle was south of the Furbush lot and west of its east line extended to the Shorey land and was not conveyed to the Bank but retained by Esty and Kimball, and, except so far as a part of it has been built over by the defendant's wall, the plaintiff has title from Esty and Kimball.

The land in suit is in the above described southerly part of the triangle.

After full hearing, which included the examination of many conveyances and their interpretation in the light of the testimony of a competent civil engineer familiar with the premises and the old landmarks, as well as other explanatory oral testimony, the trial judge found that the division line between the property of plaintiff and defendant was located where plaintiff contended and that, therefore, plaintiff had record title to the property described in the writ. That finding cannot be disturbed by this court. The location of the division line on the face of the earth was a question of fact. It depended not only upon the construction of the various deeds submitted in evidence but as well upon the oral evidence by means of which the boundaries given in the deeds could be intelligently applied to the locus itself. There was evidence upon which to base the conclusion reached. Under such circumstances the decision of the court below is binding upon this court.

But the decision goes farther. After finding that plaintiff had record title to the disputed territory, the court below found that defendant had gained title thereto by adverse possession. It is to this branch of the case that plaintiff's exceptions are addressed. He insists that this finding, on which the final judgment against him is based, is unsupported by evidence.

The land described in the writ was the space occupied by the rollway in the rear of defendant's block and the space between the rollway and the Paganucci building.

The judge below found that "the rollway was built at the same time as the bank building in 1877 and that its walls were a continuation of the walls of the basement; that it was a part of the building, constructed to be used with it as an entrance into the building and so used; that the way to and from it was over the five or six feet space south between it and the reservation over the Shorey lot, which was reserved for a passage way, so used and kept open until 1909." Also that the rollway and the space adjoining it was used and occupied by defendant and his predecessors in title for a sufficient length of time and under such conditions and circumstances that "title to it by open, notorious and

adverse use and possession was obtained by successive owners of the Bank lot and building which title is now in defendant."

Defendant first went into occupation of the premises in 1910. He testified to the use of the rollway from then to the time of hearing in 1925; that he knew nothing about the matter prior to 1910 although he believed, from the appearance of the wall, that the rollway was built as a part of the original building in 1877. Another witness testified that he had known the block from the time it was built and he "did not recognize any change in its exterior lines." Another witness testified that, as a tenant, he occupied the block now owned by defendant from 1889 to 1908, that the rollway was then there but that during that period it was not used by him nor so far as he knew by anyone else. It is upon this evidence that the conclusion to which exception is taken was based.

One who seeks to overcome a record title by a claim of title by adverse possession assumes the burden of proof. *Magoon* v. *Davis*, 84 Me., 178; *Batchelder* v. *Robbins*, 95 Me., 67; *Webber* v. *McAvoy*, 117 Me., 329; *Bradstreet* v. *Winter*, 119 Me., 30; *Webber* v. *Barker*, 121 Me., 263.

Whether or not on the evidence quoted above it could fairly be said that the finding complained of was justified, we are not called upon to decide because the defendant himself, on cross-examination, absolutely eliminated this defense. He unqualifiedly stated that he only intended to occupy to the true line wherever that line might be. He could gain no title by such occupation. One who by mistake occupies for twenty years, or more, land not covered by his deed, with no intention to claim beyond his actual boundary wherever that may be, does not thereby acquire title by adverse possession to land beyond the true line. The intention of the possessor to claim adversely is an essential ingredient in disseizin. *Preble* v. *R. R. Co.*, 85 Me., 264, and cases sited.

The occupation by defendant, of the demanded premises, in the light of his testimony, could not give him title and nothing appears in the evidence to indicate that his predecessors in title, if they occupied the disputed territory at all, occupied under any different conditions.

Exceptions sustained.

DUBOVY ET AL

vs.

WOOLF ET AL.

Cumberland. Opinion September 4, 1928.

EQUITY. MINIMUM JURISDICTION. FRAUD.

Well established exceptions to the ancient rule of chancery, that a suit involving a pecuniary value of less than ten pounds must be dismissed, were bills founded on fraud or brought to establish a right of permanent nature.

To establish fraudulent representation, it must appear that the statement or representation must be material; that is, it must be an inducement to action and as such relied upon and must also be so material to the interests of the party relying upon and acting upon it that its falsity causes him some pecuniary loss or injury.

If any pecuniary loss is shown, the court will not inquire into the extent of the injury. It is sufficient if the party misled has been very slightly prejudiced, if the amount is at all appreciable.

The preceding rule is not to be construed as meaning that the court will not, in an action to rescind, inquire into the extent of the injury. The party must be misled. The alleged injury might be so small that it could not be reasonably held that the party did rely upon representation, which if untrue would have such trivial results, and was misled. If the evidence supports the conclusion that the party was misled, then the extent of the prejudice or loss, if there is appreciable pecuniary damage, will not be inquired into. In such case, fraud and damage have both been shown, as both must be.

In the case at bar the presiding Justice found that the amount necessary to restore the condition of the upper tenement was not large (although at least $50.00) in proportion to the purchase price of the house, but the defects materially affected the value of the property and the materiality of the misrepresentation was established. His conclusion was legally sound.

On appeal from decree of sitting Justice in equity. A bill in equity brought by the vendee of real estate to set aside the conveyance because of fraudulent representations of the vendor. The

sitting Justice found facts sufficient to justify him in setting aside the conveyance and the case came before the Law Court on appeal by the defendants from the decree of the presiding Justice. Appeal dismissed.

The case is fully stated in the opinion.

Hinckley, Hinckley & Shesong,

Clarence W. Peabody, for complainants.

Jacob H. Berman,

Harry E. Nixon, for respondents.

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

BASSETT, J. This is a bill in equity brought by the vendee of real estate to set aside the conveyance because of fraudulent representations of the vendor. The sitting Justice sustained the bill and the case comes before this court on appeal from his decree setting aside the conveyance and ordering the parties to do certain things necessary to restore them to their original positions.

The defendant, Joseph R. Woolf, owning, subject to mortgages aggregating $6,100, a double tenement house and lot on Washington Avenue in Portland, placed it in the hands of real estate agents for sale. The plaintiff, Leo Dubovy, through the instrumentality of a real estate broker, with whom the property was listed, visited the premises with the broker and the defendants, Mr. and Mrs. Woolf. The upstairs tenement was closed and could not be seen on account of the absence of the tenant. Upon inquiry, made to Mrs. Woolf, who was acting as agent for her husband, she informed Mr. Dubovy that the tenement upstairs was similar to the tenement downstairs. The justice found that from her statements Mr. Dubovy was justified in understanding that the two tenements were similar in construction and condition.

Immediately following the visit to the house and the statements of Mrs. Woolf, Mr. Dubovy entered into a written contract with Mr. Woolf for the purchase of the property for $7,500, assuming the mortgages thereon, giving a third mortgage on it for, as finally determined, $400 and a second mortgage for $1,250 on another house and lot on Grant Avenue owned by Mr. Dubovy.

Immediately after the execution of the sale and of the required deed and mortgages, the plaintiffs, Mr. and Mrs. Dubovy, visited the premises to take possession and then for the first time discovered and learned as alleged that the upstairs tenement was not similar to the downstairs tenement in construction and condition but was out of repair, the ceilings in certain rooms being broken and fallen down, the plaster on walls of certain rooms cracked and the floor of the front room being of soft wood and without hardwood border like the room beneath.

Thereupon the plaintiffs without delay notified the defendants that the property had been misrepresented to them and they would not abide by the sale and, expressing a willingness to reconvey to Mr. Woolf the property, demanded a return of the consideration paid.

The sitting justice found: "Considerable evidence was offered as to the actual condition of the upstairs rent, and while an employee of the defendant Woolf testified that he repaired ceilings and walls at an expense of $13, in the light of common knowledge I find that the defects which appear from the evidence to have existed could not have been properly remedied for a price any where near as small as $13. If $13 were the cost of the repairs made, it is fair to infer the repairs were most superficial and could not have restored the property to the condition in which Mrs. Woolf represented it was at the time she stated its condition to Mr. Dubovy. Furthermore, a hardwood border, under present cost of labor and material, would cost a somewhat substantial sum and its inclusion would be necessary to permit the upstairs rent to conform in construction with the one below. While these defects are not substantial in value compared to the purchase price of the house, they materially effect the value of the property.

"It is clear that Mrs. Woolf made the representations either knowing them to be untrue, or without knowledge as to whether they were true or not. They were, in fact, untrue and in equity constitute a fraud upon the plaintiffs.

"As to the materiality of the defects, I think it follows the rule stated by Mr. Pomeroy in Section 898 of his work. 'If any pecuniary loss is shown to have resulted the court will not inquire into the extent of the injury. It is sufficient if the party misled has

been very slightly prejudiced, if the amount is at all appreciable.' "

The justice found that the defendants made an affirmative statement to Mr. Dubovy, in effect that the two tenements were similar in construction and condition, that the statement was not true, that the defendants either knew it to be untrue or made it without knowing whether or not it was true, and that Mr. Dubovy acted in reliance upon it. These elements essential and sufficient in equity to establish fraudulent misrepresentation, *Braley* v. *Powers*, 92 Me., 203, 209; *Richards* v. *Foss*, 126 Me., 413, 415; Pomeroy's Eq. Jur., 4th Ed., Sec. 876 *et seq.*, were fully supported by the evidence and the defendants raise no point with reference to them.

But another element is essential, the statement or representation must be material; that is, it must be an inducement to action and as such relied upon, and it must also be so material to the interests of the party relying upon and acting upon it that its falsity causes him some pecuniary loss or injury. Pomeroy's Eq. Jur., Sec. 898 and note a; Story's Equity Jur., 14th Ed., Sec. 289.

The defendants base their appeal on a failure to establish this element, contending that there was only evidence that the injury was so trivial that equity will not take jurisdiction, that the conclusion of the sitting justice of larger injury was based not on evidence but on "common knowledge" beyond the proper limits of which it is apparent the justice went in his findings, that the rule relied upon by the justice is not the rule under the decisions of this court, and consequently that the finding of fraudulent misrepresentation was incorrect as a matter of law.

First, as to the amount of the injury. The defendants claim that the injury was only the amount necessary to repair the plastering and that was $15. The evidence as to the actual condition of the ceilings and walls of the upstairs tenement was conflicting. An employee of the defendant testified that he repaired all the plastering and that between thirteen and fifteen dollars would have paid for it. There was no evidence of the amount of time taken to do it or the price of such labor. But the court as a matter of common knowledge knows in a general way the price of labor, 23 Corp. Jr., 150; *Bell* v. *Barnet*, 2 *J. J. Marsh*, 516 (Ky.); Opinion of the Justices, 231 Mass., 603, 610. From such

knowledge and his conclusion as to the actual condition of the walls and ceilings, the justice drew the further conclusion that if only $15 were required, the work done was superficial and repairs to put the plastering of the upper tenement into the same condition as the lower could not have been made "for a price anywhere near as small as $13." This conclusion was logically and legally justified.

But the defendants do not refer to the floor of the front or living room which the justice found would require a hardwood border to correspond with the living room below. No evidence was presented as to the size of the room or of the border or of its cost. But from the evidence as it was, the finding that such a border would cost "a substantial sum" was supported by it.

The conclusion as a matter of fact, that the defects would require some substantial pecuniary expense to repair, was supported by the evidence. The actual total or approximate total was not in evidence and was not found.

Second, the defendants contend that the injury was "trivial" and rely upon *Woodbury* v. *Portland Marine Society*, 90 Me., 18, in which an injunction was sought to prevent in part the defendant corporation from paying $15 — the same amount claimed to be the maximum damage in the instant case — as a charitable contribution. The bill was dismissed, Chief Justice Peters declaring in the opinion that "Equity does not stoop to pick up pins."

That decision was in accord with other decisions, based upon the principle that equity will not take jurisdiction of a suit, the subject matter of which is too trivial to justify it in so doing. A common phrase was that such suit is "unworthy of the dignity of the Court." But the principle is founded on reason and policy. It was designed to prevent expensive and mischievous litigation about trifling matters which in consequence of the insignificance of the amount involved would do the parties themselves more harm than good and might occasion injurious delay to other suitors. Story on Eq. Plead., 10th Ed., Sec. 500; *Allen* v. *Demarest*, 41 N. J. Eq. 162, 2 Atl., 655.

In England the rule in chancery is that a suit involving a pecuniary value of less than ten pounds and not founded on fraud or brought to establish a right of a permanent nature must be dis-

missed. By the ordinances of Lord Bacon it was declared that all suits under the value of £10 are regularly to be dismissed and this rule was declared in 1884, *Westbury on Severn R. S. Authority* v. *Meredith*, 30 Chan. Div., 387, to be still in force and not changed by the Judicature Act.

Bacon's rule, with the amount of $50 as the equivalent of £10, has been declared by Chancellors Kent in *Moore* v. *Lyttle*, 4 Johns. Chan., 183, and Green in *Swedesborough Church* v. *Shivers*, 16 N. J. Eq., 453, to have the imposing character of an original constitutional ordinance. It has in various jurisdictions been decided to be a part of the law marking and defining the boundaries of the jurisdiction of the court of equity. *Allen* v. *Demarest*, supra; *Wood* v. *Wood*, 3 Ala., 756; *Carr* v. *Inglehart*, 3 Ohio State, 457.

The rule has been rigidly adhered to. Where the amount in dispute was under $50 the suit was dismissed. *Fullerton* v. *Jackson*, 5 Johns. Chan., 276; *Mitchell* v. *Tighe*, Hopk. 119; *Douw* v. *Shelden*, 2 Paige, 323. Where just $50, it was retained. *Vrendenburgh* v. *Johnson*, Hopk., 112.

The amount was changed by statute to $100 in New York. *Church* v. *Ide*, Clarke Chan., 494 (N. Y., 1841); *Newell* v. *Burbank*, 4 Edw. Chan., 536 (1844), and in Alabama, *Wood* v. *Wood*, supra (Ala., 1842). By statute the amount was originally fixed at $50 in Tennessee, *McNew* v. *Tobey*, 6 Humph., 27 (1847), and at $100 in Michigan, *Steinbach* v. *Hill*, 25 Mich., 78 (1872); *Wallace* v. *Sortor*, 52 Mich., 159.

The rule of Massachusetts is laid down by Chief Justice Shaw in *Cummings* v. *Barrett*, 10 Cush., 190. "The rule de minimis is applied in equity with reasonable strictness. In New York the rule is that a suit in equity will not be maintained when the amount is less than one hundred dollars. That, however, we believe is fixed by statute. No such statute exists here but a similar principle is applied." See also *Smith* v. *Williams*, 116 Mass., 510; *Chapman* v. *Banker & Tradesman Pub. Co.*, 128 Mass., 478; *Gale* v. *Nickerson*, 151 Mass., 432; *Giragosian* v. *Chutjian*, 194 Mass., 504, 506.

In New Jersey, *Allen* v. *Demarest* (1886), supra, the amount of $50 was strictly adhered to although the purchasing power of

that sum was admittedly much less than at the time of the adoption of the ordinance, because it is the duty of the courts to administer and enforce laws not to ordain and establish them.

Woodbury v. *Portland Marine Society*, supra, was within the rule of £10 or $50. We think that a finding in the instant case that the injury was at least $50 was properly and legally inferable from the evidence, *Irwin* v. *Irwin*, 110 S. W., 1101 (Texas), and therefore that the rule does not apply.

But it was early held that the rule did not apply to cases of fraud. Anon. Bunbury 17 (1717) note, "Where there is a fraud or it is a complicated matter the bill will be retained though the sum be never so small." *Hamilton* v. *Johnson*, Vern. & S., 394 (1787), "But where the object of the bill is to be relieved against a fraudulent demand, fraud is the ground of the court's proceeding and it is no matter how small the sum is."

Well established exceptions therefore are bills founded on fraud or brought to establish a right of a permanent nature. *Allen* v. *Demarest*, supra; *Barnet* v. *Woods*, 2 Jones Eq., 198 (1856); *Yantis* v. *Burdett*, 3 Mo. App., 457 (1834); *Vrendenburgh* v. *Johnson*, Hopk., 112 (1824); Story on Eq. Plead., 10th Ed., Sec. 500. This case is an exception.

Third, as to the amount of pecuniary loss or injury which must be shown. This is a proceeding to rescind a contract of sale and recover the considerations paid. A distinction has been noted between cases where the misrepresentations are relied upon as a defense by the injured party (as in a bill to enforce specific performance, *Cadman* v. *Horner*, 18 Vos. 10; 11 Rev. Rep. 137), and where relied upon as a basis of action by the injured party to recover, as here.

In the former case, "if the false statement applies to a material fact the law implies that the defrauded party has suffered an injury sufficient to defeat a recovery. By showing the misstatement was a material one relative to the subject matter of the contract is proof that damages, in some degree, have been sustained by the defrauded party but he is not called upon to give direct proof of the nature and extent of his damages. Where a party is seeking affirmative relief upon the ground of fraud whether it be legal or equitable then he is called upon to prove that he has sustained

damages in some tangible amount." *Stewart* v. *Lester*, 1 N. Y. S., 699; 14 Am. & Eng. Ann. Cas., Note p. 262.

In an action to recover purchase price of stock, *Jakway* v. *Proudfit*, 105 N. W., 1039 (Neb., 1906), the court, after quoting the rule from Pomeroy relied upon by the sitting justice, says, "While there is some diversity of opinion in the adjudged cases as to the nature of the damages which will warrant a rescission of a contract, the very great weight of authority, however, is in line with the text writers above quoted on the proposition that it must be an actual pecuniary damage as distinguished from a nominal or theoretical injury. The rule in this state seems to be in harmony with the strong current of authority on this question. - - - - False representations as the basis of an action whether for damages or for the rescission of a contract are such only as in some manner actually misled the complaining party to his damage." The decision was reaffirmed in 109 N. W., 388.

In *Wainscott v. Occidental etc. Association*, 33 Pac., 88 (Cal., 1893), bill to rescind a purchase of land, the decision quotes the rule from Pomeroy. It further says, "He who would recover damages in a court of law must set forth in an orderly manner the facts showing his right to recover and the amount to which he is entitled to the exclusion of every presumption to the contrary. In such an action the damages are the essential thing. In an action to rescind upon the ground of fraud, the fraud is the essential thing; and while it must be coupled with loss, injury, damage, the precise amount of damage is of secondary importance." This principle and the rule of Pomeroy were affirmed in *Spreckels* v. *Gorrill*, 92 Pac., 1011 (Cal., 1907).

The rule of Pomeroy is quoted with approval in *Fouse* v. *Shelley*, 63 S. E., 208 (W. Va., 1908), a bill to rescind a contract for partnership because of misrepresentations.

In *Pennington* v. *Roberg*, 142 N. W., 710 (Minn., 1913), where a farm was represented to have 1600 apple trees with 1300 bearing and there were in fact 1255 trees and 1130 bearing, and the defendant in a bill to rescind contended the difference in number of trees was not sufficient to base a rescission, the court affirmed the finding of the judge below that the plaintiff relied upon such representations and was in part induced thereby to purchase and that

the contract be rescinded. "In considering these findings we must bear in mind the well established practice to refrain from disturbing a finding of the trial court unless palpably against the weight of evidence."

The adjudged cases appear to be in accord with the rule of Pomeroy. We have not found any contrary to it. While the rule has not before been in issue in our court as in the instant case, the decisions of the court have been in accord with it. We do not construe it as meaning that the court will not, in an action to rescind, inquire into the extent of the injury. An important part of the rule is a condition, "if the party is misled." The alleged injury might be so small that it could not reasonably be held that the party did rely upon a representation which if untrue would have such trivial results. It might be held he could not reasonably have been so misled. But if the evidence supports the conclusion that the party was misled, then the extent of the prejudice or loss, if there is appreciable pecuniary damage, will not be inquired into. In such case fraud and damage have both been shown as both must be. With this construction the rule is approved by this court.

The justice found that the amount necessary to restore the condition of the upper tenement was not large in proportion to the purchase price of the house, but the defects materially affected the value of the property. There was evidence to support that finding. He found that the element of materiality of the misrepresentation was established. His conclusion is legally sound. The entry must therefore be

Appeal dismissed.

MARY A. BASTON, ADMX.

vs.

THOMAS S. THOMBS.

Cumberland. Opinion September 5, 1928.

DAMAGES. PROVINCE OF COURT AND JURY.

In an action by an administratrix to recover for personal injuries resulting in the death of the intestate the underlying general rule upon which damages are given is based on the single idea of compensation.

The elements of damages for conscious physical pain and mental suffering cannot be demonstrated or calculated or rigidly and mathematically proved; they are not what any member of the jury, or anybody else, would consent to suffer bodily and mental pain for, but what in the dispassionate discretion of the twelve jurors as reasonable, practical men would compensate an injured one, legally entitled to be compensated at the expense of a defendant, for such pain and anguish, as the jury deduce from the evidence, the injured one endured.

In such cases it is not for the reviewing court to interfere merely because the award is large, or because the court would have awarded less. Unless a verdict very clearly appears to be excessive, upon any view of the facts which the jury are authorized to adopt, it will not be disturbed.

In the case at bar, while the amount of the award was large, the line between it and a smaller amount could not be drawn with valid reason, and the jury's determination must be accepted as final.

On motion for new trial by defendant. An action on the case for negligence brought by the administratrix of the Estate of Harriet A. Skillin for injuries sustained by said Harriet A. Skillin resulting in her death and alleged to have been caused by the negligent operation of an automobile of the defendant by his agent or servant.

The jury returned a verdict for the plaintiff in the sum of $2000.00. A motion for new trial on the usual grounds was filed by the defendant.

Motion overruled.

The case fully appears in the opinion.

Drummond & Drummond,

William B. Mahoney, for plaintiff.

Ralph W. Farris, for defendant.

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

DUNN, J. While in the act of walking across a public street in Falmouth, Harriet L. Skillin was struck by a motor truck which the defendant owned and his employee was driving. Miss Skillin sustained injuries from which she died in an hospital about five hours afterwards. The plaintiff, who is the administratrix of the estate of the decedent, averred in the declaration in her writ that the collision occurred under circumstances making the defendant liable, and on issue joined the jury so found. In this court liability is tacitly conceded. The specific point discussed in the brief of counsel for the defendant, in support of the motion for a new trial, is excessiveness in the award of damages.

Deceased was seventy-six years old. Both bones of her right leg were badly fractured below the knee; her left arm was broken; across the back of her head, just above the junction of the neck, there was a wound three inches in length and down to the bone; abrasions and bruises were numerous; and there was marked manifestation of the presence of that intangible but nevertheless real thing which medical men call traumatic shock.

There was evidence of her exclamations and that she moaned to some extent, of her inquiries and statements as to her condition, and of her answers to questions, from which the jury could have found that conscious physical pain was keenly suffered by the injured woman until the half-hour next preceding her death. And it could have been found from the words it was testified that she spoke to the driver of the truck, who exercised himself to make whatever contribution he could toward the care and comfort of the woman, that from the time of the accident she was apprehensive of the imminence of death.

The general underlying rule upon which in a case of this kind damages are given is based on the single idea of compensation.

Damages were not asked in this case, and on the evidence could not consistently have been given, for the purpose of punishment or example, but simply and solely for the purpose of compensation, to make whole as far as might be and as near as could be, regarding the situation at the time of Miss Skillin's death, as the brief says the charge of the trial judge illustrated it, as though Miss Skillin had walked out of the hospital and asserted that she felt as well as she ever did before she was hurt.

Loss of time, ordinarily an element of damages, is stated in this case by the one side and the other to be negligible. The element of reimbursement for necessary and reasonable expenses and for professional attention and nursing incurred properly and reasonably is not in dispute, the total amount being $110. The controverted proposition is the allowance in round numbers of $1900 for physical pain and mental anguish.

Damages for conscious physical pain and mental suffering are exceedingly hard for any jury to determine satisfactorily. These elements are not things that in any case could be demonstrated or calculated; they can never rigidly, and so to speak mathematically, be proved; they are not what any member of the jury, or anybody else, would consent to suffer similar bodily and mental pain for, but what in the cool and dispassionate discretion of the twelve jurors as reasonable, practical men would compensate an injured one, legally entitled to be compensated at the expense of a defendant, for such pain and anguish, as the jury deduce from the evidence, the injured one endured.

It is said in argument that $1900 for pain and anguish, even though the pain and anguish were intense, for so short a period as approximately five hours, is clearly excessive. The award is liberal, but the recovery is not so large as manifestly to indicate that it was made by the jury in disregard of testimony, or that the jury erred, influenced by prejudice, passion or corrupt motive. The question in every such trial involves essentially one of fact; it is a matter of judgment, and men are unequal in judgment. There are degrees of suffering; the brain of one human being might suffer more from a like injury than the living units of the brain of another, in their serried millions, could stand; the stopping place

for allowance being the point where in consciousness the heart ceases to beat and the breath to ebb and flow.

Defendant cites the case of *Ramsdell* v. *Grady*, 97 Maine, 319. The action was against a physician for malpractice. The only damages of any amount were those resulting from bodily and mental pain from Monday to Saturday of the same week, when the patient died. The jury awarded $3000. It was ordered that this be reduced to $1500, and if unsatisfactory to the prosecuting administrator, that a new trial be held. Twenty-five years have gone since then and the purchasing power of the dollar is appreciably less. Nor is this all. Only part of the suffering the decedent had known was due to the negligence of the physician; the patient might have suffered and died even if the physician had correctly diagnosed the ailment as diphtheretic and treated it accordingly. *Stone* v. *Lewiston, etc. Railway*, 99 Maine, 243, distinguishes the Ramsdell Case.

In the Stone case, supra, a passenger on a street car was knocked to the ground and run over and injured. He suffered agonizing physical and mental pain till his death the next day. The jury awarded $5000. The award withstood a motion to avoid it on the ground of excessiveness.

In determining whether a verdict is excessive, since there is no exact rule for the measurement of damages, each case must be ruled chiefly on its own facts and circumstances. The amount is primarily fixed by the jury. It is not for the reviewing court to interfere merely because the award is large, or because the court would have awarded less. Unless a verdict very clearly appears to be excessive, upon any view of the facts which the jury are authorized to adopt, it will not be disturbed. *Donnelly* v. *Booth Brothers etc. Granite Co.*, 90 Maine, 110; *Boyd* v. *Bangor etc. Co.*, 111 Maine, 332; 8 R. C. L., 674. In the instant situation the amount of the award is big, but on review the line between it and a smaller amount cannot be drawn with valid reason, and hence the determination on the part of the jury must be accepted as final.

Motion overruled.

T. R. LONGCOPE

vs.

LUCERNE-IN-MAINE COMMUNITY ASSOCIATION.

Penobscot. Opinion September 5, 1928.

EMPLOYMENT CONTRACT. STATUTE OF FRAUDS.

Under the Statute of Frauds which bars actions upon oral contracts which are not to be performed within a year, an oral contract of employment, wherein the manifest intent and purpose of the parties, affirmatively proved, is that more than one year shall be taken for its performance, is within the statute and is barred by its provisions.

When both parties understand and intend that a contract of employment shall continue for more than a year, the mere possibility of literal performance within a year does not, in this jurisdiction, remove the bar of the statute.

An action upon an oral contract to employ a person to act as the right hand man of the employer during the time that the latter is engaged in a vast plan of visioned vacational, agricultural and industrial development, stated by the employer and understood and intended by both parties to require a great many years for performance is within the statute and barred by it.

On general motion for new trial by defendant. An action on the case to recover damages for the breach of contract of employment entered into between the plaintiff and the defendant. The defendant pleaded the general issue and the Statute of Frauds.

The case was tried before a jury and a verdict returned for the plaintiff in the sum of $1,753.

A general motion for new trial was thereupon filed by the defendant. Motion sustained. New trial granted. The case fully appears in the opinion.

Locke, Perkins & Williamson, for plaintiff.

James M. Gillin, for defendant.

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

DEASY, J. In December, 1925, H. M. Saddlemire, president of the defendant corporation and projector of several other expansive plans, by oral contract, employed the plaintiff as "co-ordinator" at an agreed salary of $250 per week.

On May 1, 1926, Mr. Saddlemire discharged the plaintiff. The full stipulated salary was paid to the date of discharge. Thereupon this suit was brought to recover of the defendant damages for alleged breach of contract.

The general issue and Statute of Frauds were pleaded.

The plaintiff recovered a verdict.

The defendant filed a general motion for a new trial.

For the purpose of this opinion, the verdict establishes as true the plaintiff's version of the contract and that there was no breach of it by him.

No written memorandum satisfies the Statute of Frauds. Each of certain exhibits introduced for the purpose tends to show that on a certain day the plaintiff was in the service of the defendant corporation; but neither exhibit points to an agreement by the corporation that any paid employment should continue for even another day.

The oral contract as detailed by the plaintiff is as follows:

"His proposition was that I should leave the Hearst organization and come with him, and he had in mind quite a large development. As he expressed it at the time, he said, 'I am going to come into the State of Maine as the biggest promoter that has ever come into the State of Maine. My first object is going to be to develop the State of Maine as a playground,' and this Lucerne-in-Maine was to be the first enterprise in that regard. He said, 'After I develop it as a playground I shall develop it in an agricultural way; then I shall go from that into an industrial development, all of which will take a great many years to develop, and I want you with me to act as my right-hand man during that time.' I explained to Mr. Saddlemire --------- that I could not afford to take that risk of coming with him unless the employment was definite and permanent, and he assured me that it was permanent and outlined, as I have just stated, the various things that he was going to develop."

The plaintiff testifies that on December 5, 1925, he accepted

Mr. Saddlemire's proposition, the salary having been mutually agreed upon.

Mr. Saddlemire's version of the contract does not differ essentially from that of the plaintiff, except in respect to the claim of the latter that he expressly reserved the right to discharge the plaintiff at will. This contention is negatived and disposed of by the verdict.

The defendant's main reliance is upon the Statute of Frauds which bars actions upon contracts not to be performed within a year unless such contracts are evidenced by writing.

Contracts of employment for a specified period of more than a year or for the performance of undertakings which necessarily require more than that time are obviously within the statute.

Also within the statute are contracts wherein the manifest intent and purpose of the parties, affirmatively proved, is that more than one year shall be taken for their performance.

Browne on The Statute of Frauds, (5th Ed.) Section 281, states this principle thus:

"Where the manifest intent and understanding of the parties, as gathered from the words used and the circumstances existing at the time, are that the contract shall not be executed within the year, the mere fact that it is possible that the thing to be done may be done within the year will not prevent the statute from applying."

And in Chitty on Contracts, (11th Ed.) Page 99, it is said that "where the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a longer period longer than one year, the case is within the statute."

This Court in *White* v. *Fitts*, 102 Me., 244, quotes these authorities and in its opinion and decision affirms and applies the law as therein stated. See *White* v. *Fitts* and cases cited.

Some authorities hold that mere possibility of literal performance within a year removes the bar of the statute. Such is not the law in this jurisdiction. The intent of the parties that the contract is not to be performed within a year whether such intent is expressed in words or otherwise plainly manifested is controlling.

Mr. Longcope's contract as appears from his own testimony required him to act with Mr. Saddlemire during the time that the

latter is engaged in carrying into execution vast plans of statewide vacational, agricultural and industrial development. These ambitious projects certainly require more than a year for completion. The parties so understood and intended. It was indeed stated in the contract, as testified to by the plaintiff that the work undertaken would take "a great many years" and that "during that time" the plaintiff was to act as Mr. Saddlemire's right-hand man.

This case is clearly within the legal principle as enunciated by the above authorities.

The plaintiff cites and relies upon *Carnig* v. *Carr*, 167 Mass., 544. In that case as in *White* v. *Fitts* the Court seeks for the intent of the parties and makes that the test. Applying that test the action was held not barred.

The decision of the Massachusetts Court might well have been different if, as in the instant case, the plaintiff had agreed to work during the time his employer is engaged in vast enterprises which were expected to and indeed stated to require "a great many years to develop."

Cases involving and holding not to be within the statute, contracts terminable upon contingencies which may occur within a year are in harmony with this opinion. In this class are contracts to provide support during life. *Thurston* v. *Nutter*, 125 Me., 415. The manifest intent in such cases is that the contract shall terminate upon the happening of the contingency whether that event occur sooner or later.

It may be well argued that the contract which we are considering was made with Mr. Saddlemire individually and not with him in behalf of the Lucerne-in-Maine Community Association which was the first and perhaps the smallest of the developments which the plaintiff was employed to serve. But Mr. Saddlemire not being a party it is unnecessary to pass upon that point. In either event the present action cannot be maintained upon the evidence presented in this record.

Motion sustained.
New Trial granted.

CASCO MERCANTILE TRUST COMPANY

vs.

ROBERT B. SEIDEL ET ALS.

Cumberland. Opinion September 5, 1928.

CONVEYANCE IN FRAUD OF CREDITORS. JUDGMENT. RES JUDICATA. BANKRUPTCY.

Obtaining money through fraudulent representations is not a conveyance of property in fraud of creditors, but rather an acquisition of property in fraud of one not then a creditor.

A debtor's conveyance or mortgage of property for a present or even past consideration is not prima facie fraudulent. Preferential payments are valid at common law. Bankruptcy may dissolve them. Proof of actual fraud may defeat them. But fraud is not to be presumed.

The rule that a judgment includes and concludes not only things actually litigated, but things involved in a suit that might have been litigated, applies only between the parties.

A non-petitioning creditor is under no obligation to intervene in a bankruptcy proceeding. The existence of the right to do so is not equivalent to actual intervention. Unless such creditor exercises his right to become a party, he remains a stranger to the litigation.

A bankruptcy decree is res judicata as to the debtor's bankrupt status. This is the thing litigated and decided.

But when the petition alleges more than one act of bankruptcy a non-petitioning, non-intervening creditor being a stranger to the litigation, cannot be heard to claim that the decree is res judicata as to the particular act of bankruptcy upon which the decree was based.

On exceptions. A petition for a writ of certiorari brought by the above petitioner against three Justices of the Peace and one debtor for the purpose of having the records of said Justices certified and presented to the Supreme Court so that the same, or as much thereof as might have been illegal, might be quashed. No answers were filed by the respondents and at the October, 1927,

Term of the Supreme Judicial Court the case was submitted to the presiding Justice on the petition and written arguments by counsel on each side, no testimony being submitted by either side. The presiding Justice ruled as a matter of law that the petition be dismissed, to which ruling the petitioner duly excepted. Exceptions overruled. The case is sufficiently stated in the opinion.

Harry C. Libby, for petitioner.

Emery & Waterhouse, for defendants.

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

DEASY, J. On June 20, 1925, the plaintiff bank brought, against the defendant, Clarence E. Goff, an action of tort for deceit alleging that in 1924 he fraudulently obtained money from the bank. On July 31, 1925, the defendant, Goff, upon a petition by certain creditors, not including the plaintiff, was adjudged an involuntary bankrupt. In 1926 the plaintiff recovered judgment in its action of deceit and caused the defendant Goff to be arrested on execution. He gave the statutory bond and in due time and form submitted to examination in disclosure proceedings. A majority of the justices of the peace hearing the disclosure held that he was entitled to take the oath and it was administered.

Whereupon the plaintiff brought this petition for writ of certiorari alleging errors on the part of the magistrates and praying that their record be quashed. At nisi prius the petition was dismissed. The plaintiff excepted.

The oral examination is not presented to this court except in a summary by the magistrates in which it is said that "no oral evidence of fraud was submitted." The plaintiff contends that certain documentary evidence offered in the disclosure proceedings, and set forth in the bill of exceptions shows that the debtor, since the cause of action accrued, has conveyed property with intent to defraud creditors (R. S. Chap. 115, Sec. 65) and that therefore the magistrates made an error of law in permitting the oath to be taken. We perceive no error requiring the quashing of the magistrates record.

The alleged fraudulent transactions which are claimed by the plaintiff to be inconsistent with the oath may be summarized thus:

(1) The deceit, practiced by Goff, which was the basis of the original action.

This was a reprehensible transaction. It put Goff in peril of criminal prosecution. It created a liability not barred by bankruptcy. It was, however, not a conveyance of property in fraud of creditors, but rather an acquisition of property in fraud of one not then a creditor.

(2) Mortgages.

From the findings of the magistrates it appears that after the cause of action is alleged to have accrued, the defendant Goff gave a mortgage to secure an existing debt and another in part for the same purpose and in part to pay for services to be rendered.

It has been held that a voluntary gift of unexempt property by a debtor is prima facie fraudulent. *French* v. *Holmes*, 67 Me., 186. *Laughton* v. *Harden*, 68 Me., 213.

Not so however in case of a conveyance or mortgage for a present, or even a past consideration.

Preferential payments are valid at common law. *Folsom* v. *Smith*, 113 Me., 88. Bankruptcy may dissolve them. Proof of actual fraud may defeat them. But fraud is not to be presumed. *Grant* v. *Ward*, 64 Me., 239. In the present case fraud is not proved by any evidence before this court. The finding of the magistrates negatives it.

(3) Fraud established by the adjudication of the bankruptcy court.

The bankruptcy petition sets forth a conveyance of property in fraud of creditors and also a conveyance with intent to prefer one creditor, a transaction not necessarily fraudulent. R. C. L. Vol. 3, Page 272.

The adjudication is in the ordinary form not specifying as a basis any one act of bankruptcy. The plaintiff sets up res judicata.

But the Circuit Court of Appeals in the case *In re Letson*, 157 Fed., 78, decides this point adversely to the plaintiff's contention. The head note of that case, fairly summarizing the opinion says: "An adjudication of bankruptcy on a petition charging different acts of bankruptcy and which does not show on which one it pro-

ceeded, does not render either charge res judicata in the further proceedings."

Notwithstanding this decision the plaintiff's counsel contends that the adjudication of bankruptcy conclusively establishes Goff's fraudulent conveyance. The plaintiff invokes the rule that a judgment includes and concludes "everything that was litigated or that might have been litigated."

This rule, however, applies only when the parties are the same. 15 R. C. L., 1006, and cases cited.

The plaintiff is a party to the instant suit. Not having been either a petitioning or intervening creditor, it was not a party in the bankruptcy proceeding. So held by the United States Supreme Court in *Bank* v. *Johnson*, 249 U. S., 246, 63 L. Ed., 587.

We quote from the opinion of Mr. Justice Brandeis: "So far as it (the adjudication of bankruptcy) declares the status of the debtor, even strangers to the decree may not attack it collaterally. But an adjudication in bankruptcy, like other judgments in rem, is not res judicata as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto."

The case further holds that a non-petitioning, non-intervening creditor, i.e., one circumstanced like the plaintiff, is not a party:

"Trustee contends, however, that since ---- any creditor is entitled to intervene in the bankruptcy proceedings, the bank should be considered a party thereto. ----- But he (a creditor) is under no obligation to intervene, and the existence of the right is not equivalent to actual intervention. Unless he exercises the right to become a party, he remains a stranger to the litigation, and, as such, unaffected by the decision of even essential subsidiary issues." *Bank* v. *Johnson.*

The bankruptcy decree is res judicata as to the debtor's bankrupt status. This was the thing litigated and decided. But the plaintiff, "a stranger to the (bankruptcy) litigation" cannot be heard to claim that the decree is res judicata as to the particular act of bankruptcy upon which the decree was based, even though this be an "essential subsidiary issue."

Little v. *Cochran*, 24 Me., 508, and *Marr* v. *Clark*, 56 Me., 542, cited and chiefly relied upon by the plaintiff, differ radically from

the case at bar. In one, bankruptcy was treated as excusing disclosure, and in the other the magistrates ruled out certain pertinent questions.

Neither of these errors was made in the pending case.

Exceptions overruled.

DAVIS INVESTMENT COMPANY

vs.

BERNARD L. CRATTY.

Cumberland. Opinion September 5, 1928.

INSTRUCTION TO JURY. BILLS AND NOTES. CORPORATIONS. ULTRA VIRES. PLEADING. BANKS AND BANKING.

A party is not entitled to have a requested instruction given unless it is sufficiently supported by facts admitted or proved, nor unless it appears that such instruction is correct and not misleading, that it is not covered by the charge and that refusal to give it would be prejudicial to him.

In an action by an endorsee against the maker of a promissory note, the making and endorsement declared upon, and no affidavit under the Rule of Court being filed, the plaintiff's burden is sustained by the production of a note conforming to the declaration. This situation creates a waiver of further proof of the signature and endorsement, and of authority to sign or endorse.

Where a contract of a corporation is not on its face beyond the power of the corporation, authority to make it is presumed.

When relied upon in defense and not apparent from the declaration ultra vires *must be pleaded.*

In an action brought by a corporation indorsee of a promissory note, the general issue being the only defense pleaded, a requested instruction to the effect that the action is barred by Act of 1925, *Chap.* 193, *(prohibiting corporations other than banks from doing banking business) was properly refused.*

An action on a note signed by the defendant and made payable to Maine Rickenbacker Company Inc. Trial was had at the No-

vember, 1927, Term of the Superior Court for the County of Cumberland. At the conclusion of the testimony certain instructions were requested by the defendant which the court declined to give to the jury, to which rulings the defendant duly excepted. The jury returned a verdict for the plaintiff in the sum of $575.65. Exceptions overruled.

The case fully appears in the opinion.

Abraham Breitbard, for plaintiff.

Maurice E. Rosen, for defendant.

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

DEASY, J. Action on a promissory note of the defendant payable to Maine Rickenbacker Co. Inc., indorsed and delivered for value to the plaintiff corporation. Plea, the general issue. Verdict for the plaintiff.

The defendant brings the case forward upon exceptions to the refusal of the presiding justice to give (except as contained in the charge) two requested instructions.

A party is not entitled to have a requested instruction given unless it appears that it is sufficiently supported by facts admitted or proved, nor unless it appears that such instruction is correct and not misleading, that it is not covered by the charge and that refusal to give it would be prejudicial to him.

The first instruction requested was:

"The burden is upon the plaintiff to prove that the note in question was indorsed by Maine Rickenbacker Co. Inc. by one of its authorized officers."

This request states the law correctly, but omits an important qualification. The burden in such cases is upon the plaintiff as claimed. But the burden is satisfied by the production in evidence of a note and indorsement conforming to the declaration. No affidavit under Superior Court Rule XII (identical with S. J. C. Rule X) was filed. Proof of execution and authority was therefore waived. The note, with its indorsement, having been declared upon, nothing was needed to sustain the burden except to offer it.

The instruction as requested was misleading. Explained and qualified, it would have been non-prejudicial.

True the defendant argues that the indorsement does not conform to the declaration inasmuch as it omits the abbreviation "Inc." This, however, affects only identity, concerning which a reading of the case shows there was no dispute.

The other instruction requested was as follows:

"If the plaintiff was engaged in business of deriving profit from loan or use of money and if this transaction was in carrying on such business, then the plaintiff cannot recover."

This request has reference to Act of 1925, Chap. 193, which provides that:

"A corporation intended to derive profit from the loan of money except as a reasonable incident to the transaction of other corporate business or when necessary to prevent corporate funds from being unproductive, shall be deemed to be doing a banking business."

The Act forbids the doing of such business by corporations other than chartered banks.

This instruction invokes the defense of ultra vires.

Eminent authorities hold that no private litigant but the state only may challenge the right of a corporation to transact business beyond its chartered powers. *Bank* v. *Whitney*, 103 U. S., 99, 26 L. Ed., 443. Thompson on Corporation, 2nd Ed., Vol. 8, Sec. 2840.

See *Farrington* v. *Putnam*, 90 Me., 405, for a comprehensive discussion of ultra vires in a case which, however, involves the subject in a different aspect.

Other authorities hold that to an action by a corporation upon a contract, the making of which is a mere extension of its legitimate power, ultra vires is not a good defense, (*Oakland Co.* v. *Union Co.*, 107 Me., 279) and that such defense cannot be successfully interposed to an action as on an implied contract to recover for actual benefits accruing to the defendant; but otherwise, except as above stated, in case of actions upon express contracts which are ultra vires. *Boom Corporation* v. *Whitney*, 29 Me., 125. *Brunswick Co.* v. *United Co.*, 85 Me., 532. Cook on Corporations, 7th Ed., Vol. 3, pages 2285-6.

Whichever view is adopted the presiding justice was justified, for reasons following, in refusing to give the requested instruction.

When the issue as to corporate authority depends upon facts to be proved contracts of corporations are presumably intra vires.

"Where a contract is not on its face beyond the power of the corporation it is presumed that the corporation has the power to make the contract." Cook on Corporations, 7th Ed., Vol. 3, Page 2230. *R. R. Co.* v. *Bond*, 160 Fed., 403. Thompson on Corporations, 2nd Ed., Vol. 8, Sec. 2779. 10 Cyc, 1155.

The defendant cites *Harding* v. *Hagar*, 60 Me., 340, and *Black* v. *Life Asso.*, 95 Me., 35. But in these cases the illegality was apparent. The law of presumptions had no application.

Again the rules of pleading are fatal to the defendant's exceptions.

When relied upon in defense and not shown by the declaration, ultra vires must be pleaded. 7 R. C. L., 677. 10 Cyc, 1155. Thompson on Corporations, 2nd Ed., Vol. 8, Sec. 3255.

Moreover the requested instruction is not supported by evidence. The record falls short of showing by sufficient evidence to justify a jury in finding it to be a fact, that the plaintiff's purchase of the note in suit was in violation of the statute.

Exceptions overruled.

WILLIAM D. LIBBY

vs.

DAVID LONG.

Cumberland. Opinion September 6, 1928.

AGENCY. UNDISCLOSED PRINCIPAL. TRUSTS. JUDGMENT.

The rule is well settled that either an agent or an undisclosed principal is liable at the election of a creditor or a person to whom the agent acting with-

in the scope of his authority has incurred liability; but after a creditor has acquired knowledge of the identity and of sufficient facts to disclose the liability of the undisclosed principal, if before judgment against the agent, and has elected against which one he will proceed, a judgment against either is res adjudicata *as to the case of action and will bar a recovery against the other.*

If in the instant case the relation was one of trustee and *cestui que trust,* the plaintiff could not now recover against the *cestui* in an action at law, having with knowledge of the relation recovered judgment against the trustee as an individual.

On exceptions and general motion for new trial by defendant. An action on the case in which the plaintiff sought to recover from the defendant certain sums of money which he had paid to one Benjamin Freedman, agent of the defendant, and who, as agent for said defendant, held a mortgage in the process of foreclosure which was redeemed by the plaintiff. At the time of redemption, when the sum due and charges on the mortgage were paid to Freedman, there were included certain additional items which the plaintiff paid under protest, and later brought action against this defendant to recover the sums so paid under protest. Prior to the commencement of this action the plaintiff had brought action against Freedman and during the progress of the trial of that action it appeared in evidence that the defendant in the present suit was the principal. Plaintiff recovered judgment against Freedman. The defendant in this action therefore claims that the plaintiff had elected to hold the agent and that by so doing he had waived his rights against the principal to wit: this defendant.

To certain instruction given by the presiding Judge the defendant took exception and after verdict for the plaintiff for the sum of $160 had been returned filed a general motion for new trial. Exceptions sustained.

This case is fully stated in the opinion.

Israel Bernstein, for plaintiff.

Abraham Breitbard,

Harry S. Judelshon, for defendant.

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

WILSON, C. J. The defendant at one time owned certain property consisting of a tenement house on which a mortgage already existed. He gave a second mortgage to one Knudsen, and later purchased it and had it transferred to one Benjamin Freedman, the father-in-law of the defendant. Prior to the assignment to Freedman, Knudsen had foreclosed the mortgage.

Thereafterward, the plaintiff acquired title to the equity. Upon offering to redeem, Freedman, or the defendant claiming to act as agent of Freedman, demanded of the plaintiff for the mortgage debt an amount which included certain sums paid out by Freedman for repairs or improvements and commissions for collecting rentals.

To certain of these items the plaintiff objected but finally redeemed by paying, under protest, the sums demanded, and then without knowledge of Long's real interest in the mortgage brought an action against Freedman to recover back the amount which he claimed was improperly demanded.

The case against Freedman was first heard in the municipal court and appealed by Freedman to the Superior Court. During the trial of the case in the Superior Court, Long, the defendant in the action now at bar, testified under oath that he furnished the money to purchase the second mortgage of Knudsen.

As bearing on the plaintiff's knowledge of the relations between Freedman and Long before taking judgment against Freedman, the plaintiff at the trial of the instant case at *nisi prius* was asked the following questions:

Q Now in the former trial at this court you did hear Long testify the money was his. Is that correct?

A Yes.

Q And that he furnished the money with which to take an assignment of the mortgage?

A When it was paid off.

Q When he took the assignment from Knudsen the money was Long's?

A Yes.

Q That is what Long testified to?

A Yes.

The inference from this and other testimony in the record being

that Long was the real owner of the mortgage and the principal in the transaction, as is indicated by the following:

Q When did you first learn you had any case against David Long?

A When he claimed it was his money.

Q When did he make that claim?

A In court here. (The witness here also referring to the previous trial.)

Yet, notwithstanding Long's testimony in the action against Freedman, which the plaintiff admits was sufficient to furnish grounds for a claim against Long, the plaintiff went on and obtained a judgment against Freedman, took out execution, and cited him before a disclosure commissioner to disclose as to his property. Failing to disclose sufficient property to satisfy his judgment against Freedman, and it being confirmed by the disclosure that Freedman merely held title to the mortgage for Long, the plaintiff brought the action now at bar.

The presiding Justice instructed the jury that the judgment against Freedman would be no defense in the present action against Long. To this instruction the defendant excepted, and the case is here on defendant's exceptions.

The rule is well settled that either the agent or an undisclosed principal is liable at the election of a creditor or a person to whom the agent has incurred liability acting within the scope of his authority; but after a creditor has acquired knowledge of the identity of the undisclosed principal and of sufficient facts to disclose his liability as principal and elected against which one he will proceed, a judgment against either is *res adjudicata* as to the cause of action and is a bar to recovery against the other. *Kingsley* v. *Davis*, 104 Mass., 178; *Emery* v. *Fowler*, 39 Me., 326; *Piper* v. *Daniels*, 126 Me., 458.

It is urged by plaintiff's counsel that the plaintiff did not have sufficient notice of the real relations between Long and Freedman until after judgment was obtained against Freedman and in the disclosure proceedings and further that, even if Long's testimony in the trial of the cause against Freedman was sufficient to give the plaintiff notice in case of an undisclosed principal and compel an election, the relations disclosed were not those of prin-

cipal and agent but of trustee and *cestui que trust*, to which the doctrine of election does not apply.

The plaintiff, however, brings his action at law and it was tried below upon the basis of principal and agent. The first count in the plaintiff's writ so describes the relation, and while there is an omnibus count containing the customary allegations of money had and received, which the plaintiff now claims the evidence shows Long received and now holds, and which in equity and good conscience should be restored to the plaintiff, the evidence is not inconsistent with the relation of principal and agent. An agent may take and hold property in trust for his principal and in case of a passive trust in which he merely holds the legal title may act as agent of the equitable owner in the management thereof. If it were not a resulting trust and of personal property, it might be held to have been executed and both the legal and equitable title to have been vested at once in Long, II Pomeroy Eq. Juris., Sec. 98, 26 R. C. L., 1174-6, Sec. 7, 10, *Blake* v. *Collins*, 69 Me., 156, and that a clear case of principal and agent resulted.

The evidence at the first trial was sufficient, as the plaintiff himself admitted, to give him notice that Long was the principal in the transaction as to the mortgage and was liable to him for the money alleged to have been overpaid in redeeming the mortgage. Therefore having proceeded, after knowledge of an undisclosed principal and his liability as such to recover judgment against the agent, he must be held upon the record before this Court to have elected as to which one he would rely upon as his creditor and he can not now for the same cause of action recover against the principal; nor if the relation were one of Trustee and *cestui que trust* could he recover at law of the *cestui*, especially with knowledge of the relation, having recovered a judgment at law against the trustee as an individual.

There is also a suggestion by plaintiff's counsel in his brief of fraud on the part of the defendant in permitting the plaintiff to pursue his action against Freedman to judgment whom presumably the defendant knew to be without means of satisfying a judgment.

This contention does not appear to have been raised at *nisi prius*, and was not submitted to the jury; nor does it appear to be

supported by that degree of proof required in cases of fraud. Neither is raised by the bill of exceptions. The only questions raised here by the defendant's exceptions are whether the recovery of a judgment against an agent after notice of an undisclosed principal bars a recovery against the principal for the same cause of action, and whether the judge erred in instructing the jury that the expense of certain improvements in the building made by the assignee of the mortgage were not, as a matter of law, a part of the mortgage indebtedness. It is not necessary to consider the second exception. The mandate will be:

Exception sustained.

F. A. RUMERY CO.

vs.

MERRILL TRUST CO. ET AL.

Cumberland. Opinion September 6, 1928.

CONTRACTS. GUARANTY. ASSIGNMENT. DEMURRER.

A guaranty is a separate undertaking from that of the principal and in an action on the guaranty, the principal need not be joined.

Without an assignment to the guarantor, a claim by the principal for damages for a breach of contract can not be set off by the guarantor or a recoupment be had in an action at law against the guarantor alone.

Where a guaranty is absolute and not conditioned on the amount guaranteed being found due, and the defendant in an action on the guaranty in a brief statement as an equitable matter of defense sets up an unliquidated counter claim of the principal, but no assignment of the claim of the principal to the guarantor is alleged or that the guarantor has no remedy against the principal, nor the principal joined in the action, a special demurrer to the brief statement must be sustained.

On exceptions by defendant. An action of assumpsit to recover the sum of $1,793.59 being the balance claimed to be due on

a guaranty made by the defendant to plaintiff to prevent plaintiff enforcing its lien claim of $11,440.08 on property of one Saddlemire with whom the plaintiff had entered into a building contract. This guaranty was unconditional, but the defendant after payment of $9,656.50 had been made, declined to pay the balance above stated on the ground that plaintiff had not remedied certain construction defects.

After suit was brought the defendant filed an equitable plea setting forth the facts as to the defects, to which plea the plaintiff filed a demurrer. After hearing the presiding Justice sustained the demurrer, to which ruling the defendants seasonably excepted. Exceptions overruled.

The case is fully stated in the opinion.

Clifford E. McGlauflin, for plaintiff.

James W. Gillin, for defendants.

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

WILSON, C. J. The plaintiff entered into a contract with one H. A. Saddlemire to construct a Club House at what is known as Lucerne-in-Maine. Upon its completion in the summer or early fall of 1926 there was claimed by the plaintiff to be a balance due on the contract and for certain extras the sum of $11,440.08 and for which the plaintiff also claimed a lien on the building, and notified Saddlemire that it would enforce its lien unless the sum due was paid.

To avoid proceedings to enforce the lien claim, the defendant bank on September 10, 1926, and one J. N. Towle, guaranteed the payment of the above amount, and so far as the pleadings show, unconditionally.

Full payment was not made as agreed on the guaranty, and in March, 1927, this action was brought for the balance due under the guaranty of $1,783.59. Saddlemire was not joined.

Prior to the guaranty, on September 10th, 1926, the architect in charge of the construction had issued a certificate that there was due under the contract the sum of $9,383.61, an additional sum for extras, of $2,056.47, being admitted by the parties to be also due at that time.

In March, according to the pleadings, just prior to the bringing of this action and after $9,656.50 had been paid by Saddlemire on account of the amount due under the guaranty, the architect reported to Saddlemire that certain defects had appeared in the construction and advised holding back the balance due until remedied. Saddlemire notified the plaintiff of the reported defects, and requested that they be remedied before action was brought for the balance due. The plaintiff refused or ignored the request and brought this action. After this action was brought, the architect attempted to cancel his certificate issued on September 10, 1926.

The case was entered in court at the April Term, 1927, and the defendants at the October Term, 1927, filed a plea of the general issue and in a brief statement set up the above facts as an equitable ground of defence under Sec. 18 of Chap. 87, R. S., and asked that the plaintiff be enjoined from prosecuting his action until the defects were remedied.

The plaintiff demurred to the brief statement. The demurrer was sustained, and the defendants excepted. The case is here on the defendants' exceptions to this ruling. The exceptions must be overruled.

The guaranty was not conditioned on the amount of the guaranty being found to be due, but was absolute to pay a stipulated sum at stated intervals in consideration of the waiver by the plaintiff of its lien claim.

It does not appear that the defendants do not have an adequate remedy at law, no allegation of the insolvency of the principal being contained in the brief statement. No assignment of the principal's claim being alleged, the guarantors can not avail themselves in defense of a claim for damages for breach of contract in favor of their principal. *Newton* v. *Lee et al,* 139 N. Y., 332. *Davis* v. *Toulmin,* 77 N. Y., 280. Again, without such assignment the claim of Saddlemire against the plaintiff can not be adjudicated without Saddlemire being a party to the action. *Becker* v. *Northway,* 44 Minn., 61, 63, 64. *Gillespie* v. *Torrance,* 25 N. Y., 306, 311. According to the above decisions, if the principal was insolvent and a party to the proceedings, relief might be had in equity.

It requires no citations to support the rule that a guaranty is a separate undertaking from that of the principal or that in an action on a guaranty the principal need not be joined, or that a claim by the principal for damages for a breach of contract can not be set off by the guarantor or a recoupment be had in an action at law against the guarantor alone.

There are not sufficient grounds alleged in the brief statement to sustain an equitable defense to the action on this guaranty. The Court below may permit an amendment to the brief statement, if an equitable defense actually exists in behalf of the guarantors. *Winthrop Savings Bank* v. *Blake*, 66 Me., 285. *Corthell* v. *Holmes*, 87 Me., 25.

Exceptions overruled.

JAMES E. DOUGLAS

vs.

IDA E. BURNHAM.

Cumberland. Opinion Sept. 11, 1928.

CONTRACTS. CONSIDERATION. NEGOTIABLE INSTRUMENT LAW.

In the absence of fraud, any consideration, however small, is sufficient to support a promise. The adequacy or sufficiency of the consideration is not a test of the validity of a simple contract. The same holds true in actions under the Negotiable Instruments Law.

In the case at bar the jury were justified in their findings that no fraud was used in securing the signature of the defendant to the note in question, and that there was consideration for her promise.

Action on a promissory note. Defense, lack of consideration and fraud in procuring. The verdict was for the plaintiff, and defendant brings the case up on the general motion.

William Lyons, for plaintiff.
Harry E. Nixon,
Simon W. Moulton, and
Jacob H. Berman, for defendant.

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

BARNES, J. On January 28, 1927, defendant gave her promissory note to plaintiff, for $2,500 dollars, on three months' time, with interest. At the trial, in November of the same year, plaintiff recovered a verdict for the face and interest.

The defendant attacks the verdict on the general motion for a new trial.

The issues submitted to the jury were whether the defendant's signature to the note was gained through fraud; and whether there was what is known in law as a consideration for the promise in the note. The facts seem to be that having a note for $2,500 against a man who had left this state, on which note the defendant, mother of the absentee, was an indorser, the plaintiff presented the note to the indorser and was met with a denial of her signature.

Subsequently the plaintiff returned to the defendant and got from her the note in suit, giving up to her the note which she had indorsed for her son.

It appears from the testimony that at a time within three years of his disappearance the maker of the indorsed note was the owner of real property, and a man to whom the plaintiff was willing to loan money on the security of notes signed with him by his wife or his mother. There is testimony that since his disappearance bankruptcy proceedings were instituted against him, but the testimony goes no further in this regard.

The jury were therefore justified in concluding that the note surrendered to the defendant on her promise to pay, as evidenced by the note in suit, had value.

And they were properly instructed that the adequacy or sufficiency of the consideration is not the test.

"Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration;" and "Value is any consideration sufficient to support a simple contract."

Negotiable Instruments Law of Maine, Laws of 1917, Chap. 257, Paragraphs 24 and 25.

"Any consideration, however small, in the absence of fraud, is sufficient to support a promise. It may arise from a benefit to the promisor, or a loss or injury to the promisee."

Goodspeed v. *Fuller*, 46 Me., 141.

It is true that the defendant is a woman, and that she was sixty-nine years of age when she executed the note in suit and received the note that she had indorsed.

It is true that the indorsed note was overdue when presented to defendant, but from the record one would conclude that neither the payee nor the indorser knew that the latter was not then holden to pay the note, a fact that is of slight importance in deciding the case and one fully and correctly treated by the judge in his charge.

The judge also instructed the jury that if fraud was used in obtaining the note in suit, no recovery could be had.

The jury heard each party testify to the several conferences in regard to the note, and decided that fraud was not used in procuring it.

We do not find the existence of fraud.

Hence the mandate must be,

Motion overruled.

JOHN F. CAREY

vs.

CHARLES R. PENNEY.

Waldo. Opinion Sept. 18, 1928.

ACTIONS. "MONEY HAD AND RECEIVED." PLEADING. SPECIFICATIONS.

An action for money had and received is equitable in its nature and lies to recover any money in the hands or possession of the defendant which in equity and good conscience belongs to the plaintiff. But if a specification of plaintiff's case of action is filed either with or without order of Court the plaintiff is limited in his proof by such specification. This is the very purpose of a specification. It gives the defendant information of what charges he must be prepared to meet.

The limitation is in the pleading, not in the rule; it affects the procedure, not the right; it is self-imposed, not law-imposed.

In the case at bar "false statements, pretenses and misrepresentations" were not claimed or referred to in the plaintiff's specification and could not properly be shown in evidence. It was unnecessary therefore to consider the motion.

On exceptions and general motion for new trial by defendant. An action of assumpsit for money had and received. The writ contained the ordinary declaration for money had and received and in addition there was annexed the usual money or omnibus count with specification. To the admission of testimony introduced by the plaintiff to prove fraud, the defendant excepted on the ground that no intimation of fraud was set out in the plaintiff's specification. The jury found for the plaintiff in the sum of $516.66 and the defendant filed a general motion for new trial. Exceptions sustained.

The case is fully stated in the opinion.

Buzzell & Thornton, for plaintiff.

Harvey D. Eaton,

McLean, Fogg & Southard, for defendant.

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

DEASY, J. Action of assumpsit for money had and received. The following specification of claim was filed.

"SPECIFICATION:—Under this count the Plaintiff will prove that the above sum of six hundred and fifty dollars was paid by the Plaintiff, John F. Carey, to Charles R. Penney, the Defendant, or to his agent, Roy C. Fish, as the first payment under a contract for the purchase of the farm and other property by the said John F. Carey, which contract the said Charles R. Penney has not carried out, or completed."

The plaintiff offered evidence to prove "false statements and pretences and misrepresentations made to the plaintiff, by one Roy C. Fish an agent of the Strout Farm Company which company had been employed by Mr. Penney to negotiate the contract for sale of the farm in question." This testimony was admitted subject to the defendant's objection and exception.

Verdict for plaintiff.

An action for money had and received is equitable in its nature and lies to recover any money in the hands or possession of the defendant which in equity and good conscience belongs to the plaintiff. *Fletcher* v. *Belfast*, 77 Me., 334; *Pease* v. *Bamford*, 96 Me., 23; *Dresser* v. *Kronberg*, 108 Me., 423; *Dow* v. *Bradley*, 110 Me., 249.

But the plaintiff "is limited in his proof to the specification of his claim." *Sereto* v. *Railway*, 101 Me., 143.

"The claim of the plaintiff is restricted and his right to recover limited by his specification." *Carson* v. *Calhoun*, 101 Me., 456; *Brown* v. *Rouillard*, 117 Me., 56.

"It gives notice of the claims which plaintiff proposed to litigate and limits him to the items of the bill (specification) unless leave of court is obtained to add to them." 5 C. J. 1402.

A count in ordinary form alleging a promise in consideration of money had and received is demurrer-proof though no specification is filed. If a specification is filed, whether by direction of court or without such direction, proof is limited by it.

This is the very purpose of a specification. It gives the de-

fendant information of what charges he must be prepared to meet.

The limitation is in the pleading, not in the rule; it affects the procedure, not the right; it is self-imposed, not law-imposed.

In the present case, "false statements, pretences and misrepresentations" not having been claimed or referred to in the specification could not properly be shown in evidence. It is unnecessary to consider the motion.

Exception sustained.

PORTLAND MORRIS PLAN BANK

vs.

OSCAR H. WINCKLER ET AL.

Cumberland. Opinion Sept. 19, 1928.

AGENCY. BANKS AND BANKING. NEGOTIABLE INSTRUMENTS ACT. EQUITY. FRAUD. BURDEN OF PROOF.

A cashier or treasurer of a bank is a general agent of the bank for the performance of his official and accustomed duties. While acting within the scope of this authority he will bind the bank.

A statement made by him to one about to endorse a renewal note held by the bank that the bank holds collateral for the renewal note is admissible.

A party is not precluded from introducing testimony of other allegations made at the time, than those contained in the written contract, for the purpose of proving fraud.

To prove fraud, alleged false statements of the cashier or treasurer, known to be false, and upon the truth of which the signer of the note relied and was induced to sign, are admissable and do not violate the parol evidence rule.

While a payee of a note may be a "holder in due course" the bank here was an "immediate party."

Under the Negotiable Instruments Law the burden of proof is upon one seeking to establish fraud. He must establish it by clear and convincing proof. Where the evidence is loose, equivocal or contradictory, or in its texture open

to doubt or opposing presumption the burden is not sustained. This rule is especially enforced where the oral evidence comes mainly from the parties to the suit.

In the case at bar the defendant Hackenberg's testimony was not corroborated in any particular. He understood what his liability as accommodation signer was. It did not appear in evidence that he ever objected to the payment of the note in suit because of fraud, or except on the witness stand repeated the alleged statements on which he relied to prove fraud.

Not only was the evidence of fraud not clear and convincing, but it preponderates against the finding of the jury. The jury misunderstood or did not adequately comprehend the degree of proof necessary and so erred.

On exceptions and general motion for new trial by plaintiff. An action of assumpsit to recover on a promissory note. The defendants, Pauline A. Winckler and Oscar H. Winckler defaulted, and the defendant Jacob L. Hackenberg contested the payment of the note on the ground that the note was obtained from him by fraud on the part of the then Treasurer of the Portland Morris Plan Bank. The case was submitted to the jury by the presiding Judge solely on the question of fraud in the inception of the note. To the admission of certain testimony the plaintiff excepted, and after the jury had returned the verdict for the defendant, filed a motion for new trial on the usual grounds.

Exceptions overruled. Motion sustained.

The case fully appears in the opinion.

Jacob H. Berman,
Edward L. Berman,
Benjamin L. Berman, for plaintiff.
Albert E. Anderson, for defendant.

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

BASSETT, J. This is an action of assumpsit by the payee to recover on a joint and several promissory note for $600, dated December 18, 1923, payable nine weeks after date, against the makers, Pauline A. and her husband, Oscar H. Winckler and Jacob L. Hackenberg, who signed for the accommodation of the Wincklers. They were defaulted. Hackenberg pleaded the general issue with brief statement that the note was obtained from him by the payee

by fraud. Verdict for the defendant. The case comes up to this court on exceptions and general motion.

EXCEPTIONS.

The note was given in renewal of an overdue note for the same amount, dated July 24, 1923, payable in three months, signed by the Wincklers and one Oerter for their accommodation.

The note, one of the plaintiff's regular forms, was made out at the plaintiff's office by its treasurer Holden, handed for the purpose of obtaining co-makers to Mr. Winckler who took it to Hackenberg. It was brought back to the bank by Winckler and the renewed note delivered to him.

Hackenberg testified that, when the note was brought to him by Winckler, he refused to sign until he had talked with Holden and immediately called him on the phone. Against the objections of the plaintiff, he was permitted to testify that Holden told him that the bank had security in its possession to cover the note, that as a result of this statement of the treasurer he signed the note, and that he relied upon the statement.

The exceptions before us are those taken to the admission of this evidence.

The plaintiff's objections were two. First, the treasurer did not have any authority to state that the bank held collateral to cover the note.

We think the point is not well taken.

The by-laws of the bank provided that the duties of the treasurer were the signing of checks, signing of notes in the event of borrowing from the bank, acting in the capacity of manager, signing certificates of deposit for funds left with the bank, signing certificates of stock, paying out on loans of the bank after approval by the board or its delegated committees, acting as custodian of the bank's funds and custodian of the bank's collateral.

"When a bank presents its cashier as habitually performing certain acts or duties that may be regarded as official duties, and for the performance of them, he may be regarded as its general agent. He cannot be regarded as a general agent for the transaction of all business of the bank. - - - - A cashier, it is well known, is allowed to present himself to the public, as habitually accus-

tomed, - - - - to receive payment for bills of exchange, notes and other debts due to the bank. - -- - - His true position appears to be, that of a general agent for the performance of his official and accustomed duties. While acting within the scope of this authority he would bind the bank." *Franklin Bank* v. *Steward*, 37 Me., 519, 522.

"In short he is considered the executive officer through whom and by whom the whole moneyed operations of the bank in paying or receiving debts or discharging or transferring securities are to be conducted." *Fleckner* v. *Bank of U. S.*, 8 Wheaton, 338.

Applications to the plaintiff for loans were received by one of its clerks, the assistant treasurer, or treasurer, checked up for purposes of information, turned over to the treasurer, and by him taken up with the loan committee, of which he was a member, for its approval or disapproval.

The treasurer was, by virtue of his office, custodian of the overdue note and, both by virtue of his office and by provision of the by-laws, custodian of any collateral for it. He had by virtue of his office the duty to obtain payment of notes. This note was in effect to be renewed but with a change in the accommodating signer. He had drawn the renewal note and given it to one of the makers to procure co-makers. When so signed, he was to present it to the loan committee. The overdue note and the renewal note were, at the time of the alleged telephone conversation, a present, pending, not a past, transaction. *Franklin Bank* v. *Steward*, supra; *Central Bank* v. *Allen*, 16 Me., 41, 44. He had full knowledge of the facts connected with the transaction. He was the proper person to apply to for the information which, it was claimed, he was asked for by one who was to be a co-maker. His answer was the answer of the bank.

"Whatever an agent does or says in reference to the business in which he is at the time employed and within the scope of his authority is done and said by the principal." *American Fur Company* v. *United States*, 2 Peters, 364; *Franklin Bank* v. *Steward*, supra, at page 526.

His statement that there was collateral to cover the renewal note was on the point of his authority admissible.

Second, the statement was parol evidence varying the terms of a written contract.

The note read in part, "there having been deposited herewith as collateral security Installment Certificate of said Bank No. . . . and - - - -." This the plaintiff claims was equivalent to its expressly stating there was no collateral. There was admittedly no collateral.

We think this point was not well taken. The issue raised by the pleading and sent to the jury was fraud; viz., that the defendant was induced to sign the note because of fraudulent misrepresentations of the plaintiff.

The defendant claimed that the plaintiff by its treasurer made an affirmative statement that it held collateral security to cover the note to be signed, which statement was untrue and known by the plaintiff to be untrue and upon the truth of which he relied and which induced him to sign.

If these elements of fraudulent misrepresentation were proved, the defense of fraud was established. One of the elements was the statement of fact.

There is a distinction between mere promises and statements of a bank cashier that the bank would release a surety or no longer look to him for the payment as being a void contract and representations of fact made by such cashier which induces another who had a right to rely thereon to do or omit to do something to his injury; i.e., between contract, and estoppel or fraud. *Cochecho Bank* v. *Haskell*, 51 N. H., 116, 123 (which case held contra to *Franklin Bank* v. *Steward*, supra, as to the authority of the cashier); *Bank of Neelyville* v. *Lee*, 196 S. W., 43 (Mo. App.); *Bank of U. S.* v. *Dunn*, 6 Peters, 20, 23; *Hill* v. *Ely*, 5 Serg. & Rawle, 363, 9 Am. Dec., 376; *Cherokee County et al* v. *Meroney et al*, 92 S. E., 616, 617 (N. C.); *Barnstable Savings Bank* v. *Ballou*, 119 Mass., 487, in which case the defendant disclaimed fraud.

A party is not precluded from introducing testimony of other allegations made at the time than those contained in the written contract for the purpose of proving fraud. *Prentiss* v. *Russ*, 16 Me., 32; *Neal* v. *Flint*, 88 Me., 83; *Marston* v. *Kennebec etc. Ins. Co.*, 89 Me., 272.

The alleged statement of the treasurer was, on the point of the parol evidence rule, admissible.

Nor was the plaintiff, as contended by it, a "holder in due course." While a payee may be a holder in due course, the plaintiff was an "immediate party." *Liberty Trust Company* v. *Tilton*, 217 Mass., 462; *National Investment and Security Company* v. *Corey*, 222 Mass., 453, 455.

MOTION.

The defendant had the burden of proof of, that is the burden of establishing, fraud. Brennan's Negotiable Instrument Law, 3rd Ed., 217; *Harvey* v. *Squire*, 217 Mass., 413.

And to establish it by clear and convincing proof. *Strout* v. *Lewis*, 104 Me., 65; *Bixler* v. *Wright*, 116 Me., 133.

"In effect the proceeding here involved the reforming of a written contract on the ground of fraud and the law is well settled that to enable a court in equity to exercise this power proof of the fraud must be full, clear and decisive and relief will not be granted where the evidence is loose, equivocal or contradictory or in its texture open to doubt or opposing presumptions. - - - - This rule is especially enforced where the oral evidence comes mainly from the parties to the suit." *Strout* v. *Lewis*, supra.

We do not think the defendant's proof in this case meets the requirements of the rule.

Hackenberg, in addition to his testimony that Holden told him over the phone that the bank had collateral to cover the note, testified that Holden at the same time, and again on the following day on the street near the bank, told him that three signatures were required but only as a matter of form "to get by the bank inspectors and the directors of the bank" and the bank would not hold him liable on his endorsement. Whether or not Holden would be authorized to make these last statements by virtue of his general authority as treasurer and without proof of actual authority, *Bank* v. *Haskell*, supra; *Davis* v. *Randall*, 115 Mass., 547, 551; *First Natl. Bank of Lumberton* v. *Lennon*, 85 S. E., 715 (N. C.), is not before us, for the question of the admissibility of the testimony was not raised.

Holden denied that Hackenberg talked with him over the phone

or that he ever made the alleged statements to Hackenberg.

Hackenberg's testimony was not corroborated in any particular. Hackenberg admitted that he understood what his liability as an accommodation signer was, that he knew a note had to be approved by the directors or the loan committee of the bank and by the State Bank Examiner. Holden had explained to him how loans were obtained from the bank. He had signed as accommodation co-maker at least three notes prior to the note in suit, one of which was for the Wincklers, dated February 25, 1923, on which a balance was due and paid by Hackenberg on September 2, 1924.

It did not appear that Hackenberg ever objected to the payment of the note in suit because of fraud or that he ever, except on the witness stand, referred to or repeated the alleged statements of Holden on which he relied to prove fraud, although there were several occasions when it would have been naturally and reasonably expected of him.

Nor does any reasonable or sufficient motive appear for Holden's trying to obtain the defendant's signature. The bank held Winckler's note, approved by the directors, with an endorser. Winckler, not Holden, was interested in getting any renewal note. Under the rules of the bank, co-makers were not required if there was collateral. If there had been collateral, it is not reasonable to believe that Holden would require Winckler to get co-makers also. If there was no collateral, it is not reasonable to believe Holden would falsely, for he must have known, state there was collateral to get one accommodation endorser in the place of another, and in addition state that three signers were a matter of form and give assurance that the bank would never enforce payment of Hackenberg.

Not only is the evidence of fraud not clear and convincing, but we think it preponderates against the finding of the jury. From a careful examination of the entire evidence, it appears that the jury must have misunderstood, or did not adequately comprehend, the degree of proof necessary and so erred.

The entry therefore must be

Exceptions overruled.
Motion sustained.

STATE

vs.

CARMINE F. RUSSO.

Cumberland. Opinion Sept. 21, 1928.

CRIMINAL LAW. LARCENY. POSSESSION. PRESUMPTIONS.

In prosecutions for larceny, where the goods are proven to have been stolen, it is a rule of law that possession by the accused, soon after they were stolen, raises a reasonable presumption of guilt and unless the accused can account for that possession consistently with his innocence, will warrant his conviction, altho such evidence is by no means conclusive.

Possession is not limited to actual custody about the person. It may be of things elsewhere but under the control of the person. It may be in any place where it is manifest that it must have been put by the act of the party or with his undoubted concurrence.

In the case at bar the respondent was not aggrieved by the failure of the presiding Judge to comment on the proposition that the length of time between the larceny and the finding of the stolen goods is a matter of importance in deciding how much weight to attach to the unexplained possession of stolen goods by the respondents, when the evidence is that but two weeks had elapsed between the two events. Such comment could not possibly have been of aid to the respondent. It might well have been detrimental to him.

An indictment for breaking and entering in the night time and larceny of a pair of barber's clippers.

The elements of breaking and entering were nol prossed before verdict and the respondent was found guilty of larceny. The State submitted the evidence of two witnesses and rested its case.

The respondent's council offered no evidence but submitted a written motion for a directed verdict. To its denial by the presiding Judge exception was seasonably taken. To certain instructions given by the presiding Judge exceptions were likewise seasonably taken. Exceptions overruled. Judgment for the State.

The case is fully stated in the opinion.
Ralph M. Ingalls, County Attorney,
Franz U. Burkett, Assistant County Attorney, for the State.
Henry C. Sullivan, for respondent.

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

PATTANGALL, J. On exceptions. Respondent was indicted and arraigned on a charge of breaking and entering in the night-time and larceny. He plead not guilty. Trial followed and, after a nolle prosequi had been entered as to the breaking and entering, was found guilty of larceny.

At the close of the State's case, respondent waived his right to introduce evidence and moved for a directed verdict. The motion was denied and exceptions taken. Exceptions were also taken to certain instructions given to the jury.

Respondent was accused of having stolen electric clippers from a barber shop. The clippers were hanging, in their usual place, on the wall, when the shop was locked at night and in the morning were missing. There was nothing to indicate the manner in which the building had been entered and the proprietor had never seen respondent until they met at the police station some two weeks after the clippers were taken.

A police inspector, having been notified of the theft, interviewed respondent who, after some questioning on the officer's part, asked what would happen if the clippers were returned. Following this conversation, respondent returned to his house accompanied by the inspector and another officer, walked down the cellar stairs, nearly to the last step, reached up under some part of the floor, pulled out the clippers wrapped in a newspaper and gave them to the inspector.

On these facts, uncontroverted and unexplained, the presiding justice very properly submitted the case to the jury. The motion for a directed verdict was rightfully denied.

"In prosecutions for larceny, where the goods are proved to have been stolen, it is a rule of law, that possession by the accused, soon after they were stolen, raises a reasonable presumption of

guilt and unless the accused can account for that possession consistently with his innocence, will warrant his conviction. Such evidence is by no means conclusive and it is stronger or weaker as the possession is more or less recent." *State* v. *Merrick*, 19 Me., 400; *Beloit* v. *State*, 36 Miss., 96; *Garcia* v. *State*, 26 Texas, 209, 17 R. C. L., 72. Possession is not limited to actual custody about the person. It may be of things elsewhere but under the control of the person. It may be in any place where it is manifest that it must have been put by the act of the party or his undoubted concurrence. *State* v. *Johnson* (N. C.), 86 Am. Dec., 434, and authorities cited.

The instructions given to the jury were based upon the foregoing. Respondent insists that he was aggrieved in that, in stating the law, no reference was made to the importance of the element of the length of time which elapsed between the theft and the finding of the stolen goods. It is true, as stated above, that the more recent the finding the stronger the presumption but it is difficult to perceive how the respondent could be aggrieved by failure to emphasize that phase of the law when but two weeks had intervened between the theft and the discovery of the goods in respondent's possession. The time was fixed. It was obviously recent. The less said about it the better if respondent desired to escape punishment for the offence which the evidence submitted sufficiently proved him to have committed.

Exceptions overruled.

MARY M. COLE *vs.* ALEXANDER K. WILSON.

Knox. Opinion Sept. 21, 1928.

MOTOR VEHICLES. DUTY OF DRIVER ENCOUNTERING FOG, AND WHEN BLINDED BY LIGHTS. CONTRIBUTORY NEGLIGENCE. RIGHTS AND DUTIES OF PEDESTRIANS ON HIGHWAY.

A driver of an automobile, encountering a heavy fog, may proceed on his way, at reasonable speed and in the exercise of due care. He is not obliged to stop and wait for the fog to lift in order to escape the charge of negligence.

But the failure on the part of a driver of an automobile, blinded by the light from another vehicle so that he is unable to distinguish objects in front, to bring his car to a stop raises a prima facie presumption of negligence on his part.

Contributory negligence need not be specially plead unless the case falls within the provisions of Sec. 48, *Chap.* 87, *R. S.* 1916. *With that exception it is a proper defense under the general issue.*

Sidewalks are for the exclusive use of pedestrians but the remaining portion of the highway is not for the exclusive use of vehicles. In the absence of statutory or municipal regulations to the contrary, the pedestrian has equal rights on the street with the operator of an automobile.

A pedestrian proceeding longitudinally on the right hand side of the highway, on a dark foggy night and in a section where automobile traffic is considerable, must exercise vigilant watchfulness.

A pedestrian walking on the gravelled shoulder of the road, keeping watch of approaching and overtaking cars and stepping back on the grass to the edge of the deep ditch as such cars drew near, cannot be said, as a matter of law, to be guilty of contributory negligence, even though there was a sidewalk, which was passable, though uncomfortable, upon which she might have walked, and although the night was dark and foggy and automobiles passing frequently in both directions.

In the case at bar the question of due care on the part of the plaintiff was of fact and for the jury.

The verdict of $4,049 was not excessive in the case at bar where the plaintiff, a woman, fifty years of age sustained a fracture of both the right tibia and

fibula, about three inches below the knee; a fracture of the left fibula; torn ligaments at the ankle; a fractured finger and facial bruises and contusions.

On general motion for new trial by the defendant. An action on the case to recover for personal injuries sustained by the plaintiff, a pedestrian, by being struck by an automobile.

The jury rendered a verdict for the plaintiff in the sum of $4,049. A general motion for new trial was filed by the defendant. Motion overruled. The case appears fully in the opinion.

Charles T. Smalley, for plaintiff.

Allan L. Bird, for defendant.

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

PATTANGALL, J. On motion. Damages for personal injury sustained by pedestrian overtaken and struck by automobile. Verdict for plaintiff in the sum of $4,049.00.

Plaintiff, accompanied by four grandchildren, was walking toward her home about 10.00 p.m. on a dark, foggy July night. For a portion of the way they walked on the sidewalk which they finally deserted on account of its condition, and were walking in the highway at the time of the injury. Three of the grandchildren preceded the plaintiff, one followed her, all walking in single file.

The highway was of concrete, twenty feet in width, with shoulders of gravel about three feet wide, along the edge of which was a narrow strip of grass and beyond the grass a deep ditch.

The sidewalk was built of crushed limestone and is described as being muddy, wet and soft in places, and in part composed of fine chips and rocks, uncomfortable to walk upon and not generally used at the time of the injury, although it had been, to some extent, repaired during the previous month.

The testimony was conflicting as to just where, on the highway, plaintiff and the children were walking, but it was in evidence that they proceeded along the gravelled shoulder on the right hand side of the road, and plaintiff testified that just previous to being struck by defendant's car, she had stepped back on to the grass to the very edge of the road.

Defendant was driving toward his home when he overtook plaintiff. There was considerable traffic on the highway at the time, cars moving in both directions and the roadway was used by pedestrians. Defendant was proceeding at a moderate rate of speed, his lights and brakes in good order.

Shortly before the occurrence which is the subject of complaint, he had passed a car going in like direction and in doing so had temporarily driven to the left side of the way but immediately resumed his proper place on the extreme right. The lights from the car which he had passed shone through the rear window of his car and, combined with the lights of two approaching cars, blinded him. Also the fog had dampened his windshield and thereby somewhat obscured his vision.

He summarized the situation in these words: "Lights coming in the rear and front blinded me so that I couldn't see very well and the windshield was covered with water and I began to slow my car up all I could and reached for my windshield wiper so I could see better, and as I did so I struck some object. I didn't know what it was. I heard someone scream. I applied my brakes and stopped my car in about twenty feet. If it had not been for the lights, I could see fairly well to follow the other cars along through that space."

It would appear then that had it not been for the glare of the lights in front and rear, defendant would probably have seen plaintiff, in spite of the darkness and fog, in time to have avoided the accident, either by stopping his car or by swerving slightly to the left.

Under these circumstances, the jury was justified in finding him guilty of negligence in not stopping his car. Not on account of the fog. "The driver of an automobile encountering a heavy fog while on his way home may proceed at a reasonable speed and is not obliged to stop and wait for the fog to lift in order to escape a charge of negligence. He must, however, exercise a degree of care consistent with the existing conditions." *Johnson* v. *State of New York*, 104 Misc., N. Y., 403. But because of the blinding glare of the lights. "If the operator of a machine is blinded by the light from another vehicle so that he is unable to distinguish an object in front, reasonable care requires that he bring his vehicle to a

stop and a failure to do so justifies a charge of negligence." *O'Bierne* v. *Stafford* (Conn.), 87 Atl., 743; *Jacquith* v. *Worden* (Wash.), 132 Pac., 33; *Buzick* v. *Todman* (Iowa), 162 N. W., 259; *Jolman* v. *Alberts* (Mich.), 158 N. W., 170; *Hammond* v. *Morrison* (N. J.), 100 Atl., 154; *Topper* v. *Maple* (Iowa), 165 N. W., 28; *Woodhead* v. *Wilkinson* (Calif.), 185 Pac., 851.

It is possible, of course, to conceive of circumstances, such as the too close proximity of a car in the immediate rear of the confused driver, which might excuse him from making an abrupt and immediate stop. There is no evidence of such a situation here, and, should such an excuse be offered, its validity and weight would be for the jury.

The defendant, in his pleadings, set up the defense of contributory negligence. There is no occasion, in this state, to plead that defense specially, during the lifetime of the plaintiff. Due care is a matter of affirmative proof on plaintiff's part unless the case falls within the scope of Sec. 48, Chap. 87, R. S. 1916. The law is otherwise in certain jurisdictions. By Chap. 553, Mass. St. 1914, a plaintiff is presumed to have been in due care. Not so in Maine. The burden of proof, on this issue, was on plaintiff. The jury found that she sustained the burden. The question was of fact. The evidence warranted the finding. It cannot be said, as a matter of law, that a pedestrian is necessarily guilty of negligence in leaving the sidewalk to walk along the highway. This is true although the sidewalk may not be impassable. *Booth* v. *Meagher*, 224 Mass., 472; *Blackwell* v. *Renwick* (Calif.), 131 Pac., 94; *Meras* v. *McElfish* (Md.), 114 Atl., 701; *Petrie* v. *E. A. Myers Co.* (Pa.), 112 Atl., 240; *Mauchler* v. *Panama-Pacific International Exposition Co.* (Calif.), 174 Pac., 400; *Devcchio* v. *Ricketts et al* (Calif.), 226 Pac., 11.

Sidewalks are for the exclusive use of pedestrians but the remaining portion of the highway is not for the exclusive use of vehicles. In the absence of statutory or municipal regulations affecting the question, the pedestrian has equal rights in the street with the operator of an automobile. *Lane* v. *Sargent*, 217 Fed., 237; *Emery* v. *Miller*, 231 Mass., 243; *Aiken* v. *Metcalf*, 90 Vt., 196.

True, the night in question was dark, there was a thick fog, automobiles were moving in both directions under conditions which

made it difficult for careful drivers to observe and protect pedestrians. If plaintiff was to walk on the highway, it would have been much safer for her to have proceeded along the left side than the right, as she would then have had a better opportunity to observe approaching cars and would have been reasonably free from danger of injury from cars moving in the direction in which she was walking. If she saw fit to accept the obvious hazard of the highway, under these conditions, rather than suffer the discomfort of the sidewalk, due care required that she should be "most vigilant for her own safety." *Virgilio* v. *Walker et al* (Pa.), 98 Atl., 815.

There was evidence that she was vigilant. The testimony is that she walked on the gravel shoulder of the road; that as cars overtook her, revealed to her by their approaching lights, she stepped back on the grass, to the edge of the road, prevented from going further by the deep ditch and that she pursued this course of conduct as defendant's car approached. There was testimony tending to prove that she was on the concrete portion of the road when struck. But the jurors were the judges of the credibility of the witnesses and there is nothing inherently improbable in the relation of the events which was accepted by them as correct.

The damages were not excessive. The tibia and fibula of the right leg were both fractured about three inches below the knee. The fibula of the left leg was fractured. The ligaments at the left ankle joint were torn. A finger of the left hand was fractured. There were contusions and abrasions about the face and hands. She was five months in the hospital. Her physician's bill was $600.00. A certain degree of permanent disability was predicted. At the time of the trial, some nine months after receiving her injuries, she was lame and was still undergoing treatment by both doctors and nurses.

The verdict must stand.

Motion overruled.

ANNIE L. HART *vs.* A. V. ELMORE.

Knox. Opinion September 24, 1928.

MOTION FOR NEW TRIAL. FORM OF SAME.

One who moves the Law Court that a verdict be set aside, on the ground that being against the evidence, the verdict is contrary to law, is required by statute to supplement his motion by a report of the whole evidence.

Where, as in the case at bar, the case is submitted on less than a report of the whole evidence, there is no authority to consider the motion.

On general motion for new trial by the defendant. An action on the case to recover rent of furniture. Cause of action between the parties was first tried by referees who heard it under a count for work done and materials furnished, which declaration was followed by a specification alleging rental of furniture. The referees declined to receive evidence of rental of furniture under a count for materials furnished, but rendered judgment for $40.00 for work and materials furnished, and their report was accepted. Plaintiff did not ask to amend his declaration by inserting additional counts, either before the referees or the Court but took judgment on the award then made. After judgment was paid by the defendant in the first suit, plaintiff brought another suit for rental of furniture setting forth the same contract as in the first suit.

The jury found for the plaintiff in the sum of $267.72 and the defendant filed a general motion for new trial. Motion overruled. Judgment on the verdict.

Oscar H. Emery, for plaintiff.

Edward K. Gould, for defendant.

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

DUNN, J. The brief of counsel for the defendant discusses that the verdict, adverse to his client, is obviously wrong.

Discussion proceeds along the line that the issues in a former and the present action between the same parties are in a legal sense the same.

One who moves this Court that a verdict be set aside, on the ground that, being against evidence, the verdict is contrary to law, is required by statute to supplement his motion by a report of the whole evidence. R. S., Chap. 87, Sec. 57, as amended by 1925 Laws, Chap. 170.

The report of the evidence in this case contains a copy of the declaration in the writ, of the defendant's pleadings, and a transcript of the testimony. The former action, which was referred under a rule to referees, whose finding has been accepted, has mention in the testimony. The docket entries appear there also. But copies of the writ, the declaration, the plea, and the referee's report in that action, all which were admitted into the evidence at the jury trial of this action, are not in the report of the evidence.

In his brief statement, defendant sets up with particularity the already satisfied judgment, but the brief statement is not evidence.

On cross-examination plaintiff testified that she recovered a judgment against the defendant, and that the judgment had been satisfied. This avails nothing. The testimony does not reach to identity of issues.

Where, as here, the case is submitted on less than a report of the whole evidence, there is no authority to consider the motion. *Rogers* v. *Kennebec, etc., Company,* 38 Maine, 227; *Bradbury* v. *Saco, etc., Company,* 41 Maine, 155.

The mandate must be:

Motion overruled.
Judgment on the verdict.

MAUD E. FISH *vs.* RALPH A. NORTON.

Washington. Opinion September 24, 1928.

JURY FINDING, WHEN SET ASIDE. NEW TRIAL, WHEN GRANTED.

A verdict so manifestly, palpably, glaringly against the evidence as plainly to denote that the jury misunderstood the testimony, upon a material issue, necessarily relied upon or that the jury disregarded such testimony or where there is ground for suspicion that prejudice, passion or some improper motive influenced the conclusion of the panel, or where the surrounding circumstances make the testimony of a witness, as to matters validly admissible to prove one side or the other of the issue, and accepted for that purpose of such great improbability as to merit but disapproval, a new trial may and ought to be granted.

In the case at bar the story told by the plaintiff was so contrary to probabilities, so inconsistent with circumstances, so unreasonable, that justice required that it be disregarded.

On general motion for new trial by defendant. An action of trespass for assault by defendant upon the person of the plaintiff in an aggravated, insulting and indecent manner in attempt to have with her improper criminal relations. The jury rendered a verdict for the plaintiff in the sum of $1683.50. The defendant filed a general motion for new trial. Motion sustained. Verdict set aside. New trial granted.

The case sufficiently appears in the opinion.

Hubert E. Saunders, for plaintiff.

Oscar J. Dunbar, Herbert J. Dudley, for defendant.

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

DUNN, J. In this civil action for damages from an assault with intent to ravish, the plaintiff has the verdict, and defendant urges his general motion for a new trial.

There are two counts in the declaration in the writ. The first

alleges the trespass on the twenty-third day of May, 1927; the second, on the second day of May, 1927, and "continually thereafterwards on each and every day until the twenty-third day" of the same May.

Numerous executed individual assaults are laid by the declaration; one on May 23, 1927. In the next count plaintiff charges, in effect, that the defendant committed different assaults on the different days from and including the second day of May until the twenty-third day of that month, i.e., exclusive of the day last mentioned and inclusive of the day immediately before.

Taken inversely, the counts in the declaration set out the contentions of the plaintiff according to the order of time.

The plea is the general issue. The verdict is general with an award of damages in the sum of $1683.50.

Plaintiff is thirty-four years of age. She lives in a house twenty feet back from a principal street in the village of Columbia Falls. Defendant is fifty years old.

At five different times, all in May, 1927, and prior to the twenty-third day, on the testimony of the plaintiff, the defendant proposed that there be liaison between them. The first two proposals were in the defendant's store, the next two in the plaintiff's house, and, of the five, the last was in her dooryard.

Concerning the third proposal — the first in the house of the plaintiff — and concerning it alone, is there testimony of an overt act; the act testified to being injuries to an arm and side. Little is necessary to be said of the testimony, given solely by the plaintiff, tending to support this single instance of the many which the count alleges. If the jury gave full credence and weight to the testimony, then the testimony does not reasonably justify the award of damages, even conceding punitive damages justifiable.

As the record is, it seems consistent to recite, for the background it may afford the whole situation, that the first two proposals were received by the plaintiff in silent indifference. In declining that at the house, in connection with which proposal the physical injuries are sworn to have been done, plaintiff witnessed that she stated that her husband would be "in soon." On the occasion of the next proposal, she told the defendant that her husband was in the barn, and, on the occasion of the last of the five, she

pointed to her husband in a field across the street, where he was plowing.

On May 23, 1927, between three and four o'clock in the afternoon, so the testimony of the plaintiff continues, when only she and her three-year-old child were in the house, defendant came there; on being told that the husband was not at home, defendant seized plaintiff by the arms, pushed her against the couch, opened his clothing, placed her on the couch, disarranged her clothing, "and got on top of me"; not however to the accomplishment of purpose, because of the opportune arrival of plaintiff's husband.

There is not in the evidence of the plaintiff the suggestion of effort at resistance, unless by implication from the use of the word "pushed." There is no mention of any outcry, till she was lying on the couch, with the defendant over her, when, plaintiff's version is, she screamed: "What do you think I am? Get out of here!" Just that, and nothing more. The plaintiff's husband was then in the kitchen — the room next to that in which the plaintiff was.

A verdict on a properly submitted issue should not be lightly set aside. *Sanford* v. *Kimball*, 106 Maine, 355. The case must be clear to vacate a jury verdict. But the constitutional assurance of trial by jury would lack in its guarantee were there not an authority, in a judge or in a bench of judges, to be exercised with caution and yet without uncertainty, to overturn a verdict (except on acquittal of a criminal charge), if the verdict be contrary to law or against evidence. *Capital Traction Co.* v. *Hoff*, 174 U. S., 1, 43 Law Ed., 873.

It is out of the question to lay down a hard and fast rule by which to determine whether a verdict should be set aside as against the evidence. The general rule is that if the verdict is so manifestly, palpably, glaringly against the evidence in the particular case as plainly to denote that the jury misunderstood the testimony, upon a material issue, necessarily relied upon, or that the jury disregarded such testimony, or where there is ground for the suspicion that prejudice, passion, or some improper motive influenced the conclusion of the panel, or where the surrounding circumstances make the testimony of a witness, as to matters validly admissible to prove one side or the other of the issue, and accepted for that purpose, of such great improbability as to merit but dis-

approval, a new trial may and ought to be granted. *Googins* v. *Gilmore*, 47 Maine, 9; *Butler* v. *Rockland, etc., Railway*, 99 Maine, 149, 153; *Jacobs* v. *Bangor*, 16 Maine, 187; *Phillips* v. *Laughlin*, 99 Maine, 26; *Blumenthal* v. *Boston & Maine Railroad*, 97 Maine, 255, 261; *Garmong* v. *Henderson*, 114 Maine, 75. Believability and credibility may be strained till they snap.

The story by this plaintiff, not yet herein fully told, is so contrary to probabilities, so inconsistent with circumstances, so unreasonable, that justice requires that it be disregarded.

Five times already, so the case shows, had there been made known to the plaintiff by this defendant, his sensual desire. She heard the defendant when he drove into her yard on May 23rd. Plaintiff and defendant met in the kitchen, she apparently coming to that room from another room in her house. He asked if her husband was at home. She answered, "No." Then she "stepped through the door to lay the magazine on the table." True, she gives testimony, her idea was to escape out of the house, but defendant "grabbed me by both arms, . . . pushed me back toward the couch, . . ." and other details. No evidence was adduced, as has been noted before, that she offered resistance. And, till she and the defendant were in compromising position on the couch and her husband in the kitchen, she did not speak, except when she said her husband was away from home.

The husband had left home, after dinner on that day, to repair the roof on the house of a neighbor. On the way, finding his heifer out, he got the creature into the pasture and fixed the fence. When this was done, it was three o'clock, and the husband started back home, not by retracing his steps on the public road, but across lots.

The husband did not come directly into the room where his wife was; he came into the barn, from barn to shed, through the shed, through the old kitchen, and thence into the kitchen proper. It is significant, especially in the absence of any offer of explanation by the plaintiff, that the presence of the husband in the kitchen and the outcry heard by the husband, "Ralph Norton, get out of here!" were coincidental.

Let the motion be sustained.
Verdict set aside.
New trial granted.

STATE *vs.* ALFRED BELANGER.

York. Opinion September 24, 1928.

CRIMINAL LAW. BILL OF EXCEPTIONS.

A printed copy of testimony and of the Judge's charge, which are not made a part of a bill of exceptions, though presented with it, do not form grounds for sustaining a bill of exceptions. The bill itself must contain sufficient to show that the excepting party was aggrieved. The Law Court can not consider matters outside of the bill.

On exceptions. The respondent was tried upon the charge of knowingly transporting liquor from place to place within the State, without a federal permit.

After the State had rested its case the respondent filed a written motion for a directed verdict in his favor. To the refusal of the presiding Justice to grant such motion exception was seasonably taken. Exception was also taken to portions of the charge. Exceptions overruled. Judgment for the State.

The case appears sufficiently in the opinion.

Perley H. Ford, County Attorney for the State.

Henry Cleaves Sullivan, for respondent.

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

WILSON, C. J. The respondent was tried on a complaint for transporting intoxicating liquors without a federal permit and found guilty. At the close of the state's testimony without offering any evidence in defense the respondent moved that the jury be directed to bring in a verdict of not guilty, which motion was denied and exceptions taken.

Counsel for respondent also took exceptions to certain portions of the charge of the presiding justice. He presents a bill of exceptions to this Court, setting forth the fact that exceptions were taken and referring to the transcript of the charge and the evi-

dence for the basis of the exceptions, which are not made a part of the bill of exceptions, though presented with it.

The essential requirements of a bill of exceptions have been so often pointed out by this Court that it appears to have become a case of wasted effort to further stress them. At least it must in itself show in what respect the excepting party was aggrieved. *Jones* v. *Jones*, 101 Me., 447, 451.

This case requires no further consideration than to say that neither the bill of exceptions nor the record presented, if made a part, discloses that the respondent was aggrieved by the rulings of the Court. There was abundant evidence from which, unexplained, a jury might infer guilty knowledge which was the only issue involved. There was no error of law in the parts of the Judge's charge to which counsel objected.

Exceptions overruled.
Judgment for the state.

NELLIE A. GATCHELL *vs.* EVERETT R. GATCHELL ET AL.

Kennebec. Opinion September 25, 1928.

EQUITY. FINDINGS OF FACT. FRAUD. DEEDS. DELIVERY. RECORDING. TITLE BY DESCENT. R. S., CHAP. 78, SEC. 14. R. S., CHAP. 80, SEC. 1.

In causes under equity jurisdiction upon the issue of fraud the evidence must be clear and convincing, precise and indubitable.

The finding of fact by a sitting Justice in an equity cause has the force of a jury verdict in that it may not be disturbed unless clearly wrong.

Delivery of a deed occurs at the moment when the deed is in the hands of the grantee, or in the hands of some person eligible to have it for him, with the consent of the grantor, and beyond his control, with intent on the part of the grantor that the deed should operate and inure as a muniment of title to the grantee.

Possession and production of a deed by the grantee is prima facie evidence of its having been delivered; the date stated in the deed is prima facie evidence as to when it was delivered.

Reservation by the grantor of use of the property for a period of time is not inconsistent with the vesting of title in the grantee.

In the case at bar the fact that the widow had no knowledge of the deed until after the death of her husband had no effect on the passing of title. Want of record of the deed did not reinvest seizin in her husband. As the estate by descent which a widow takes arises only on the title her husband had, based on his seizin during the marital relation, and cannot rise higher or be more extensive, in the absence of proof of a concurrence of seizin in the husband and coverture, the ruling that the complainant had not taken an estate by descent, was correct.

On appeal. A bill in equity seeking partition of the homestead farm of Geo. H. Gatchell deceased, brought by the widow and involving the validity of a certain deed of the farm alleged to have been executed by the said Geo. H. Gatchell on October 1, 1918.

The complainant who was married to Geo. H. Gatchell six weeks after the date of the deed alleged that the transaction of the deed was not in good faith but was a fraud upon her, that the deed was never properly delivered, and that, being unrecorded, was ineffectual as against her.

Upon hearing, the sitting Justice found for the defendants and dismissed the bill.

Complainant appealed. Appeal dismissed, decree below affirmed. The case fully appears in the opinion.

Locke, Perkins & Williamson, for plaintiff.

Gatchell & Lancaster, for defendants.

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

DUNN, J. The bill filed by this complainant, praying equitable partition of certain real estate in Monmouth, on the theory that an undivided third thereof had descended to her, was dismissed below. Appeal has brought the record up.

George H. Gatchell, whom the complainant married and whose widow she is, owned the premises in fee simple, prenuptially. On October 1, 1918, a matter of six weeks before his marriage, he

voluntarily conveyed, not all his real property, but this particular property, to his only two surviving sons by a former marriage; these sons being the respondents in this cause.

The deed was not recorded until December 30, 1925, shortly after the husband and the wife, who for several years next preceding had been living apart from each other, had entered into an agreement for her separate support; this about seven months before the husband died.

While the husband and the wife lived together, they lived on the premises in question, one of the sons living there too, apparently as one family, after the manner in which father and son had before the new wife came.

The complainant alleges in her bill that the transaction of the deed was not in good faith but a fraud upon her to deprive her of any inchoate interest by descent. Upon the issue of fraud the evidence must be clear and convincing, precise and indubitable. *Morneault* v. *Sanfacon*, 122 Maine, 76, 78.

The Justice who heard this case found it lacking in satisfactory evidence of fraud. The finding has the force of a jury verdict, in that it may not be disturbed unless clearly wrong. *Young* v. *Witham*, 75 Maine, 536; *Wilson* v. *Littlefield*, 119 Maine, 143. It is plain on the record that there is not enough evidence to overturn the finding.

Under appropriate allegations in her bill, which the answer denies, counsel for the complainant argues that she introduced believable evidence in preponderating degree sufficient to show that, if there ever were delivery of the deed, the delivery was subsequent to marriage, and in any case that want of seasonable record renders the conveyance, as to which she was not actually informed, ineffectual as to her; she being neither the heir nor the devisee of the grantor.

Delivery of a deed occurs at the moment when the deed is in the hands of the grantee, or, what in law is the very same thing, in the hands of some person eligible to have it for him, with the consent of the grantor, and beyond his control, with intent on the part of the grantor that the deed should operate and inure as a muniment of title to the grantee. *Brown* v. *Brown*, 66 Maine, 316. Whenever, by acts or words, or both acts and words, the grantor so

assents to the possession of the deed, then, and not until then, is delivery of the deed complete.

Aside from possession and production of the deed by the grantees, prima facie evidence of its having been delivered (*Patterson* v. *Snell*, 67 Maine, 559), and aside from the date of the deed, the date being prima facie evidence as to when the deed was delivered (*Sweetser* v. *Lowell*, 33 Maine, 446), the single Justice found the evidence to shed that light in which was seen no question as to the delivery of the deed to one of the grantees, for himself and for the other grantee, so that seizin passed to the grantees, the next day after the deed was signed and acknowledged, and therefore before the day of the marriage. That finding was abundantly warranted. The reservation to the grantor of the use of the granted premises for one year — that is, the control over the property, but not over the deed — was not inconsistent with the vesting of title in the grantees. *Watson* v. *Cressey*, 79 Maine, 381; *Hall* v. *Cressey*, 92 Maine, 514. That the grantor enjoyed the use for an even longer period does not appear to be of consequence. However he may have regarded his tenure, that mere fact alone cannot affect the validity of the title which had passed by the deed. *Givens* v. *Marbut*, 168 S. W., 614 (Mo.).

There is a statute to this effect:

> "No conveyance of an estate in fee simple . . . is effectual against any person, except the grantor, his heirs and devisees, and persons having actual notice thereof, unless the deed is recorded . . ." R. S., Chap. 78, Sec. 14.

A widow is not the heir of her deceased husband. *Golder* v. *Golder*, 95 Maine, 259; *McCarthy* v. *Welsh*, 123 Maine, 157, 161. This widow is not the devisee of her late husband; and her testimony that she never knew of the existence of the deed till her husband had died appears worthy acceptance.

The want of record of a deed does not render the instrument void. Want of record does not reinvest seizin in him who gave the deed. The statute invoked, which provides only that in certain instances the conveyance shall be ineffectual, does not avail the complainant. As it was with dower, so it is with the superseding estate by descent, there must have been seizen by the husband during coverture. R. S., Chap. 80, Sec. 1. The estate by descent

which a widow takes arises only on the title her husband had, based on his seizen during the marital relation, and cannot rise higher or be more extensive.

The delivery of the deed, although unrecorded, was sufficient to transfer seizen from him who later became the complainant's husband. In the absence of proof of a concurrence of seizin in the husband and coverture, the ruling that the complainant had not taken an estate by descent was correct. *Blood* v. *Blood*, 23 Pick., 80, 85; *Whithed* v. *Mallory*, 4 Cush., 138, 140.

The appeal is dismissed, and the decree below affirmed. An additional single bill of costs may be taxed.

So ordered.

CHARLES F. BOOBER *vs.* ALBERT A. TOWNE.

Oxford. Opinion September 29, 1928.

HIGHWAYS. EMINENT DOMAIN. DAMAGES.

When a way is laid out and established the land owner is entitled to just compensation for the rights in his land acquired by the public. These rights include not merely the use of a strip of land to be travelled over, but also the right to build the way and fit it for safe and convenient use, even though such acts are certain or probable or likely to cause a change or increase in the flow of surface water upon adjacent land to its injury.

In determining just compensation there are to be considered the damage suffered by the owner through the subjection of his land to such public rights, assuming their proper exercise, and on the other hand any special and particular benefits accruing thereto.

In the absence of evidence showing malice or negligence, a road builder acting under competent public authority is not liable for injuries to adjacent land in respect to which injuries the land owner or his predecessor in title at the time of the original taking had the opportunity by proper and seasonable procedure, to obtain compensation.

On exceptions. An action of trespass brought by the plaintiff for damages alleged to have been caused by the building of culverts on a state road job in the Town of Norway in July, 1926, whereby the natural flow of surface water upon his premises was greatly increased. At the conclusion of the jury trial, the court, on motion of the defendant, directed a verdict for the defendant, to which ruling the plaintiff excepted. Exceptions overruled.

The case sufficiently appears in the opinion.

Wilford G. Conary,

Benjamin W. Blanchard, for plaintiff.

Albert J. Stearns,

Harry Manser, for defendant.

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

DEASY, J. Action on the case for tort. Verdict directed for defendant. Plaintiff excepts.

In 1926 the public way bordering the plaintiff's premises in Norway was repaired and improved. As a result the amount of surface water flowing to and upon the said premises was increased and damage caused. The work upon the road was done by a crew in charge of the defendant under the general direction of W. P. Lynn representing the State Highway Department.

No complaint is made of any change of grade (R. S. Ch. 24, Sec. 84) nor of injury (other than through surface water flowage) of land outside the limits of the way, nor of any alteration or other disturbance of natural water courses.

The plaintiff does complain that the turning of water to and upon his land was, on the part of the defendant, done maliciously and negligently. No evidence is produced, however, to sustain either of these charges.

The record shows these facts: The defendant in repairing and reconstructing the highway, under competent public authority, proceeding in a manner not shown to be unreasonable or improper, brought about an increase in the flow of surface water to and upon the plaintiff's land causing injury thereto.

Upon this statement of facts the plaintiff is not entitled to recover.

Such damage was compensated for when the way was established or at all events the land owner had the opportunity, by proper and seasonable procedure, to obtain such compensation.

If it be said that he did not own, or may not have owned the land when the way was established, the obvious reply is that he acquired his land subject to all public rights.

When a way is laid out and established the land owner is entitled to just compensation for the rights in his land acquired by the public. These rights include not merely the use of a strip of land to be travelled over, but also the right to build the way and fit it for safe and convenient use, even though such acts are certain or probable or likely (112 Me., 322) to cause a change or increase in the flow of surface water upon adjacent land to its injury.

In determining just compensation there are to be considered the damage suffered by the owner through the subjection of his land to such public rights, assuming their proper exercise, and on the other hand any special and particular benefits accruing thereto.

Penley Complnt., 89 Me., 315; *Meacham* v. *R. R. Co.*, 4 Cush., 291; 10 R. C. L., 158.

By the declaration the defendant is charged with the commission of a tort. The evidence proves that his acts were in the exercise of a public right. Nothing in the case shows that such acts were negligent, or otherwise improper. No tort appears.

All of the authorities so far as we have observed are in harmony with this opinion.

"Where land is seized under the power of eminent domain, compensation is measured upon the theory that the officer representing the public may so prepare and maintain it that the public may safely and conveniently use it as a passage way."

Elliott on Roads and Streets, Pg. 556.

"If such a condition (increased flow of surface water) depreciates the value of the land below, the owner is entitled constitutionally to compensation therefor. And we think he must seek his compensation for this injury . . . in the condemnation proceedings or not at all." *Peaks* v. *Co. Comrs.*, 112 Me., 318.

"When a highway is laid out, compensation is allowed to the pro-

prietors of the land for all the damage it will occasion, both direct and incidental. When it exists as an ancient way the adjoining proprietors purchase their lands subject to the rights of the public. One of these rights is that of keeping the travelled path free from surface water." *Turner* v. *Dartmouth*, 13 Allen, 293.

Exceptions overruled.

HARRY S. COOMBS *vs.* HOWARD A. MACKLEY.

Androscoggin. Opinion October 8, 1928.

MOTOR VEHICLES. NEGLIGENCE. DUE CARE IN EMERGENCY. QUESTION OF FACT FOR JURY.

When a collision occurs between the vehicle of a person on the wrong side of the road and the vehicle of a person coming towards him, the presumption is that it was caused by the actionable fault of the person who was on the wrong side, but his presence on that side may be explained or justified.

When a person is required to act in an emergency and in a place of impending personal peril the law will not declare that reasonable care demands he must choose any particular one of the alternatives presented. Such is for the judgment of the jury.

Unless in extreme cases and where the facts are undisputed, which of two alternatives an intelligent and prudent person traveling the highway should select as a mode of escape from collision the law will not say, but will send to the jury the question whether the traveler acts with ordinary care.

A traveler is not necessarily guilty of negligence because he turns to the left in an attempt to avoid another vehicle approaching from the opposite direction on the wrong side, with which a collision is threatened, but whether negligence exists depends upon the particular nature of the case.

It is a question of fact for jury determination whether the conduct of the driver of a motor vehicle measures up to the standard of common caution for the driver of a motor vehicle under like conditions and circumstances.

The driver is exonerated if the course which he takes in an emergency is one which an intelligent and prudent man would take.

When the facts are such that reasonable men may fairly differ upon the question as to whether there was negligence or not the determination of the matter is for the jury.

In the case at bar the finding of the jury was not inconsistent with the evidence presented.

On motion for new trial by plaintiff. An action on the case to recover for personal injuries and property damage sustained by the plaintiff in collision between his automobile and that of the defendant, alleged by him to have been occasioned by the negligence of the defendant. Trial was had at the December Term, 1927, Androscoggin County, before the Superior Court with jury. The jury found for the defendant. Motion for new trial on the customary grounds was filed by the plaintiff. Motion overruled.

The case fully appears in the opinion.

George C. Webber, for plaintiff.

Reginald W. Harris,

Perkins & Weeks, for defendant.

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

DUNN, J. This case comes here on a general motion by the plaintiff. The action was brought for damages to an automobile and personal injury from a collision between automobiles.

The accident happened on July 7, 1927, in broad daylight, on the paved highway in the town of Gray. On the authority of the diagram sent up with the printed case, the highway is slightly curved and runs north and south. The cement pavement is seventeen and three-fourths feet wide. Adjoining, on the east, apparently for the convenience of a lunch room and gas and oil station, is a graveled area defined by an interior curve which approximates more or less closely to an ellipse, one fixed point of which is about one hundred and seventy-five feet from the other, and the widest part of which, twenty-six feet, is directly in front of the lunch room. South of the graveled surface and near the vehicular highway is a strip of grass ground. On the west or opposite side of the

road is a shoulder of earth two and one-half feet wide, then a ditch of that width and twice as deep, a bean patch, a mail box, a telephone pole, and an apple tree.

Plaintiff's automobile was traveling south on the west side of the road. Defendant's automobile was coming from the opposite direction on the east side. Each was properly on the way in an unobstructed course. Thus far the facts are either conceded or undisputed. From this point the parties are at difference. Around the contradictory contentions of the opposed sides is evidence, or at least the jury could have found evidence, from several witnesses sustaining the one side or the other.

The jury could have found that, when from his own car the plaintiff first saw the car of the defendant, one hundred feet or more was intervening between the two cars; that the defendant's automobile then turned to the wrong side of the road and came head on towards the plaintiff's car at a rapid rate of speed until the collision occurred; this despite the efforts of the plaintiff to avoid a collision by turning his automobile so that one front wheel, if not both, was off the concrete in the direction of the ditch, where the plaintiff attested he stopped his automobile.

When a collision occurs between the vehicle of a person on the wrong side of the road and the vehicle of a person coming towards him, the presumption is that it was caused by the actionable fault of the person who was on the wrong side, but his presence on that side may be explained or justified.

The defendant maintains that, although unexplained the evidence against him might warrant a finding of negligence in the operation of his car, yet the jury was entirely justified in finding him not liable for violation of the law of the road, since that which he did was done in an emergency which no negligence of his created and in which he exercised care for the rights and safety of the plaintiff as a user of the way, comparable with what an ordinarily prudent and careful man would and does exercise under the same or similar circumstances.

In his testimony defendant stated that when he saw the plaintiff's automobile for the first time it was some three hundred feet distant from his own car. With defendant, as with plaintiff, when earlier in the trial he named one hundred feet, or at least one hundred feet,

as the distance between the two cars, the expression was one of personal judgment. The jury may have concluded that while the judgments of the witnesses did not go just alike, still with their judgments, as generally with the judgments of men and their watches, each believed his own.

Defendant swore his speed thirty miles an hour; that of the other had been given at twenty-five to thirty miles. Suddenly, without warning, there was testimony, an automobile, afterward referred to throughout the trial as the New Jersey car, shot out from behind plaintiff's car to cut in by it, and made at furious speed in course for and dangerously near to the defendant's car. Defendant evidenced that to avoid the New Jersey car, collision with which to him appeared only too imminent, he swerved to the left and when that car had passed defendant swung to return to his own side of the road as soon as practicable. If plaintiff's car, in front of which defendant turned, had stopped already, as had been testified, that defendant knew the fact or knew that it was stopping is not expressly shown. Before defendant's car was wholly back on its own or the east side of the road it collided with the plaintiff's car; the places of impact being the front left end of the bumper and mudguard on the latter, and the rear left door and mudgard of the other.

Was there an emergency, in the sense of the perplexing contingency or complication of circumstances, in the making or bringing together of which, as contended, no negligence of the defendant had to do? And given the emergency, did the defendant exercise ordinary or reasonable care; that of a man of average care and prudence so circumstanced being the standard required? On these propositions defendant had the burden of going forward with the evidence.

There was testimony, as has been noticed before, tending to establish the presence of the New Jersey car. Plaintiff's testimony, that he did not remember seeing a car between his own car and the defendant's, seemingly was regarded by the jury as of no avail, for plaintiff testified further that he had no occasion to look to his left until after the accident.

Defendant gave evidence that he did not stop his automobile because of the necessity, weighing with him as imperative, of saving

his property and himself from being injured by the New Jersey car. On his right, so the defendant testified, an automobile parked between the filling station and the road blocked traveling that way. On the left was the ditch, the patch of beans, the post and its mail box, the telephone pole, and the tree. The choice was made as best it could be under the situation that confronted me, continued the witness, to paraphrase his language, and once by the New Jersey car, in the perhaps sixty feet between my car and the plaintiff's (a distance in respect to which the parties seem to be substantially in accord), it was my hope by hurrying action and accelerating speed to weave my way back to the right of the center of the road, but the effort failed, through no fault of mine however.

The question of ordinary care, depending on answers to other questions, some of law and some of fact, is properly left to the jury with appropriate instructions. *Larrabee* v. *Sewall*, 66 Me., 376. When a person is required to act in an emergency and in a place of impending personal peril, the law will not declare that reasonable care demands that he must choose any particular one of the alternatives presented. In such cases the law invokes the judgment of a jury. *Blair* v. *Lewiston, etc., Railway*, 110 Me., 235. Unless in extreme cases and where the facts are undisputed, which of two alternatives an intelligent and prudent person traveling the highway should select as a mode of escape from collision the law will not say, but will send to the jury the question whether the traveler acts with ordinary care. *Larrabee* v. *Sewall*, supra. A traveler is not necessarily guilty of negligence because he turns to the left in an attempt to avoid another vehicle approaching from the opposite direction on the wrong side, with which a collision is threatened, but whether negligence exists depends upon the particular nature of the case. *Skene* v. *Graham*, 114 Me., 229.

The law as to drivers of motor vehicles is not different from that which governs other persons. Whether the conduct measured up to the standard of common caution for the driver of a motor vehicle under like conditions and circumstances was a question of fact. *Massie* v. *Barker*, 224 Mass., 420. Where an automobilist, to avoid striking a pedestrian, swerved to one side and struck a wagon, it was for the jury to determine whether his act was the result of an emergency, and whether, if there was an emergency, defendant act-

ed with becoming prudence, not necessarily with the same degree of deliberation and heed as in an affair of human life elsewhere but there. *Kosrofian* v. *Donnelly*, 117 Atl., 421 (R. I.). The driver is exonerated if the course which he takes in an emergency is one which an intelligent and prudent man would take. Whether he did this was a question for the jury. *Gravel* v. *Roberge*, 125 Me., 399. See, too, *Brown* v. *Rhoades*, 126 Me., 186; *Lammers* v. *Carstensen*, 191 N. W., 670 (Neb.); *Richards* v. *Rifenbery*, 233 Pac., 692 (Okla.); *Lee* v. *Donnelly*, 95 Vt., 121; *Donker* v. *Powers*, 202 N. W., 989 (Mich.); *Henderson* v. *Dimond*, 43 R. I., 60. When the facts are such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. *Larrabee* v. *Sewall*, supra; *Parker* v. *Smith*, 100 Vt., 130. That is this case.

Motion overruled.

THE FIRST NATIONAL BANK OF PORTLAND

vs.

EDWARD C. REYNOLDS AND GEORGE H. STANWOOD, ADMINISTRATORS OF THE ESTATE OF JOHN W. MINOTT

AND

FRANK L. MINOTT, EXECUTOR OF THE WILL OF ELIZA D. MINOTT.

Cumberland. Opinion October 8, 1928.

EQUITY. INTERPLEADER. FINDINGS OF FACT. COSTS. P. L. 1923 CH. 150, SEC. 5.

The remedy of interpleader requires four elements:

(a) The same thing, debt or duty must be claimed by all the parties against whom relief is demanded; (b) All of their adverse titles must be dependent on or derived from a common source; (c) The person asking the relief must not

have nor claim any interest in the subject matter; (d) Plaintiff must have incurred no independent liability to either of the claimants.

Section 5, Chapter 150, P. L. 1923, is intended to supplement, not to supersede, interpleader. It may be applied where interpleader will not lie. It may be invoked in certain cases as a concurrent remedy with interpleader. It is permissive. It provides a means by which the title to a bank deposit, under some circumstances, may be litigated. But the remedy of interpleader is still an appropriate remedy, where interpleader will lie, notwithstanding the adoption of this statute.

The mere fact that a contractual relation exists between plaintiff and defendant under which the fund is required to be paid to such claimant, does not, of itself, defeat the right of interpleader. The obligation referred to in the rule must be independent of the title or right of possession of the fund in question. The obligation must be such that the litigation between the defendants will not determine it, in order to warrant the dismissal of the bill.

In the absence of statutory enactment, the privity rule is binding upon this court. But this rule only properly applies when the title asserted by one claimant is wholly paramount to and independent of the claim of the other. Interpleader will be denied on ground of want of privity when the conflicting titles are so wholly independent of, unrelated and antagonistic to, each other, as to destroy, contradict, or defeat the right by which one asking for the interpleader holds possession of the thing in controversy.

In order that interpleader will lie, it must appear that the fund or property in dispute came lawfully into the hands of the stakeholder; in the case of a bank, that the depositor had authority to make the deposit; in the case of a bailment that the bailor rightfully placed the property in the hands of the bailee.

It is only when unsupported by evidence, that findings of fact by a single justice sitting in equity, may be reversed by the court.

Costs and reasonable counsel fees may properly be allowed the plaintiff out of the fund in his hands.

On exceptions and appeal. A bill in equity praying that the defendants, the representatives of the estates of John W. Minott and Eliza D. Minott, be ordered to interplead touching their respective claims to a balance of deposits of money with the plaintiff bank to the credit of an account opened by Eliza D. Minott deceased in the name of "Eliza D. Minott, Executrix." Defendant Frank L. Minott, Executor, inserted in his answer a demurrer to the bill. This demurrer was overruled and the defendants were ordered to interplead. Defendant Frank L. Minott excepted to the decree

overruling his demurrer, and excepted also to such parts of the decree ordering defendants to interplead as awarded to the plaintiff bank, out of the fund in its hands, any money as costs and counsel fees.

To the final decree awarding defendants Reynolds and Stanwood, Administrators of the Estate of John W. Minott, the ownership of the balance of the deposit with the plaintiff bank, less $116.33 allowed plaintiff as counsel fees and costs, the defendant, Frank L. Minott, Executor of the Will of Eliza D. Minott, appealed. Exceptions overruled. Appeal dismissed. Decree below affirmed.

The case fully appears in the opinion.

Verrill, Hale, Booth & Ives, for plaintiff.

Robinson & Richardson, for defendant Edward C. Reynolds, Admr., etc.

Joseph E. F. Connolly,

Clinton D. Palmer, for defendant Frank L. Minott, Executor.

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

PATTANGALL, J. On exceptions and appeal. Bill of interpleader. Defendant Frank L. Minott, hereinafter referred to as executor, demurred to plaintiff's bill. Demurrer was overruled, bill sustained, and exceptions taken.

The subject matter of the suit was a fund deposited with plaintiff by executor's testate, who was, in her lifetime, executrix of the will of John W. Minott, of whose estate defendants Reynolds and Stanwood, hereinafter referred to as administrators, are now administrators d.b.n.c.t.a. Hearing was had on the merits and final decree entered ordering plaintiff to turn over the fund to administrators. Executor appealed and the matter comes to this court; first, on exceptions to the overruling of the demurrer; and second, if exceptions be not sustained, on appeal from the final decree.

The bill recites that Eliza D. Minott, widow of John W. Minott, who died June 23, 1908, was appointed executrix of John W. Minott's will on July 21, 1908, and that under the terms of the will, Mrs. Minott was given a life interest in the residue of the estate, with power to use the principal if the income was insufficient for

her reasonable support and maintenance, the remainder, after her decease, being given to various persons.

Mrs. Minott died May 19, 1910, and defendants Reynolds and Stanwood became administrators d.b.n.c.t.a. of the estate of John W. Minott. Defendant Frank L. Minott is executor of her will.

On July 15, 1908, Mrs. Minott deposited with plaintiff $455.60, making the deposit in the name of "Eliza D. Minott, executrix." At various times thereafter, additions to and withdrawals from this deposit were made and interest accumulated upon the balance, so that, at the time the bill was brought, it amounted to $1,534.32. Plaintiff had no knowledge as to the source of any of the deposits.

Defendants Reynolds and Stanwood as administrators notified plaintiff that they claimed the deposit as a part of the estate of John W. Minott.

Frank L. Minott, as executor, claimed the deposit as a part of the estate of Eliza D. Minott and threatened to bring suit unless it was paid over to him at once.

Plaintiff asserted that it could not safely pay the money to either and offered to bring the amount into court for the benefit of the rightful claimant and to pay as directed by the court.

Executor in support of his exceptions urges that the remedy of interpleader requires four elements: (1) The same thing, debt or duty must be claimed by all the parties against whom relief is demanded; (2) all of their adverse titles or claims must be dependent or derived from a common source; (3) the person asking the relief must not have nor claim any interest in the subject matter; (4) plaintiff must have incurred no independent liability to either of the claimants, citing 4 Pomeroy's Equity Jurisprudence (3rd Ed.), Sec. 1322; 1 Words and Phrases (2nd Ed.), 745; Whitehouse Eq. Pl. & Pr., 237; 2 Story Com. Eq. Pl., 124; 15 R. C. L., 224. He claims that the allegations of the bill do not state a case which embraces the second and fourth of these essential elements and that, therefore, the court below erred in overruling his demurrer.

His contention is that the original deposit of July 15, 1908, and the subsequent deposits, unidentified as to their source, import a contract on the part of the plaintiff bank to recognize the title of the depositor to the fund; that Eliza D. Minott was the depositor, the word "executrix" being mere descriptio personae; and that the

relation of debtor and creditor exists between the bank and the legal representatives of Eliza D. Minott, so that plaintiff has incurred an independent liability to one claimant. And further, that the administrators' claim to the fund, being based upon the theory that it is a part of the estate of John W. Minott, while the executor's claim is based upon the theory that the fund was the personal property of Mrs. Minott, there is no privity between the two claimants, but their titles are independent, not derived from a common source, and each asserted as wholly paramount to the other.

Furthermore, executor insists that the bill will not lie because of the provisions of Sec. 5, Chap. 150, P. L. 1923, which he construes as providing an adequate and exclusive remedy in such a case as this, the statute apparently having been passed to relieve banks from liability to irresponsible claimants and to protect legitimate claimants from unnecessary litigation.

Defendant's objection that the bill must be dismissed because plaintiff does not come within the rule that, in order to be entitled to the relief prayed for, it must have incurred no independent liability to either defendant, cannot be sustained. He bases this conclusion on the premise that as he is the legal representative of Mrs. Minott and Mrs. Minott was the depositor of the fund in question, the relation of debtor and creditor exists between the bank and himself and that this contractual relation, thus established, is sufficient to warrant the court to refuse to entertain the bill.

This conclusion is not justified. The mere fact that a contractual relation exists between plaintiff and one of the defendants under which the fund is required to be paid to such claimant does not of itself defeat the right of interpleader. *Love* v. *Hartford Life Ins. Co.*, (Mo.) 132 S. W., 335. If such were the law, it would be difficult to conceive of any set of facts which would enable a bank, a trustee, or other custodian of funds or even a bailee to maintain interpleader. The obligation referred to in the rule must be independent of the title or right of possession of the fund or property in question.

"A bank may be entitled to relief by bill of interpleader against separate and adverse parties who claim title to moneys therein deposited." *City Bank of New York* v. *Skelton et al*, (N. Y.) Fed. Cas., 2739. "The independent obligation covered by the rule must

be such that the litigation between the defendants will not determine it, in order to warrant the dismissal of the bill." *Byers* v. *Sansom-Thayer Commission Co.*, 111 Ill. App., 580. The instant case does not offend the rule in this respect.

Nor can we agree that the demurrer should have been sustained on the ground that Sec. 5, Chap. 150, P. L. 1923, provides a complete, adequate and exclusive method by which disputes concerning the title to bank deposits may be determined. That statute was intended to supplement, not to supersede, interpleader. It may be applied where interpleader will not lie. It is not unlikely that it might be properly invoked in certain cases in which interpleader would be an appropriate remedy. It is permissive. It provides one means by which the title to a bank deposit may be, under some circumstances, litigated. There are still other methods to reach that end. One of them is pointed out in *Hatch* v. *Caine*, 86 Me., 282. But the remedy of interpleader is still an appropriate remedy, where interpleader will lie, notwithstanding the adoption of the statute in question.

The executor, however, raises a further and more serious objection to the maintenance of the bill. He says that it must be dismissed because the adverse claims set up by the defendants are not dependent nor derived from a common source; that there is no privity between the claimants; that each asserts a title wholly paramount to the other and that in such a case plaintiff is not entitled to equitable relief but must leave the parties to their legal remedies.

Paragraph 7 of the bill recites that the administrators claim the deposit "as a part of the estate of the said John W. Minott, which has not yet been administered." Paragraph 8 alleges that the executor claims that "all cash, checks, coupons or other paper deposited to the credit of said account were the property of Eliza D. Minott and that the balance standing to the credit of said account was, at the time of the decease of said Eliza D. Minott and now is the property of her estate."

Plaintiff argues that the rule relied upon by the executor has been, of late, somewhat relaxed, and that interpleader has been held an appropriate remedy in certain cases, where the facts were such that, under a rigorous application of the well established principle here invoked, interpleader would not lie.

The argument is not without support. Professor Pomeroy, discussing this feature of interpleader, said (4 Pomeroy's Eq. Jur. 4th Ed., Sec. 3468), "It is a manifest imperfection of equity jurisdiction that it should be so limited. A person may be and is exposed to danger, vexation and loss from conflicting independent claims to the same thing as well as from claims that are dependent and there is certainly nothing in the nature of the remedy which need prevent it from being extended to both classes of demands." And in the notes following the section adds, "It is not surprising therefore that courts have sometimes ignored the doctrine in their decisions or have been ready to admit exceptions to its operation."

To the same effect is the comment in 33 C. J., 435, "The requirement that there should be privity of estate, title or contract between claimants or that their claims must be derived from a common source, is not inherently necessary to the proper administration of the remedy and there has been a disposition to relax the rigidity of the rule in this regard both in England and America, in later times. The validity of the rule has been regarded as doubtful in ordinary actions of interpleader."

11 Ency. of Pl. and Pr., 451, is authority for the proposition that "The doctrine of privity seems to have been abrogated in England partly by statute and partly by judicial decisions. In the United States, according to high authority; the code provisions for interpleader do not recognize the rule and its validity has been regarded as doubtful in ordinary actions of interpleader."

A note in 1 Am. and Eng. Ann. Cases, 513, quotes the rule, citing numerous authorities approving it, but adds "there are decisions of our courts which question its applicability under modern equity practice."

A full discussion of the subject of interpleader is found in 91 Am. St. Rep., 593-614. The particular question involved here is taken up on pages 600 and 601. After reciting the rule and supporting authorities, a somewhat lengthy quotation is given from the opinion in *Crane* v. *McDonald*, 118 N. Y., 648, in which Professor Pomeroy's criticism is quoted in full, and the author adds, "Since the adverse claims may arise from such an endless variety of causes, it is difficult to define any limitation which must deprive the holder of the fund or property of his right to be protected. And

this strict rule seems so artificial that we do not hesitate to indorse the dictum of the New York court and the opinion of the well-known writer on equity jurisprudence there quoted."

In 15 R. C. L., 226, commenting on the suggestion already noted as frequently appearing in editorial notes that the rule has been somewhat relaxed in recent years, the author says, "On the other hand it is said that the inclination thus to relax the rule is founded largely upon statutory provisions, is by no means general and amounts to a criticism of the rule rather than a repudiation of it."

An examination of decided cases is complicated by the fact that in very many states interpleader is now regulated by statute and frequently the statutory provisions are especially aimed to enlarge the jurisdiction of the equity court on the lines suggested by Professor Pomeroy and Mr. Freeman. Analysis of the various decisions not depending upon statutes leads to the conclusion that the comment in R. C. L., *supra*, is an accurate statement of the real situation and that there are very few well considered cases either in England or America in which the rule has been disregarded or even relaxed. When such appears to be the case, careful examination, in almost every instance, discloses that the decision is based upon a statute; as in *Meynell* v. *Angell;* Calverly, Claimants, 139 Rev. Rep., 719, governed by the Common Law Procedure Act of 1860; *Fox* v. *Sutton*, 59 Pac., 939, and other California cases controlled by Sec. 386 of the Code of Civil Procedure as amended in 1881; *Crane* v. *McDonald*, 23 N. E., 991, and many more decisions of the New York courts based on code provisions and cases in other states which have enacted similar legislation. These cases are frequently cited as instances of the relaxation of the rule.

The privity rule is sustained in *Love* v. *Hartford Ins. Co.*, supra; *Runkle's Admr.* v. *Runkles Admr.*, (Va.) 72 S. E., 695; *Gibson* v. *Goldthwaite*, (Ala.) 42 Am. Dec., 592; *Ranch et al Appts.* v. *Ft. Dearborn National Bank*, (Ill.) 79 N.E., 273; *U. S. Trust Co.* v. *Wiley*, 41 Barb., 477; *German Exchange Bank* v. *Excise Com.*, 6 Abb. N. C., 394; *Republic Casualty Co.* v. *Fischman et al*, (N. J. Ch.) 134 Atl., 179; *Atlantic City Nat. Bank* v. *Thompson et al*, (N. J. Ch.) 87 Atl., 636; *Byers* v. *Sansom Thayer Comm. Co. et al*, supra; *Northwestern Mutual Life Ins. Co.* v. *Kidder*, (Ind.) 1 Am. and Eng. Ann. Cases, 509; *First National Bank of Morris-*

town v. *Bininger et als*, 26 N. J. Ch., 345; *Packard* v. *Stevens*, 58 N. J. Eq., 502; *Wells Fargo Co.* v. *Miner et al*, 25 Fed. Rep., 533; *Third National Bank of Boston* v. *Skillings, Whitney and Barnes Lumber Co.*, 132 Mass., 410, and numerous other cases. The doctrine laid down in these cases, so far as it is pertinent here, is stated in general terms in a note, 10 L. R. A. (N. S.), 754, "The consistent rule would seem to be that the bank cannot force its depositor and a stranger to interplead but that it may compel interpleader where the title of the third person was alleged to have been derived from the depositor." In the absence of statutory enactment in this state, we hold the rule binding upon this court. As was well said in *First National Bank* v. *Bininger*, supra, "We cannot break through a rule so firmly established as to be, in the judgment of Judge Story, no longer open to discussion."

But the application of the rule is often attended with difficulty. Many of the apparent inconsistencies in the decisions are reconciled if they are examined in the light of the following statement: "It will be noticed that, even in the statements of the law upholding the rule in all its strictness it is only in cases where there is 'no privity' between the claimants, and that only when the title one asserts is 'wholly paramount' to, and 'independent' of, the other, that the remedy is denied. And an examination of the cases denying the right of interpleader on this ground will disclose that what is meant is that the conflicting titles and claims are so wholly independent of, unrelated, and antagonistic to, each other as to destroy, contradict, or defeat the right by which the one asking for the interpleader holds possession of the thing in controversy." *McGinn* v. *Interstate Nat. Bank*, (Mo.) 166 S. W., 346. To put the idea in slightly different words — in order that interpleader will lie, it must appear that the claimants agree that the fund or property in dispute came lawfully into the hands of the stakeholder; in the case of a bank that the depositor had authority to make the deposit; in the case of a bailment that the bailor rightfully placed the property in the hands of the bailee.

It is only with this view of the law in mind that one is enabled to reconcile such cases as *Third National Bank of Boston* v. *Lumber Co. et al*, supra, and *Fairfield Savings Bank* v. *Small et al*, 90 Me., 546. In the former case a deposit made by one defendant, in his

own name, was claimed, after depositor's death, by his employer as its property. The bank interplead depositor's executrix and the employer. There was no suggestion that the deposit was made with the employer's consent nor did the employer admit that depositor had any right whatever to make it. The claim of the defendant Lumber Company amounted to a denial of the right of the bank to have received the deposit, in the first instance. The bill was dismissed for want of privity.

In the latter case, a deposit made by a wife was, after her death, claimed by her husband. The bank interplead the husband and the administrator of the depositor. It was admitted that the deposit was made in the wife's name with the knowledge and consent of the husband. Our court sustained the bill, specifically finding that "all of the essential requirements upon which the equitable remedy of interpleader depends, were satisfactorily established."

The line which separates these cases appears to be that suggested in *McGinn* v. *Bank*, supra, and this view is confirmed by the position taken by the Massachusetts court in *Fairbanks* v. *Belknap*, 135 Mass., 179, in which the finding in *Nickolson* v. *Knowles*, 5 Madd., 47, is approved, that interpleader will not lie when a title paramount to that under which a party consented to receive property is asserted.

So far as banks are concerned, the situation in Massachusetts has been relieved by the enactment of statutes which permit interpleader in cases where it would not otherwise lie. *Phillips* v. *Suffolk Savings Bank*, 219 Mass., 597; *Roberts* v. *Trust Co.*, 234 Mass., 224.

The present case neither requires the aid of a statute nor a relaxation of the rule to sustain it. It falls within the rule, properly interpreted. There is no assertion on the part of either defendant of a claim which is, in any way, antagonistic to plaintiff's right of possession. No title is asserted paramount to that under which the bank received the property. Whether Mrs. Minott deposited her own funds, as executor claims, or deposited estate funds, as administrators claim, she had an absolute right to make the deposit and the bank rightfully received it. Both defendants claim the same fund, through the same depositor. True, they differ as to whether the depositor was acting in a personal or in a fiduciary capacity

when she made the deposit, but not as to her right to make it. The bank, under these circumstances, is a mere stakeholder, without interest in the fund, ready and willing to pay it over to the legal representatives of its depositor, when it can be informed who those legal representatives are. The bank cannot decide whether its depositor was Eliza D. Minott, the individual, or Eliza D. Minott, executrix of the estate of John W. Minott. It cannot decide whether the executor or the administrators are the legal representatives of its depositor. Defendants have raised that issue. The bank was fully justified in submitting it to the court, by bill of interpleader. Exceptions to the overruling of executor's demurrer cannot be sustained.

Defendants were properly ordered to interplead, answers were filed and hearing was had. On the evidence submitted, the court below found that the fund in question was the property of the estate of John W. Minott and ordered it paid to the administrators. We cannot disturb this finding. It is only when unsupported by evidence that findings of fact by a single justice, sitting in equity, may be reversed by this court. That situation does not obtain here.

Executor raises one more objection. It was decreed that plaintiff should retain the sum of one hundred sixteen dollars as costs and counsel fees, paying the balance of the fund into court to await its final disposal. The executor regards the allowance of counsel fees as unwarranted. The usual practice in this state has been to award costs and a reasonable counsel fee to plaintiff in interpleader. In some jurisdictions, statutes provide that this shall be done. We have no such statute but the practice prevailing here is not unusual. *Lottery Co.* v. *Clark*, 16 Fed., 20; *McNamara* v. *Ins. Co.*, 114 Fed., 910; *Trustees* v. *Greenough*, 105 U. S., 535; *Daniel* v. *Fain*, 5 Lea (Tenn.), 258; *Morse* v. *Stearns*, 131 Mass., 389; *Woolen Mill Co.* v. *Sprague*, 259 Fed., 338. Such an allowance is, however, a matter of discretion and not of right. *Gardiner Savings Institution* v. *Emerson*, 91 Me., 535. In the instant case the discretionary power of the court, in this respect, was not exceeded.

Exceptions overruled.
Appeal dismissed.
Decree below affirmed.

M. LEWIS BOWMAN *vs.* SIDNEY GEYER.

Lincoln. Opinion October 8, 1928.

EXCEPTIONS. PRINCIPLES OF STATUTE CONSTRUCTION. REAL ACTIONS.

P. L. 1927, CH. 212, SEC. 2.

Exceptions lie to rulings of law only, not to findings upon questions of fact, and the bill of exceptions, to be available, must clearly and distinctly show that the ruling excepted to was upon a point of law and not upon a question of fact; nor upon a question in which law and fact were so blended as to render it impossible to tell on which the adverse ruling was based.

It is a well established principle of law that no statute ought to have a retrospective operation. In the absence of any contrary provisions all laws are to commence in futuro *and act prospectively, and the presumption is that all laws are prospective and not retrospective.*

All statutes are to be construed as having only a prospective construction unless the purpose and intention of the legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used. But the presumption against retrospective operation of statutes is only a rule of construction and if the legislative intent to give a statute a retrospective operation is plain such intention must be given effect unless to do so will violate some constitutional provision.

While the general rule is that a statute should be so construed as to give it only prospective operation yet where the language employed expresses a contrary intention in unequivocal terms, the mere fact that the legislation is retrospective does not necessarily render it void.

The defendant in a real action may show title in another person, and when the plaintiff fails to show title in himself, and the defendant shows title in another, under whom he had possession, judgment for the defendant is warranted.

In the case at bar the very broad language used in the Act of 1927, providing for the validation of deeds otherwise valid except that the same omitted to state any consideration therefor or that the same were not sealed by the grantors, or any of them, plainly shows the intention of the legislature to make the same retrospective in its effect. This being so the deed from Mrs. Poland to Mrs. Curtis, now the wife of the defendant, conveyed title to her. The claims of the plaintiff based upon adverse possession and abandonment are mixed questions of law and fact, and the finding of the court below was correctly made.

On exceptions. A writ of entry to recover possession of certain land of which plaintiff claimed defendant disseized him. The defendant pleaded the general issue with a brief statement of equitable defense alleging title in his wife. Jury trial was waived. The presiding Justice made a finding and directed judgment for the defendant.

To the exclusion by the Court of certain exhibits which he offered, the plaintiff seasonably excepted, and likewise filed exception to the finding of the presiding Justice and to his directed judgment for the defendant. Exceptions overruled.

The case fully appears in the opinion.

A. D. Tupper,

George A. Cowan, for plaintiff.

Weston M. Hilton, for defendant.

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

PHILBROOK, J. On exceptions by plaintiff. This is a real action for the recovery of land. Jury trial waived, case heard in term time by the presiding Justice who made a finding and directed judgment for the defendant. Copies of certain deeds were offered by plaintiff and excluded. The first exception relates to these exclusions. The second exception is to the finding of the presiding Justice and to his directed judgment for the defendant.

Exceptions lie to rulings of law only, not to findings upon questions of fact, and a bill of exceptions, to be available, must show clearly and distinctly that the ruling excepted to was upon a point of law and not upon a question of fact; nor upon a question in which law and fact were so blended as to render it impossible to tell on which the adverse ruling was based. *Laroche* v. *Despeaux,* 90 Me., 178; *Hurley* v. *Farnsworth,* 115 Me., 321.

It is conceded that Eliza D. Poland was owner of the demanded premises on January 16, 1893, at which time she executed, acknowledged, and delivered a deed thereof, complete in all respects except that it bore no seal, to Madge B. Curtis, who is now the wife of Sidney Geyer, the defendant. This deed is not contained in the record but according to the finding of the Justice in the court below

it was intended, by this instrument, to convey a vested estate in remainder with possession or enjoyment of the estate deferred until the death of the grantor. Mrs. Poland died, intestate, on December 7, 1897, leaving three daughters, Mary E. Keene, Lula Hanna and Julia E. Look, and the plaintiff, M. Lewis Bowman, grandson, who is also referred to, in the record, as Milford N. Bowman. On January 3, 1899, Mary E. Keene was appointed administratrix of the estate of Mrs. Poland. She gave an administratrix deed to Annie R. Poland dated September 4, 1899, which was offered by the plaintiff as exhibit 4 and was excluded subject to exception. On May 6, 1901, the same Annie R. Poland gave a deed to George E. Little which was offered by the plaintiff as exhibit 6, and was excluded subject to exception. On September 4, 1899, the same date as the administratrix deed to Annie R. Poland, Mary E. Keene gave an administratrix deed to Wendall P. Keene which was offered by plaintiff as exhibit 5, and was excluded, subject to exception. Thus it will be seen that during the trial exceptions were reserved to the exclusion of these three exhibits, but in the bill of exceptions presented for our consideration the plaintiff presses only the exceptions to the exclusion of exhibits 4 and 5. These rulings therefore constitute the ground of the first exception.

The plaintiff claims that the deed of Eliza D. Poland to Madge B. Curtis, now Madge B. Geyer, under date of January 16, 1893, conveyed nothing because the instrument bore no seal. He also claims that by inheritance, he being a grandson of Eliza, and by deeds from other heirs of Eliza, he has title to three-fourths undivided interest in the land described in the declaration, and that there was adverse possession of the property by the heirs of Eliza D. Poland and himself, acquiesced in by Mrs. Geyer, and abandonment of her rights thereto, if any she ever had.

As to the deed from Mrs. Poland to Mrs. Curtis, bearing no seal, the defendant claims that P. L., 1927, Chap. 212, Sec. 2, validated the same. That section makes many provisions for validation of deeds but the particular one relied upon by the defendant reads thus: "All deeds and other instruments, including powers of attorney, heretofore made for the conveyance of real property in this state, or any interest therein, and otherwise valid except that

the same omitted to state any consideration therefor, or that the same were not sealed by the grantors or any of them, such deeds are validated." It may here be properly observed that the deed in question was duly recorded in the office of the register of deeds, for the county in which the land laid, on January 17, 1893, the day following its execution and delivery, and it appears from plaintiff's testimony that although he claimed no actual knowledge of its existence yet he had heard something about it and that its existence was common knowledge among the heirs. This claim of validation by legislative act was sustained by the Justice below, the effect of which was to make the deed from Mrs. Poland to Mrs. Curtis, now Mrs. Geyer, a perfectly good instrument lodging complete title in the grantee, even though it had not been reformed by suit in equity.

"To be sure," says the finding in the court below, "the date of the writ in this action antedates the effective day of the statute, but where, as in the case at bar, the plaintiff may have succeeded to the rights of another, with no greater equities than that other had, the curative statute is applicable retroactively," citing *Cooley Const. Lim.*, 528; *Black Const. Law*, 754; *Pelt* v. *Payne*, 30 S. W., 426; 6 *Enc. of Law*, 940; 26 *Enc. of Law*, 698, 699.

The plaintiff claims that rights to which parties were entitled under prior law cannot be taken away by legislative act after suit brought, relying upon *Rogers* v. *Greenbush*, 58 Maine, 395, but an examination of the opinion in that case shows that the court held "There is no language in the new statute which indicates any intention in the legislature to make it retrospective, or to apply it to past transactions, or to interfere with actions pending. We never hold an act to be retrospective unless it is plain that no other construction can be fairly given."

This rule is in harmony with the well reasoned cases in courts of last resort. There is no general principle better established than that no statute ought to have a retrospective operation. In the absence of any contrary provisions all laws are to commence *in futuro* and act prospectively, and the presumption is that all laws are prospective and not retrospective. *Gerry* v. *Stoneham*, 83 Mass. (1 Allen), 319. It is a rule of statutory construction that all statutes are to be construed as having only a prospective construc-

tion, 36 Cyc., 1205, supported by a long list of authorities, unless the purpose and intention of the legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used. 36 Cyc., 1206, 1207, and cases of abundant authority there cited.

But the presumption against the retrospective operation of statutes is only a rule of construction, and if the legislative intent to give a statute a retrospective operation is plain, such intention must be given effect, unless to do so will violate some constitutional provision. *Baldwin* v. *Newark*, 38 N. J. L., 158.

While the general rule is that statutes should be so construed as to give them only prospective operation, yet where the language employed expresses a contrary intention in unequivocal terms, the mere fact that the legislation is retroactive does not necessarily render it void. *Stephens* v. *Cherokee Indians*, 174 U. S., 445; 43 L. ed., 1041.

In the case at bar the very broad language used in the act of 1927 plainly shows the intention of the legislature to make the same retrospective in its effect. This being so the deed from Mrs. Poland to Mrs. Curtis conveyed title to her.

The defendant in a real action may show title in another person, *Rowell* v. *Mitchell*, 68 Maine, 21. The plaintiff having failed to show title in himself, and the defendant having shown title in another, under whom he had possession, warranted judgment for defendant.

The claims of the plaintiff based upon adverse possession and abandonment by Mrs. Geyer, mixed questions of law and fact, by the finding in the court below were impliedly, and we hold correctly, denied.

Exceptions overruled.

JESSIE M. LUQUES, PET'R *vs.* HERBERT N. LUQUES.

York. Opinion October 10, 1928.

DIVORCE. POWER OF COURT TO ALTER DECREE FOR SUPPORT.

"CARE AND SUPPORT" CONSTRUED AND DEFINED.

Where divorce was decreed against the libelee and by agreement or consent of libelant alimony and support of herself and minor child was granted the libelee, the power to make further decree respecting the support of minor children without the consent of the libelant still remains in the Court. Where the presiding Justice found facts for which there was sufficient evidence on which to base his findings, no error of law appears.

The terms "care and support" in the divorce statute must be construed in the light of the purpose of the legislative body in enacting the statute.

"Care and support," under the divorce statute, must be held to include not only food, shelter and clothing, but whenever a parent is able, suitable training to fit a child for a vocation in life.

While upon a decree for divorce without any order for the custody or care and support of minors a father's common-law liability remains, when an order for care and support is made, a statutory liability is substituted for that of the common law.

Whether the expense of a musical training of a minor can be deemed a necessity for which a father is liable at common law is not determinative of the power of the Court to order a father to contribute for the care and support of a minor child, in order that it may have such training as may be necessary to fit it for a vocation in life.

Upon a divorce being decreed, the sum a parent may be ordered to contribute for the care and support of a minor child is within the sound discretion of the Court. No abuse of that discretion appeared in the case at bar.

On exceptions. A petition asking that a decree for an allowance as entered in a divorce proceeding, wherein Herbert N. Luques was the libelant, and Jessie M. Luques, the libelee, in 1921, be altered or amended, and that the respondent be ordered to pay an additional sum or sums of money in order that the petitioner may provide an education in music for Pauline Luques an adopted daughter of the respondent. At the outset of the hearing on the petition the re-

spondent objected to the jurisdiction of the Court to change or alter the said decree, but the presiding Justice ordered the matter to hearing, and found for the petitioner and ordered the respondent to pay the sum of fifteen dollars per week during the minority of the said Pauline for her musical education. To the decree, findings of fact, and rulings of law the respondent seasonably filed exceptions. Exceptions overruled.

The case fully appears in the opinion.

F. R. & M. Chesley, for petitioner.

Willard & Ford, for respondent.

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

WILSON, C. J. At a term of the Supreme Judicial Court held in York county in September, 1921, the respondent was granted a divorce from the petitioner for the cause of cruel and abusive treatment. By an agreement between the parties, the Justice granting the divorce ordered the respondent to transfer certain real estate and personal property to the petitioner and in addition to pay to the petitioner the sum of thirty-five dollars weekly for the support of the petitioner and a minor child so long as the petitioner remained unmarried.

No decree was made as to the custody of the minor, who it appears was a granddaughter of the petitioner and respondent, but was adopted by the grandparents upon the death of her own mother at childbirth; but by consent of the respondent and with the approval of the Court, it was evidently a part of the agreement that she was to continue to live with the petitioner, who since the divorce has been appointed her legal guardian.

The petitioner now represents in her petition addressed to a Justice of this Court under Sec. 14, Chap. 65 R. S., that the amount ordered to be paid to her in the divorce decree and her personal means are not sufficient to properly educate the minor child and fit her for a vocation in life, she having more than ordinary musical talents, and toward the expense of such education the respondent has refused to contribute, and prays that the former de-

cree be altered or amended and the respondent be ordered to pay an additional sum toward the expenses of her musical education.

At the hearing on her petition, the respondent at the outset objected to the granting of the prayer on the ground that the Court was without jurisdiction. The decree in the action for divorce being the result of an agreement between the parties, and not made under the statute, it was contended, that the Court was without power under the section above cited to modify or alter it.

Counsel now also raises a question as to the liability of the respondent to support the minor child described in the former decree and in the petition, on the ground that there was no evidence of her legal adoption, and also further contends that, even if the liability of the respondent be shown and the Court had jurisdiction, the musical education of a minor child is not a necessity and, therefore, a father cannot be compelled by an order under Sec. 14, Chap. 65 R. S., to supply means for such education.

The Court below expressly found against the respondent on all points. It does not appear from the record that the legality of the adoption was raised in the Court below. The presiding Justice, however, in his decree found as a fact that the child in question was the adoptive child of the parties to the proceedings. As there was evidence on which the finding could have been based, no error of law appears from the record by reason of such finding.

Whether the expense of a musical training can be deemed a necessity at common-law is not determinative of the power of the Court under the divorce statute of this state to order a parent to contribute to the care and support of a minor child, a divorce having been decreed. Sec. 14, Chap. 65 R. S., authorizes the Court granting a divorce to decree concerning the "care, custody, and support" of any minor children, and any Justice on petition may alter it from time to time. The kind and degree of care and support which the Court may decree is not specified in or limited by the statute. *Stetson* v. *Stetson*, 80 Me., 483, 484. It is rather a question of the construction of the terms "care" and "support."

The legislative consideration for the vesting in the courts the authority to decree concerning the care and support of a minor child was the welfare of the child and not the common-law liability

of either parent. The terms "care" and "support" as used in the statute are general in their scope and must be construed in the light of the purpose of the statute and applied according to the circumstances of each case. *Call* v. *Call*, 65 Me., 407; *Stetson* v. *Stetson*, supra; 9 R. C. L., 483; *Husband* v. *Husband*, 67 Ind., 583. The purpose of this provision of the statute should be held to be to provide for minor children who are deprived of the care and training that naturally flow from a united home, sufficient means—within the ability of the parents—to furnish them not only with support but with proper training to ensure their finally becoming self-supporting and useful members of society.

"Care" and "support" under our divorce statute, therefore, must be held not only to include food, shelter, and clothing, but, whenever a parent is able, suitable training to fit the child for a vocation in life to which his or her natural or special talents may be especially adapted.

While upon a decree of divorce without any order for the custody or support of minor children, the father's common-law liability still remains, if, by virtue of the statute, an order for custody, or care and support is made, a statutory liability is substituted for the common-law liability. *Hall* v. *Green*, 87 Me., 122, 125. It may be, in whole, or in part, imposed upon the mother if she be given the care and custody without such order, though she has no such liability at common-law. *Gilley* v. *Gilley*, 79 Me., 292; *Brow* v. *Brightman*, 136 Mass., 187. Under conceivable circumstances, a mother, under the statute, might even be ordered to contribute to their support when the care and custody are given to the father, if he were without means.

It is true that the extent and nature of the training and education of a minor, so long as the marital ties exist, is within the control of the father, but when upon sufficient grounds the Court has found for any reason that he has forfeited or surrendered that right, or with his acquiescence, a minor child, upon a divorce being granted, is permitted to remain in the custody of the mother, it may, under the divorce statute, determine what is proper under all the circumstances.

Upon a decree of divorce being granted, therefore, the amount

which a father may be ordered to contribute to the care and support of minor children, where with his consent the child is allowed to remain with the mother, even though no decree for custody is made, is determined, not by his common-law liability, but in the sound discretion of the Court, taking into consideration his financial ability, or his ability to earn, and the standard of living to which they have been accustomed. *Call* v. *Call*, supra; *Stetson* v. *Stetson*, supra.

The presiding Justice in this instance, however, gave careful consideration to the father's liability at common-law and found, under the circumstances of this case, that the training of the voice of this young girl was an expense to which the respondent might be required to contribute even if limited by common-law obligations, which this Court in *Kilgore* v. *Rich*, 83 Me., 305, held to include the "good teaching or instruction" of a minor "whereby he may profit himself afterward," according to the definition of necessaries laid down by Lord Coke three centuries ago, which certainly should not be restricted under modern conditions. Also see *Esteb* v. *Esteb*, 138 Wash., 174.

The purpose for which the sum ordered to be paid in the instant case is to be used, clearly, we think, comes within the intent of the divorce statute authorizing the Court to make provision upon a decree of divorce for the "care" and "support" of minor children, and there was no abuse of judicial discretion in the amount awarded. The Court in *Harvey* v. *Lane*, 66 Me., 536, sustained a decree of a reasonable sum for the "support and education" of minors.

Upon the first question raised and upon which counsel lays the greatest stress, no error is shown. It is true that, under the divorce statute of this state, a husband can not be compelled without his consent to provide alimony or support for a wife against whom he has obtained a divorce for her fault, *Henderson* v. *Henderson*, 64 Me., 419; *Stratton* v. *Stratton*, 77 Me., 376; and a decree for her future support based on his consent can not be modified against his will; but a decree for the support of a minor child, or altering such part of a prior decree as provides for such support does not require the consent of the father; nor can the parties by any agreement oust the Court of jurisdiction to alter or amend its decrees in

this respect, or to make future provision for the care and support of minor children, if none be contained in the decree of divorce. *Connett* v. *Connett*, 81 Neb., 777; *Kershner* v. *Kershner*, 202 Mo. App., 239; *State ex rel* v. *Ellison*, 271 Mo., 416. Minor children are always the especial concern of the Court, and the legislature in the divorce statute has expressly vested in the Courts the power to alter or amend its decrees, or to make additional provisions from time to time as the needs of the minor children may require. *Harvey* v. *Lane*, supra; *Hall* v. *Green*, supra.

To this extent we think the Court below had the power to modify or amend the original decree and make further provision for the care and support of the minor child beyond the provisions made in the original decree; and it could amend or add to that decree by an order for additional contribution for her musical training, it having been found by the Court below to be warranted by her natural talent and as fitting her for a vocation and to comport with her station in life and the standard of living established by the father when he maintained a home for his wife and child, and with his present financial ability.

Exceptions overruled.

ROY C. HANDLEY

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

Androscoggin. Opinion October 10, 1928.

INSURANCE. WAIVER. KNOWLEDGE OF AGENT. R. S. CHAP. 53, SEC. 119.

An insurance company is not bound, though its agent may be, by promises, assurances or representations of such agent not contained in the policy. Knowledge of the agent may, however, read itself into the insurance contract. The burden of proving such knowledge as is necessary to create a waiver of the

terms of the policy and establish the liability claimed, is upon the policy holder or his representative.

Waiver is a voluntary relinquishment of a known right. Knowledge is an essential element of waiver.

In the case at bar the plaintiff applied for and received from the defendant a policy of health insurance against "the results of disease or sickness contracted while this policy is in force." The policy expressly excepted existing diseases from its coverage. When the policy was issued the defendant's agent knew that the plaintiff was affected by a disease of the scalp, that for it he had received surgical treatment and that he planned to go again to a hospital. The disease was a form of cancer, but neither the agent nor the insured knew this fact. The plaintiff in his application answered "No" to the direct question as to whether he had ever had cancer. The knowledge possessed by the agent therefore did not under R. S., Chap. 53, Sect. 119, constitute a waiver so as to create liability on the defendant's part in respect to such cancerous disease.

On exceptions. An action on the case to recover amount alleged to be due to plaintiff according to the terms of an accident and health insurance policy issued to him by the defendant.

At the conclusion of the plaintiff's testimony the defendant's attorney moved for a non-suit which was granted by the Court. To which rulings and instructions and refusals to instruct the plaintiff excepted. Exceptions overruled.

The case fully appears in the opinion.

George C. Webber, for plaintiff.

W. B. & H. N. Skelton, for defendant.

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

DEASY, J. Action on a policy of health insurance. Nonsuit ordered. Plaintiff excepts.

In the body of the policy the defendant corporation insures the plaintiff against "the results of disease or sickness contracted while this policy is in force."

Repeating and emphasizing the limits of the coverage, a clause in the policy reads: "The insurance . . . . shall not cover any disease, sickness or disability . . . which results from or is the sequel of any

disease contracted or infirmity existent prior to the date of this policy."

The date of the policy is September 20, 1926; its term twelve months.

On November 8, 1926, the plaintiff entered a hospital in Boston for treatment.

For total disability while in the hospital and partial disability while at home, indemnity is asked, for an entire period of about a year. In his statement of claim the plaintiff described his disease as "tumor in the scalp." Dr. Cushman, the only medical witness, diagnosed the disease as "epithelioma of the scalp," "one of the varieties of cancer," "a malignant growth." The undisputed evidence shows that at the time of the issuance of the policy the plaintiff was and for some years had been suffering from the same progressive disorder; that he had before received surgical treatment for it and planned to go again to a hospital. It is clear that the plaintiff's disease was not "contracted while this policy is in force" but was "existent prior to the date of this policy."

But the plaintiff relies upon R. S. Chap. 53, Sec. 119, which provides: "Such agents and the agents of all domestic companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk and of all matters connected therewith. Omissions and misdescriptions known to the agent shall be regarded as known by the company, and waived by it as if noted in the policy."

The plaintiff gave the insurance agent (Howland) all the information about his disease that he himself possessed. He told Howland about the origin and progress of the disorder, his previous surgical treatment and his intention of entering a hospital; also that another insurance company had by reason of the same disease refused to pay an idemnity. But the plaintiff did not inform the agent, and indeed did not himself know that his disease was a malignant tumor or cancer.

The defendant corporation did not by the terms of its policy undertake to insure the plaintiff against existing disease. It expressly excepted from the coverage of the policy all such diseases and their results.

It clearly is not liable to pay indemnity on account of existing diseases that were unknown to the company or its agent when the policy was issued.

But the plaintiff argues that, by force of the statute, the company must be held liable to pay indemnity in respect to any disease of the insured of which, at the date of the policy, it had constructive knowledge.

An insurance company may, with full knowledge, insure against the results of an existing disease as it could against the destruction of a burning building or the loss of a sinking ship. A statute in force when a policy is issued may read itself into the contract and superseding express stipulations to the contrary, compel such construction.

But a contract or statute would need to be very clear in its terms to create a liability so unlikely to be intentionally assumed.

By the statute above quoted knowledge possessed by the agent when the policy is issued, is imputed to the principal. And the statute goes further. It provides that "omissions and misdescriptions" known to the agent shall be deemed to be noted in the policy and waived.

Whether the waiver which the statute creates out of known "omissions and misdescriptions" is intended to charge insurance companies with responsibility for the results of known diseases it is not now necessary to determine.

A waiver is a voluntary relinquishment of a known right. Knowledge is an essential element of waiver. *Marcoux* v. *Society of St. John Baptist*, 91 Me., 250; *Whalen* v. *Accident Co.*, 99 Me., 236.

It is not shown that the defendant when it made its contract had any knowledge, either actual or imputed, of the plaintiff's cancerous affection, a material and vital fact.

The written application signed by the plaintiff, though filled out by the agent's hand, communicated no such knowledge. To the direct question contained in it, "Have you ever had cancer or tumor"? the answer is, "No."

It is not shown that the agent had been informed or knew that the plaintiff was suffering from a form of cancer. Indeed the plaintiff was not then aware of it.

The company is not bound, though the agent may be, by promises, assurances or representations of such agent not contained in the policy.

Knowledge of the agent may, however, read itself into the insurance contract.

But the burden of proving such knowledge as is necessary to create a waiver of the terms of the policy and establish the liability claimed is not in this case supported by evidence.

Exceptions overruled.

NAPOLEON PERRY v. PARK STREET MOTOR CORPORATION.

Oxford. Opinion October 10, 1928.

EVIDENCE. NOTICE. SALES. PLEADING.

The deposit of a letter, properly addressed and stamped in the post office, may be prima facie evidence of its receipt by the addressee by due course of mail, for the law assumes that government officers do their duty.

Where a contract for sale of an automobile provides that "if said motor car is not ready for delivery as specified, the cash deposit shall be returned to me on demand together with used car deposited in part payment, if any, or proceeds thereof, if sold, less cost of repairing said used car and 15% of sale price for handling," in an action of general assumpsit brought by the prospective purchaser to recover the allowed net cash value of the used car deposited in part payment, there being no cash deposit;

Held:

If plaintiff did not receive notification that the new car was ready for delivery yet under his contract, his remedy, if any there was, would not be in assumpsit to recover the allowance in cash but to demand his car, or the proceeds, if sold, less deductions already above recited.

In the case at bar the declaration was not based on a claim for proceeds nor was there any evidence that there was any sale of the used car and a consequent right to recover under the omnibus count.

On general motion for new trial by defendant. An action in general assumpsit on an account annexed to recover money had and received arising out of an alleged breach of contract for the sale and purchase of an automobile.

Plaintiff owned a five passenger coupe which he wished to exchange with the defendant for a two passenger open car. He was allowed the sum of $1050 for his car less the sum of $648, which he still owed on account of the same. The balance was to be paid within 15 days after notification to him that the new car was ready for delivery. Date of delivery was to be on or about April 10, 1924. The contract further provided that if the plaintiff failed to take the new car within the 15 days after notification the contract might be cancelled, and the amount paid be retained as liquidated damages. Plaintiff claimed he never received the required notice and three years later brought action for the net value of his car plus interest. The jury found notice had not been given and rendered judgment for plaintiff in the sum of $412.53.

A general motion for a new trial was thereupon filed by the defendant. Motion for new trial granted.

The case fully appears in the opinion.

Albert Beliveau, for plaintiff.

Clifford & Clifford, for defendant.

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

PHILBROOK, J. On defendant's motion to set aside a jury verdict. No exceptions.

On November 17, 1923, the plaintiff signed a written order for a motor vehicle known as a Studebaker special six model roadster 1924, to be delivered on or about April 10, 1924, which delivery the plaintiff agreed to accept at the defendant's place of business. According to the testimony of the president and treasurer of the defendant corporation, it had a place of business at Lewiston and one at Rumford, the latter town being the plaintiff's residence. The plaintiff admits that the order was fully read to him before he signed it.

The plaintiff owned a five passenger coupe and wanted to ex-

change it for a two passenger open car. In the trade plaintiff was allowed $1,050.00 for the coupe which he turned in, but there were notes given by him in part payment for that car amounting to $648.00, which defendant agreed to pay, so that the net allowance in part payment for the new car was $402.00.

The order which plaintiff signed stated that his post office address was 405 Waldo Street, Rumford, Maine. Without objection defendant offered a copy of a letter which its general manager said he dictated, signed and mailed to the plaintiff, addressed to him at 405 Waldo Street, Rumford, Maine, bearing date of April 14, 1924, and stating that the automobile ordered on November 17, 1923, to be delivered on or about April 10, 1924, was ready for delivery.

The plaintiff claims that he never received the original letter, of which the exhibit was a copy. One provision in the order reads thus: "If the balance of the full purchase price is not settled by me within fifteen days after notice that said motor car is ready for delivery, you may cancel this order and retain all payments made by me as liquidated damages." It is admitted that the balance was not paid and this suit is brought to recover in cash the net allowance of $402.00 with interest from April 10, 1924, to the date of the writ.

The plaintiff not only denies receipt of the letter dated April 14, 1924, but claims that "notice" from defendant to him was necessary, and that where notice is required to be given, and the method of giving that notice is not specified, the mere mailing of such a notice is not sufficient unless it can be proven that such notice was received by the party for whom it was intended. In support of this doctrine he cites *Curtis* v. *Nash*, 88 Maine, 426, and *Goodwin* v. *Hodgkins*, 107 Maine, 170. The former citation was evidently a clerical error, as that case in no way deals with the subject of notice, but the case appearing in volume eighty-eight of the Maine Reports next preceding the Curtis Case, viz., *Chase* v. *Surry*, 88 Maine, 468, discusses notice. The notice there referred to is one which is a condition precedent to the plaintiff's right to recover in a statutory action for injuries received on account of a defective highway. The court there states that the duty imposed by statute upon the party injured is to "notify" one of the municipal officers

of the town, and this duty is imperative if he seeks to recover of such town. It is not directory but mandatory. To "notify" is to "make known." The statute requires that the municipal officers should have information, or knowledge, within the time stated. It requires the party injured to communicate that information, or knowledge; and it is not enough for him to write a notice, however formal; it is not enough to mail it, even within the fourteen days. The writing and mailing of a notice within the time is not notifying the officers of the town as the statute requires.

Goodwin v. *Hodgkins*, supra, discusses the question of actual notice to a delinquent that fence viewers have directed him to rebuild his portion of a partition fence, before action can be maintained against him, and since the action is under a penal statute it is incumbent upon the plaintiff to prove that all the requirements of the statute have been complied with. These cases upon which the plaintiff relies are unrelated, and have no application to the case at bar. The provision for notice in the order signed by plaintiff does not require that the same should even be a written one, but the defendant shows a copy of the letter, above referred to, which was mailed to the plaintiff, and the deposit of a letter, properly addressed and stamped, in the post office, may be prima facie evidence of its receipt by the addressee by due course of mail, for the law assumes that government officers do their duty. *Chase* v. *Surry*, supra. The plaintiff claims that he went to work in the woods about the time that the above letter was written and mailed to him, addressed to 405 Waldo Street, Rumford, but admits that the family living there was very friendly with him, and that he received mail which they forwarded to him after he went into the woods.

At all events this plaintiff, depending upon the labor of his hands for support, claiming that the defendant actually owed him $402.00, made no demand for payment of that sum until June, 1927, which was more than three years after he could have received his due allowance by complying with the order which he signed. The present claim is somewhat stale. The plaintiff says that the whole case hinged on whether or not the defendant had given notice to the plaintiff that the car was ready for delivery as per the terms of the contract. This, as the plaintiff understands

the case, was the only issue presented to the jury and by them decided in favor of the plaintiff; that this was a question of fact and the decision final. The charge of the presiding justice, showing the issues presented to the jury, is not before us, but it is quite plain that there were other issues which should then and now be considered.

Assuming that the jury correctly found that the defendant gave no notice to the plaintiff, yet there is another provision of the contract which is of vital importance in the case and is as follows: "If said motor car is not ready for delivery as specified, the cash deposit shall be returned to me on demand together with used car deposited in part payment, if any, or proceeds thereof, if sold, less cost of repairing said used car and 15% of sale price for handling."

In the case at bar there was no cash deposit but there was a used car deposited in part payment. If, therefore, the plaintiff did not have notice that the car was ready for delivery, yet under his contract his remedy, if any he has, would not be assumpsit to recover the allowance in cash but to demand his car, or the proceeds, if sold, less cost of repairing the used car and 15% of the sale price for handling and failing to obtain either to bring an appropriate action to recover any sum claimed by him.

The declaration in the present case is not based on a claim for proceeds nor is there any evidence in the record that there was any sale of the used car and a consequent right to recovery of proceeds under the omnibus count.

The mandate must therefore be

Motion for new trial granted.

BERTRAND L. MOORE, PRO AMI v. ABRAHAM ISENMAN.

Cumberland. Opinion October 16, 1928.

MASTER AND SERVANT. NEGLIGENCE.

DEGREE OF CARE REQUIRED OF INFANT EMPLOYEE.

In this State employers are by statute divided into two classes, small employers and large employers. A small employer is one having five or less workmen in the same industry or business, or, when he has different businesses, five or less workmen regularly employed in a business single in kind. Common law rules govern actions between a small employer and his employees.

Whether plaintiff was an employee of the defendant was a question of fact and for the jury.

The degree of care which an infant employee must exercise is the ordinary care a reasonably prudent person of his age and intelligence would exercise under like circumstances. The law holds him to no higher obligation.

In the case at bar the evidence clearly established that the plaintiff was fully acquainted with the nature of his work and the sort of machinery with which he worked, that he was likewise aware of all the defects in that machinery. He saw fit, though fully aware of the danger, to operate the machine in its dark corner location, near the end of the working day. His conduct was hence unmarked by the ordinary prudence of a boy as old as he was. His contributory negligence barred any recovery of damages.

On exceptions and general motion for new trial by defendant. An action on the case to recover for personal injuries sustained by the plaintiff, an employee, alleged to have been occasioned by the failure of the defendant to provide a reasonably safe place in which to work, and reasonably safe appliances with which to work. At the close of the evidence the defendant moved for a directed verdict in his behalf, which motion the court denied. To which ruling the defendant excepted, and after the jury had found for the plaintiff in the sum of $500, filed a general motion for new trial. Exception overruled. Motion sustained. Verdict set aside. New trial granted. The case fully appears in the opinion.

Richard E. Harvey, for plaintiff.

Israel Bernstein, for defendant.

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

DUNN, J. This action is of tort for personal injury. It is against an employer. The plaintiff being under twenty-one years of age, his next friend prosecutes for him. The suit is at common law. The defendant pleaded the general issue. Plaintiff has the verdict. The case is here on exception to the refusal of the trial judge, at the close of all the evidence, to direct a verdict for the defendant, and on general motion by the defendant to set aside the verdict.

Employers are legislatively divided into two classes, small employers and large employers. A small employer is one having five or less workmen in the same industry or business, or, when he has different businesses, five or less workmen in a business single in kind, regularly. R. S., Chap. 50, Secs. 2 and 3; *Nadeau* v. *Caribou, etc., Company*, 118 Maine, 325. This defendant was a small employer. Therefore common-law rules govern.

Primarily, the plaintiff maintains that the defendant failed in his duty, implied from the relation of employer and employee, to exercise ordinary care to provide a reasonably safe and reasonably suitable wood-sawing machine for the use of the plaintiff; secondarily, that the defendant failed in his duty to use like care to keep the machine in reasonably safe and reasonably suitable condition; thirdly, that through the actionable fault of the defendant, the place of employment was not reasonably safe and reasonably suitable in that it was not sufficiently lighted. In the declaration is the allegation of the plaintiff's own due care, likewise that defendant's negligence was the proximate cause of the plaintiff's injury.

The bill of exceptions calls for but small attention. When the evidence on both sides had closed, the declared assertion, that the defendant was the employer of the plaintiff, was in controversy. That question was for the jury. The exception, therefore, has no point, nor ever had. The exception is overruled.

The jury having settled the question that plaintiff was in the employ of the defendant, the motion to set aside the verdict, on the ground that it is against law and evidence, invites consideration.

On May 15, 1926, the day of his injury, the plaintiff was within five months of eighteen years of age. He possessed the intelligence and understanding which were usual with boys of that age. He had aptitude for things mechanical.

For the period of nine months he had been working for the defendant, a fuel dealer in Portland. The work included converting bundled pine edgings into kindling. This is what the plaintiff was doing when he got hurt.

A circular saw mounted on a frame, the saw designed to be motor-driven through a slit or opening in the top of a traveling carriage, had been provided by the defendant. In operation, the carriage, with a bundle of wood upon it, was moved forward by the plaintiff, he being the sawyer, and the wood fed sidewise to the saw. In reverse movement the carriage would return to its original position. The construction of the sawing machine was quite simple and was open and exposed to view.

Prior to the contract of employment one of the V-shaped wooden supports of the frame of the machine had been broken. A board had been nailed across the break and the whole wrapped with rope. And the nuts were off the end of a rod or slide on which the machine carriage was moved forward and back. Because of these defects, and the consequent want of rigidity when the carriage was heavily laden, the saw would not always keep a true plane of rotation during the process of cutting.

That plaintiff fully appreciated the extent of the peril to which he was exposed, and was apprehensive of personal injury, his own testimony clearly defines. After working two or three months, he called the defects to the notice of the defendant. The defendant assured the plaintiff that repairs would soon be made, and directed him to keep at work. Six months passed and the machine still remained unrepaired. The plaintiff knew it all the while. Although he had been aware all along, not only from his own experience, but from observation of the operation of the machine by other sawyers, that at times the saw ran out of line, he never mentioned this nor spoke again relative to the defects.

It was nearing the end of the working day, on May 15th, between the hours of five and six of the clock, and was "awful dark" in the corner of the old barn where the machine sat, when the accident

happened. No light then issued into the barn through the opening in the outside wall. No bulb was in the light fixture above the saw. The other lights were too far off to see by. Neither the saw blade nor the kerf could be seen by the plaintiff. But he did see the carriage lifting, as it ever had before when the saw wabbled. His right hand came in contact with the teeth of the saw and he lost his second finger.

The foregoing statements rest upon all the evidence favorable to the plaintiff, and the reasonable inferences arising therefrom, viewed most favorably for him.

Conceding, for argument's sake, that the evidence warranted the finding of negligence on the part of the defendant, was plaintiff himself unoffending with regard to contributory negligence?

The promise of the employer to remove the defects of which the employee complained, assuming the promise to have been made, was confession to a breach of duty, and, granting for the purpose of the case that such promise remained effective and unwaived to and inclusive of the moment of the accident, the promise did not relieve the employee of his duty to exercise care in requisite legal degree to protect himself against injury. *Harris* v. *Bottum*, 81 Vt., 346; *Western Coal, etc., Co.* v. *Burns*, 104 S. W., 535 (Ark.); *Comer* v. *Meyer*, 78 N. J. L., 464; *Crookston Lumber Co.*, v. *Boutin*, 149 Fed., 680.

The degree of care which an infant employee must exercise is the ordinary care a reasonably prudent person of his age and intelligence would exercise under like circumstances. The law holds him to no higher obligation. *Mott* v. *Packard*, 108 Maine, 247; *Dame* v. *Skillin*, 111 Maine, 156.

With the fact acknowledged, as it is in the brief of counsel for the defendant, that the plaintiff was in the employ of the defendant, there is no room in the evidence for intelligent and fair-minded men to have honest difference of opinion in respect to the want of due care on the plaintiff's part. So the question is for the court. *Wormell* v. *Maine Central Railroad Company*, 79 Maine, 397.

In the light of his full appreciation of the defective and dangerous condition of the machine, and of his practical acquaintance with the situation, the conclusion is irresistible that, had his care been that of an ordinary boy of his years and experience, plaintiff

would have stood before the revolving saw, panoplied with knowledge that the lifting carriage manifested danger, obvious, immediate, and constant. Out of this nettle, danger, it was for the plaintiff to pluck the flower, safety.

Plaintiff did not stop the saw, as he could have stopped it, by turning the key to the switch. He did not reverse the movement of the carriage. Nor, simpler yet, he did not step back from the machine. On the contrary, and of his own free will, he kept on advancing the wood to the saw, the darkness of a dark evening having settled, there alone.

His conduct was unmarked by the ordinary prudence of a boy as old as he was. Whatever risk he might voluntarily take for himself, he could not by unreflectingly going about his work subject his employer to responsibility for the accident which resulted injuriously. Plaintiff was contributorily negligent. Contributory negligence bars the recovery of damages. *Nelson* v. *Sanford Mills*, 89 Maine, 219; *Western Coal, etc., Co.* v. *Burns*, supra.

Where men work, particularly around buzz saws, accidents occur. Many industrial accidents could have been prevented if certain things had been done or not done by employees. This case adds one more to the number.

The motion is sustained.

Verdict set aside.
New trial granted.

CRAWFORD'S CASE.

Penobscot. Opinion October 20, 1928.

WORKMEN'S COMPENSATION ACT. TERM "MISTAKE" CONSTRUED.

The term "mistake," as used in the Workmen's Compensation Act, must be construed to mean one of fact and not of law.

A mistake of fact takes place either when some fact which really exists is unknown, or some non existent fact is supposed to exist.

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 party 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 Section 20 of the Workmen's Compensation Act for failure to give notice of the accident as required in Section 17 of the Act, provided that notice is given within a reasonable time after the latent injury becomes apparent.

In the case at bar the claimant's failure to give notice can not be held to be the result of mistake. He fixed the date of his accident as January 29, 1927. Within a few days thereafter he consulted his physician and the nature and results of his injuries were clearly apparent and fully diagnosed, yet he failed to give notice within the following thirty days.

The decree of the Commission was error of law and subject to review by the Law Court.

Appeal from an affirming decree of a single Justice awarding compensation to the petitioner Charles A. Crawford, for disability alleged to be due to strained muscles of the heart occasioned by lifting heavy loads in the course of his duties as a transfer man in the employ of the American Railway Express Company. The petitioner alleged that the accident happened on an "indefinite day during 1926." In its answer the respondent claimed that it received no notice of the accident and claim to compensation until April 12, 1927, more than thirty days after the happening of the accident.

At the hearing before the Industrial Accident Commission the Associate Legal Member found for the petitioner and awarded compensation at the rate of $14.77 per week from February 5, 1927, to June 8, 1927.

The decree was affirmed by a single Justice and respondent filed its appeal. Appeal sustained. Decree reversed.

The case sufficiently appears in the opinion.

Cornelius J. O'Leary, Arthur L. Thayer, for petitioner.

Ryder & Simpson, for respondent.

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

STURGIS, J. This appeal from an award of compensation by the Industrial Accident Commission must be sustained. Written notice

of the accident was not given to the employer within thirty days after the happening thereof, and the facts negative knowledge by the employer or its agent, or a mistake excusing delay. Sections 17, 18, and 20, of the Compensation Act, bar the maintenance of this proceeding.

The term "mistake," as used in the Act, has recently been construed by this Court in *Brackett's Case*, 126 Maine, 365. Relying on the fundamental principles that the "mistake" must be one of fact and not of law, and that a mistake of fact takes place either when some fact which really exists is unknown, or some non existent fact is supposed to exist, this rule is laid down: "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."

Applying this test, the claimant's failure to give notice was not the result of "mistake." He fixes the date of his accident as Saturday, January 29, 1927. The following Monday he was unable to work and consulted his physician. The nature and results of his injuries were then clearly apparent and fully diagnosed, and there was no time thereafter, within the thirty days following January 29, that the claimant could be "reasonably justified" in questioning the nature, extent, or result of his injuries. If there was change, it was for the better, and has so continued to time of hearing.

The facts involved in this issue being undisputed, the decree of the Commission excusing the claimant's failure to give notice within the statutory period, on the ground of mistake, is an error of law subject to review by this Court. *Wardwell's Case*, 121 Maine, 216; *Brackett's Case*, supra. The error voids the claimant's award, and renders a consideration or determination of the legal character and cause of his incapacity unnecessary.

Appeal sustained.
Decree reversed.

STANLEY LONDON *vs.* FRED L. SMART.

Aroostook. Opinion October 24, 1928.

EVIDENCE. NEW TRIAL. DAMAGES.

Where there are two or more counts in the declaration it is not necessary that the evidence should support all the counts; if the evidence is sufficient to support one good count the general verdict will stand.

A verdict will not be set aside unless it clearly appears that the same was the result of bias or prejudice.

The granting of a new trial is not a matter of absolute right in the party but rests in the judgment of the court and is to be granted only when it is in furtherance of substantial justice. Where the verdict is substantially right no new trial will be granted although there may have been some mistakes committed in the trial.

In order to warrant the granting of a new trial on the ground of newly discovered evidence it must appear that the evidence is such as will probably change the result if a new trial is granted; that it could not have been discovered before the trial by the exercise of due diligence; that it is material to the issue; that it is not merely cumulative or impeaching, unless it is clear that such impeachment would have resulted in a different verdict.

Damages for alienation of affections are to be assessed by the jury.

On motion for new trial by defendant. An action on the case for alienation of affections. A second count in the writ charged the defendant with criminal conversation.

On trial of the action the jury returned a general verdict for the plaintiff in the sum of $5,000. A motion for new trial on the usual grounds was filed by the defendant and later a motion to set aside the verdict on the ground of newly discovered evidence. Both motions overruled. The case fully appears in the opinion.

A. S. Crawford, Jr., for plaintiff.

Archibalds, Ransford W. Shaw, for defendant.

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

PHILBROOK, J. This is an action on the case in which the plaintiff charges the defendant, in the first count, with alienation of the affections of his wife; the second count alleges criminal conversation. The plaintiff recovered a verdict of $5,000 and the case is before this court on defendant's motion to set aside the verdict upon the general grounds that the verdict is against law and evidence and that the damages are excessive; and also motion to set aside the verdict on the grounds of newly discovered evidence. There are no exceptions.

The testimony offered before the jury would perhaps fall short of proving the second count satisfactorily but there is evidence which, if believed by the jury, who saw the witnesses and heard them testify, would satisfy a general verdict for the plaintiff. Where there are two or more counts in the declaration it is not necessary that the evidence should support all the counts for if the evidence is sufficient to support one good count a general verdict will stand. *West* v. *Platt*, 127 Mass., 367.

The credibility of witnesses and the weight to be given to their testimony is particularly within the province of the jury and we should not set their finding aside unless manifest error is shown or unless it appears that the verdict was the result of bias or prejudice, *Hatch* v. *Dutch*, 113 Maine, 405.

More than a hundred years ago the court of highest authority in this country held that upon a motion for a new trial after verdict the whole evidence is to be examined with minute care, and the inferences which the jury might properly draw from it are adopted by the court. If therefore upon the whole case justice has been done between the parties and the verdict is substantially right no new trial will be granted although there may have been some mistakes committed in the trial. The granting of a new trial is not a matter of absolute right in the party but rests in the judgment of the court and is to be granted only when it is in furtherance of substantial justice, *M'Lannahan* v. *Universal Insurance Company*, 1 Peters, 170. This is still the law of the land.

In support of the motion for a new trial on the ground of newly discovered evidence the defendant offers the testimony of only two persons. The first is that of Ethel L. Mooers. She is a cousin of the plaintiff's wife who was the chief witness for the defendant, and

Mrs. London had a room at the house of Mrs. Mooers during the summer preceding the date of the trial. No good reason appears why she could not have been obtained as a witness at the first trial by the exercise of due diligence and at best her testimony is only in contradiction of that of the plaintiff upon an issue which is not vital, or in other words affecting only the credibility of the plaintiff.

The other witness is Walter F. Mott who was manager of a hotel in Houlton and was so acting at the date of the trial. Here again his testimony, taken at its best, simply went to the credibility of the plaintiff's testimony.

Applications for new trials on the ground of newly discovered evidence, not being favored by the courts, should always be subjected to the closest scrutiny and the burden is upon the applicant to rebut the presumption that the verdict is correct and to prove that he used due diligence. 20 R. C. L., 290.

In order to warrant the granting of a new trial on the ground of newly discovered evidence five things must appear: (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; (4) that it is material to the issue; (5) that it is not merely cumulative or impeaching. 20 R. C. L., 290.

If from the nature of the evidence that the moving party seeks to rely upon, as disclosed by the motion and affidavits, it is apparent no purpose can be served other than the impeachment of the testimony of an adversary, or of witnesses of the adverse party, a new trial should not be granted unless the testimony of the witness sought to be impeached was so important to the issue, and the evidence impeaching the witness so strong and convincing that a different result must necessarily follow. 20 R. C. L., 294.

Newly discovered evidence which only goes to impeach the credibility or character of a witness is not sufficient ground for a new trial unless it is clear that such impeachment would have resulted in a different verdict. *Beals* v. *Cone*, 27 Colo., 473; 62 Pac., 948; 83 A. S. R., 92.

Upon the question of damages we only quote from *Audibert* v. *Michaud*, 119 Maine, 295, "It was for them (the jury) to say how

much the plaintiff should recover for a stolen wife and a broken home."

Both motions overruled.

ALBERT R. PATRIDGE *vs.* FRANK L. MARSTON.

Cumberland. Opinion November 1, 1928.

ATTACHMENT. INTERVENTION. R. S. CHAPTER 87, SECTION 32.

Under R. S. Chapter 87, Sec. 32, intervention is authorized when real estate of the intervenor is specially attached, in a suit against the grantor, on the ground of fraud in the conveyance.

Under R. S. Chapter 87, Sec. 32, intervention is authorized to enable the intervenor to defend against the allegations in the declaration, but not to defend against an allegation of fraud contained in the direction to the officer endorsed on the writ.

Independently of statute intervention is authorized only when rights of the intervenor are directly involved and only when necessary to preserve or protect such rights.

In the case at bar the petitioner's rights, which by intervention she sought to defend, were not directly involved, and intervention was not necessary to protect them. Whether or not the conveyance was fraudulent could be determined by appropriate procedure. The defendant Frank L. Marston, who presented the bill of exceptions, was in no way aggrieved by the rulings.

On exceptions. An action of assumpsit on a promissory note. By instructions contained in the writ, real estate in the name of Ermina B. Marston, wife of the defendant, was specially attached on the allegation that the same had been conveyed to her in fraud of the plaintiff and without consideration.

At the time of the hearing Ermina B. Marston filed a motion to intervene and defend against the said allegation and the attachment and that the attachment be discharged. To the refusal of the presiding Judge to so rule and instruct, the defendant, Frank L. Marston, seasonably excepted.

Exceptions overruled. The case fully appears in the opinion.

Frank H. Haskell, for plaintiff.

Oakes, Skillin & Tapley, for defendant.

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

DEASY, J. Assumpsit on a promissory note payable to the plaintiff, of which note the defendant, Frank L. Marston, is the maker.

Real estate in the name of Ermina B. Marston is attached upon the ground, as alleged in the instructions indorsed upon the writ, that "said real estate was conveyed by the said Frank L. Marston to his wife, Ermina B. Marston, in fraud of this creditor and without consideration."

Ermina B. Marston filed a petition for "leave to intervene and defend against said allegation and said attachment."

Intervention was refused by the Justice presiding. The correctness of this ruling is the only issue before the Court.

The petitioner relies upon R. S., Chap. 87, Sec. 32, which provides that "grantees may appear and defend in suits against their grantors in which the real estate conveyed is attached."

If the petitioner were asking leave to intervene to "defend" in the sense in which that word is used in the statute, i.e., to defend against the allegations contained in the declaration, the statute would apply literally. She is a grantee. The suit is against her grantor. The real estate conveyed is attached. Moreover, the case in such event would be within the intent and purpose of the statute.

The plaintiff cites *Sprague* v. *M'fg. Co.*, 76 Maine, 417, as contra, relying, however, upon a sentence wrenched from the context. The opinion in that case says "The provision is applicable only to grantees whose conveyances were subsequent to the attachment; otherwise, their duly recorded deeds would take precedence of the attachment and they would have no occasion to defend."

If the petitioner's "duly recorded deed (takes) precedence of the attachment" and therefore she has "no occasion to defend," she plainly should not be permitted to intervene. This is what the Sprague case holds. But the plaintiff having specially attached

the real estate conveyed is apparently indisposed to admit such precedence.

The petitioner fails, however, in that she asks to intervene, not to defend against the allegations of the declaration but to defend "against said allegation (of fraudulent conveyance) and said attachment," matters which are not contained in the declaration and are not and cannot be made issues in the present case.

But the petitioner contends that independently of the statute she should be permitted to intervene. This contention is challenged by the plaintiff.

It is probably true that no authority for this practise can be found in the ancient law books. True also that most of the cases on the subject are cases construing State statutes or codes and are therefore irrelevant.

In several states, however, having no statutory or code provision on the subject intervention in suits at law has been sanctioned and upheld. *Reynolds* v. *Damrell*, 19 N. H., 397; *Pike* v. *Pike*, 24 N. H., 394; *Clough* v. *Curtis*, 62 N. H., 409; *Smith* v. *Gettinger*, 3 Georgia, 145; *Stieff* v. *Bailey*, 27 Del., 508; 89 Atl., 366; *Banker's Co.* v. *Sohland*, Del. 138 Atl., 361; 23 L. R. A., N. S., 540, note. Several of the above authorities are cited with approval in *Gumbell* v. *Pitkin*, 124 U. S., 131; 31 L. Ed., 379.

In other states having statutory provisions regulating the subject intervention has been allowed though "not within the relevant statute." *Gibson* v. *Ferrell*, 77 Kan., 454; 94 Pac., 783; *Consolidated Co.* v. *Scotello*, 21 New Mex., 492; 155 Pac., 1089; *Awbrey* v. *Estes*, 216 Ala., 66; 112 So., 529.

But upon principle and authority intervention is allowed only when the rights of the intervenor are directly involved. *Glover* v. *Smith*, 126 Maine, 397. And only when necessary to preserve or protect such rights.

The petitioner's rights which by intervention she seeks to defend are not involved. Intervention is not necessary to preserve or protect them. The question of fraud is an open one which can be determined by appropriate procedure.

For these reasons and for the further independent reason that the bill of exceptions is presented by Frank L. Marston who is in no legal sense aggrieved by the ruling complained of, the entry must be

Exceptions overruled.

MARY A. HIBBARD *vs.* JESSIE E. COLLINS.

Aroostook. Opinion November 6, 1928.

BILLS AND NOTES. NEGOTIABLE INSTRUMENTS ACT. PLEADING.

A note under seal payable by instalments and containing what is in effect a chattel mortgage securing it is not thereby deprived of its status as a negotiable instrument.

In a suit on a note, the burden is upon the plaintiff to prove that he is a holder in due course, but nothing else appearing, the production of the note in due form sustains the burden.

When the principal of a note is payable by instalments and one instalment is overdue and unpaid at the time the paper is indorsed and transferred, the whole paper is dishonored and subject to all equities between the original parties.

A matter of equitable defense must be pleaded by brief statement.

The defense of payment, however, is open under the general issue.

In the case at bar the evidence showed that the Aroostook Trust Co. was not a holder in due course, having received the note after one or more instalments were due and unpaid; and that the note was transferred to the Trust Co. and by it to the plaintiff subject to equities.

The note in question was given many months after the debt was contracted, and dated back to the time of the original transaction. A payment made on the note was by mistake overlooked and the note made for the full amount. Under such statement of facts the payment should be properly allowed against the note although only the plea of the general issue was filed.

On report. An action on the case on a promissory note signed by the defendant as maker and purchased by the plaintiff from a holder after maturity. The case was heard at the April Term of the Supreme Judicial Court held in the County of Aroostook. At the conclusion of the evidence the cause was reported to the Law Court. Judgment for the plaintiff for $467.54.

The case fully appears in the opinion.

J. Frederick Burns, Elmer G. Lawler, for plaintiff.

Adolphus S. Crawford, Jr., for defendant.

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

DEASY, J. This is an action on a promissory note given by the defendant to Hibbard Brothers Company; by that company indorsed to the Houlton Trust Company, and by it indorsed to the plaintiff. The form of the note is as follows:

"$600.00 Houlton, Me.
July 18, 1922

For Value Received, I hereby sell and convey to Hibbard Bros. Co., his heirs, and assigns, the following described property, to wit: One five passenger Mitchell car, Number 4229.

And promise to pay to the order of Hibbard Bros. Co., the sum of Six hundred and no/100 Dollars, as follows: Payable at $5.00 a week with interest at eight percent until said sum is paid in full.

Provided, nevertheless, that I may continue in possession of said property, until default in payment has occurred, and also that if I pay the said sum and interest at the time aforesaid, then this conveyance shall be VOID, otherwise to remain in full force and effect. It is understood and agreed that if default shall be made in any payment, that the said grantee may enter my premises and carry the same away, and that all rights to an action of trespass or damage thereby waived, and all rights of resistance thereunto are disclaimed; and no right of redemption shall exist.

Witness:

(*Signed*) H. F. Cates (*Signed*) Mrs. Jessie E. Collins"

(*Seal*)

Eight small payments amounting in all to $105 are noted on the back of the instrument. All such payments purport to have been made between June and October, 1923. On the back of the note there also appear the indorsement of Hibbard Bros. Co., without date, and the indorsement of the Houlton Trust Company, dated April 13, 1926. The note is payable in instalments and is under

seal, but neither these nor any other of its features deprive it of its status as a negotiable instrument.

Such fraud in its inception as would have the effect of invalidating the note, while suggested, does not sufficiently appear. It is inferentially negatived by a letter from the defendant introduced in evidence.

The principal issue in the case is whether two payments of one hundred dollars each made by the defendant to Hibbard Bros. Co., are available as against the plaintiff to reduce the amount of recovery.

The facts leading up to this suit are as follows: In July, 1922, the defendant bought an automobile from Hibbard Brothers Co. She turned in an old car and agreed to pay six hundred dollars more. No note or writing was made at that time. Much later (the defendant says more than a year later) the instrument in suit was made and signed by the defendant. Though before it was made two hundred dollars had been paid, it contained a promise to pay the whole sum of six hundred dollars with interest at eight per cent. The note was at some undisclosed time transferred to the Houlton Trust Company. On April 13, 1926, it was endorsed by the Houlton Trust Company to the plaintiff.

The plaintiff claims the rights of a holder in due course and contends that the payments amounting to two hundred dollars made by the defendant to Hibbard Brothers Co., cannot legally, as against her, be deducted.

"The burden is upon the plaintiff to prove that she is a holder in due course. Nothing else appearing, the production of the note in due form sustains the burden." *Dodge* v. *Bowen*, (Mass.) 182 N. E., 368, and cases cited.

But the plaintiff acquired title to the note after all its instalments were due. This appears from an endorsement on the note and is admitted by the declaration. The plaintiff, therefore, was not a holder in due course. Negotiable Instruments Act, Sec. 52.

But she says that she acquired her title "through a holder in due course," to wit, the Houlton Trust Company, and "has all the rights of such former holder in respect of all parties prior to the latter." Negotiable Instruments Act, Sec. 58.

Was the Houlton Trust Company a holder in due course? Prima

facie, yes. But not if the evidence shows its title to have been acquired after any instalment was due and unpaid.

"All the authorities agree that, when the principal of a note is payable by instalments and one instalment is overdue and unpaid at the time the paper is indorsed and transferred, the whole paper is dishonored, and subject to all equities between the original parties." 3 R. C. L., Pg. 1048 and cases cited; *Field* v. *Tibbetts*, 57 Me., 358; *Vinton* v. *King*, 4 Allen, 562.

The date when the Trust Company acquired the note does not definitely appear. The endorsement of Hibbard Bros. Co. to the bank is undated. The bank's attorney received it for collection March 31, 1924. The defendant's undisputed testimony is to the effect that the note was made and signed "more than a year" subsequent to its date. According to this testimony the bank could not have acquired the note until after July 18, 1923. At that time the note was apparently dishonored. Many instalments were overdue and unpaid so far as any endorsements showed. Moreover, it was actually dishonored. If all payments including the $200 are applied to the settlement of matured instalments and interest, several remained overdue and unpaid on July 18, 1923, and at all times thereafter.

The Trust Company was not a holder in due course. Payments made to the original payee must be credited.

A question of pleading arises: The payments under consideration were made in 1922. When the note was made and signed these payments were disregarded and the obligation made for the original sum. We cannot assume that this was due to fraud, vitiating the transaction. It was, we believe, due to a mistake. This equitable defense was open to the defendant. Such defense must be pleaded by brief statement. R. S. Ch. 87, Sec. 18. The defense of payment, on the other hand, is open under the general issue which is the only plea. But we think this point will not avail the plaintiff. The note was taken by Hibbard Brothers Co., not as a payment of the account due, but instead of the account. It was taken nunc pro tunc. It was apparently intended to put the parties in the same position as if the note had been taken at the time of the original transaction.

In view of this, we think that the two hundred-dollar payments

may be treated as payments upon the note and allowed under the general issue.

Interest must be figured at eight per cent up to the date of the "preceding term," to wit, September Term, 1928, as of which term judgment will be entered. R. S. Ch. 82, Sec. 49.

Judgment for plaintiff for $467.54.

WILLIAM J. BROWN

vs.

ANDROSCOGGIN & KENNEBEC RAILROAD COMPANY.

MARY A. BROWN *vs.* SAME.

NORA M. BROWN *vs.* SAME.

ESTHER SLATTERY, PRO AMI *vs.* SAME.

Cumberland. Opinion November 13, 1928.

STREET RAILROADS. NEGLIGENCE. DUE CARE DEFINED. DIRECTED VERDICTS.

In actions involving the question of negligence the well established rule of law is that the measure of care demanded of each party to the action is that degree of care that would be expended by an ordinarily prudent person, in the same or like circumstances.

When upon evidence presented, a verdict for the plaintiff cannot be sustained, it becomes the duty of the presiding Justice to direct a verdict for the defendant.

In the case at bar the evidence established that the driver of the automobile was "hard of hearing"; that the track of the electric street railway approached the highway, at the scene of the accident, through a private dooryard and not along an intersecting street. It therefore became the duty of each party to the action to exert more care than if otherwise conditioned and situated; the driver to be alert through the sense of sight to make up for any handicap because of less than normal acuteness of hearing; and the motorman to have his

speed reduced and his car under that degree of control that is demanded when an electric car is to be propelled from roadside property to and over the surface of a public and much travelled street, in the afternoon of a bright day at the height of summer traffic.

The record of the case showed, on one hand proper care and control on the part of the motorman, on the other hand a lack of due care on the part of the driver and adult occupants of the automobile. The ruling of the presiding Justice in directing verdicts for the defendant was correct.

On exceptions. Four cases are brought, by the driver of an automobile, his wife, his daughter, and by a granddaughter, an infant, by her next friend, against one and the same defendant, an electric railroad company.

Collision between automobile and a trolley car, on a grade street crossing, caused the injuries.

The four cases were tried together. Verdicts were directed for the defendant and exceptions taken in each case.

Exceptions overruled. No negligence on the part of the defendant company or its agents being found the verdicts stand, and under all the circumstances one opinion is sufficient for the four cases.

The facts are sufficiently recited in the opinion.

Richard E. Harvey, Eugene F. Martin, for plaintiffs.

William B. Skelton, for defendant.

SITTING: WILSON, C. J., PHILBROOK, DUNN, BARNES, JJ., DEASY, J. concurring in the result.

BARNES, J. The case first entitled is an action brought by the driver of an automobile to recover damages suffered in a collision with an electric car which was being moved, in the carriage of freight, in the course of its business, by the defendant company.

With this case were tried three other cases wherein the passengers in the automobile which this plaintiff was driving are suing the same defendant to recover for injuries by them sustained. These passengers are the wife, daughter and granddaughter of the driver.

To secure brevity the opinion is written as of the first case. The same result is reached in each.

Neither the driver nor any other plaintiff is entitled to a verdict,

unless such plaintiff shall establish the fact of negligence in the operation of the defendant's car.

The testimony is undisputed that the granddaughter, at the time of the accident, was but five years old, and that her grandparents, one the driver, the other a passenger, were her guardians on the day of the accident.

Plaintiffs must severally prove that, in their individual capacities, and as guardians of the minor, they were free from contributory negligence.

At the conclusion of all the evidence the defendant moved that verdicts should be directed for the defendant.

Such verdicts were directed, each plaintiff took exceptions thereto, and the question for determination by this Court is whether or not the direction of such verdicts, or any of them, was proper, under the law.

The accident occurred in broad daylight, on a crossing of defendant's track, at grade, over a main highway, which each had a right to travel, and where their rights and duties are commensurable, save that the defendant is confined to its rigid road of steel.

The measure of care demanded of each is that degree of care that would be expended by an ordinarily prudent person, in the same or like circumstances.

Now what are the facts?

The driver testified that he was "hard of hearing," though he said in cross-examination, "I always hear in the car, my folks tell me, better than I can in the air."

The motorman approached the highway through a private dooryard and not along an intersecting street.

They must each, therefore, exert more care than if otherwise conditioned and situated; the driver to be alert through the sense of sight, to make up for any handicap because of less than normal acuteness of hearing, and the motorman to have his speed reduced and his car under that degree of control that is demanded when an electric car is to be propelled from roadside property to and over the surface of a public, and a much travelled street, in the afternoon of a bright day at the height of the summer traffic.

For about a quarter of a mile northerly from the crossing the highway is straight and unobstructed. At three hundred feet from

the crossing, and northerly was a sign, four feet, three inches above the ground, easily to be read from the highway, and inscribed, "Safety First. Railroad Crossing — 300 Feet."

Down this highway the driver guided his automobile, and after he had passed the sign, the track of defendant's railway, with its trolley wire overhead, ran along on his left. Each of the three adults observed the safety sign; at least two of them spoke of it. The automobile was driven on, it may be at reduced speed, and as its occupants approached the crossing a sign at the crossing became more and more plainly visible, as also the trolley-wire suspended over the highway. Yet they testified they could not see the crossing, could not tell from which side a car or train might be approaching, or whether it was the crossing of a steam or of a trolley road.

The three were positive that none heard the approaching car.

The automobile was not stopped before making its crossing, evidence of negligence had it been approaching a crossing of a steam railroad, but proceeded on the side of the highway at its driver's right; an automobile coming to its rear was pulled out to the left, passed it and went on, and as the driver of the wrecked car followed, he testified, "The first thing I knew this car bumped into me. * * * My car was across the track when the electric car hit me * * * I see the crossing when I got on to it, when I looked back to the right, after I got on the crossing."

Asked if his daughter warned him of the crossing ahead, he said, "She certainly did."

The driver's wife testified: "I noticed a sign and moreover, I heard my daughter say that the sign was a railroad crossing sign; she says, 'There is a railroad crossing ahead,' and so of course when we got to that place I was trying to see as much as I could from the back seat, and the first thing I knew was that we were all looking as we went ahead and one car was ahead of Mr. Brown; I don't know whether there was more or not but there was one car and I looked just like this (illustrating), you know, as anyone naturally will and the little girl was on this side of the window looking out, and I was paying my attention to the electric car.

Q. To what?

A. To the railroad crossing.

Q. Now as you drove along which way did you look?

A. Why, I happened to be looking like this (illustrating).

Q. Do you mean straight ahead?

A. Straight ahead, and of course when I looked like this I usually notice anything that is in the outside air.

Q. You knew that there was a crossing some distance ahead of you?

A. Yes, I heard Mary say so.

Q. You saw the sign yourself?

A. Yes, I saw the sign.

Q. Did Mr. Brown see the sign?

A. I don't know; he is always looking of course for railroad crossing signs but he didn't speak to me and I didn't speak to him but I knew it from Mary's saying so.

Q. Did you listen as you drove along there?

A. Yes, sir."

Considered under the rule demanding of them the exercise of ordinary care these plaintiffs were negligent, and to the very moment of impact. And the little child suffered because of the negligence of its guardians at the time of the accident. It is evident that none of the occupants of the automobile perceived that a car was approaching, or that if they were aware of the fact they failed to adjust their movements to the necessities of the situation.

Three disinterested witnesses were in positions where they may have heard signals by the motorman as he approached the crossing. One testified that he did not hear any; another that she heard the car approaching; that she couldn't say for sure the whistle sounded, but that she supposed it did, and the third that as he stood in his dooryard he heard the motorman's signals.

In the rear compartment of the car an express messenger rode, a man whose duty it was to aid when contact with the trolley wire was disturbed. There was no conductor. The express messenger testified that he heard the motorman's signals for the crossing and described the signals as the motorman described them.

The latter testified that while he was in the dooryard next the crossing he saw the automobile about 300 feet up the road; that a house or houses obstructed his view while moving in the dooryard; that he was running slowly, his power was shut off; he was just "drifting"; that when he arrived at a point about 50 feet from the

crossing he gave the car a little power; that when he came near the crossing he saw the automobile again, as he said "right on me." "I throwed my brake and stopped, and he came along and didn't even touch the coupler, down underneath the bumper." He testified that in the dooryard next the crossing his regular signal for the crossing was one long whistle followed by two short ones; and that just before the collision he "blew one long whistle and then I blew another short one, and when this car was coming I blew a long whistle, a great, big, long whistle."

The driver of the car was a witness for the plaintiffs, and his testimony as to speed and management was not contradicted.

A woman witness, standing on the sidewalk that the car must cross, accompanied by her two little girls, testified that it was coming to the sidewalk, "Very slow. Q. — Faster than a good walk? A. — No; slower if anything." And the messenger, who was in the rear of the car, said when asked as to the suddenness of the stop: "There was no jolt such as you feel when the car is placed in emergency, the same feeling you would have when the car came to an ordinary stop."

Where the car stopped, how far across the travelled part of the highway it had proceeded when it stopped, is of importance in considering any of the phases of these cases.

The roadway was macadam, with gravelled shoulders. Asked "How far into the road part had you got when your car came to a dead stop?" the motorman answered, "I should say I wasn't over two feet on the macadam." He said that when he stepped from the door at the left forward corner of the car down to the ground he stood on the gravel.

The express messenger observed that when he returned to a position exactly in front of the standing car, to catch the trolley rope, his toes were right on the edge of the macadam. The witness who testified to hearing the whistle and the crash of the collision, went at once to the automobile, and returning noted the position of the car. He testified that the trucks of the car had not entered on the macadam.

No witness attempts to give the exact distance the car moved beyond the gravelled shoulder of the road, but none of them suggest it reached the middle of the macadam.

The record shows no evidence of negligence on the part of the defendant. It shows clearly, in the testimony above cited, and in other sections not herein referred to, that the adult passengers were each engaged in some sort of search for the crossing all knew they were approaching. If their testimony is taken literally, it shows negligence on the part of each, negligence that contributed to the occurrence of the collision, and that continued to a point of time when nothing that the motorman could do could afford them impunity.

When the motion for a directed verdict was made, the Justice doubtless asked himself, on the evidence, can a verdict for any of these plaintiffs stand?

If the answer were in the negative, it became clearly his duty to direct verdicts for the defendant.

It is the opinion of the Court that the ruling of the Justice was correct.

Exceptions overruled.

ABRAHAM BERNSTEIN *vs.* PHILIP BLUMENTHAL.

Cumberland. Opinion November 24, 1928.

MORTGAGES. REDEMPTION CONSTRUED AND DEFINED.

To redeem is to repurchase.

A mortgagor may cause a mortgage debt to be paid and by agreement the mortgage and note may be delivered uncancelled or assigned in the usual manner to the party advancing the funds, who will hold the title thereto in trust for the mortgagor who has become obligated to repay the mortgage debt to the party advancing the funds.

A discharge of the mortgage on the Registry records is not essential to constitute a redemption in contemplation of law, nor are circumstances under which the mortgagee can be compelled to discharge the mortgage.

If a mortgagor causes the mortgage debt to be paid and by agreement the premises are released to a third party who advances the funds, or the mortgage

and notes are delivered up to the third party uncancelled, or the mortgage assigned to the third party, and in each case for the mortgagor's benefit, who becomes obligated to repay the funds so advanced, it constitutes a redemption as between the mortgagee and mortgagor, though the mortgage is not discharged in accordance with Sec. 31, *Chap.* 95, *R. S.*

On exceptions. An action by a real estate broker upon an account annexed to recover commission alleged to be due for sale of property of the defendant. The defendant pleaded the general issue. Whether or not a commission was due the plaintiff depended upon whether or not the premises, for the sale of which the commission was claimed, were redeemed from a mortgage. Action was brought in the Superior Court for the County of Cumberland and heard by a referee who made a report to the Court of facts proved. Upon the findings of fact the presiding Judge ruled *pro forma* that there had been a redemption of the mortgage and ordered judgment for the defendant; to which ruling the plaintiff seasonably excepted. Exceptions overruled.

The case fully appears in the opinion.

Israel Bernstein, for plaintiff.

Sherman I. Gould, Abraham Breitbard, for defendant.

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

WILSON, C. J. In August, 1926, the defendant was the holder of several mortgages given by one Geisinger on certain real estate located on Spring Street in the city of Portland. On the junior mortgage, the defendant had foreclosed, the period of redemption expiring April 9, 1927.

The defendant, evidently assuming that the mortgagor might fail to redeem, authorized the plaintiff to procure a purchaser for the property when and if his title became absolute. A contract of sale negotiated by the plaintiff contained the following stipulation:

> "It is further understood and agreed that in event that the owner of the equity of redemption redeems the Spring Street property, then and in that event, this contract shall be null and void and the parties released from any and all obligations thereunder."

In the latter part of March, 1927, the mortgagor and owner of

the equity of redemption with two others, who it later developed were to advance the money to take up the mortgages, called at the defendant's place of business and requested him to meet them at the office of an attorney named and his mortgages would be "taken up."

Upon an accounting as to the amount due, it appeared that the parties did not at that time have sufficient ready funds. A written agreement was entered into by which the defendant on April 12, 1927, or three days after the expiration of the equity of redemption, the mortgagor joining in the agreement and waiving his right of redemption, agreed, upon the payment of the amounts due under the mortgages, to convey the property to the parties advancing the money for the mortgagor, the parties advancing the money also entering into an agreement with the mortgagor to reconvey to him the property at any time within two years upon the payment of the sums so advanced, which the mortgagor agreed to pay.

After leaving the attorney's office, the defendant bethought himself of his contract of sale negotiated by the plaintiff under which he had agreed to convey unless the mortgagor redeemed from the mortgages, and fearful lest the transaction as above outlined might not relieve him from the obligation to convey, returned to the attorney's office and explained the circumstances.

An examination of the records at the Registry of Deeds disclosing attachments of the equity of redemption of the mortgagor, and fearful lest a discharge of the mortgages would give the attaching creditors a prior lien over any security of the mortgagor could give the parties advancing the money to take up the mortgages under Sec. 59, Chap. 86, R. S., it was arranged to have the mortgages assigned to the parties advancing the money, although the parties advancing the money would under the circumstances have been subrogated to the rights of the mortgagee. *Williams* v. *Libby*, 118 Me., 80; *Kinsley* v. *Davis*, 74 Me., 498; *Kelley* v. *Jenness*, 50 Me., 455; 27 Cyc., 1435, 1438.

The plaintiff then brought this action to recover his commission as a broker in negotiating the conditional contract of sale in August, 1926, claiming that as there had been no discharge of the mortgage on the record, but an assignment, and the period of redemption having expired, there had been no redemption of the mortgage within the contemplation of the parties to the contract

of sale, and, therefore, the plaintiff was entitled to his commission as a broker.

The cause was first referred to a referee who made a report finding the above facts and submitting to the court the question of whether there had been a redemption as a matter of law.

The judge below ruled *pro forma* that there had been a redemption of the mortgage as a matter of law and ordered judgment for the defendant. To this ruling, the plaintiff took exceptions. We think the exceptions must be overruled.

Under the stipulations in the bill of exceptions, the issue is determined by the intention of the parties to the contract of sale as to what they had in mind by the provision above quoted excusing performance.

In construing this provision, the Court receives no aid from the entire contract, it not being made a part of the bill of exceptions, and we must, therefore, assume it throws no light upon it; nor is any assistance afforded by evidence of an interpretation by the parties themselves. The provision must speak for itself.

We are not impressed, however, with the view that only a payment and discharge of the mortgage, or a redemption only under circumstances under which the defendant could be compelled to discharge the mortgage was contemplated. Such a construction imputes an intent to the parties to the contract of sale to take every advantage of the mortgagor's necessities.

While the bill of exceptions does not in terms set forth that the agreement that the assignees would reconvey to the mortgagor upon the payment of the sums due upon the mortgages was to continue under the new arrangements, it is a fair inference from the facts set forth.

To redeem, according to the authorities, is to repurchase. *Re edemptio.* See *Webster's Dic.; Bouvier's Law Dic.; Black's Law Dic.; Words and Phrases, Title, Redeem; Bunn* v. *Braswell,* 142 N. C., 113; *Cold* v. *Beh,* 152 Ia., 368; *Mannington* v. *Hock. Val. R. Co.,* 183, Fed. R., 133, 145; *Maxwell* v. *Foster,* 67 S. C., 377, 390; *Miller* v. *Ratterman,* 47 Ohio St., 141, 156.

It is clear from the statement of facts contained in the bill of exceptions that the intent of the parties to the transaction in March, 1927, was that the mortgage debt to the defendant was to be paid

and the mortgage "taken up" for the benefit of the mortgagor. If the mortgagor or the parties advancing the money could not have compelled an assignment, *Lumsden* v. *Manson*, 96 Me., 357, the mortgagee could have been compelled to deliver up the mortgage note and mortgage uncancelled. *Jones on Mortgages*, 8th Ed., Vol. II, Secs. 1003-4, 1391.

As one person may purchase land and take title in the name of a third person who will hold the title in trust, so, too, a mortgagor may cause a mortgage debt to be paid and by agreement the mortgaged premises may be released, or the mortgage assigned to the parties providing the funds, who will hold the title in trust for the benefit of a mortgagor who has become obligated to repay the mortgage debt to the party advancing the funds, or the period of redemption be held to be extended. In any event, the rights of the mortgagor will be protected in a court of equity. 42 Cyc., 377; *Joiner* v. *Duncan*, 174 Ill., 252; *Herlihy* v. *Coney et al.*, 99 Me., 469; *Anderson* v. *Gile*, 107 Me., 325.

A junior mortgagee redeeming from a senior mortgagee by paying the amount due, may, if equity requires, compel an assignment of the mortgage to himself, or he may, even though the mortgage be discharged, be held to be subrogated to the rights of the senior mortgagee. *Williams* v. *Libby*, 118 Me., 80; 19, R. C. L., 479. So, too, there are other circumstances under which a court of equity upon redemption may compel an assignment. *Jones on Mortgages*, 8th Ed., Vol. II, Secs. 1004, 1391; 19 R. C. L. 482; *Heisler* v. *Aultman*, 56 Minn., 454.

The element of an absolute discharge of the mortgage, therefore, is not essential to constitute a redemption in contemplation of law, nor are circumstances under which the mortgagee can be compelled to discharge the mortgage. If a mortgagor is able to arrange for or cause the mortgage debt to be paid and by agreement the premises are released to a third party for the mortgagor's benefit, it constitutes a redemption as to the mortgagee, and by the mortgagor, though the property be not directly conveyed to the mortgagor or the mortgage discharged in accordance with Sec. 31 of Chap. 95, R. S.

Therefore, whether in this instance the mortgage had been paid at the request of the owner of the equity and discharged and the

parties advancing the funds subrogated to the right of the defendant; or the defendant had delivered up the mortgage note and mortgage uncancelled as he could have been compelled to do; or to accomplish the same purpose the mortgage and note were assigned to the parties advancing the money to be held for the benefit of the owner of the equity; it amounted to a redemption by the owner of the equity within the meaning of the parties to the contract of sale. To hold otherwise would impute to the parties to the contract of sale an unconscionable intent.

Exceptions overruled.

PETER A. ISAACSON, TRUSTEE

vs.

FREEMAN G. DAVIS ET AL.

Androscoggin. Opinion December 15, 1928.

EQUITY. COMMON LAW ASSIGNMENT. FRAUD. BANKRUPTCY.

In a bill in equity brought by a trustee in bankruptcy for the purpose of setting aside an assignment for the benefit of creditors on the ground of a fraudulent intent on the part of the assignee at its inception, the assignment having been made more than four months prior to the petition in bankruptcy, held:

That the finding of the court below that no fraudulent intent was shown is sustained by the evidence;

That the provision in a common-law assignment that only such creditors as assent thereto shall share in the funds does not render such assignment void.

That a period of sixty days in which creditors must signify their assent is not unreasonable;

That such assignments are not to be set aside for fraud before or after their execution. To render an assignment void on the ground of fraud, it must be shown to exist at its inception;

That the assignment in the instant case having been made more than four months before the petition in bankruptcy and being a valid assignment and it appearing from the record that the assets in the hands of the assignee are insufficient to pay in full the assenting creditors and those entitled in equity to share in the proceeds, the trustee in bankruptcy has no interest in the funds and the bill must be dismissed.

On appeal. A bill in equity brought by the Trustee in Bankruptcy of Merton W. Robinson against Freeman G. Davis and Merton W. Robinson seeking to have a common law assignment made on July 15, 1926, by said Robinson to said Davis for the benefit of creditors set aside on the ground of fraud.

Upon hearing the sitting Justice found for the petitioner and filed a decree declaring the common law assignment null and void, and defendant appealed. Appeal sustained. Bill dismissed.

The case fully appears in the opinion.

Harold L. Redding, for plaintiff.

Frank A. Morey,

Harry Manser, for Freeman G. Davis.

Benjamin L. Berman,

David V. Berman,

Jacob H. Berman,

Edward J. Berman, for Merton W. Robinson.

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

WILSON, C. J. A bill in equity, brought by a trustee appointed by the Bankruptcy Court, seeking to have a common law assignment by the bankrupt for the benefit of creditors declared void on the ground that the assignee at the time of the assignment fraudulently represented to the assignor that he would faithfully administer the trust under the assignment for the equal benefit of all the creditors of the assignor; that he had no such intention; on the contrary that he had a present and existing intent not to administer said trust for the equal benefit of all the creditors of the assignor, but for his own benefit and to obtain a preference for himself and the F. G. Davis Company, of which he was treasurer and manager, over the other creditors of said assignor.

The bill also asks for an accounting and the removal of the assignee.

The defendant, Merton W. Robinson, engaged in trade and becoming financially embarrassed, arranged for the sale of his stock and fixtures to one Newman on July 8, 1926. Before the trade was consummated, his stock was attached in an action brought by the

Lewiston Trust Company to recover on a note of the defendant the sum of $3700, with interest. On July 15, following a conference with several of his creditors at the store of the F. G. Davis Co., Robinson assigned all his property, real and personal, except such as is exempt under the bankruptcy statute, to the defendant, Davis, the deed of assignment containing the usual provision that the funds derived from a sale of the property should be distributed among such creditors as should within a certain time assent to such assignment and agree to accept their proportionate part in full discharge of their claim.

Upon the assignment being delivered, Davis arranged for the sale to Newman to be completed by paying the claim of the Trust Co., which agreed to accept $3500 in full discharge of its note. Davis took an assignment of the claim with the authority to prosecute the suit; but to enable the sale to go through was, of course, obliged to discharge the attachment, and the suit was abandoned. Davis also purchased the claims of several other creditors at varying discounts and had them assigned to himself.

At the time of the assignment, no inventory of the property or a list of creditors was attached or made a part. Robinson, however, gave Davis a list of his trade creditors, which with one exception appears to have been complete. There was no evidence that any was withheld with fraudulent intent. He was, however, owing several other parties on personal obligations of which he gave no list to Davis, but it does not appear that Davis had any knowledge thereof until this bill in equity was brought.

All the trade creditors, twenty in number, with possible exception of one, appear to have been seasonably notified of the assignment. Fourteen assented within the time fixed for their assent, viz., sixty days; and five more, without assenting, assigned their claims to Davis within the sixty day period, who assented to the assignment as assignee of these claims on November 14, 1926, but nearly four months after the date of the assignment. Three of the trade creditors, aggregating in amount $228.28, refused to assent, and, of course, none of the personal creditors, having claims aggregating nearly $1500, assented thereto, as none of them knew of the assignment, at least, until the bankruptcy proceedings were begun in November, 1926.

On November 27, 1926, Robinson on his own petition was adjudicated a bankrupt. When his petition was filed does not appear, but it is conceded it was not filed within four months after the assignment.

The ground on which it is alleged in the bill that the assignment is voidable is fraud on the part of the assignee at its inception. The Court below found that this allegation was not sustained by the evidence, but held that the assignment was void by reason of the provisions requiring the creditors to assent within sixty days and to release their claims in order to share in the distribution. The defendant Davis appealed.

While the views of the sitting justice always commands the respect of this Court, we think the appeal must be sustained. If it were a new question, the weight of authority might lead us to hold that a clause in an assignment of this nature, requiring the creditors in order to share in the proceeds to assent and release their claims in full would render an assignment voidable, 2 R. C. L., 671, Sec. 29 and cases cited in the footnotes; but while the opinions in the early Maine cases of *Fox* v. *Adams*, 5 Me., 245; *Canal Bank* v. *Cox*, 6 Me., 395; and *Todd* v. *Bucknam*, 11 Me., 41, are not couched in as conclusive language as they might have been, yet we think it clear that a contrary ruling was intended, or assumed as the law, by the Court in each of these cases, and that both Bench and Bar in this state have since understood that such a provision in a common law assignment for the benefit of creditors does not render the assignment voidable.

Whether the legislature by the Act of 1836 intended to provide otherwise may well have been open to question, nevertheless, this Court in *Pearson* v. *Crosby*, 23 Me., 261, construed this act as prohibiting such a provision. The legislature, however, the following year, Chap. 112, P. L. 1844, repealed the act of 1836, and provided that, if the debtor surrendered up any claim he had against the creditor, the creditor should release his claim against the debtor upon receiving his proportionate share of the proceeds. A provision authorizing the insertion of a clause requiring the discharge of claims in full was continued in the following revisions of the statutes, Chap. 70, Sec. 2, R. S. 1857, and Chap. 70, Sec. 2, R. S. 1871, until the enactment of the insolvent law in

1878, which repealed the statute regulating assignments, *Smith* v. *Sullivan*, 71 Me., 150.

Following this repeal, assignments at common law were still recognized as valid, *Pleasant Hill Cemetery* v. *Davis*, 76 Me., 289; but whether a clause providing for the discharge of the debtor was involved in the cases immediately following the enactment of the insolvent law, *Smith* v. *Sullivan*, supra; *Lewis* v. *Latner*, 72 Me., 488, and *Pleasant Hill Cemetery* v. *Davis*, supra, in which it was held that the assignment statute was repealed, does not appear. Presumably such clause was contained therein as the assignment in each case was based on Chap. 70, R. S. 1871. In the case of *Pleasant Hill Cemetery* v. *Davis*, supra, the assignment, though founded on the statute, was held valid at common law. In *National Bank* v. *Ware*, 95 Me., 388, 394, the assignment contained such a provision, and the Court assumed, without deciding, that if the plaintiff had become a party to the assignment, it would have been bound to accept the payment in full.

Again, in *Thompson* v. *Shaw*, 104 Me., 85, the assignment was in the usual form of a common law assignment in general use in this state for the benefit of creditors and contained the provision for discharge of the claims of those assenting. While the issue was not raised, the assignment, as will later appear, was held valid.

It is true that since the early decisions and especially since the passage of the Act of 1844, the question has not been expressly raised, for the reason that the statute permitted it, and since its repeal we think the understanding of the Bench and Bar of this state has been that the early decisions cited settled the rule in this state as to common law assignments, and the practice has been based on that assumption. In *Pleasant Hill Cemetery* v. *Davis*, supra, the Court said: "The repeal of the assignment laws, no new statute being enacted, would leave assignments as they were before the passage of the laws."

The sitting justice also based his decision in part at least on the provision requiring an assent by the creditors within sixty days, as being unreasonable and, therefore, grounds for voiding the assignment. He, however, recognizes in his findings that "with present day means of communication, if notice had been publicly given to all creditors, a Court might hesitate to say that a period of

sixty days without consideration of other facts was unreasonable"; and we are of the opinion that the provision of sixty days for an assent, with the present day means of communication is not in itself unreasonable. The period provided in the assignment law of 1836 was only three months. Surely in point of time, sixty days today is comparable in consideration of present day methods of communication with three months almost a century ago.

The deed of assignment in *Thompson* v. *Shaw*, supra, in addition to providing that assenting creditors should receive their proportionate part in full discharge of their claims, also contained the provision that distribution should be made only among such creditors as should signify their assent within *sixty days*. Though these issues were not raised, the Court said of this assignment:

> "Nothing appears in the assignment to indicate fraud. It is in the usual form of a common law assignment for the benefit of creditors. By it all the assignor's property not exempt from attachment and execution, was conveyed to be divided pro rata among all of her creditors who should assent thereto, and reasonable time for such assent was provided for. Such an assignment, if bona fide, is lawful. It is not *contra bonos mores*. Until assailed by some one claiming rights against it under the provisions of the bankruptcy law it stands as a valid transfer of the property described as conveyed therein. *Pleasant Hill Cemetery* v. *Davis*, 76 Maine, 289."

The sitting justice, however, laid stress on the fact that the assignment contains no provision for notice to creditors and none in fact was given. We presume the Court referred to public notice; because while no list of creditors was attached to the assignment, what the assignee assumed was a complete list of creditors was furnished him, and a personal notice by mail was sent by him to each creditor listed, dated on the day following the assignment.

Why the assignee gave no public notice but a personal one by mail does not appear. It may have been that he considered the latter the best form of notice, assuming he had a complete list, and even if he failed to state the time within which assent must be made, or did not take the proper method in giving notice, it would not necessarily affect the validity of the assignment, since assuming a

public notice, should have been given and there was an intent on the part of the assignee by the manner and form of giving notice to mislead creditors, it would not necessarily be fraud committed upon the assignment, or in its inception, but afterward, and, therefore, would not render it voidable. 2 R. C. L., 703, Sec. 55; *Loos* v. *Wilkinson*, 110 N. Y., 195.

An assignment can not be set aside because of fraud before or after. Such facts, it is true, may be evidence of fraud in the assignment that would vitiate it; but do not, if the assignment itself is without fraud, render it voidable.

We are of the opinion, therefore, that the conditions contained in the assignment are under the law of this state neither *contra bonos mores*, or unreasonable. Nor should these conditions or any fault or neglect of the assignee deprive innocent creditors, free of laches, of their rights therein. Nor has the plaintiff based his complaint upon these grounds.

As to the first ground and the one relied on in the bill: that there was a present intent to fraudulently administer the affairs under the assignment, it is now urged by the plaintiff that, notwithstanding the finding of the sitting justice to the contrary on this point, the bill should be sustained on this ground and the appeal dismissed.

While there are grounds on which it might be held that the assignee through ignorance of his duties under the assignment may have had a present intent, or even, with a full understanding of his obligations, a conscious fraudulent intent not to administer his trust in accordance with its terms, his failure to do so, as held by the sitting justice, resulted in no injury to the creditors, and is not a sufficient ground for voiding an assignment, in order that the funds may be distributed in the Bankruptcy Court. His intent at the time of the assignment to benefit himself, if he had such, by purchasing the claims and taking an assignment of them and of the note of the Trust Company must have been predicated on the expectation that the estate would pay the creditors in full or at least sufficient so that his share as assignee of these claims if allowed at their face would amount to more than he paid for them. Under the circumstances, if he can now share with the other unsecured creditors, his acts will only result to his own disadvantage,

and work no injury to the other creditors who have assented, or being free of any laches are permitted to assent.

Without fraud being clearly shown that entered into the assignment, equity requires, we think, the upholding of the assignment for the benefit of those creditors who have not proven their claims in the Bankruptcy Court, as it may become a question, if the assignment is held void, whether the assenting creditors can now prove their claims in that Court. Sec. 57n of the Bankruptcy Law; Collier on Bank, 11th Ed., pp. 823, 824.

It may, it is true, also be a question under the assignment whether the assignee of the several claims who did not assent within the sixty days can now share in the property under the assignment, but that question is not involved in this case and we express no opinion thereon.

The assignment having been made more than four months before the filing of the petition in bankruptcy and being valid, and it appearing from the only evidence in the record that the property in the hands of the assignee is insufficient to pay the creditors in full who have already assented to the assignment, the trustee in bankruptcy has no interest in the property conveyed to the assignee or its distribution, and the bill must be dismissed. The creditors still have their remedy in equity.

Appeal sustained.
Bill dismissed.

GEORGE M. COLBATH *vs.* H. B. STEBBINS LUMBER COMPANY.

Aroostook. Opinion January 1, 1929.

CONTRACTS. PERFORMANCE. CONDITIONS. "TIME IS OF THE ESSENCE" CONSTRUED. WAIVER. ESTOPPEL. EXCEPTIONS.

At law time is always of the essence of the contract unless it clearly appears that the intention of the parties is otherwise.

Time in equity is held to be of the essence or not according to the circumstances of the case.

The phrase "time is of the essence" is properly construed to mean, that the performance by one party at the time specified in the contract is essential in order to enable him to require performance from the other party.

In an action at law, when a promise is expressly conditioned upon an agreed condition to be performed within an expressed time, the Court cannot say that is immaterial which the parties have made by the contract material.

Whenever an instrument can be understood from its own words, its interpretation, the promise it makes, the duty or obligation it imposes, is a question of law for the Court.

Waiver is a voluntary or intentional relinquishment of a known right; it is essentially a matter of intention; may be proved by express declaration or by acts and declarations manifesting an intent or purpose not to claim the supposed advantage or by a course of acts or conduct or by so neglecting and failing to act as to induce a belief that it was the intention and purpose to waive; is a matter of fact.

While there may be all the elements of waiver in estoppel, the converse may not be true; for a party may so conduct himself as to show an intention to waive his rights when the adverse party has not been deceived or misled thereby and no estoppel may arise although a waiver may well be found.

In voluntary waiver the result is intended; in waiver by estoppel in pais the conduct may have been voluntary but the effect, as a matter of law, may not have been intended.

To constitute a waiver where there is no consideration, there must be a promise or permission, expressed or implied in fact, supported only by action in reliance thereon, to excuse performance in the future of a condition or of an obligation not due at the time when the promise is made, or to give up a defense not

yet arisen, which would otherwise prevent recovery on an obligation. While not a true estoppel such may be called a "promissory estoppel."

Where incorrect instructions have been given to the jury, unless it appears as a matter of law a contrary verdict could not have been found, if correct instructions had been given, then the excepting party was aggrieved and the exceptions must be sustained.

In the case at bar it appears that the parties made mutual promises expressly conditioned upon the performance of an agreed condition. Under the first part of the contract the defendant was bound to sell the lumber and was entitled to its commission thereunder. This had nothing to do with the second part of the contract and could not be considered as having any effect on it nor could the receipt of benefits therefrom be considered as any consideration for a modification or waiver of the second part of the contract. The instructions given, that time was not of the essence, and that even if it was, that a waiver might be found from the acceptance of the lumber for sale, were consequently erroneous and the exceptions were well taken.

On exceptions and general motion for new trial by defendant. An action on the case to recover under a written contract for an alleged "excess" of board feet over a stated amount in logs cut, hauled and sawed into lumber by the plaintiff. The defendant pleaded the general issue with a brief statement denying (1) that there was any actual "excess" and (2) that if by adding certain items there was an "excess" yet the plaintiff did not seasonably notify the defendant of this "excess" as in the contract provided. The jury rendered a verdict for the plaintiff in the sum of $5,317.98. To the refusal of the presiding Justice to give certain instructions, the defendant seasonably excepted, and after the verdict filed a general motion for new trial. Exceptions sustained. The case fully appears in the opinion.

Pattangall, Locke & Perkins,
R. K. Wood,
W. S. Brown, for plaintiff.
Cook, Hutchinson & Pierce, for defendant.

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

BASSETT, J. Action on the case to recover under a written contract for an alleged excess of spruce and fir logs above an amount

stated in the contract. Plea, general issue with brief statement that there was in fact no excess and that any excess was not proved within the time provided by the contract. Verdict of $5,317.98 for plaintiff. Case comes up on exceptions and general motion.

The plaintiff and defendant, by its treasurer, H. B. Stebbins, entered into a written contract dated August 30, 1920, by which the plaintiff agreed to construct a rossing mill at Squa Pan Lake, and cut during the ensuing logging season, and sell and deliver, the last delivery to be shipped by December 1, 1921, to the defendant 8,000 cords of rossed pulp wood and the defendant agreed to buy the pulp wood at specified prices.

The plaintiff by May 14, 1921, had cut and put into the lake all the logs to be used under the contract and had delivered some of the pulp wood to the defendant.

The defendant, conditions having changed, did not want to complete the contract. It was rescinded, the defendant agreeing to credit the plaintiff on his open account with an agreed sum for the logs in the lake, and the parties making a new written agreement which was made up of two parts, both dated and executed on May 14.

By one of these parts, drawn first, the plaintiff agreed to complete his sawmill on the lake and have it ready within thirty days to manufacture the logs then in the lake, the approximate amounts of which were stated, and to manufacture and ship the logs according to orders furnished by the defendant and to pay the defendant a commission of five per cent on the selling price, the proceeds to be applied first upon a mortgage given that day by the plaintiff to the defendant upon the logs to secure in part an advance payment of the balance due on stumpage of the logs, and of an amount not exceeding forty thousand dollars, to be advanced by the defendant to complete the mill. The plaintiff agreed to manufacture and ship on orders of the defendant a sufficient quantity of lumber to pay the mortgage on or before December 31, 1921.

The defendant agreed to advance not exceeding forty thousand dollars to complete the mill and put it into condition to manufacture the lumber and to pay the balance due on stumpage and when the mortgage had been paid, then to pay plaintiff the amount, less commission, of shipments made thereafter within sixty days of the date of shipment.

On May 14 the plaintiff and defendant met and drew a second part, which is the center of the controversy, as follows:

> "In connection with our agreement of May 14th, 1921 and of cancellation of our agreement of August 30, 1920, H. B. Stebbins Lumber Company agrees to turn over to G. M. Colbath money required for labor bills in the manufacturing of logs under our agreement of May 14th, 1921, not to exceed $6.00 a thousand on lumber as it is shipped under that contract. If by December 31, 1921 it proves that G. M. Colbath now has cut and in Squa Pan Lake to apply on our contract of May 14th, 1921, Spruce and Fir logs in excess of 4,590,666, we will pay you an amount equal to $10.00 a thousand on such excess of Spruce and Fir logs, but not to exceed $8,355.00. If it should prove by December 31, 1921 that the amount of Spruce and Fir logs now cut and in Squa Pan Lake to apply under our contract of May 14, 1921 is less than 4,590,666, G. M. Colbath agrees to pay H. B. Stebbins Lumber Company an amount equal to $10.00 a thousand on such shortage."

The mill was completed about July 1 and the manufacture into lumber of the logs in the lake began and continued until about November 10 when the lake froze over and manufacturing was suspended until the following spring. During 1921 about half of the logs had been manufactured. During the winter of 1921-1922 the plaintiff landed on the ice of the lake another cut of logs, which were boomed. The logs in question were loose. The plaintiff from time to time shipped lumber manufactured from the logs in question upon orders of the defendant and the defendant received the stipulated commission. By August 23, 1922, all the logs were manufactured except 521 which became mixed with the new cut. On September 15, 1922, the plaintiff sent to the defendant the mill scale amount of the manufactured lumber which showed an excess above the 4,590,666 stated in the second part of the contract. The defendant refused to pay (1) because the scale included some lumber graded as "red rot," (2) because the lumber had been sawed scant at the mill, thereby making the mill scale appear more than actually sawed, so that with scale bill corrected by rejection of red rot and reduction for scant sawing there was a shortage, not an excess, and

(3) because the amount of any excess had not been determined by December 31, 1921.

The first exception raises the question, whether, in determining the "excess" or "shortage" under the second part of the contract, lumber graded as "red rot," of which there was admittedly 433,204 feet board measure, should be excluded. In view of other instructions deemed to be erroneous and prejudicial, bearing on the plaintiff's right now to maintain his claim for an alleged excess, we think it is unnecessary to consider further this exception other than to say the question was properly left to the jury and the exception cannot be maintained.

The second exception raises the question of the effect of the date, December 31, 1921, in the second part of the contract, the defendant contending that it was of the essence of the contract.

The parties on May 14 in executing the second part of the contract had in mind a liquidation of the damages to the plaintiff for not carrying out the rescinded contract. They had agreed upon a sum, which was credited to the plaintiff based upon an agreed amount of logs in the lake, which amount the plaintiff believed to be less than the actual amount and the defendant believed to be more than, or at least not less than, the actual amount.

The completion of the first part of the contract was in no way dependent upon any difference between the actual and the fixed amount of logs in the lake as agreed upon in the second part of the contract. In fact the two contracts are in no way dependent on each other. By the second part, the defendant promised that, if by December 31 it was proved there were in the lake on May 14 more than the stated amount of logs, he would pay the plaintiff a computed amount of money, and the plaintiff making a mutual and similar promise in case of shortage. Proving or determining by December 31 was not an impossible condition, nor at the date of the contract did it appear to be so. If to prove it would require taking the logs from the lake and piling them, "banking them" before and manufacturing them after the lake froze or running the plant more hours in the twenty-four, that would not, though causing additional expense, be an excuse for non-fulfillment of the condition.

The defendant requested an instruction "that the alleged overrun not having been proved before December 31, 1921, the plaintiff cannot recover."

This was refused and the jury were instructed, "Now I charge you . . . that in this contract that date, December 31, 1921, is not of the essence of the contract to such an extent as to make an absolute and precise and complete compliance with the matter of the scale at the tail of the mill to be such as to deprive Colbath of any rights on the ten dollars phase of the contract after that date — on stuff sawed after that date. . . . If the evidence now in the case, spoken and written, has satisfied you that on that day in 1921 when their minds met in the contract they both knew and appreciated that the defendant's liability was to end on December 31, 1921, you may find that that date was of the essence of the contract and govern your further deliberations accordingly. Generally the date does not bind. If they both knew and appreciated the fact and agreed to it in May, it certainly does bind."

The defendant excepted to the refusal to instruct and to the instructions given, because (1) under the contract time was of the essence of the contract, (2) because that question should not have been left to the jury, and (3) because of the words in the charge, "generally the date does not bind."

In general, it may be said that at law time is always of the essence of the contract, *Snowman* v. *Harford*, 55 Me., 197, 199; *Hill* v. *Fisher*, 34 Me., 144; *Williston on Contracts* (1921) II, Sec. 845; 6 R. C. L., Sec. 285 at page 898; 13 C. J., 686; *Jennings* v. *Bowman*, 91 S. E., 732 (So. Car.), although in equity a different rule prevails. Time in equity is held to be of the essence or not, according to the circumstances of the case. *Snowman* v. *Harford*, supra; *Williston on Contracts II*, Sec. 852; 13 C. J., 686; *Telegraphone Corp.* v. *Telegraphone Co.*, 103 Me., 454. And under some circumstances, in law time may or not be of the essence according to the intent of the parties.

But when it is said that time is of the essence, the proper meaning of the phrase is that the performance by one party at the time specified in the contract is essential in order to enable him to require performance from the other party. One party may make his promise expressly conditional on the exact performance of any agreed condition, and, therefore, performance on a specified day

or hour, or before a specified day, may be made such a condition. *Williston on Contracts II*, Sec. 846.

We think that in the instant case the parties made mutual promises expressly conditional upon the performance of an agreed condition and the case falls within the well-established rule that where parties expressly agree that liability shall depend upon the happening of a future event, the plaintiff must show that the event upon which the money is to be paid has happened or that the defendant has improperly prevented its happening or has waived it. *Holdripp Exec.* v. *Otway*, 2 Saunders, 106; *French* v. *Campbell*, 2 H. Black, 178; *Hecht* v. *Taubel*, 26 Atl., 20 (N. J.); *B. & M. River R. R. Co.* v. *Boestler*, 15 Ia., 555; *Patterson* v. *Augusta Water Company*, 30 Me., 91; *Richardson* v. *Boston Chemical Laboratory*, 9 Met., 42; *Ames et al* v. *Brooks et al*, 143 Mass., 348; *Jennings* v. *Bowman*, supra.

In an action at law, when a promise is expressly conditioned upon an agreed condition to be performed within an expressed time, this Court cannot say that it is immaterial which the parties have made by their contract material. *Hill* v. *Fisher*, supra.

Whenever a paper can be understood from its own words, its interpretation, the promise it makes, the duty or obligation it imposes, is a question of law for the court. *State* v. *Patterson*, 68 Me., 473; *Hoyt* v. *Tapley*, 121 Me., 239.

We think, therefore, that the jury should have been instructed that, as a matter of law, the mutual promises to pay were conditioned upon a condition precedent, upon it being proved by December 31, 1921, whether the number of feet of logs in the lake on May 14 exceeded or fell short of the stated number, and the jury should not have been instructed that time was not, as a matter of law, of the essence and that whether the parties intended it to be of the essence was a question of fact for them to determine.

Third exception. The defendant contended that what is a reasonable time is a question of law for the court; and that if it were held that time was not of the essence the plaintiff would have only a reasonable time after the date fixed in the contract, that a delay of eight months after December 31 had expired was more than a reasonable delay. The Court refused and instructed, "with the knowledge which you have of the case and the business, it is a ques-

tion for you to determine whether that delay so expressed was an unreasonable delay, if you find that time was of the essence of the contract." To the refusal to instruct and to the instruction given, the defendant excepted.

What is a reasonable time is a question of law when the facts are ascertained; under other conditions it is a mixed question of law and fact, for submission to a jury; the requisite diligence is governed by the circumstances of the particular case. *Motor Co.* v. *Stanyan*, 123 Me., 346, 350; *Fisk* v. *Williams*, 75 Me., 217.

As the question of unreasonable delay would arise only if the defendant waived the performance of the condition, it is unnecessary, in view of the rulings on the questions raised in connection with an alleged waiver, to consider further this exception. *Attwood* v. *Clark*, 2 Green, 249; *Watson* v. *Fales*, 97 Me., 366; 13 C. J., 690.

The fourth and fifth exceptions can be considered together. They raise the questions of waiver of the time limit fixed and whether a consideration therefor was necessary.

The defendant requested an instruction that there was no evidence for the consideration of the jury that the defendant waived the time limitation in the contract. The court refused to do so, and instructed the jury that the question of waiver would arise only in case the jury found that the plaintiff must observe at his peril the date, December 31; and, if they so found, that time was of the essence, they must, in order for it to be waived, further find a consideration for the waiver, and left it to the jury to find both a waiver and consideration.

The defendant also requested an instruction that the fact the plaintiff shipped lumber to the defendant after December 31, 1921, and paid commission could not constitute consideration for the waiver as the defendant had agreed to do so in the contract. The court refused to do so, and stated to the jury he had instructed them to the contrary quite fully.

To these refusals to instruct and the instructions given, the defendant excepted.

Waiver and its essential requirements have been defined by our court. It is a voluntary or intentional relinquishment of a known right, *Burnham* v. *Austin*, 105 Me., 199; *Hurley* v. *Farnsworth*, 107 Me., 309; and further it is essentially a matter of intention,

Libby v. *Haley*, 91 Me., 333; *Stewart* v. *Leonard*, 103 Me., 132; *Burnham* v. *Austin*, supra; *Hurley* v. *Farnsworth*, supra. It may be proved by express declaration or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage, or by a course of acts and conduct, or by so neglecting and failing to act as to induce a belief that it was the intention and purpose to waive. *Burnham* v. *Austin*, supra; *Hurley* v. *Farnsworth*, supra. Waiver is a matter of fact. It is for the jury to say what the conduct of the party against whom a waiver is claimed means or signifies; what his words, acts, or non-action under the circumstances naturally and logically indicate to have been his intention, whether they show a voluntary choice not to claim a right or a voluntary abandonment of it. *Libby* v. *Haley*, supra.

It has been said that "Waiver is where one in possession of any right, whether conferred by law or contract, and of full knowledge of the material facts, does or forbears to do something inconsistent with the existence of the right or of his intention to rely upon it, and thereupon he is said to have waived it, and is precluded from claiming anything by reason of it afterwards. And it may be added that under such circumstances, if a renunciation of the waiver would work to the injury or disadvantage of another who relied upon it, the party making the waiver is estopped to deny it." *Smith* v. *Phillips National Bank*, 114 Me., 302.

It perhaps is more accurate to say that it is where one in possession of any right whether conferred by law or contract, and of full knowledge of the material facts, does something or forbears to do something, the doing of which or the failure or forbearance to do which is inconsistent with the right or his intention to rely on it.

While there may be all the elements of waiver in estoppel, the converse may not be true; for a party may so conduct himself as to show an intention to waive his rights when the adverse party has not been deceived or misled thereby and no estoppel would arise, although a waiver may well be found. In voluntary waiver the result is intended; in waiver by estoppel in pais, the conduct may have been voluntary but the effect, as a matter of law, may not have been intended. The cases do not all recognize this distinction and apply the doctrine of waiver and estoppel indiscriminately in furtherance of justice. *Libby* v. *Haley*, supra.

It is stated that to constitute a waiver, there must be either a

contract supported by consideration or the necessary elements of estoppel. 27 R. C. L., Sec. 5, page 910; *Williston on Contracts*, Vol. II, Sec. 679, page 1314, note 26. If the "estoppel" of this alternative means the ordinary equitable estoppel, a necessary element of which is the misstatement of an existing fact, this court has not so held. Nor as appears from an analysis of the language and of the facts in the decisions of this court, cited above, is the definition of waiver to be understood as implying that any voluntary or intentional relinquishment of a known right is necessarily effective. Such an implication would be of course unsound. A waiver may, as appears in some cases, have also the elements of equitable estoppel. A waiver may be supported by consideration. But it will appear from the decisions of this court that to constitute a waiver where there is no consideration, there must be a promise or permission, express or implied in fact, supported only by action in reliance thereon, to excuse performance in the future of a condition or of an obligation not due at the time, when the promise is made, or to give up a defense not yet arisen, which would otherwise prevent recovery on an obligation. Though there is often said to be in such case an estoppel and the case said to be distinguishable from a waiver, there is not a true estoppel for there is no misrepresentation of an existing fact. It may be called "a promissory estoppel." *Williston on Contracts*, Vol. II, Sec. 678, 679, 689-692. We think that this distinction will harmonize many decisions and will clarify what appears to be some confusion of definition and expression.

In the instant case, waiver might have been considered with reference to two periods of time, before and after December 31. If before, the waiver would be the relinquishment of a right to insist upon the performance of the condition before the time within which it must be performed had passed and before a defense of non-performance had arisen; if after, it would be the relinquishment of a defense already arisen.

If there was any promise or agreement before December 31, either express or implied, on the part of the defendant that it would not insist on the excess logs being determined before that date, if the defendant had indicated by words or acts, while performance of the condition was still possible that its non-performance would not affect his own action under the contract, and the plaintiff acted upon that understanding, "a promissory estoppel" would result

and no consideration would be necessary.

If, however, it is claimed that the defendant agreed after December 31 to waive its defense of non-compliance with the contract as to time, it is in effect a new undertaking, and a consideration was essential to support it.

The Court in instructing the jury on this question told them they might consider the acceptance of the lumber for sale after December 31 without inquiring as to when it was measured, whether before or after December 31, and the further acceptance of lumber for sale during the season of 1922 as evidence of a waiver and that they might regard the fact that it received a benefit by so doing in the form of commissions on the sale of the lumber as a sufficient consideration for the waiver.

Obviously, this was erroneous. The defendant was bound under the first part of the contract to sell the lumber and was entitled to its commission thereunder. This had nothing to do with the second part of the contract and would not be considered as having any effect on it nor could the receipt of benefits therefrom be considered as any consideration for a modification or waiver of the second part of the contract.

These erroneous instructions that time was not of the essence of this contract and, if it was, that a waiver of it might be found from the acceptance of lumber for sale under the first part of the contract, and the failure, as there was, to call the jury's attention to the question of a possible waiver before December 31, must have misled the jury, and, as there was no conclusive evidence of a prior waiver, the erroneous instructions must be deemed prejudicial.

Various expressions have been used in the books in defining what constitutes prejudicial error and the burden resting on the excepting party to establish it.

In *Toole* v. *Bearce*, 91 Me., 209, 214, it was stated that the burden resting on the excepting party required him to show that, but for the ruling complained of, the verdict and judgment might properly have been different. This does not require him to show it probably would have been different, but only that there was evidence on which the jury might have arrived at a contrary verdict, which, in law, would be permitted to stand.

The rule laid down in the case of *Starkey* v. *Lewin*, 118 Me., 87,

91, therefore, appears to be a correct statement of what constitutes prejudicial error, viz., if the jury *may* have been misled and, but for the ruling, might have properly arrived at a contrary verdict, the excepting party is aggrieved.

This rule is also further recognized in *Toole* v. *Bearce*, supra, at the close of the opinion, "If that does not appear (that is, that a contrary verdict might have properly been found) and the verdict in the end must have been against the excepting party, the excepting party was not prejudiced;" and in *Coombs* v. *Fessenden*, 114 Me., 347, 354, where the court said the excepting party was prejudiced where it could not be held "with unmistakable certainty that the (excepting party) must necessarily ultimately fail."

Or conversely, unless it appears as a matter of law that a contrary verdict could not have properly been found, if correct instructions had been given, then the excepting party was aggrieved, and the exceptions must be sustained.

The verdict of the jury may have been based on their finding that time was not of the essence of the contract, or that it was of the essence and there was a waiver after December 31 supported by the consideration of acceptance of lumber for sale after December 31. Such bases were erroneous.

We think further that, if correct instructions had been given, the jury on the question of a waiver prior to December 31 might, on the evidence, have properly found for the defendant; that is, a verdict for the defendant could not, as a matter of law, be set aside on that ground.

It cannot, therefore, be determined upon what the verdict was based. *Farr* v. *Whitney*, 260 Mass., 193, 197.

Our conclusion makes a consideration of the motion unnecessary.

The mandate must be

Exceptions sustained.

JESSIE F. CUMMINGS APPL'T FROM DECREE OF JUDGE OF PROBATE.

Cumberland. Opinion January 4, 1929.

APPEAL. PROBATE COURTS. ADOPTION. DIVORCE. R. S. CHAP. 72, SEC. 36.

In a petition for the adoption of a child by the grandmother it was alleged that the mother was not a suitable person to have custody of the child, which at the time the petition was filed was the only ground on which the consent of the mother could be dispensed with. The Probate Court found as a fact that the mother was not a suitable person to have custody and against her protest granted the petition for adoption.

On appeal, the Supreme Court of Probate reversed the finding of the Probate Court as to the fitness of the mother, but it appearing that since the filing of the petition in the Probate Court the mother had obtained a divorce in another state, and that previously the Probate Court in Cumberland County had given custody to the father, the Supreme Court of Probate dismissed the appeal on the ground that under the statutes of this state, Sec. 36, Chap. 72, R. S., when a divorce has been decreed and custody has been given by some court having jurisdiction to one of the parents the consent of the other parent is not necessary in order to grant a petition for adoption, held:

That where a statute is general in its terms and not expressly limited in its application to conditions existing at the time of the enactment, it will be held to apply to cases within its terms or purview that arise or come into existence subsequent to its passage.

That the petition of the Probate Court, being the foundation upon which its jurisdiction and that of the Supreme Court of Probate is based, must allege sufficient facts to show the authority and power of the Court to make the decree prayed for.

That while the ruling of the Supreme Court of Probate was correct upon the question of a parent's consent in a petition for adoption, having found that the only allegation set forth in the petition on which the Probate Court was warranted in dispensing with the mother's consent was not true, the Supreme Court of Probate should have sustained the appeal.

On exceptions. An appeal by Jessie F. Cummings from the decree of the Probate Court for Cumberland County which granted the petition of Nellie F. Cummings, the grandmother, for the adoption of Evelina F. Cummings, the minor child of the appellant and Ralph G. Cummings, and came before the Law Court on exceptions

by the appellant from the rulings of law made by the presiding Justice of the Supreme Court of Probate dismissing her appeal. Exceptions sustained.

The case fully appears in the opinion.

Harry B. Ross,

F. J. Laughlin, for appellant.

Edmund P. Mahoney, for appellee.

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

WILSON, C. J. The petitioner and her husband, Ralph G. Cummings, became estranged sometime prior to October, 1924. On October 30 of that year, the Probate Court for Cumberland County entered a decree on the petition of the father, giving the custody of their minor child to the father on condition that the child should remain in the home of the father's mother, there to be maintained by the father, the mother to have full opportunity to see the child.

On May 19, 1925, the appellant obtained a divorce from her husband in Massachusetts, where she was then living, no decree, of course, being made by the Massachusetts court as to the custody of the child, it not being within the jurisdiction of that court.

In April, 1925, and prior to the granting of the divorce, the grandmother, Nellie F. Cummings, filed a petition in the Probate Court in Cumberland County, praying that she be allowed to adopt the child, to which petition the father consented, the petition representing that the mother was not a fit person to have the custody of the child. At the time of the filing of the petition, unless it was found that the mother was not a fit person to have custody of the child, her consent to the adoption was necessary.

The Probate Court, however, after notice to the mother found that she was not a fit person to have custody of the child and entered a decree of adoption. From this decree the mother appealed. The appeal came before this Court on the question of whether the motion was a person aggrieved by the decree. This Court held in 126 Me., 111, that she was a person aggrieved and entitled to prosecute her appeal. At the October Term of the Supreme Judicial Court, 1927, the Court sitting as a Supreme Court of Probate reversed the finding of the Probate Court that the mother was not a fit person to have custody and found that the mother was a fit per-

son to have custody of the child, but dismissed the appeal on the ground that a divorce having been decreed between the parties and the custody of the child having been given to the father, although not by the Court granting the divorce, the consent of the mother was not necessary under Sec. 36 of Chap. 72, R. S., and further held that the Supreme Court of Probate should not for this reason disturb the decree below.

The case is now before this Court on the appellant's exception to this ruling. It is urged by the appellant that the exceptions should be sustained on the ground, that the statute dispensing with consent applies only in cases where custody has been given to one parent by the court granting the divorce, and, therefore, she having been found to be a suitable person to have custody, the mother's consent was required in this case.

It is true in enacting the amendments to the original statute relating to adoption in 1865, Chap. 295, and in 1867, Chap. 87, and providing in case of separation or divorce the consent only of the parent entitled to the custody of the child was required, the legislature could not have had in mind a decree granting custody except in cases of divorce, since the power to order custody in case of separation was not given to Probate Courts until 1895, Chap. 43.

The language of the statute enacted in 1867, however, was general in its terms: "Instead of the consent of each parent of the child sought to be adopted * * * the written consent of the parent entitled to the custody of the child shall be sufficient, when a divorce from the bonds of matrimony or from bed and board, has been decreed to the parents." It was not in terms limited to custody granted by the court making the decree of divorce. It was prospective in operation. In slightly different terms, the last amendment is now found in Sec. 36 of Chap. 72, R. S.

Where a statute is general in its terms and not expressly limited in its application to conditions existing at the time of the enactment, it will be held to apply to cases within its terms of purview that arise or come into existence subsequent to its passage. 25 R. C. L., 778.

This Court, when this case was previously before it, 126 Me., 111, 114, adopted this rule of construction, and we hold it may properly be applied to the situation now before us.

We think, too, this case comes within the purview of the stat-

ute. The legislature has from time to time amended the original act adopted in 1855, Chap. 189, which required the consent of both parents, by providing in cases of separation or divorce that the parent entitled to custody only need consent; and that if either parent was not fit to be entrusted with custody of the child, though no decree of custody in the other parent had been made; and in 1927, Chap. 189, in case either parent had abandoned the child, his or her consent was not required. The purpose of the legislature in the progressive course of this legislation has been to dispense with the consent of a parent who by reason of unfitness, whether resulting in a decree of custody in the other parent or not, or by the abandonment of a child had forfeited his or her right to control its trainings and its future welfare. Custody in one parent granted by the Probate Court after separation of the parents presumably must have been predicated on the abandonment by, or some element of unfitness or indifference to the welfare of the child on the part of the other parent. That the consent of such parent is unnecessary in case of adoption is consistent with the general purpose of the statute as well as being within its terms.

The petition to the Probate Court, however, is the foundation upon which its jurisdiction and that of the Supreme Court of Probate is based, and it must allege sufficient facts to show the authority and power of the court to make the decree prayed for. *Taber* v. *Douglass*, 101 Me., 363, 367; *Overseers of Fairfield* v. *Gullifer*, 49 Me., 360; *Paine* v. *Folsom*, 107 Me., 337. The Supreme Court of Probate cannot act when the Probate Court may not, *Hanscom* v. *Marston*, 82 Me., 288, 296; *Veazie Bank* v. *Young*, 53 Me., 555, 559.

"The written consent of adoption given in one of the several methods specified in Sec. 33 (now Sec. 36) is expressly made a statutory prerequisite to the exercise of the power conferred upon the Court to grant such a petition. It is a jurisdictional fact required by statute and must be distinctly alleged in the petition as the basis of the Court's authority to act in the premises." *Taber* v. *Douglass*, supra, p. 368.

While probate petitions may in proper cases be amended, and greater freedom of amendment should be allowed than in the common law courts, we do not think, as contended by counsel for the appellee, this case falls within that class of cases cited in *Morin's*

Case, 122 Me., 338, where the case was fully heard on all the facts below and this Court where the pleadings are amendable will not send the case back for an amendment but will decide the cause as though an amendment had been made.

To find that the only jurisdictional fact alleged in the petition did not exist, and to dismiss the appeal, leaves a petition in the Probate Court, on which no decree could be based without the consent of the mother; and to hold that the Supreme Court of Probate should not disturb a decree based on facts which it found did not exist was error.

What the decree of the court below would have been if the question of the unfitness of the mother had not been raised and found as a fact, we do not know. The statute requires the judge, even when consent of a parent is shown or rendered unnecessary, to take into consideration the ability of the petitioner and of the fitness and propriety of the adoption, Sec. 37, Chap. 72, R. S., and whether it would in this instance have deprived the mother of all possible control or rights in her daughter, even of the right to see her which she now has, if it had been found that she was a suitable person to have the custody of her child, has not been adjudicated.

Therefore, while the ruling as to the consent of the mother not being required was correct as a matter of law on the premises assumed, since the only ground found in the Probate Court for dispensing with the consent of the mother and the only reason for the appeal was determined in the Supreme Court of Probate in favor of the appellant, and there being no other allegation in the petition on which the Supreme Court of Probate could affirm the decree of adoption without the consent of the mother, we think the exceptions must be sustained and the order below should have been appeal sustained.

The mandate here will be:

Exceptions sustained.

JAMES A. HUSSEY *vs.* EDWARD S. TITCOMB.

GEORGE W. PERKINS ET ALS *vs.* SAME.

CHARLES M. BOYLE ET AL *vs.* SAME.

CHARLES M. BOYLE *vs.* SAME.

J. WESLEY NEAL *vs.* SAME.

York. Opinion January 4, 1929.

TRUSTEE PROCESS. "CONTINGENCY" DEFINED. ESTATES. WIDOW'S ALLOWANCE. R. S. CHAP. 91, SEC. 36 AND 55. R. S. CHAP. 70, SEC. 14.

The contingency referred to in R. S. Chap. 91, *Secs.* 36 *and* 55, *relative to trustee process, is one which may prevent the principal from having any claim whatsoever or right to call the trustee to account or settle with him. It is not a contingency as to whether anything may be found due from the trustee to the principal, who has an absolute right to call upon the trustee to render the account and make the settlement.*

The right of a legatee to a legacy and the interest of an heir in the distributive share of an intestate estate are subject to be attached on trustee process before it is ascertained that there are sufficient assets to pay the same.

Uncertainty as to whether there will be anything for distribution does not constitute a "contingency" within the meaning of the statute.

A widow's allowance under R. S. Chap. 70, *Sec.* 14, *takes precedence over any distribution of the personal estate. The amount allowed rests in the reasonable judicial discretion of the Judge of Probate, subject to review on appeal.*

Prior to decree of the Judge of Probate granting a widow's allowance it is not subject to trustee process. Resting in the sound discretion of the Judge of Probate it is not a matter of right. It is contigent and uncertain. It is not a debt due from the estate nor a distributive share of it.

In the case at bar the distributive share of the widow of the intestate vested at her husband's death. The uncertainty as to whether there would be anything eventually payable to her was not a statutory "contingency." It was subject to attachment upon trustee process and the trustee was chargeable therefor upon final settlement of his account and decree of distribution. However, this widow's distributive share was all absorbed by the widow's allowance granted by the Judge of Probate. Hence the defendant could not be held chargeable as trustee of the principal defendant in any of the five suits here involved.

On exceptions. Five actions of *scire facias* against a trustee. By agreement of the parties the cases were presented and heard together at the May, 1928, term of the Supreme Judicial Court for York County, by the presiding Justice on an agreed statement of facts, of which the material are set forth in the opinion.

The presiding Justice found for the plaintiffs and ordered judgments to be entered as of the May term.

The defendant seasonably excepted to these rulings. Exceptions sustained in each case.

E. P. Spinney, for plaintiffs.

F. Roger Miller,

Willard & Ford, for defendant.

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

STURGIS, J. Five actions of *scire facias* to enforce judgments in trustee suits against the defendant as administrator of the estate of William H. Furlong, late of North Berwick, Maine, deceased. Exceptions to rulings by the presiding Justice at nisi prius bring the cases here, and identity of issues of fact and law permit a single consideration.

These actions are brought under R. S. Chap. 91, Sec. 67, and the trustee not having been examined in the original suits, in lieu of the examination on *scire facias* authorized by R. S. Chap. 91, Sec. 71, the trustee was charged on an agreed statement of facts of which the following are material.

William H. Furlong died intestate and without issue on November 17, 1924. He was survived by a widow, Winnie H. Furlong, who is the principal defendant in the trustee suits from which these *scire facias* actions originate.

January 2, 1925, Edward S. Titcomb, the defendant, was appointed and qualified as administrator of the estate of William H. Furlong; April 2, 1926, an inventory was filed showing personal estate only; May 28, 1926, the trustee writs, naming the widow as principal defendant and the administrator as trustee, were served; and at the September Term of the Supreme Judicial Court for the County of York the trustee, without examination, under oath, disclosed assets of the estate then in his hands amounting to $3,089.58.

At the following January Term judgment was entered for the plaintiffs, and on February 9, 1927, executions issued against the principal defendant and the trustee.

February 15, 1927, the administrator settled his first account, showing a balance of assets of $3,089.58 as disclosed. And on the same day, on a petition then pending, the Judge of Probate for the County of York granted to the widow, as a widow's allowance, all the personal estate of the deceased not necessary for payment of debts, funeral charges, and expenses of administration.

Except to note that the administrator has not yet filed his final account, and no order of distribution has issued, a further recital of facts seems unnecessary.

The liability of the principal defendant in the original trustee suits is admitted — the single question at issue being whether the trustee can be charged to the extent of this liability for the widow's distributive share or allowance. The court below ruled the trustee was liable as charged in the trustee suits, and ordered *scire facias* judgments to issue for the full amount of the plaintiffs' several claims with costs. The correctness of this ruling is challenged by the exceptions before us.

The principal defendant as widow of the intestate, there being no issue, was entitled upon distribution of her husband's estate to one half of the net balance of the personal estate in the hands of the administrator, after payment of debts, funeral charges, and charges of settlement, R. S. Chap. 80, Sec. 20; *Fogg, Appellant*, 105 Me., 480; *Smith, Appellant*, 107 Me., 247.

"Any debt or legacy due from an executor or administrator, and any goods, effects and credits in his hands, as such, may be attached by trustee process," but "No person shall be adjudged trustee by reason of any money or other thing due from him to the principal defendant, unless at the time of the service of the writ upon him, it is due absolutely and not on any contingency." R. S. Chap. 91, Secs. 36 and 55.

The contingency referred to in the statute is one which may prevent the principal from having any claim whatever or right to call the trustee to account or settle with him. It is not a contingency as to whether anything may be found due from the trustee to the principal, who has an absolute right to call upon the trustee to render the account and make the settlement. *Dwinel* v. *Stone*, 30 Me.,

384; *Wilson* v. *Wood*, 34 Me., 123; *Cutter* v. *Perkins*, 47 Me., 557; *Jordan* v. *Jordan*, 75 Me., 103.

It is therefore held in *Cutter* v. *Perkins*, supra, that the residuary bequest is subject to trustee process, the uncertainty as to its amount not clothing it with the contingency of the statute. "They (the residuary legatees) had a right to call upon the trustee to render his account in probate and make the settlement, and this, notwithstanding it might in the end turn out that the estate was all absorbed, without leaving anything for them."

The Court of Massachusetts reaches a similar conclusion in its construction of the statute of that Commonwealth, which in context and import is substantially the same as that of Maine.

In *Wheeler* v. *Bowen*, 20 Pickering (Mass.), 563, the administrator of an intestate estate was charged on trustee process with the distributive share of an heir-at-law, before a decree of distribution, that Court holding that the uncertainty as to whether there would be anything for distribution was not a contingency within the statute.

In *Mechanics Savings Bank* v. *Waite*, 150 Mass., 234, it is said: "It is settled that the principal debtor's distributive share of an estate in the hands of an administrator may be attached by trustee process as soon as the administrator has given bond and has received letters of administration. The lien takes effect from the service of the process, and reaches the whole interest of the debtor in the personal estate that may eventually come into the hands of the administrator."

And in *National Bank* v. *Jaynes*, 225 Mass., 432, the Court observes: "It was early decided that the right of a legatee to a legacy and the interest of an heir in the distributive share of an intestate estate was subject to be attached on trustee process before it was ascertained that there would be sufficient assets to pay the same, notwithstanding the general provision of the trustee statute that no person should be adjudged a trustee 'by reason of any money or other thing due from him to the principal defendant, unless it is at the time of the service of the writ on him due absolutely and without depending upon any contingency.' "

The distributive share of Winnie H. Furlong, widow of the intestate in the instant case, meets these tests and falls within the rules stated. Her right to it was fixed by law. It vested at her hus-

band's death. The liability of the administrator of her husband's estate to account for it and make settlement cannot be questioned. The uncertainty as to whether anything would be eventually payable to her was not a statutory "contingency." It was attached at the time of the service of the trustee writs upon the administrator, and he was chargeable therefor upon final settlement of his account and decree of distribution, unless upon his disclosure in the original suits or on *scire facias* it appears that "the estate was all absorbed without leaving anything for them (the plaintiffs)." *Cutter* v. *Perkins*, supra.

Upon the facts stated, however, this widow's distributive share was "all absorbed." All personal estate of the intestate, after payment of debts and charges, was granted to the widow as an allowance under R. S. Chap. 70, Sec. 14. Such allowance took precedence over any distribution of the personal estate R. S. Chap. 80, Sec. 20; *Gilman* v. *Gilman*, 54 Me., 531, 535. The amount allowed rested in the reasonable judicial discretion of the Judge of Probate, *Walker, Appellant*, 83 Me., 17; *Kersey* v. *Bailey*, 52 Me., 198; *Gowen, Appellant*, 32 Me., 516, subject to review on appeal; *Cooper, Petitioner*, 19 Me., 260; *Kersey* v. *Bailey*, supra, but not in these proceedings. The allowance included all the personal property of the estate from which the distributive share of the widow was payable. It must be held to have completely absorbed this share as of the date of the decree of the Judge of Probate granting the allowance, and the administrator of the estate was not thereafter chargeable for it on trustee process against the widow.

The liability of the defendant as trustee depended upon the condition of things as they existed at the time of service. A contingent liability to the principal defendant at the time of service, although changed into an absolute indebtment or liability after service and before judgment, will not render the trustee chargeable. *Williams* v. *Railroad Co.*, 36 Me., 201; *Norton* v. *Soule*, 75 Me., 385. Prior to the decree of the Judge of Probate granting the widow's allowance it was not subject to trustee process. Resting in the sound discretion of the Judge of Probate and not a matter of right, it was at the time of service of the trustee writs contingent and uncertain. *Tarbox* v. *Fisher*, 50 Me., 236, 238. It was not a debt due from the estate nor a distributive share of it. *Smith* v. *Howard*, 86 Me., 203, 208.

For the reasons stated the defendant cannot be held chargeable as trustee of the principal defendant in any of the five suits here involved. The trustee being a resident of the County where the original process was returnable, on *scire facias*, judgment for costs only can be rendered against him. The ruling below was error.

Exceptions sustained in each case.

PORTLAND TERMINAL CO. AND MAINE CENTRAL RAILROAD CO.

vs.

BOSTON AND MAINE RAILROAD.

Cumberland. Opinion January 4, 1929.

RAILROADS. EQUITY PLEADING. "AGREEMENT" DEFINED. CONSTRUCTION OF STATUTES.

In equity in so far only as the allegations of the bill and the evidence entitle the plaintiff to equitable relief can a decree therefor be rendered.

It is a fundamental rule in the construction of statutes, that unless inconsistent with the plain meaning of the enactment, words and phrases shall be construed according to the common meaning of the language, and technical words and phrases and such as have a peculiar meaning convey such technical and peculiar meaning. Legal terms are presumed to be used according to their legal significance.

The word "agreement" has been construed to signify an expression by two or more persons of assent in regard to some present or future performance by one or more of them. Agreement is in some respects a wider term than contract.

In the case at bar the word "agreement" as used in the statutory provision has a broader meaning than the word "contract," and its creation and existence cannot be measured by that branch of the law.

The provision fixing the proportionate payment did not sound in contract. It created no liability on the part of one railroad to the other, or by either to the Terminal Company, which could be enforced under the law of contract. It provided for a mutual expression of assent enforcible only under the special juris-

diction conferred upon the court of equity by the Act. The statute created the right and gave the remedy which was appropriate and therefore exclusive.

The agreement contemplated by the act must be a "written agreement."

The "written agreement" of the statute cannot be found in this case.

Any verbal agreement was not converted by the letter of Mr. McDonald into a written agreement under the statute.

The bill alleged only an agreement in accordance with Sec. 7 of the Act as the basis of the plaintiffs prayer for relief. Hence "relief only *secundum allegata et probata*" could be granted. The decrees of the Public Utilities Commission were not in issue and could not be passed upon.

On report. A bill in equity seeking by mandatory injunction or other suitable process to compel the Boston and Maine Railroad to pay to the Portland Terminal Company the sum of $624,953.99 alleged to be due petitioner as defendant's unpaid proportionate part of the amount due for its use and operation, together with the Maine Central Railroad Company, of the terminal facilities of the petitioner, under an agreement in accordance with Section 7 of Chapter 189, Private and Special Laws of Maine of 1911. In its answer defendant denied any sums due from it under either the Act or any agreement.

At the conclusion of the evidence the cause was reported to the Law Court. Bill dismissed with a single bill of costs.

The case is fully stated in the opinion.

Charles H. Blatchford, for complainants.

Cook, Hutchinson, Pierce & Connell, for respondent.

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

STURGIS, J. The Portland Terminal Company, originally incorporated under Private and Special Laws of 1887, Chap. 96, as the Portland Union Railway Station Company, by Private and Special Laws of 1911, Chap. 189, acquired its present corporate name, and by extension of its original charter was authorized to include within its limits and acquire by contract, purchase or lease, any or all of the properties situated in the cities of Portland, South Portland and Westbrook, in the State of Maine, owned by the Bos-

ton and Maine Railroad, the Maine Central Railroad Company, or any other railroad using the terminal. Issuing capital stock and bonds as authorized by the Act, the Terminal Company purchased the properties of the Maine Central Railroad Company and the Boston and Maine Railroad situated within the cities designated, and on July 1, 1911, began operation under its extended charter, with these two railroads as sole users of its facilities.

Section 7 of the Act of 1911 provided that "The railroad companies using the railway terminal shall pay to the terminal company for such use, in monthly payments, such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of the terminal and of the facilities connected therewith and owned by said terminal company, including insurance and all repairs, all taxes and assessments which may be required to be paid by said terminal company, the interest upon its bonds or other obligations issued under the provisions of this act as the same shall become payable, and a dividend, not to exceed five per cent per annum, upon its capital stock. Each of such railroad companies shall pay for such use of the terminal and its facilities in the proportion in which it has the use thereof, the same to be fixed by the written agreement of all such railroad companies, and in case they fail to agree, the board of railroad commissioners shall determine such proportions upon the application of said terminal company or of any of said railroad companies. Said proportions as so fixed, either by agreement or by decision of the board of railroad commissioners, may be revised and altered from time to time, either by the written agreement of all the railroad companies at any time, or by the board of railroad commissioners upon like application, at intervals of not less than three years. The decisions of the board of railroad commissioners fixing said proportions of payments shall be final and binding upon all of said railroad companies, and the payments required to be made by them respectively to said terminal company either by such agreement or decisions shall be deemed part of their operating expenses, and the supreme judicial court or any justice thereof shall have jurisdiction in equity to compel such payments to be made, either by mandatory injunction or by other suitable process."

In this bill in equity, dated January 15, 1926, the Maine Central Railroad Company joins with the Terminal Company as plaintiff,

alleging that pursuant to the provision of Section 7, as above quoted, the railroads entered into an agreement fixing the proportions which each should pay for its use of the terminal facilities, which is still in force and effect, that the Boston and Maine Railroad has not paid its proportionate part of the expense of the terminal as so determined and is indebted to the Terminal Company for this deficiency in payments. The bill concludes with a special prayer for mandatory process to compel payment and a prayer for general relief.

The answer denies the existence of an agreement in accordance with the Act, with an affirmative defense that the proportions of payments due from the two railroads to the Terminal Company have been determined by decrees of the Public Utilities Commission of Maine (as successor of the former Board of Railroad Commissioners) subsequent to and inconsistent with the agreement relied upon by the plaintiffs in their bill.

In so far only as the allegations of the bill and the evidence entitle the plaintiffs to equitable relief can a decree therefor be rendered, *Singhi* v. *Dean*, 119 Me., 287, 291; *Glover* v. *Jones*, 95 Me., 303, 307, and this within the jurisdiction conferred upon this Court by Section 7 of the Act. The plaintiffs declare upon an "agreement" alleged to be within the provisions of the Act. Hence upon this bill this Court has jurisdiction only to compel payment by the defendant Railroad as due under and by virtue of such an agreement.

Turning back to the early history of the Terminal Company, we find that prior to the beginning of operations under the new charter the Terminal Company, under the name of the Portland Union Railway Station Company, operated the terminal facilities at Portland, Maine, used by the Boston and Maine Railroad and the Maine Central Railroad Company. Originally it was operated only as a passenger terminal. On May 1, 1910, however, a Terminal Division was established, bringing both passenger and freight terminals within its operations. An arrangement was then made between the roads for the determination of the proportionate division of the cost of the operation of the terminal division chargeable to each. For the first six months period the percentage of cost thus determined was 50.9 for the Maine Central and 49.1 for

the Boston and Maine, and for the second six months 52 for the Maine Central and 48 for the Boston and Maine. Settlements between the roads for these periods were made on these percentages.

July 1, 1911, the Act of 1911 became effective. Under it the Terminal Company extended the limits of the terminal and included within its holdings properties of both roads previously operated outside the terminal division. In passing it may be noted that the capital stock of the Terminal Company, under its original charter, was owned in equal shares by the Boston and Maine Railroad and the Maine Central Railroad Company, and this equality of ownership of stock continued when the Terminal Company began its extended operations. The details of this stock ownership and its subsequent history, however, are not important in the determination of this case. The Railway Station Company and its facilities was the terminal for the two roads here involved and used by them only. Its affairs were managed and controlled from their offices, and its official personnel included members of their executive boards. Charles S. Mellen was President of the Boston and Maine Railroad, President of the Maine Central Railroad Company, and President of the Portland Terminal Company, and to use his expression in reference to the roads and the terminal, they were "all in one family." The Vice President and General Manager of the Boston and Maine was Mr. Frank Barr. Mr. Morris McDonald of Portland occupied a similar position with the Maine Central.

Just previous to July 1, 1911, the effective date of the operation of the terminal by the Terminal Company, Mr. Mellen, the President of the three corporations, discussed terminal operations with Mr. McDonald, who tells us that this meeting was on the morning of June 19, 1911, at Portland, and says "Mr. Mellen represented the Portland Terminal Company, and he also represented the Maine Central Railroad Company and the Boston and Maine." For the Maine Central Railroad Mr. McDonald "was discussing the Maine Central interests, and called his attention to the percentages that we had used during the Terminal Company's operations, and other matters in connection with it, until I built up a picture that seemed to me to be pretty satisfactory in the matter which I was going to recommend, which was for simplification and other reasons, that I had thought we had better make the percentages 50 to each company; and as I remember it, he thought it over

and he said 'That is very fair, and you are very close to it now; there are a lot of benefits the two roads get, and we are all in one family and it seems to me that is perfectly fair and proper, and that will be agreed to as far as I am concerned on the Boston and Maine.' . . . I think he said 'You write to Frank Barr, and I will do whatever is necessary at Boston to have the matter understood.' "

Following this conversation Mr. McDonald says he wrote on the same day the following letter:

"Mr. Frank Barr,
Vice President & General Manager,
Boston and Maine Railroad, Boston, Mass.
Dear Sir:—

As you know, the operation of the Terminal Division which expires midnight of June 30th, has been operated on a percentage basis, arrived at according to the traffic conditions, and it is intended that the operations by the Portland Terminal Company thereafter to put the Boston and Maine and Maine Central operations on a fifty per cent basis to each line.

This for your information.

Yours truly,
(signed) Morris McDonald
Vice-President and General Manager."

Mr. McDonald continues: "I heard nothing further from it, but I remember shortly after that I had a talk with Frank Barr on the telephone, and he said he had got my letter, as I remember it, and that he hadn't had a chance to talk with Mr. Mellen, but as far as he was concerned it was all right."

Apparently this discussion of the apportionment of terminal expense by Mr. Mellen and Mr. McDonald, with the letter to Mr. Barr and his conversation with Mr. McDonald over the telephone, concluded the discussion of this matter by the responsible officers of the three railroad corporations. The arrangement thus made was carried into effect as of July 1, 1911, and continued in force until the roads passed under Federal control in the World War period. It was acquiesced in by the several corporations, and accounts were kept and payments made in accordance with it.

In January, 1918, however, the Boston and Maine Railroad instituted a protest against the continuance of this apportionment,

and its President (who was then also temporary receiver under pending court proceedings) wrote a series of letters to Mr. McDonald, who had succeeded Mr. Mellen as President of the Maine Central Railroad and of the Portland Terminal Company, asking for a new apportionment of terminal expense. This request being denied, on February 18, 1918, a petition to the Public Utilities Commission of Maine was filed by the Boston and Maine Railroad, asking that Board to fix the proportions of terminal expense which the two railroads should pay. In this connection it is sufficient to note that this petition was dismissed without prejudice because of continuance of Federal control.

Prior to March 1, 1920, when the roads were returned to private ownership, viz., on January 19, 1920, addressing Mr. McDonald as President of the Maine Central Railroad Company, Mr. Hustis, the then President of the Boston and Maine Railroad, wrote Mr. McDonald seeking a readjustment of the existing apportionment of terminal charges, with the suggestion that if it were not possible to adjust the matter by negotiation it would be necessary to make application again to the Public Utilities Commission. Mr. McDonald's reply, dated January 28, 1920, stated his disbelief in the propriety of handling the matter by negotiation, with a suggestion to go to the Commission first and get the matter reviewed and decided.

As a result, on March 4, 1920, the Boston and Maine Railroad again filed a petition with the Public Utilities Commission of Maine for determination of percentages to be paid by it and the Maine Central Railroad for use of the Terminal Company's facilities, and on September 1, 1920, a preliminary decree was rendered, directing the Terminal Company to collect, record and report statistics relative to the use of its facilities, with provision that the tenant railroads should contribute as heretofore to the operating expenses of the Terminal Company, final adjudication upon the petition when made to be retroactive to September 1, 1920, with adjustment of payments so made in accord with proportions as finally determined.

This decree was carried into effect, data collected, records kept, and report filed with the Public Utilities Commission, resulting in a decree on the 31st day of January, 1924, determining the per-

centages to be paid by the tenant railroads as 55.1888 for the Maine Central Railroad and 44.8112 for the Boston and Maine Railroad. This decree, however, was later modified by stipulation of the parties and decree of the Commission of July 15, 1924, percentages being finally fixed as 54.89 for the Maine Central Railroad and 45.11 for the Boston and Maine Railroad.

This general review of the making of the agreement by which the expense of the Terminal Company was apportioned between the Boston and Maine Railroad and the Maine Central Railroad Company and the subsequent acts and attitude of the two roads concerning it, is sufficient to outline the basis upon which the plaintiffs here claim the making of a "written agreement" required by Section 7 of the Act of 1911. Their contention is that the facts thus stated constitute a "written agreement" within the meaning of the statute, and they support its continued existence by a denial of the jurisdiction of the Public Utilities Commission of Maine in the several proceedings brought before them, with a resulting nullity in their decrees. They assert that the terms and conditions of the letter of June 19, 1911, of Mr. McDonald, then Vice President and General Manager of the Maine Central Railroad, to Mr. Barr, then Vice President and General Manager of the Boston and Maine Railroad, having been accepted and acted upon for many years by the two railroads, the letter and its acceptance constitute a "written agreement" which determines the proportionate payments to be made by the tenant railroads, and authorizes compulsory payment of deficiencies amounting to more than $600,000. They rely in support of this claim on the law of contracts, and invoke the well recognized principle that when one of the parties to a contract signs a writing and the other orally accepts it both are bound. Bishop on Contracts, Enlarged Ed., Sec. 342; and Williston on Contracts, Vol. I, Sec. 90a.

We are not convinced that this contention can be sustained. The question here is not one of the law of contracts but of statutory construction, and the proper meaning to be ascribed to the words "written agreement" in the light of context and subject matter involved. The question is not whether the Boston and Maine Railroad is "bound" to the Maine Central Railroad Company or the Portland Terminal Company and liable in a suit at law

upon its contract, but whether proportionate charges by the Terminal Company have been fixed by an agreement within the terms of the statute which still exists and can be enforced in this proceeding.

It is a fundamental rule in the construction of statutes, that unless inconsistent with the plain meaning of the enactment, words and phrases shall be construed according to the common meaning of the language, and technical words and phrases and such as have a peculiar meaning convey such technical and peculiar meaning. R. S., Chap. 1, Sec. 6. In and of this major rule is the rule that legal terms are presumed to be used according to their legal significance. *McLellan* v. *Lunt*, 14 Me., 258.

"Agreement" is defined by Webster as "a concurrence in an engagement that something shall be done or omitted; an exchange of promises; mutual understanding, arrangement or stipulation." It is "the language embodying reciprocal promises."

Mr. Williston, in his work on the law of contracts, Vol. I, p. 2, Sec. 2, says: "An agreement is an expression by two or more persons of assent in regard to some present or future performance by one or more of them. Agreement is in some respects a wider term than contract. It covers executed sales, gifts, and other transfers of property. It also covers promises to which the law attaches no legal obligation."

In *Sage* v. *Wilcox*, 6 Conn., 81, 85, it is said: "The word 'agreement,' in its popular and usual signification, means no more than concord; the union of two or more minds; or a concurrence of views and intention. . . . This concord or union of minds, may be lawful or unlawful; with consideration, or without; creating an obligation, or no obligation. Still, by the universal understanding of mankind, proved by daily and hourly conversation, it is an *agreement*."

And continuing the writer of this opinion says: "If the enquiry be made, whether there exists an agreement, which the law will enforce, the subject matter limits the signification of the term 'agreement,' and gives it a new and peculiar meaning. The question does not regard the broad and comprehensive intendment of the term; nor its usual and popular acceptation; but the object of the enquiry is, an agreement of a special nature, distinguished by a legal

consideration, and enforcible in a court of justice. . . . The mind, influenced by the popular and most familiar use of the term 'agreement,' considers the law as pointing to promises only; but if, from any source it appear, that the consideration was meant to be embraced, the peculiar and technical sense of a legal and sufficient contract, is seen to have been intended. . . . The word 'agreement,' if there be nothing to limit its meaning, regards promises only, and not their consideration."

"Agreement" has received multiple definition and construction in the courts of this Country and England, illustrating both the broad and comprehensive scope of the term in its usual and general use and its limited significance in the light of context and subject matter to which it has reference. It does not seem necessary here to make the exhaustive review necessary to point out the distinctions and reasons controlling the many and varied constructions placed on the word. Cases covering this field are collected and digested in 2 C. J., 979 *et seq.*, also under appropriate titles in Words and Phrases, 1st and 2d Editions.

Turning to the statutory provision before us, we are confirmed in the view that the word "agreement" as there used has a broader meaning than the word "contract," and its creation and existence cannot be measured by that branch of the law.

The Act is an re-enactment and extension of an existing corporate charter, conferring new powers and new rights upon the Corporation. It authorizes the continuance of a railroad terminal already created, with authority for extension of its property holdings and terminal facilities and service. It provides for occupation and use by the tenant railroads, and determines the amount of rentals which the Terminal shall receive, emunerating in detail the items of expense which shall in the aggregate measure the rentals charged. The right of contract as to rentals is not left to the Terminal and its users. Each of the railroads, by the Act, "shall pay for such use of the terminal and its facilities in the proportion in which it has the use thereof." The single matter left to the volition and judgment of the parties is the fixing of their proportionate liability for terminal charges. If the railroad can agree, these proportionate charges are to "be fixed by the written agreement" of all such railroad companies. If they cannot

agree, the proportions are to be determined by the Board of Railroad Commissioners.

This provision for fixing of proportionate payments does not, we think, sound in contract. It creates no legal liability on the part of one railroad to the other, or by either to the Terminal Company, which can be enforced under the law of contract. It provides for a mutual "expression of assent" enforcible only under the special jurisdiction conferred upon the court of equity by the Act. The statute creates the right and gives the remedy which is appropriate and therefore exclusive. *Miller* v. *Spaulding*, 107 Me., 271; *Hammond* v. *L. A. & W. St. Ry.*, 106 Me., 213; *Abbott* v. *Goodall*, 100 Me., 235.

The agreement contemplated by the Act must be a "written" agreement. And we are convinced that to prevent uncertainty, to perpetuate evidence, and create a memorial which permits of no doubt or uncertainty, it was the legislative intent that the agreement be written as to all the railroads, be intended as an "expression of assent" and possess some degree of formality. The "written agreement" alone is the warrant of the Terminal Company for its charges and collection of its revenues. By it is measured the liabilities of the users of terminal facilities, and in review by the tribunal designated, its terms establish the basis of remedial adjustment.

The "written agreement" of the statute is not found in the letter of Mr. McDonald of June 19, 1911, especially when read in the light of attending circumstances. As already stated in this opinion, Mr. Charles S. Mellen, President of the Boston and Maine Railroad and of the Maine Central Railroad Company, the tenant users of the terminal, and also President of the Portland Terminal Company itself, on the morning of June 19, 1911, when the letter was written, was in conference with Mr. McDonald at Portland. At Mr. McDonald's instance Mr. Mellen's attention was called to the proportions that the railroads were then paying for Terminal Company service, with the suggestion that "we had better make the percentages fifty to each Company." With the statement that "we are all in one family," and that so far as Mr. Mellen was concerned the suggestion would be agreed to by the Boston and Maine, Mr. McDonald was directed to write to Mr. Barr. He did so, and his

letter has been quoted. This conference and the writing of this letter took place eleven days prior to the effective date of the new Terminal Company operations and was undoubtedly in anticipation of that change. A careful reading of the letter convinces this Court that it is in fact but a report to Mr. Barr of the result of the conference of Mr. Mellen with Mr. McDonald. The gist of the letter lies in the statement, "It is intended that the operations by the Portland Terminal Company thereafter to put the Boston and Maine and Maine Central operations on a fifty per cent basis to each line." The purpose for which it was written is indicated by the concluding sentence, "This for your information."

Keeping in mind that no reply to this letter was written, and the only direct evidence of its receipt lies in Mr. McDonald's report of Mr. Barr's conversation over the telephone, in which Mr. Barr is quoted as acknowledging the receipt of the letter but saying that he had not then had a chance to discuss the matter with Mr. Mellen, we feel justified in drawing the inference that at some time Mr. Mellen was consulted by Mr. Barr or other official of the Boston and Maine Railroad, and in reaching the conclusion that the "agreement" fixing the apportionment of terminal charges after July 1, 1911, grew out of that consultation and the earlier verbal discussion between Mr. Mellen and Mr. McDonald at Portland. We are not of opinion that Mr. McDonald's letter of June 19, 1911, converted this verbal agreement into a "written agreement" under the statute.

This case was reported apparently upon the theory that if this Court found there was no "written agreement," the validity and effect of the decree of the Public Utilities Commission of January 31, 1924, as modified by stipulation of the parties and subsequent decree of July 15, 1924, could here be determined and compliance enforced by proper process. The bill alleges only an agreement in accordance with Section 7 of the Act as the basis of the plaintiffs' prayer for relief. In this proceeding as under the general equity jurisdiction of this Court, "relief only *secundum allegata et probata*" can be granted, *Scudder* v. *Young*, 25 Me., 154, 155; *Singhi* v. *Dean*, supra; *Glover* v. *Jones*, supra. The decrees of the Public Utilities Commission are not in issue and cannot be passed upon.

The entry is,

Bill dismissed with a single bill of costs.

STATE *vs.* LOUIS PELLETIER.

York. Opinion January 8, 1929.

CRIMINAL PLEADING. EVIDENCE.

Where a statute sets forth a certain wording as being sufficient in law for a complaint or declaration under its provisions, but not specifically excluding other forms, any other form which in substance is the same may be equally valid.

The chief purpose of a complaint is not notice, but the detention of a person charged with crime until examination can be had. Formal precision and exhaustive detail are not necessary.

Commission of crime must be stated with substantial accuracy.

In a complaint charging the sale of intoxicating liquor testimony of the purchaser as to what the contents of the bottle in question tasted like is admissible.

In such cases it is the duty of the court to admit for the consideration of the jury all evidence tending to identify the kind of liquor, and to show its intoxicating quality.

In the case at bar the complaint was set forth in form sufficient in law. Testimony of the purchaser of the liquor as to its taste and character, and conversation with the seller relating to the character of the liquor at the time of the sale, was properly admitted in evidence.

On exceptions. The respondent was tried and found guilty of a sale of intoxicating liquor.

During the trial exceptions were entered to the admission of certain testimony.

Exceptions overruled. Judgment for the State.

The case is fully stated in the opinion.

Perley H. Ford, County Attorney, for the State.

Abraham Breitbard,

Edward J. Harrigan, for respondent.

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

BARNES, J. This case comes up on exceptions to the admission of testimony in the trial of a criminal issue.

Respondent contended that the testimony was inadmissible because of the wording of the complaint upon which he had been arrested.

The complaint is not in precise form as laid in Section 54, Chapter 127, R. S.

But this is not necessarily fatal, said Section 54 declaring certain forms set forth therein as being sufficient in law, and by no means excluding other forms if sufficient.

"It is true that in the form presented by the statute the word here omitted is inserted. But the statute does not provide that that form alone shall be used.

"It only provides that it shall be sufficient. Any other form which is in substance the same, may be equally valid." *Adams* v. *McGlinchey*, 66 Me., 474.

Not only in substance, but in precise words the complaint declares the offence charged to be the sale of intoxicating liquor.

The chief purpose of a complaint is not notice, but the detention of a person charged with crime until examination can be had. Formal precision and exhaustive detail are not necessary.

Commission of crime must be stated with substantial accuracy.

The complaint in this case set out that on a day stated, in a city named, within the jurisdiction of the court of issuance, the defendant "without lawful authority, license or permission, therefor, did sell a certain quantity of intoxicating liquor, to wit one bottle containing about eleven and one half ounces of a mixture composed mainly of Cod Liver Oil, Rum and Honey, labeled Pierre Cartier's Medicine," to one named, *contra pacem.*

Respondent's argument in support of his exceptions seems to be that after the videlicet in the complaint the pleader did not specify that the offence charged was the sale of a "beverage containing one-half of one per cent of Alcohol by volume."

Unfortunately for respondent the complaint charges the sale of intoxicating liquor, to wit a mixture of rum and honey and cod liver oil. Apprised of this charge, in the course of receiving admissible testimony in proof, the Court ruled that the purchaser might testify that he opened the bottle, tasted its contents; that it tasted like rum, very sweet and pleasing.

The ruling of the Justice was clearly right.

Prior to the question first objected to, and separated by only three questions, on the same subject matter, the witness had been asked what talks he had with respondent on the day when he purchased the liquor in question.

This was his reply: "Why, I went in to his store and asked him for another bottle of beef, iron and wine, and he said he didn't have any, he was out, and I told him that it made a pretty good drink. I said I didn't care much for this cheap alcohol. He said, 'No, that was poison,' and I says, 'Is there anything — enough in that beef, iron and wine to hurt anyone to drink it, is there?' and he said, 'No, no, but,' he said, 'there isn't much to it,' he says, 'nothing but wine.' He says, 'I have got something here that I will show you.' He says, 'It is cod liver oil and rum.' He says, 'There is a little more rum than there is oil in the bottle, and,' he says, 'You take a straw and put down through this oil and you can suck the rum out.' 'Well,' I said, 'I guess I will try a bottle of that.' So I purchased this bottle."

It was the duty of the Court to admit for consideration of the jury all evidence tending to identify the liquor as rum, if such it should prove to be, and to show its intoxicating quality.

Exceptions overruled.
Judgment for the State.

VENEER PRODUCTS COMPANY *vs.* HARRY F. ROSS.

Piscataquis. Opinion January 8, 1929.

LOGS AND LOGGING. CONTRACTS. DAMAGES.

Timber or stumpage permits, in the usual form in which such contracts are drawn in this state, are revocable at the pleasure of the land owner and are automatically revoked by sale of the land without reservation.

The contract right created by such permits, however, is not revocable and is subject to breach.

A permit to cut a definite quantity of timber on a given tract is not necessarily exclusive but may be so and such exclusive rights may be implied from certain provisions in the contract, especially when the conduct of the parties raises a fair inference that they so construed the agreement.

A land owner, who, without permission of one who is cutting timber under an exclusive permit, by the terms of which the grantee is entitled to select the particular area upon which to cut in any given season, permits another to go upon the land for the purpose of cutting timber, thereby ousting the original permittee from a portion of the territory assigned to him, is liable in damages.

The measure of damages is the difference between the contract price of the standing timber and the market price of similar standing timber, similarly situated, and reasonably accessible to the permittee.

In the case at bar the plaintiff's right to cut on certain specified lots was exclusive. In the year 1923 it gave its written consent to the operation during that year by Hollingsworth & Whitney Company, on a portion of these lots. A written assent for further operation in the year 1924 by that Company was not given by the plaintiff, and the evidence did not warrant a finding that the plaintiff had waived its exclusive right to operate on several of the lots that year allotted by the defendant to Hollingsworth & Whitney Company.

Depriving plaintiff of the opportunity to cut the large timber on these lots, numbered 29 and 30, represented a loss to it of $4.00 per thousand feet on one million fifty thousand feet or $4,200, for which sum with interest defendant was liable.

On report. An action of assumpsit to recover damages for an alleged breach of contract involving a lumber permit.

Judgment for plaintiff for $4,200 with interest from the date of the writ.

The case fully appears in the opinion.

C. W. & H. M. Hayes,

John E. Nelson, for plaintiff.

Fellows & Fellows,

Ryder & Simpson, for defendant.

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

PATTANGALL, J. On report. Action to recover damages for alleged breach of contract.

Defendant is the owner of certain timberland located in Smithtown, so-called, in Piscataquis County. The property was purchased by him in February, 1923, at which time plaintiff was engaged in operating the land under a permit or lease from defendant's grantors.

The permit was, in essential respects, in the usual form in use between timberland owners and operators in this state. The territory covered by its terms included blocks numbered 19 to 36 inclusive. It was executed on July 17, 1919, and permitted plaintiff to cut spruce, fir and pine logs, of a certain size. It covered a period of five years. The price to be paid by plaintiff for stumpage was eight dollars per thousand feet, with a possible differential to be applied after the first year, depending upon the market price of sawed lumber.

Plaintiff was permitted to cut three million feet of lumber and obligated to cut, or at least to pay stumpage on, two million feet, during each of the five years. If it cut less than two million feet in any given year, it was, nevertheless, to pay for two million feet. But it might cut, without charge, during the following year, an excess over two million feet, sufficient to equal the overpayment of the preceding year.

It was estimated that there was on these blocks, in July, 1919, fifteen million feet of standing timber, of the size and kind described in the permit. If plaintiff, each year, cut the maximum amount allowed under the contract, it would cut all that was estimated to be on the land. If it confined its cutting to the minimum, it would cut two-thirds of the amount so estimated.

In 1921, the contract was amended in two particulars. The first amendment required plaintiff to cut all trees six inches in diameter or over, breast high, which were infected with a destructive parasite known as the bud-worm, within the area upon which it operated. The second amendment removed, for the logging season of 1921-1922, the obligation to pay for more logs than were actually cut, and extended the permit for an additional year.

In June, 1923, it was agreed, by the parties to this suit, that it was necessary to take some action, additional to that contemplated

in their contract, to save the timber which was in process of destruction by the parasite already referred to, and they agreed that defendant should make a separate permit to whom he pleased covering Lots 31, 32, 33, 34, parts of Lots 35 and 36, and the south halves of Lots 29 and 30. Immediately thereafter this territory was leased to Hollingsworth & Whitney Company, which operated it during the logging season of 1923-1924.

The original contract between plaintiff and defendant's predecessors in title contained a clause which provided that "all differences of opinion which may arise between said grantors and said grantee as to the mode of said grantee operating or of landing said logs, as to the amount of damages due from said grantee to said grantors by reason of failure to comply with the specifications of this permit are to be adjusted by the scaler or, if both parties are not satisfied, then by an arbitration committee of three."

By the amendment of 1921, plaintiff had bound itself to cut all infected trees, six inches and over in diameter at breast height, which would make merchantable timber and which were within the area selected by it, from year to year, for its logging operations. In June, 1924, defendant claimed that plaintiff had not complied with this clause in the contract, claiming damages for its failure to do so in the amount of $32,160.63. Arbitrators were appointed and after an extended hearing, defendant's claim was rejected.

In May, 1924, another permit was given by defendant to Holingsworth & Whitney Company to operate on Lots 26, 27, 28 and the north half of Lots 29 and 30; also in another section of the town, Lots 13, 14, 19 and 20. A portion of this territory was embraced in the original contract and none of it had been included in the supplementary agreement of June, 1923.

Hollingsworth & Whitney Company operated upon these lots, notwithstanding the expressed desire of plaintiff to occupy a portion of them, during the last year of plaintiff's lease.

Plaintiff asserts that this later permit to Hollingsworth & Whitney Company was a breach of the contract between it and defendant and predicates its claim for damages upon that breach, on the ground that its permit was exclusive as to the class of timber and territory described therein, and that it had not consented to this lease to Hollingsworth & Whitney Company.

Defendant takes the position (1) that the original permit was not exclusive; (2) that the permit of May, 1924, was given with the express consent of the plaintiff; (3) that even if the original permit should be held to be exclusive and even if the permit of May, 1924, had not been consented to, so that giving it constituted a breach of the contract, plaintiff waived the breach; and (4) that no damage, or at least no definitely proved damage, resulted from the alleged breach.

There are certain well settled legal propositions directly bearing upon the controversy which are not and cannot be in dispute. Such a permit as that under which plaintiff operated is revocable at the pleasure of the land owner, and is revoked by the conveyance of the land without reservation. *Banton* v. *Shorey*, 77 Me., 48; *Buker* v. *Bowden*, 83 Me., 67; *Emerson* v. *Shores*, 95 Me., 237; *Brown* v. *Bishop*, 105 Me., 272. But the contract right, created by the permit, is not revocable and is subject to breach. *Emerson* v. *Shores*, supra.

In the instant case the evidence is conclusive that, although the sale of the land to defendant was without reservation and therefore, in the absence of any agreement between plaintiff and defendant, would have worked a revocation of the lease, defendant adopted the contract as his own and became bound by it so that the rights and obligations of the parties are exactly as though the original permit and the amendments of 1921 had been executed by plaintiff and this defendant.

A permit to cut a definite quantity of timber on a given tract does not necessarily forbid the owner of the land from operating on the same territory or permitting others to do so. *Martin* v. *Johnson*, 105 Me., 156. But such contracts may give exclusive territorial rights and we are of the opinion that this is true of the permit under consideration, so far as certain kinds of timber are concerned.

Plaintiff's only undertaking, under the original permit, was to cut spruce and pine trees, twelve inches or more in diameter, breast high, and fir ten inches or more in diameter, breast high.

Defendant expressly reserved "the right to grant to other parties the privilege of cutting and hauling any growth not herein named on any or all parts of the above named premises." This

reservation seems to carry the fair implication that the license to cut spruce, pine and fir, of the agreed size was exclusive. The amendments of 1921 did not affect this proposition.

The parties construed the contract as exclusive. In 1923 when the ravages of the bud-worm made it imperative that the soft wood timber should be cut more rapidly than plaintiff could reasonably or profitably cut it, arrangements were made with Hollingsworth & Whitney Company to operate a certain section of the town, but before contracting with that company defendant solicited and received from plaintiff written consent to so contract. This writing recites that plaintiff "will allow Mr. H. F. Ross (defendant) to cut or permit the stumpage" on certain lots and concludes, "this concession is made in order to allow him to salvage the bud-worm infected timber."

No such consent would have been solicited by defendant, no such language in granting it would have been used by plaintiff or allowed to pass without protest by defendant, had not both parties regarded plaintiff's permit as conferring an exclusive right to cut spruce, pine and fir, of the agreed size, on the territory allotted to it, during the time of the contract. Defendant did not attempt to enlarge the grant to Hollingsworth & Whitney Company in 1924 without first asking for and, as he claims, receiving the consent of plaintiff to the agreement.

It is also to be noted that the understanding between the parties was that plaintiff should select the particular location for its operations of each year. This right is recognized in the first amendment to the original permit which recites that "The Veneer Products Company (plaintiff) shall cut, within the area *which it shall select* from year to year under said permit." According to the evidence, this was the construction put upon the contract by the parties, plaintiff informing defendant each year where it intended to operate and up to at least the season of 1924-1925, there was no interference with its plans on the part of defendant and no claim of right to so interfere.

In the spring of 1924, plaintiff was about to enter upon the last year of its operations on defendant's land. It was privileged to cut three million feet of large logs, during that period, and to select the territory from which they should be cut but had obligated itself

to cut the small logs as well, in the territory so selected. The only limitation on its right to locate its 1924-1925 operation was that created by its agreement with defendant, given in 1923, permitting him to lease to Hollingsworth & Whitney Company lots numbered 31, 32, 33 and 34, the east half of Lot 35, a portion of Lot 36 and the south halves of Lots 29 and 30. These lots had been occupied by Hollingsworth & Whitney Company in 1923-1924 and a substantial amount of timber taken therefrom, but had not been entirely cut over.

Defendant was, that spring, facing a very serious situation. The destructive work of the bud-worm had continued until it became imperative to market the infested trees in order to save them from becoming an entire loss.

Under these circumstances he was anxious not only that plaintiff should make as large a cut as possible but that Hollingsworth & Whitney Company should continue its operations on a large scale, and at a conference with the latter, he was informed that, in order to carry on a substantial operation, additional territory would need to be added to that already allotted to it.

If such an arrangement were to be made, the natural and logical proceeding was to add to the Hollingsworth & Whitney Company permit the remaining portions of Lots 29 and 30 and the adjoining Lots 26, 27 and 28, not only because this land was adjacent to that embraced in its existing lease but also because these lots were separated from the tier of lots lying directly north of them by a ridge, so that it was impracticable to combine both tiers of lots in one operation and defendant had been advised that there was sufficient timber north of the ridge to provide plaintiff with its quota.

On May 12, 1924, a permit was drawn up under the terms of which the Hollingsworth & Whitney Company territory was enlarged by the addition of Lots 26, 27 and 28, the north halves of Lots 29 and 30 in the eastern part of the town, and Lots 13, 14, 19 and 20 in the western part. But such a permit, if executed by defendant without the consent of plaintiff, would constitute a breach of the contract existing between them.

He did execute the permit on May 17 and he claims that plaintiff, on May 15, by its agents, Mr. Hall and Mr. Crowley, gave oral

consent to his so doing. This is denied and thus a sharp issue of fact is raised between the parties.

Defendant, with his timberland cruiser, Mr. Hussey, met Mr. Hall, plaintiff's manager, and Mr. Crowley, who had charge of plaintiff's woods operations, at the hotel in Greenville on May 15, where they were in conference for an hour or more. Conflicting evidence is presented as to what took place at that conference. Defendant testified that after going over the situation fully, plaintiff's agents assented to the proposition that the territory south of the ridge might be allotted to Hollingsworth & Whitney Company and that plaintiff would operate north of the ridge. His testimony was corroborated by Mr. Hussey, whose memory was refreshed by entries made, at the time, in his diary. It was contradicted by Mr. Hall and Mr. Crowley, who go so far as to state that the subject was not even mentioned and that the conference was devoted to discussing whether or not plaintiff had, in the cutting already done by it, failed to observe the requirements of its lease.

The basis of plaintiff's claim against defendant is, that, without its consent and without right, defendant ousted it from territory upon which, under its lease, it had exclusive right to cut. Defendant meets this issue squarely by asserting that the alleged ouster was a matter of agreement between the parties and that the agreement was consummated at Greenville, on May 15, 1924.

Plaintiff, in its brief, raises the point that evidence of plaintiff's oral consent to the lease from defendant to Hollingsworth & Whitney Company is inadmissible, the contract between plaintiff and defendant being in writing. But parties to a written contract may change its terms by subsequent oral agreement. *Copeland* v. *Hewett et als*, 96 Me., 525. And certainly if they may do so, evidence that they did so is admissible. There is no merit in this contention of plaintiff.

The issue involved here is whether or not the oral agreement, which defendant relies upon, was made. Upon this issue, the burden is on the defendant. The evidence as to just what did occur at Greenville is not only conflicting but confusing. The statements of the witnesses concerning it must be studied and interpreted in view of prior events and in the reflected light of their subsequent conduct.

When the entire situation is carefully analyzed it appears that, at that meeting, four matters were discussed: first, the question of whether or not plaintiff had violated its contract by failing to cut timber, during the two preceding seasons, in accordance with the terms of its lease; second, whether or not plaintiff would consent to enlarging the Hollingsworth & Whitney Company permit to include the north halves of Lots 29 and 30; third, if such consent were given and plaintiff confined its operations to Lots 23, 24 and the adjacent territory north of the ridge which separated those lots from 29 and 30, whether arrangements could be made which would avoid interference between the two permittees in landing their logs; fourth, whether or not there was sufficient timber north of the ridge to enable plaintiff to cut its quota in that territory alone.

All of these matters were discussed in an informal and friendly manner and with an apparent desire on the part of plaintiff to coöperate with defendant in his effort to salvage as much as possible of the timber which was in process of destruction by the bud-worm and on the part of the defendant to so arrange matters that plaintiff would be in a position to cut at least two million feet and three million if it cared to do so.

There was no direct disagreement between the parties nor was there any definite agreement. No definite conclusion was reached concerning any one of the matters under discussion. Everything was tentative. Defendant appears to have understood that plaintiff consented to the proposed enlargement of the Hollingsworth & Whitney Company permit. We do not find that this assumption was warranted or that the minds of the parties met on this very important point. Neither Hussey's testimony as refreshed from the entry made in his diary at the time, the later correspondence between the parties, nor conversation between them at a subsequent conference, accords with the theory that a definite agreement was made, which authorized defendant to permit additional territory to the Hollingsworth & Whitney Company.

It is probable that some such agreement might have been entered into at a further conference had defendant not pressed his claim for damages against plaintiff on account of improper cutting. This claim, amounting to over $32,000, was formally presented in June, insisted upon in a conference in September, submitted to arbitra-

tion in October, and, as has been noted, was finally decided against the defendant. The controversy concerning this matter entirely changed the attitude of the parties toward each other and after it was seriously entered upon, neither was disposed to accord favors to the other. Both insisted upon their strict legal rights.

Defendant, on May 17, executed the new lease to Hollingsworth & Whitney Company, including in it not only the north halves of Lots 29 and 30, the proposition which had been discussed at Greenville, but also Lots 26, 27 and 28 in the eastern part of the town and Lots 13, 14, 19 and 20 in the western part, about which nothing had been said at that conference.

By so doing, he confined plaintiff's operations to Lots 23 and 24 and adjacent territory in the northeastern portion of the town. Plaintiff operated that territory, after having protested against being ousted from the south slope, and cut thereon, during the following season, 3,127,760 feet of timber. This included 1,967,370 feet of the larger sized logs, of which it was entitled to cut three million feet. Its original plan had been to cut the north halves of Lots 29 and 30 in addition to its operations north of the ridge. Had it been permitted to do so, it would have gotten its quota. To the extent that it was prevented from so doing, it was damaged and defendant is liable for that damage.

The measure of damages is the difference between the contract price for stumpage and the price which plaintiff would have been obliged to pay, in the open market, for similar stumpage. The contract price was eight dollars per thousand feet. The parties agree that a fair market price for standing timber on Lots 29 and 30 was twelve dollars per thousand feet. There was, available to plaintiff, but for the permit to Hollingsworth & Whitney Company, 1,050,000 feet of large logs on the south slope, in the northern portion of these lots.

We do not find that plaintiff, in any sense, waived its right to cut on this territory by continuing to operate on that part of the town which was still open to it under its lease, nor is the amount of damage caused by defendant's breach uncertain or difficult to ascertain. Depriving plaintiff of the opportunity to cut the large timber on Lots 29 and 30 represented a loss to it of four dollars per thousand feet on one million fifty thousand feet, or $4,200 for which defendant is liable.

Plaintiff urged payment also for damages on account of being excluded from Lot 28 but offered no evidence tending to show either that it had intended to operate that lot or that the stumpage thereon was of more value than that on the land north of the ridge upon which it did operate. The recoverable damage is limited to the amount stated above.

Judgment for plaintiff for $4,200, *with interest from the date of the writ.*

HORACE H. SMITH *vs.* WALLACE DIPLOCK.

Kennebec. Opinion January 12, 1929.

APPEAL. EQUITABLE MORTGAGE. EQUITY. EVIDENCE. REDEMPTION.

In equity the finding of a single Justice upon matters of fact will not be reversed unless the Appellate Court is clearly convinced of its incorrectness, the burden being on the appealing party to prove the error.

Irrespective of the form and phraseology of the written evidence of a conveyance, if the Court is satisfied that, at its inception, the agreement of transfer was as security, such conveyance though in form a deed absolute, is in effect an equitable mortgage and will be so declared even though the agreement may have been oral.

In such case, "Equity regards that as done which ought to be done."

To warrant the finding of an agreement to reconvey and that an absolute deed shall be held to be a mortgage the degree of proof must be practically beyond a reasonable doubt. The evidence must be clear, unequivocal and convincing. Extrinsic evidence and oral testimony are, however, admissible.

To show the existence of an agreement to reconvey, the acts and declarations of the parties are to be considered, and all inferences that can be logically drawn from the facts proven have weight.

The character of the transaction, as ascertained by a consideration of all the material facts attending it, is fixed at its inception.

In the case at bar, upon the entire record, it seems beyond a reasonable doubt that an expression of an agreement to reconvey was a part of the deed when it

was delivered; hence the deed was an equitable mortgage, and the shares of stock were subject to redemption.

The case must properly be remanded to the lower Court for further determination.

On appeal by complainant. This is a bill in equity to establish that a deed under which defendant holds title to certain real estate is an equitable mortgage, and that an apparent sale of corporation stock is but a conveyance as a pledge, and for redemption. Upon a hearing, new counsel representing defendant's interest, the sitting Justice dismissed the bill. Appeal was taken.

Appeal sustained, with costs.

Decree of sitting Justice reversed. Case remanded for further proceedings in accordance with the opinion, which sufficiently states the case.

George W. Heselton,
Herbert E. Foster, for complainant.
McLean, Fogg & Southard,
Arthur F. Tiffin, for defendant.

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

BARNES, J. The issue between the parties in this case is as to the character of a transfer of property.

The parties for several years had each owned ninety-nine of the two hundred shares of a corporation engaged in the business of retailing furniture and one-half, in common and undivided, of the store used in the business and the lot on which it stands, in Augusta.

The defendant had been in the business for thirty-four years, and engaged in the real estate business for twenty-five years at time of hearing.

In 1921, the Wallace Diplock Co., a corporation, was formed, Mrs. Diplock and Mrs. Smith each holding a share of stock. Defendant was president and a director; plaintiff, treasurer and a director, and Mrs. Diplock the other director.

In the later years of the business, goods to the value of $75,000 were annually bought and handled in the store and two warehouses, the defendant purchasing and handling the financial side of the

business and the plaintiff selling and delivering over the countryside, operating two motor trucks. Plaintiff is termed the outside man.

Each drew from the business the sum of seventy dollars weekly, denominated in the record, "officer's salaries."

Practically all of the vending was by sales on open account, for not over three thousand dollars worth of accounts receivable are from sales upon lease.

Collecting was slow at the time of the transfer and the corporation then owed heavily — $2,800.00 to banks and individual lenders, evidenced by its notes endorsed by both the parties hereto, and $7,500.00 secured by mortgage on the store and lot. Liabilities at this time for stock in trade, less "reserve for bad debts," totalled about $40,000.00.

Experience in the furniture business on the part of the defendant has been alluded to above. Prior to investing in this corporation the plaintiff had been employed as a stationary engineer in a little village in western Maine.

In the fall of 1926, the financial condition of the corporation was very bad, creditors were pressing their claims insistently, telegrams and night letters demanded payment and threats of suits were received.

About the beginning of the year 1927, defendant began conversations with plaintiff to the effect that money must be put into the treasury.

Plaintiff owed money outside the business, one of his notes, for $1,500.00 being indorsed by defendant. He could furnish no funds but suggested and attempted to interest others to invest in the corporation.

Conferences between the parties were an almost daily occurrence, defendant offering to sell his stock and his interest in the real estate for lessening sums, finally as low as $10,000.00, but plaintiff could not purchase.

Finally, on February 9, 1927, plaintiff transferred to defendant ninety-eight shares of the stock and gave him a quit claim deed of half the store and lot; an agreement on the same date being signed that defendant would save plaintiff harmless from notes aggregating $2,800.00 that had been given to replenish the corpora-

tion treasury, and plaintiff to indemnify defendant against the note for $1,500.00 which the latter had signed with him.

Plaintiff retained one share of the corporate stock, remained in his former position of director and treasurer, and continued in the same employment in the business as formerly, except that plaintiff testifies that on the day after the transfer defendant asked him if he couldn't take less wages until the company could get on its feet, and that he drew thereafter $40.00 instead of $70.00 a week.

The business went on until April 11, 1927, when plaintiff learned that defendant had sold half of the business to newcomers, and at the request of corporation counsel he resigned his office of treasurer.

Thirty days later this bill was brought, and a restraining order issued, after hearing, on May 31st. Hearing was had on the 15th day of March, 1928, and the decree of the Justice was "That the said plaintiff's bill be dismissed with costs to be taxed by the clerk of this court."

The contention of the plaintiff is that the transfer was made on the suggestion of the defendant that if he had all but three shares of the capital stock and a deed of plaintiff's undivided interest in the real estate in his name, for a time, defendant could the more easily raise funds to appease the clamoring of creditors and re-establish the credit of the concern, and that when this was accomplished if plaintiff should tender and offer to pay to defendant one-half such sums as defendant had advanced in aid of the corporation the shares of stock would be returned to plaintiff, and his interest in the real estate reconveyed to him; that to secure plaintiff in a measure defendant assigned to him a $10,000.00 real estate mortgage and the note secured thereby, the same to be returned to defendant when he received one-half his advances.

Plaintiff contends that he carried out his part of the proposals of the defendant; surrendered all but one share of his stock, executed the agreement to pay his note indorsed by the defendant, and signed, executed, and secured the signature of his wife to a deed of the real estate, on which was written, after the description of the property conveyed, at the bottom of the first sheet of the deed, which was written on the form prepared and commonly used for deeds written on a typewriter.

"It shall here by be understood that this Dead together with 98 shares of the Wallace Diplock Co. is given Wallace Diplock by Horace H. Smith for the soul purpose of raising money to finance the Wallace Diplock Co. For which Wallace Diplock shall sign over a certain Mortgage Dead for $10,-000.00 given him by a Mr. Walsh. It shall also be understood that at any time said Horace Smith shall surrender this Mortgage Dead together with one-half the sum of money required to finance the Wallace Diplock Co. Wallace Diplock shall surrender this Dead together with 98 shares of the Wallace Diplock Co. Other wise Wallace Diplock asumes all claimes which may arise against Said Co. or this property."

This deed plaintiff delivered to the counsel of the corporation, who was at the time as well counsel for both plaintiff and defendant.

Plaintiff further contends that within three weeks of date of transfer, defendant collected substantial sums from accounts receivable; advanced $4,800.00 to the treasury from his own funds, and testifies that he then proposed he would raise and contribute a like sum, that they might "change things back." He says that defendant rejoined "You wait a little while, money is coming in good, it won't be necessary for you to raise any money. He says, we will soon be able to change it back without raising any money"; that later, after he had observed strangers interested in the store and stock, about the 24th of March, defendant approached him and said, "I think these people, these fellows are going to buy the company. Now he says, if they buy, I will take out the amount of money I have put in and I want the Walsh mortgage back, and I will make things right with you on the balance."

Hence plaintiff contends that the purpose of the transfer was in fact but to try an expedient to tide over a period of insufferable indebtedness, which was to be followed, if successful, and if plaintiff met the terms of the agreement, by a reconveyance and redelivery of the property transferred.

He asks that the deed be decreed an equitable mortgage, and that he be allowed to redeem the 98 shares of stock, and proffers the sum that shall be found due from him to equal the amount contributed by defendant.

Defendant testifies that the transfer was in completion of a per-

fected agreement of sale, and denies many of the material allegations of the plaintiff.

As above the presiding justice made no finding of fact, so the Court has not the advantage of a situation wherein it is evident that the statements of witnesses may have seemed reinforced by their appearance, demeanor, character and delivery.

At the close of the presentation of testimony for plaintiff, a motion was made and argued that as a matter of law the bill should be dismissed. This was overruled. Apparently then the Justice decided that the remedy sought was proper and the process conformable with our rules of pleading.

This decision seems to us correct, see, *Reed* v. *Reed*, 75 Me., 264; *Stinchfield* v. *Milliken*, 71 Me., 567; *Pierce* v. *Robinson*, 13 Cal., 116; *Freedman* v. *Avery*, 89 Conn., 439; *Deadman* v. *Yantis*, 230 Ill., 243; *Campbell* v. *Dearborn*, 109 Mass., 130; *McArthur* v. *Robinson et al.*, 104 Mich., 540; *Porter* v. *Nelson*, 4 N. H., 130; *Rich* v. *Doane*, 35 Vt., 125; *Horn* v. *Keteltas*, 46 N. Y., 605; *Wilcox* v. *Bates*, 26 Wis., 465.

The finding of the sitting Justice being adverse to the plaintiff, he appeals, and thereby assumes the burden of proving that the evidence will demonstrate that the deed given is in effect an equitable mortgage, and that the capital stock of the corporation was transferred as a pledge or as security and not by way of sale.

It is sometimes said that there is a presumption in favor of the decision of a single Justice upon matters of fact in an equity case.

The rule in this state undoubtedly is that such a decision should not be reversed unless the appellate court is clearly convinced of its incorrectness. *Sposedo* v. *Merriman*, 111 Me., 530.

No matter what the form and phraseology of the written evidence of a conveyance, if the court is satisfied that, at its inception, the agreement of transfer was as security, such conveyance, though in form a deed absolute, is in effect an equitable mortgage.

The agreement may have been oral. *Stinchfield* v. *Milliken*, 71 Me., 567; *Reed* v. *Reed*, 75 Me., 269; *Jackson* v. *Maxwell*, 113 Me., 366.

This upon the maxim that equity considers that what ought to have been done has been done.

We cannot say, however, there was an agreement to reconvey

unless the degree of proof is practically beyond a reasonable doubt. *Jackson* v. *Maxwell*, supra.

Courts have exhausted the supply of adjectives to express the convincing force of the testimony that is to be adduced before an absolute deed shall be held to be a mortgage. An interesting collation of such expressions of a multitude of courts is found in L. R. A. 1916 B., at page 192.

To have this effect the evidence must be clear, unequivocal and convincing.

We are, however, by no means limited to the wording of the deed.

Extrinsic evidence and oral testimony are admissible.

"Where a conveyance is made by a deed absolute in form, the transaction may, in equity, be shown by a written instrument not under seal, or by oral evidence alone, to have been intended as a security for a preëxisting, or for a contemporaneous loan.

Extraneous evidence is admissible to inform the court of every material fact known to the parties when the deed and memorandum were executed. To insist on what was really a mortgage as a sale, is in equity a fraud, which can not be successfully practised under the shelter of any written papers, however precise they may appear to be. The general current of authorities holds that courts incline against conditional sales as they do against forfeitures; and when upon all the circumstances, the mind is uncertain whether a security or a sale was intended, the courts guided by fundamental reasons, will treat it as the former. *Reed* v. *Reed*, supra.

To show the existence of an agreement to reconvey, the acts and declarations of the parties are to be considered, and all inferences that can be logically drawn from facts proven have weight.

"There is another rule that is inflexible, viz. that the character of the transaction, as ascertained by a consideration of all the material facts attending it, is fixed at its inception." *Reed* v. *Reed*, supra; *Bradley* v. *Merrill*, 88 Me., 319; *Libby* v. *Clark*, 88 Me., 36; *Hawes* v. *Williams*, 92 Me., 490; *Hurd* v. *Chase*, 100 Me., 561; *Knapp* v. *Bailey*, 79 Me., 201; *Norton* v. *Berry*, 120 Me., 536.

It is not disputed that defendant endeavored to sell his interest in the business and real estate to the plaintiff.

He would have us believe that on February 9, 1927, the plaintiff sold to him outright. That is his defense. And yet, when testifying

in chief, regarding propositions advanced by him to bring about the transfer, when asked, "Did you ever approach him (meaning the plaintiff) with the proposition that he get out completely, if you put money in the company?" he replied "No I never did."

In weighing the probabilities, as to whether the transfer was a sale or a deposit to secure, it is proper to consider the difference between the value of the property transferred and the consideration given the plaintiff.

It is conceded the consideration was a mortgage for $10,000.00.

What was the value of the property transferred, one-half the fair value of the real estate, above its mortgage, and practically half the worth of the net proceeds of the corporation?

Plaintiff testified the real estate was worth between $15,000.00 and $20,000.00; defendant, between $9,000.00 and $12,000.00

It was mortgaged for $7,500.00. If it were worth not more than $10,500.00, the median between extremes given by defendant, plaintiff's interest amounted to $1,500.00.

Much testimony was given by the parties as to the value of stock and equipment, and defendant introduced as an exhibit a copy of the Corporation Income Tax Return for the year ending October 31, 1926. Here we find the office equipment and delivery truck valued at $2,076.26; approximately $1,000.00 measuring plaintiff's interest therein.

As tending to show the fair value of the other assets, and the amount of the liabilities of the corporation there is much testimony.

Fortunately for a seeker after truth we have the Tax Return of date when defendant testifies assets and liabilities were the same as at date of transfer, introduced by defendant, and a copy of the balance sheet of the corporation prepared for the inspection of the creditor bank within three weeks after that date. The latter exhibit was introduced by the plaintiff and identified by the treasurer of the bank.

We also have an exhibit, speaking as of the same date as the Tax Return. This is a statement of profit and loss for the fiscal year ending October 31, 1926, prepared by a public accountant from an inspection of the books of the corporation.

Defendant testified:

Bill receivable	$40,000.00	
Stock in trade	$18,000.00	$58,000.00
Bills payable		$32,000.00
Value of accounts and stock above bills payable		$26,000.00

The exhibit prepared for the bank shows:

Accounts receivable	$46,018.68	
Merchandise less office and delivery equipment	33,000.00	$79,018.68
Accounts payable		20,167.86
Net worth		$58,950.82

In the Tax Return we find accounts receivable *less* reserve for bad debts, listed at $47,751.92, so that we are inclined to the belief that defendant's information was unreliable or his recollection faulty. Especially since the statement which he presented to the bank on March 1, 1927, set out a net worth of $60,104.92 above all indebtedness.

It goes without saying that the accounts receivable are subject to appreciable discount, when the cash value is sought.

And the value of the stock in trade may be less than as represented to the bank. But the plaintiff owned nearly half the assets.

The court cannot accept defendant's claim that stock in trade and accounts receivable aggregated only $26,000.00 more than the liabilities of the business.

If stock in trade and accounts receivable are shrunk one third,

plaintiff's share of their net worth is	$16,255.63	
To this add his interest in the r. e.	1,500.00	
One half equipment	1,000.00	
		$18,755.63
Deducting now half the amount of money borrowed		1,400.00
We have plaintiff's share expressed as		$17,355.63

Plaintiff transferred this interest for a consideration of $10,000.00, and the fact of such disparity between value of property transferred and consideration is evidence tending to prove the transfer to have been by way of security, as proving the consideration inadequate if advanced as proof of a sale.

"If there is a large margin between the debt or sum advanced, and the value of the land conveyed, that of itself is an assurance of payment stronger than any promise or bond of a necessitous borrower or debtor." *Reed* v. *Reed*, supra; *Campbell* v. *Dearborn*, 109 Mass., 144; *Coyle* v. *Davis*, 116 U. S., 108; *Bridges* v. *Linder*, 60 Iowa, 190; *Pace* v. *Bartles*, 47 N. J. Eq., 170; *Rubo* v. *Bennett*, 85 Ill., App. 473.

The financial embarrassment of the plaintiff is to be considered. So far as his ability to raise funds was concerned, he had none.

When the plight of the concern was brought home to him, it is admitted that he suggested resort to bankruptcy.

This has evidentiary force. *Reed* v. *Reed*, supra, *Reynolds* v. *Blanks*, 78 Ark., 527, 94, S. W., 694; *Pond* v. *Eddy*, 113 Mass., 149; *Skinner* v. *Miller*, 5 Litt. Ky., 84; *Maculay* v. *Smith*, 132 N. Y., 524.

It is argued that the retention of the plaintiff and his wife as stockholders was but a charity and has no force as tending to show a right to redeem. We hold, however, that in the light of all the circumstances this may be regarded with the rest, and the more especially in that plaintiff was retained as treasurer, until defendant resolved to sell to others.

That plaintiff was continued in the conduct of the business would not alone prove a right to redeem, but after the transfer there was discussion between the parties as to his salary. It becomes pertinent. Plaintiff testified thereto as follows:

Q. "How long did this continue before there was any other event came up?

A. The next day Wallace says to me —

Q. The next day after what?

A. That would be the tenth.

Q. The next day you mean after the transaction?

A. Yes, sir: Wallace said to me, now Horace I have given you a note for $10,000.00 which you can collect the interest on; now, don't you think you could take less wages until the company gets

on its feet? I says, yes, that is agreeable to me, I can get along on $40.00 a week. He says, all right, you take $40.00 a week and if we change things back before you draw any interest the company will make up your wages and I will see you don't lose any money.

Q. Was that the next day?

A. Yes, sir.

Q. Did it go along any length of time — were you drawing $40.00 a week and continuing there in the company?

A. Yes, I think it ran along until about the tenth of March and the bookkeeper told me there was a Mr. Connor there looking and wanted to buy the business. Wallace didn't say anything to me about him or about it; but about March 24, March 23 or 24, Mr. York and Mr. Connor, the two Mr. Yorks and Mr. Connor came there to the store. Wallace didn't give me any introduction to them: but about the 24th of March as Wallace got back from dinner, he says to me, I think these people, these fellows are going to buy the company. Now, he says if they buy, I will take out the amount of money I have put in and I want the Walsh mortgage back, and I will make things right with you on the balance.

And something came up so that was all there was said at that time."

Plaintiff's contention that he was retained as part owner, director and treasurer is admitted, and his explanation why he accepted less salary is not denied anywhere by defendant or anyone else.

If the transfer was a sale, it seems incredible that plaintiff's entire interest and his wife's share were not purchased, inexplainable why plaintiff remained in the company's employment, at barely above half the salary earned before. And, again, if the transfer was a sale it does not seem that defendant would have been so insistent as the record shows him to have been, to have, for evidence against his business associate a note for the amount of interest on the Walsh note that was due at time of transfer.

It would certainly serve as reliable evidence of a holding for a limited time, or for a definite purpose.

So, under the recognized rules, this Court studies the varied phases of this transaction. It is argued that Hoppe's talks would have been different; that Bagley's recital would not have been the same, had the transaction not been one of sale.

These and perhaps many other particulars of the testimony may appeal to different minds as calling for comment.

There is one circumstance that may have overwhelming probative force, and to some minds determine the question of sale or no sale.

The deed is found to have been mutilated. As was stated above a section of the blank upon which the deed had been written, sufficient in area, if wide margins were left on its four sides to contain the 120 words claimed to have been written there before plaintiff signed it, was cut off before the deed was recorded.

This situation, with testimony that a clause of reconveyance was a part of the cut off section, is a suspicious circumstance, and arrests the attention of the Court.

If the mutilation deprived the deed of any expression carrying a declaration regarding reconveyance, it becomes of great moment to decide when the excision was made, whether before or after delivery. It is admitted that part of text of the deed was cut off.

There is testimony that the excised section of the deed contained expressions that throw light on contention in dispute, that an agreement to reconvey was reached before the transfer—and there is testimony that the excised portion of the text could not be interpreted to apply to an understanding that reconveyance might be had.

There is testimony as to the words of that part of the text excised. There is testimony that the deed was signed, executed and delivered with the paragraph above quoted an integral part thereof; and there is testimony that the excised portion was cut off before the signing of the deed.

It is claimed by plaintiff and his wife that he brought to her, at noon time of the day of transfer, the quit-claim that is an exhibit in the case; that she read it and made a hurried copy of the last paragraph of its first page, before she signed the deed. This copy, in pencil, is an exhibit in the case. It contains formal errors, and is not in the language employed by some scriveners. But it also contains words evidencing that when the men signed it, the deed proved that a right to a reconveyance, and a right to redeem, were part of the transaction of transfer.

With its errors, we are not concerned. We are much concerned as to whether it was written on the deed at time of signing.

The defendant says no such phraseology was ever part of the deed, nor any words expressing a right of redemption, and that the idea was never discussed by the parties.

In this he is supported by the testimony of the counsel for corporation and for the parties severally.

Both these say that counsel began a writing at the end of the description in the deed of the property conveyed, that was to convey the idea in an exhibit introduced at the hearing.

This exhibit reads:

"1. The said Wallace Diplock hereby assumes and agrees to pay and indemnify and save harmless the said Horace H. Smith from and against all liability on a certain note given jointly by the said Wallace Diplock and Horace H. Smith to Swift & Anderson of said Augusta for about $800.00.

2. The said Wallace Diplock hereby assumes and agrees to pay and to indemnify and save harmless the said Horace H. Smith from and against all liability on a certain note given jointly by the said Wallace Diplock and Horace H. Smith to the Augusta Trust Company for about $2,000.00.

3. The said Horace H. Smith hereby agrees to indemnify and save harmless the said Wallace Diplock from and against all liability upon a certain promissory note for $1,500.00 endorsed by the said Wallace Diplock for the accomodation and benefit of the said Horace H. Smith payable to the Augusta Trust Company and due sometime in July, 1927, and upon any extension or renewals of said note."

There is in this state no presumption that alteration of a written instrument was made before or after its execution. *Gooch* v. *Bryant*, 13 Me., 386; *Crabtree* v. *Clark et al.*, 20 Me., 337; *Belfast Bank* v. *Harriman*, 68 Me., 522.

It must be proved. *Palmer* v. *Blanchard*, 113 Me., 380.

Material alteration, made after delivery, is fraud, and the burden is on the party claiming to gain because of such alteration to explain any apparent material alteration. *Dodge* v. *Haskell*, supra; *Croswell* v. *Labree*, 81 Me., 44.

The writer of the deed testified. He was the only attorney whose counsel was sought in effecting the transfer.

According to his testimony, he was engaged by defendant to make out the papers; plaintiff was present in the attorney's office,

on the morning of the ninth of February, when the deed was in process of preparation, and asked counsel to incorporate in it some memorandum of an agreement to reconvey; that he began writing the substance of the exhibit above quoted, and when he had written two to four lines thereof, defendant entered, noticed what was being written and promptly objected to anything of the sort being made a public record.

Whereupon, counsel says, he took the deed from his machine, and plaintiff held the paper while counsel cut off the section now missing.

Defendant swears to the same act. They make oath to a condition of affairs that, if they are believed, renders it impossible that Mrs. Smith ever saw the deed in other condition than as we have it now, barren of any allusion to an expression of a right to redeem.

Their testimony, if believed, presents both Mr. and Mrs. Smith as willful perjurers, and forces the conclusion that she, with or without the aid of her husband, evolved, at sometime prior to the hearing of May, 1927, the exhibit first herein quoted.

We are not concerned over the question of validity of a deed.

If the substance of what Mrs. Smith testifies she copied from the bottom of the first page of the deed, at noon, on February 9, while her husband was in the cellar, inspecting the furnace, was a part of the deed, and was later cut off by anyone, whatever be the intent, the right of redemption is proven.

If the excision was made by defendant or by anyone for him, grisly fraud at that moment vitiated the proceedings.

It will avail nothing to quote at length the testimony of the husband and wife on the one side, and defendant and his counsel on the other.

But another witness to the content of the excised section was called, a Mrs. Peacock, the wife of a man whom at times defendant took to his lake property to labor thereon.

Her testimony was that, in May, 1927, the same month in which the first hearing was held, defendant while waiting for her husband, in Mrs. Peacock's home, just a few days after she had seen in the newspaper an account of the first hearing, talked over the matter.

She testified defendant said that they had searched for the slip of paper which was cut off from the deed and that when he found it

"there was a very small percentage of the words that were spelled like the one in the original contract."

Upon the entire record it seems unreasonable to doubt that an expression of an agreement to reconvey was a part of the deed when it was delivered. If so the deed is an equitable mortgage, and the shares of stock are subject to redemption.

The case is remanded to the lower court, by whom a master may be appointed, to determine the amount of money contributed to the treasury of the corporation by the defendant between February 9, 1927, and the date of agreement of conveyance to the Yorks and the Mr. Connor named in the bill, or to any or either of them, and upon payment into court of one-half the sum so found, together with delivery to the Court of an assignment of the Walsh mortgage to defendant by plaintiff, decree shall issue in accord with this opinion, with full costs for plaintiff.

Appeal sustained.
Case remanded.

ELIZABETH M. THOMAS, ADMINISTRATRIX

vs.

MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion January 12, 1929.

FEDERAL EMPLOYERS' LIABILITY ACT. FEDERAL BOILER INSPECTION ACT. NEGLIGENCE. ASSUMPTION OF RISK. PROXIMATE CAUSE. CONTRIBUTING CAUSE. EVIDENCE. BURDEN OF PROOF. DIRECTED VERDICTS.

Under the Federal Employers' Liability Act the employer is liable for any negligence chargeable to it which caused or contributed to cause the decedent's death; and the decedent will not be held guilty of contributory negligence, or to have assumed the risks of his employment if a violation of Section 2 of the Boiler Inspection Act contributed to cause his death.

Under the last named section, the employer is absolutely bound to furnish what before, under the common law, it was his duty to exercise ordinary care to

provide. The burden rests on the plaintiff to prove the defendant's violation of the act.

While under the federal rule the credibility of witnesses, the weight and probative value of evidence, are to be determined by the jury and not by the judge, yet it is the duty of a judge to direct a verdict in favor of one of the parties when the testimony and all of the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding.

In the case at bar the testimony plainly showed that a hot box on the locomotive would not alone produce conditions which would make the engine and its appurtenances such that it could not be used without "unnecessary peril to life or limb." Therefore the condition of the locomotive was not the sole proximate cause of the injury. Nor was it a contributing cause. A contributing cause is one which under the same circumstances would always be an element aiding in the production of an accident. The burden imposed upon the plaintiff required her to show that the condition of the engine was either the sole proximate cause of the injury or a contributing proximate cause. These she failed to do.

The weight of authority sustained the claim of the defendant that when the deceased stepped in front of a moving train on the east bound track, he created an intervening cause between the existence of the hot box and the blow received from the train which struck him.

On exceptions. An action on the case brought under the Federal Employers' Liability Act and the Federal Boiler Inspection Act, to recover damages for the benefit of the widow of Oscar R. Thomas, whose death was caused by an alleged breach of duty by the defendant corporation while the deceased was engaged in interstate commerce and in the employ of the defendant.

At the conclusion of the evidence the presiding Justice on motion of the defendant directed a verdict for the defendant, with the stipulation that if plaintiff's exceptions were sustained judgment should be issued for plaintiff and the case remanded for hearing in damages. To this direction the plaintiff seasonably excepted. Exceptions overruled.

The case is fully stated in the opinion.

Jacob H. Berman,

Edmund P. Mahoney, for plaintiff.

Perkins & Weeks, for defendants.

SITTING: WILSON, C. J., PHILBROOK, DEASY, BARNES, JJ. DUNN, J., concurring in the result.

PHILBROOK, J. This is an action on the case brought under the Federal Employers' Liability Act and the Federal Boiler Inspection Act, and acts amendatory thereof and additional thereto, to recover damages for the benefit of the widow of Oscar R. Thomas whose death was caused by an alleged breach of duty on the part of the defendant.

At the conclusion of the testimony, on motion of the defendant, a verdict was directed for the latter, to which direction the plaintiff seasonably presented exceptions and the same were duly allowed.

The writ, pleadings, stipulations, exhibits, and evidence are made part of the bill of exceptions, together with the following docket entry dictated by the presiding justice: "Exceptions to the direction of a verdict for defendant filed and allowed. It is stipulated that if the plaintiff's exceptions to the direction of the verdict for the defendant are sustained, judgment is to be entered for the plaintiff, and the cause remanded to this court for assessment of damages."

There are five counts in the plaintiff's writ. In argument before this court counsel for the plaintiff discontinues as to the second, fourth and fifth counts, relying only on the first and third.

Without quoting either the first or third counts in their entirety we observe that in the first count the defendant's breach of duty is alleged to consist in supplying him with a locomotive engine which was wholly unfit, improper, and wholly unsafe to operate without unnecessary peril to life or limb, charging "that certain parts and appurtenances of said locomotive were so defective, worn, out of adjustment and alignment, and improperly and insufficiently lubricated, that said locomotive . . . developed a hot box, so-called, in the left trailer journal of said locomotive which became extremely and dangerously overheated."

In the third count the defendant's breach of duty is alleged to consist in providing and supplying the deceased with a locomotive engine which was wholly unfit and improper, and wholly unsafe for use, charging "that one of the axles of said locomotive engine was so defective, improperly adjusted, and out of alignment, and so lacking in proper lubrication facilities, that said axle . . . developed or caused a hot box, so-called, in the housing box of said

axle and became so extremely and dangerously heated that said housing box became inflamed. And the plaintiff avers that the deceased . . . proceeded to examine said housing box with the purpose of remedying the condition of same, and when he, the said deceased, was in the act of lifting the cover of said housing box, a flame of fire flashed toward him from said housing box, which forced and compelled him, the said deceased, in order to avoid coming in contact with the same, to jump backward away therefrom and on to an adjoining track of said defendant corporation," where he was struck by another locomotive moving in an opposite direction from that in which the deceased had been proceeding and instant death followed.

As to the testimony there is little dispute. The deceased, an engineer of nine or ten years' experience was operating freight train No. 621 travelling from Waterville toward Portland. At a point known as Kennebec Siding, which was about four miles north of Augusta, he discovered the hot box above described. At this siding there was a track of ample length to accommodate his train if it were necessary to investigate and remedy the trouble. Nothing of the kind was there done and the train moved on to Augusta. After doing some shifting at Augusta, using side tracks for so doing, he placed his train and locomotive on the main west bound track preparatory to proceeding toward Portland. He then alighted from his engine, voluntarily took a position between the main east and west bound tracks, between which there was a distance of only eight and one-half feet, lifted the cover of the hot box, and therefrom a flame darted out toward him. He quickly stepped backward toward the east bound track which brought him in front of passenger train No. 3 going toward Waterville, and running on schedule time, by which train he was struck and instantly killed. No breach of duty on the part of the defendant in the operation of passenger train No. 3 is alleged or claimed.

It is stipulated that the accident happened while the plaintiff's intestate was engaged in Interstate Commerce, that the defendant company, at the time of the accident, was engaged in operating a train in Interstate Commerce; and that the plaintiff's intestate was instantly killed.

The plaintiff claims a breach of duty on the part of the defend-

ant by reason of a violation of the Federal Boiler Inspection Act of February 17, 1911, Chap. 103, Sec. 2, U. S. Compiled Statutes, Sec. 8631 as amended in 1915. In the argument of plaintiff's counsel reliance is particularly based on Sec. 2 of the Boiler Inspection Act as now found in Volume 44, Part 1, U. S. Stat. at Large, Title 45, Chap. 1, Sec. 23, which provides as follows:

"It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of Sections 28, 29, 30 and 32, and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." By the act of March 4, 1915, Chap. 169, Sec. 1, Congress provided that Section 2, above referred to, "shall apply to and include the entire locomotive and tender and all parts and appurtenances thereof."

Plaintiff's counsel calls attention to the fact that in the first and third counts, upon which he is relying, there is no allegation of negligence on the part of the defendant corporation, because, as he claims, the duty created by the Federal Boiler Inspection Act is absolute, and that negligence on the part of the defendant requires neither allegation nor proof by one proceeding under said act. He also claims that no allegation of due care on the part of the deceased is necessary because, if the defendant is guilty of a breach of its absolute duty under the Inspection Act as amended, it cannot avail itself of the defense of contributory negligence. He also claims that assumption of risk on the part of the deceased is not available to the defendant because, if the defendant is guilty of an absolute duty under the Inspection Act, it cannot avail itself of the defense of assumption of risk. In short he claims that the provisions of the Boiler Inspection Act make the employer an insurer of the safety of the place in which the employee works and of the appliances with which he works.

Cases in which damages are sought by reason of negligence on the part of a defendant, and those in which damages are sought by

reason of defendant's failure to perform a specified, absolute duty, are governed by widely differing legal rules.

The requirement of the Boiler Inspection Act is substituted for the common law rule which holds the employer to ordinary care to provide his employees a reasonably safe place in which, and reasonably safe appliances and machinery with which to work. It is as definite and certain as the common law rule. The act was passed to promote the safety of employees and is to be read and applied under the Federal Employers' Liability Act. Under the latter defendant is liable for any negligence charged to it which caused or contributed to cause the decedent's death; and such decedent will not be held guilty of contributory negligence, or to have assumed the risks of his employment, if a violation of Sec. 2 of the Boiler Inspection Act contributed to cause his death. By the last mentioned section, the defendant was absolutely bound to furnish what before, under the common law, it was its duty to exercise ordinary care to provide. But the burden is on the plaintiff to prove a violation of the Act by the defendant. *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S., 521, 69 L. Ed., 419.

Under the Federal Statute, and upon authority of various cases cited, the plaintiff contends:

First: That the defendant used a locomotive, or permitted it to be used, the journal on the left trailer of which, was not in proper condition and safe to operate within the meaning of Section 2 of the Boiler Inspection Act as amended, in that said journal was so defective that, as it revolved in its bearings on the day of the accident, it produced unusual and excessive friction, causing an extreme and overheated condition which resulted in the combustion of flame; that this flame gushed out at the deceased while he was in the act of examining the condition of said journal, as it was his duty to do, and drove or forced the deceased to jump backward away from the same and onto the adjoining track where he was struck and instantly killed.

Second: That the defective condition of this journal, which produced the unusual and excessive friction, causing the extreme and overheated condition, which resulted in the combustion of flame and which, in turn, drove or forced the deceased to his death, was a contributing, proximate cause of death.

In connection with the second contention the plaintiff urges that

in a proceeding under the Federal Statute it is not necessary to establish the fact that the defendant's breach of duty was the sole, proximate cause of the injury or death, but that the defendant is liable in damages, under that Statute, if its breach of duty was a contributing, proximate cause.

Bearing in mind the principle that in actions under the Federal Employers' Liability Act, the kind and amount of evidence necessary to establish proof of a fact is controlled by the rules laid down by the United States Supreme Court, the plaintiff urges that the credibility of witnesses, the weight and probative value of evidence are to be determined by the jury and not by the judge, *B. & O. R. R. Co.* v. *Groeger*, supra, yet in the same opinion the Federal Court declares that "it is the duty of a judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding." Or, to use the language of the same court in *C. M. & St. P. Ry.* v. *Coogan*, 271 U. S., 472, "It is the duty of the trial judge to direct a verdict for one of the parties when the testimony, and all of the inferences which the jury reasonably may draw therefrom, would be insufficient to support a different finding."

The same court has also said that when the record leaves the claims of the plaintiff in the realm of speculation and conjecture it is not enough. *Patton* v. *T. & P. Ry. Co.*, 179 U. S., 658.

The plaintiff therefore argues that the real issue in the case, as it now stands before this court, is whether the testimony, together with all the inferences which the jury could justifiably draw therefrom, is so insufficient that it could not support a finding for the plaintiff.

The record plainly shows that a hot box on a locomotive engine, or on its trailer, would not alone produce conditions which would make the engine and its appurtenances such that it could not be used without "unnecessary peril to life or limb." In other words, the condition of the locomotive was not the sole proximate cause of the injury. Was that condition, under the circumstances in this case, a contributing, proximate cause of the injury? A contributing cause is one which under the *same circumstances* would *always* be an element aiding in the production of the accident. *Broschart* v. *Tuttle*, 58 Conn., 1, 17; 21 Atl. Rep., 925, 929; 11 L.R.A.,

33, 38. This definition has received judicial sanction, is plain, and sound. Under the burden imposed upon the plaintiff to show that the defendant was guilty of a breach of duty it was necessary for her to first prove that the condition of the locomotive was such that under the same circumstances it would always be an element aiding in the production of the accident, in order to satisfy the definition of contributory cause above given. This she has failed to do. It was also necessary for her to prove that the condition of the locomotive was the proximate cause of the injury. Proof that such condition was only a remote cause would be insufficient.

In the instant case the injury occurred because and when the deceased stepped in front of a moving train on the east bound track. Hence it is claimed by the defendant that this act of the deceased was an intervening cause between the existence of the hot box, or the condition of the locomotive which produced it, and the blow received from train No. 3, or in other words, that the hot box and the conditions which produced it were, at best, only remote causes.

Conversely the plaintiff claims that the existence of the hot box, or the condition of the locomotive which produced it, was the proximate cause of the injury. Under that portion of the argument of plaintiff's counsel relating to the unsafe condition of the journal of the engine as a contributing, proximate cause of death, he cites *Kidd* v. *Rock Island Ry. Co.*, 310 Mo., 1; *Lehigh Valley R. R. Co.* v. *Beltz*, 10 Fed. (second series), 74; *Lehigh Valley R. R. Co.* v. *Huben*, 10 Fed. (second series), 78; *B. & O. R. R. Co.* v. *Groeger*, supra; *Davis* v. *Hand*, 290 Fed., 73.

In *Kidd* v. *Chicago, R. I. & P. Ry. Co.*, supra, an engine drawing a freight train was stalled on the east bound main track. Another train proceeding on the same track came nearly to but stopped about 150 to 200 feet north of and behind the stalled train. The stalled train was being drawn by an engine numbered 3002, which, it was claimed, was in a defective condition which caused steam to escape therefrom in large amount and with excessive noise. The engine on the second train bore the number 3022. Kidd was engineer on 3022. While the stalled engine was standing on the track the sixteen consecutive hours of service of the crew of the second train, prescribed by Federal Statute, expired. The crew of that train therefore was released from further duty and its conductor

with his brakeman, left their train and walked along the right of way toward the yard office for the purpose of registering. These men walked south on the west bound track until they had passed the steam escaping from engine 3002. This walking on the west bound track was done "to keep from getting too close to the steam." Kidd came along slightly in the rear of the other members of the crew of the second train, walked on the west bound track to avoid the steam, and as he was emerging therefrom was struck by train 57 running on the west bound track. The train which thus struck and killed Kidd was about two hours and forty-five minutes late. By reason of a train order Kidd had notice that train 57 was late and had not passed the point of the fatal accident.

In that case the defendant railway company was charged with negligence and violation of the Federal Boiler Act, in permitting engine 3002 to become defective, and to be used and operated in service while not in a reasonably proper condition, and so as to emit steam and vapor, thereby causing the deceased to be on the west track, obstructing his view, and that because of the noise of escaping steam and use of a blower, due to defects in engine 3002, the deceased was prevented from hearing the ordinary running, operation, and approach of train 57, wherefore it was charged that the defendant failed to furnish and provide the deceased a reasonably safe place to work and to walk in the performance of his duties. The defendant's answer generally denied the allegations in the plaintiff's position and alleged that the deceased met his death by reason of his own negligence and that he assumed the risk due to his employment. In that case judgment was for the plaintiff. Many elements therein arose which it is unnecessary to consider in this opinion. The question particularly germane to the present discussion is, was engine 3002, with its escaping steam and unusual noise a proximate cause of the fatality? It was there held that the use of said engine, in its then condition, rendered the defendant railroad liable, "provided that its use was in part a proximate cause of the injury," and it was also held that the defective condition of engine 3002 was a proximate cause of the injury sustained by the deceased. In reaching this conclusion the court stated that by reason of the condition of the engine, an unusual amount of steam was caused to escape from the cylinder cocks, accompanied by a loud

and unusual noise accentuated by use of the engine blower; and that the escaping steam created apprehension that the steam would probably burn one who was walking by the engine, if between the two tracks, and that in order to avoid the apprehensive danger the employees walked on the west bound track to avoid being burned by the steam. In that case it must be borne in mind that the deceased had finished his work and was simply walking to the railroad office for the purpose of registration.

In order to reach their conclusion therefore the Missouri Court was virtually obliged to hold that the company, under the National Boiler Act, was liable not only for failure to furnish safe place and appliances while the employee was actually at work, but to furnish safe place for its employees to walk when going to or returning from work.

We feel that this interpretation of the National Boiler Act was carried too far; that neither in letter or spirit does that act hold a railroad company responsible for failure to perform an absolute duty after the employee has ceased his work.

In the Kidd Case the Missouri Court cited *Shafir* v. *Sieben* (Mo. Sup.), 233 S. W., 419; 17 A. L. R., 637, in which the question of proximate cause was considered where a plaintiff meeting with an obstruction negligently placed by one defendant on a sidewalk and extending almost to the center of the street was thereby caused to pass around the obstruction onto the roadway of the street used for vehicular traffic, where he was injured by an automobile owned and negligently operated by another defendant. In its reasoning the court said in the last cited case that, "The cause of the injury in this case necessarily consisted of two elements: (1) the presence of the plaintiff in the path of the automobile which struck him; and (2) the blow it delivered against his body. Both of these causes were present and in full operation at the instant of the injury. His presence was due to the wrongful act of these defendants, and the blow was delivered by the wrongful act of the driver of the machine. Neither would or could have occurred without the operation of the other at the same time. Both were commingled in the single act of the injury. The argument by which it is attempted to separate them is specious and artificial."

In the latter case the National Boiler Act was not involved.

There were two tortious conditions acting simultaneously and in that case the court correctly held that both were commingled in the single act of the injury. This fact, together with other elements involved, differentiates the latter case from one involving the National Boiler Act.

City of *Louisville* v. *Hart's Administrator*, 143 Ky., 171; 136 S. W., 212; 3 L. R. A. (N. S.), 207; falls into the same category with *Shafir* v. *Sieben*, supra, the National Boiler Act not being under consideration, and two tortious acts occuring simultaneously.

Lehigh Valley R. R. Co. v. *Beltz*, 10 Fed. (second series), 74, is a case in which the deceased was in charge of a freight train and was riding in the cab of one of the defendant's engines when the main pin broke, causing the driving and parallel rods to fly about, disabling the engine and punching a hole in the boiler, causing a violent emission of steam, hot water and coals of fire in the cab. Those on the engine jumped in an effort to save their lives. In so doing the plaintiff's intestate received bodily injuries from which he died. The National Boiler Act was under consideration, and the circuit court distinctly stated that in cases of this class it must appear that the failure of the carrier to comply with the act was the proximate cause of the accident which resulted in the injury; that liability arises only when the failure to obey the act is the proximate cause of the injury.

In passing it is interesting to observe that of the three circuit judges before whom that case was argued one dissented on the ground that the ruling was inconsistent with *Baltimore & Ohio* v. *Groeger*, supra, which had been decided in the Supreme Court of the United States on January 5, 1925, while the Lehigh Valley Case was decided November 2, 1925. In the Lehigh case it was held that the defective locomotive was the proximate cause of the death. We hold this to be sound law under the circumstances of that case but it has one material difference from the case at bar. In that case there was plainly a proximate causal relation between the defective locomotive and the plaintiff's intestate. He jumped from the engine to save his life from destruction caused by the explosion. In the case at bar Thomas did not attempt to remedy the defect in his locomotive at a safe place on Kennebec Siding nor at a safe place when

his locomotive was on a side track after doing shifting work; but he deliberately placed his engine on the west bound track and voluntarily took a dangerous position between the west bound and east bound tracks in which to do his work, a place not furnished by the defendant but taken at his own risk, by his own voluntary act, assuming risks incident to such an act and contributing to the fatal result by his own negligence.

Lehigh Valley R. R. Co. v. *Huben*, 10 Fed. (second series), 78, was a case arising in connection with the fatality in *Lehigh Valley R. R. Co.* v. *Beltz*, supra, and the cases were argued together. In the Huben case after Beltz and his companions had jumped from the engine it continued on its course and ran into a passenger train with the result that Huben received injuries which caused his death. In the latter case the Court states that the only question there necessary to consider was whether Huben had established by sufficient evidence that he was engaged in interstate commerce at the time of his death. The decision of that question in that case therefore has no bearing upon the case at bar.

In *B. & O. R. R. Co.* v. *Groeger*, supra, a locomotive engineer was killed by the explosion of a boiler. This explosion was caused in whole or in part by an unsafe and insufficient condition of the crown sheet of the boiler and the railroad's failure to have a fusible plug in that crown sheet. The court there held that the railroad company was liable if its breach of duty contributed to cause the death. And the court remarked that if the boiler was in the condition described by a witness it would not be unreasonable to conclude that a breach of duty of the defendant caused or contributed to cause the explosion; and that it did not conclusively appear that the failure of the deceased properly to operate the engine was the sole cause of the explosion. In that case death was caused by a boiler explosion, which explosion under the law of cause and effect was related to the imperfect condition of the crown sheet and it might be properly said that under the same circumstances the imperfect condition would always be an element aiding in the production of the accident and hence be a contributory cause. Not so as to a hot box as in the case at bar.

Davis v. *Hand*, 290 Federal, 73, is a case where the deceased, a fireman, had completed his duty of coupling cars which because of

defective couplers had required him to go between cars to line up the couplings. The train was then at a standstill, and it was his duty to give the engineer the signal to move out, in such a manner and from such a position as he might select, and this he did from a position either on the sill at the end of the car or standing on the ground between the car and a coal bin with insufficient clearance, of which he had knowledge, either position being dangerous, and was crushed between the car and the bin when the train went ahead on his signal; and it was there held that the proximate cause of his death was not any violation of the safety appliance act but his own carelessness in taking a dangerous position from which to signal. This last case is more favorable to the contention of the defendant than to the plaintiff.

As bearing upon the question of causal connection between the hot box and the fatal accident the defendant submits authorities which clearly indicate the great weight of authority in supporting the view that there was no causal connection between the hot box and the injury which caused death.

In *Phillips* v. *Pa. R. R. Co.*, 283 Fed. Rep., 381, the deceased was a fireman on a locomotive attached to a train which was standing at a water plug. After adjusting the spout he obtained a wrench from the engineer and went forward over the boiler to repair the automatic bell ringer from which a cotter pin had dropped out, and when stepping over the steam dome the safety valve popped, he lost his balance, fell, and was injured. In that case a verdict was directed for the defendant and in sustaining this ruling the court said that the defective condition of the bell ringer was negligence per se, but that the defective bell ringer was the occasion and not the proximate cause of the accident.

In *McDougall* v. *A. T. & S. F. R. R. Co.*, 186 Pac., 1028, an engineer was killed when he was leaning out of the gangway to look back at the condition of a hot box on an engine immediately following his in the train. The court dismissed the case on the ground that the hot box was not the proximate cause of the plaintiff's death, nor did it have anything to do with his head coming in contact with a bridge girder; that the proximate cause of death was the engineer's negligent act in leaning out of the engine cab while passing through the bridge.

In *Watson* v. *G. S. & F. R. R. Co.*, 136 S. E., 921, Watson was killed while walking along a small rod on the tank of the engine for the purpose of placing a lantern on the tank. The court held that although the plaintiff's writ showed the decedent to be engaged in an act so obviously dangerous that a person of ordinary prudence would not have undertaken it, that if a violation of a safety statute had occured the decedent's negligence was immaterial, provided such violation had a causal connection with the injury; but that the placing of the lantern had no causal connection with the violation, was merely a compliance with a private rule of the company, and no liability under the statute could be predicated thereon. In the case at bar Thomas was remedying the hot box under a rule of the defendant that the engineer must perform such duties.

In *Taton* v. *Seaboard A. L. R. R. Co.*, 113 Southern, 671, suit was brought to recover for the death of an engineer. The engine had a defective driving box wedge which had been fixed by the engineer. The plaintiff contended that the engineer was leaning out so as to observe the wedge and coming in contact with the rack used to load wood on engines, was knocked from his engine and killed. The defendant pleaded assumption of risk as the wood rack had been in the same position for a long time and the engineer was familiar with it. The court held that there was no causal connection between the defect of the engine and the decedent's death but that the proximate cause of the death was decedent's coming in contact with the wood rack, and as there was no violation of the Federal Statute, assumption of risk was a complete defense. In the case at bar it will be remembered that train Number 3 was due to arrive on the east bound track, a fact known to Thomas by reason of his train order.

It seems plain to this court that under the law as stated in the latter group of cases, together with other principles of law applicable to the case at bar, the plaintiff has failed to show that the hot box was a contributing proximate cause of the death of her intestate, that the ruling of the court below in ordering a verdict for the defendant was correct and the mandate must be.

Exceptions overruled.

ABBIE M. HEARD, IN EQUITY *vs.* HARRY O. GURDY, ADMR. D. B. N.

Knox. Opinion January 14, 1929.

BANKS AND BANKING. GIFT INTER VIVOS. JOINT TENANCY.

To create a joint tenancy the four unities of title, time, interest and possession must be present.

To create a gift inter vivos there must be an absolute surrender by the donor of control of the subject matter and completed delivery to the donee.
Garland, Appl't 126 *Me.*, 84, *followed.*

In the case at bar delivery necessary to constitute a gift was wholly lacking.

The intestate stated that he did not wish to give the money outright as he might need it. It was an attempt to retain control of the money and dispose of it after his death. The unities necessary to create a joint tenancy were lacking. The funds therefore, belonged to the estate.

On report. A bill in equity to determine the ownership of a deposit made in the Rockland Savings Bank by Angus A. Staples in his life time. After taking out the evidence the cause was by agreement reported to the Law Court for hearing and decision. Bill dismissed with costs. The case sufficiently appears in the opinion.

Z. M. Dwinal, for plaintiff.

R. I. Thompson, for defendant.

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

BARNES, J. This is a bill in equity, brought forward to this court on report.

For a time prior to and continuing until the death of his wife, Abbie Staples, the late Angus A. Staples was the owner of a fund in the Rockland Savings Bank, carried under the title of "A. A. Staples or Abbie Staples."

The wife died in 1920, and subsequent to the decease of his wife, apparently on September 3 of that year, Mr. Staples caused the same bank to reintitle the account, and against this account de-

posit book No. 31741 was issued, both deposit and book being entitled "A. A. Staples or Abbie Hurd, Ash Point, In Account with Rockland Savings Bank, Rockland, Maine, Payable to Either or Survivor."

This Abbie Hurd is the plaintiff in this cause, and a daughter of Mr. Angus A. Staples.

Mr. Staples died intestate, on January 6, 1922, having neither added to nor withdrawn from the savings account.

On January 18, of that year, the plaintiff drew from the bank the full deposit, amounting with accrued interest to $2,597.73, and on the 21st day of the following February, was appointed administratrix of the Staples estate.

As administratrix she did not include the proceeds of the bank deposit in the assets of the estate.

After consideration of a petition of certain of the heirs of her decedent, the judge of probate ordered plaintiff to add to the inventory the amount of said proceeds and this was done "under protest," at some time after December 19, 1923.

In February, 1928, plaintiff resigned as administratrix, and during the following month defendant was appointed, qualified, and received as administrator, from the plaintiff, principal and "earnings" of the Rockland Savings Bank account, now of the value of $3,154.82.

This amount plaintiff claims is her property because, she says, deposit was the joint property of Mr. Staples and herself at the time of his decease and never became a part of the estate of decedent.

It is admitted that defendant still holds the proceeds of the A. A. Staples or Abbie Hurd deposit.

During her service as administratrix plaintiff filed a second account in which she claimed as a credit item the value of the deposit, and this item was disallowed and appeal taken. At the April term of Supreme Court in Knox County, final decree was made in which the decree of the Judge of Probate disallowing the item under consideration was affirmed; but such affirmation was expressly declared "to be without prejudice to said Abbie M. Heard in her individual capacity to try the title to said money and its increment in appropriate proceedings against a proper party defendant."

Prior to the date of the above decree, however, this bill was brought, praying that defendant be declared trustee of the fund sought, for the benefit of plaintiff, and be ordered forthwith to pay the same to her.

The case was reported to this Court on evidence taken out before the sitting justice below.

It is clear from the evidence that the case is controlled by *Garland Appl't*, 126 Me., 84. Delivery to constitute a gift is wholly lacking. The intestate stated in connection with the account that he did not want to give her the money outright, as he might need it. It was an obvious attempt to retain control of the money and dispose of it after his death. The necessary unities are lacking to create a joint tenancy. The funds belong to the estate.

Bill dismissed with costs.

WILFRED BOLDUC *vs.* WILLIAM S. GARCELON.

Androscoggin. Opinion January 16, 1929.

MOTOR VEHICLES. NEGLIGENCE. EVIDENCE. NEW TRIALS. DAMAGES. P. L. 1921, CHAP. 221, SEC. 7.

The violation by the operator of a motor vehicle of the provisions of Chap. 211, *Sec. 7 P. L.* 1921, *requiring operators of motor vehicles when turning to the left at the intersection of ways to keep to the right of the center lines of the travelled part of such ways, creates a presumption of negligence against him.*

Violation of the law of the road is prima facie evidence of negligence on the part of the person disobeying it.

In an issue involving contributory negligence where the testimony while controverted in certain details, is not incredible, and the facts may have been substantially as stated by the plaintiff, the Court cannot say as a matter of law that the plaintiff was guilty of contributory negligence. It is within the province of the jury to determine whether the plaintiff exercised the degree of care that an ordinary, prudent person would have exercised under similar circumstances.

A stipulation of the parties by counsel in substitution of a motion for a new trial on the ground of newly discovered evidence is irregular and without sanction in the rules of practice. It does not rest within the power or privilege of counsel to waive the motion upon which alone relief can be granted.

In the case at bar the evidence offered in the defendant's behalf failed to overcome the presumption of negligence against him arising from his violation of the law of the road. Upon this issue of plaintiff's contributory negligence, while the facts were disputed and the testimony was conflicting, the plaintiff's account of the collision was not incredible, and the jury were warranted in their conclusion that he was not guilty of contributory negligence.

The damages awarded by the jury were not excessive. $7,491.66 was well within the range of just compensation for the injuries received by the plaintiff.

The evidence offered in support of the stipulation substituted for a motion for a new trial on the ground of newly discovered evidence was merely commulative or tending to impeach testimony already of record and would not warrant the conclusion that a different verdict would be rendered in a new trial.

On motion for new trial by defendant. An action of negligence to recover damages for injuries received by the plaintiff in a collision between his motorcycle and the automobile driven by the defendant.

Trial was had at the October Term of the Superior Court for the County of Androscoggin. The jury found for the plaintiff awarding him damages in the sum of $7,491.66. A motion for a new trial on the usual grounds was filed by the defendant with stipulation of counsel substituted for a motion for a new trial on the grounds of newly discovered evidence. Motions overruled. The case is sufficiently stated in the opinion.

Clifford & Clifford, for plaintiff.

Frank A. Morey, for defendant.

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

STURGIS, J. The plaintiff brings this action to recover damages for injuries resulting from the collision of his motorcycle with the defendant's automobile. His verdict below is brought here on motions for a new trial.

The evidence shows that the collision occurred a little after nine o'clock in the forenoon of June 21, 1928, at the intersection of

Main and Holland Streets in the City of Lewiston. The defendant was driving up Main Street on the right hand side, and in disregard of the motor vehicle laws of this State, turned his car to the left across Main Street into Holland Street, passing south and to the left of the intersection of the center lines of the travelled part of the two ways. This was a direct violation of Chap. 211, Sec. 7 P. L. 1921, a statute especially designed to prevent collisions at the intersection of ways, reading as follows: "Whoever operates a motor vehicle shall at the intersection of ways keep to the right of the intersection of the center lines of the travelled part of such ways when turning to the right, and pass to the right of such intersection when turning to the left, except when traffic officers otherwise direct traffic."

This flagrant disregard of the law by the defendant, while not absolutely establishing his liability, creates a presumption of negligence in favor of the plaintiff which the defendant, upon the issue of his own negligence, must overcome if he would prevail. "Violation of the law of the road is prima facie evidence of negligence on the part of the person disobeying it." *Dansky* v. *Kotimaki*, 125 Me., 72, 74, and cases cited.

The evidence offered in the defendant's behalf fails to overcome this presumption against him. As he turned across Main Street his attention was undoubtedly directed to automobiles following immediately behind him, and in his turn across and into Holland Street he gave little if any consideration to the approach of vehicles from the north. In fact, from the evidence we think it is doubtful whether he saw the plaintiff until just prior to the collision, and the jury may well have found that the defendant suddenly and without warning turned across Main Street in entire disregard of the plaintiff's rights as a traveller upon the highway and was negligent.

The jury found also that the plaintiff was not guilty of contributory negligence. Upon this issue the facts are disputed and the testimony is conflicting. There is evidence that the plaintiff was operating his motorcycle at a high rate of speed. He says he was driving slowly, and in the situation in which he found himself did all that a reasonably prudent man could do. His testimony is: "I started down on my motorcycle. When I got down as far as Hig-

gins Block there was a truck set between those two trees, and when I got up to the rear end, the hind wheel of the truck, I seen the car coming, an automobile coming on the car track. So I kept going just the same, going ahead. When I got corner of Holland Street I looked on Holland Street and the road — wasn't no car out there that I see — so I kept coming just the same. When I got little over halfway across I seen that car leaving the car track, shooting diagonally right on to me. So I didn't have no chance to drive to my left because I didn't known if he going straight then or hit me, so I keep to my right just the same. When I got between the post and this car I got struck."

He says that before his motorcycle crossed Holland Street he "slowed down a little." And he adds that he could not turn on to the sidewalk because there was a post and tree and a woman there. His further description of the situation and his reasoning is: "If I had taken a swing out there I would have hit either the post or the woman, and if I swing this way he was too close up here and (I) would have run right into (his) car. I thought the best I could do was to go between the car and the post."

The Court cannot say as a matter of law that the plaintiff was guilty of contributory negligence. The plaintiff's version of the incidents of the collision, while controverted in certain details, is not incredible, and the facts may have been substantially as he states them. If so, it was within the province of the jury to find that the plaintiff exercised that degree of care that an ordinary, prudent person would have exercised under the circumstances, and was not guilty of contributory negligence.

The damages are not excessive. The plaintiff is a young man thirty years old, married, a carpenter by trade. He has been regularly employed at current wages. He lost his left leg near the junction of its lower and middle third. He must seek other employment, presumably less renumerative. The award of $7,491.66 is well within the range of just compensation.

There remains to be considered the stipulation of the parties by counsel in substitution of a motion for a new trial on the ground of newly discovered evidence. This procedure is irregular and without sanction in the rules of practice. It does not rest within the power or privileges of counsel to waive the motion upon which alone relief

can be granted. In strictness the demand for a new trial on the ground of newly discovered evidence is not before the Court. To avoid the expense and delay necessary to the presentation of a motion in regular form, which upon facts presented cannot avail the defendant, it is deemed best, however, to state the opinion of the Court on this issue.

The rule governing the granting of new trials on the ground of newly discovered evidence has been so recently stated in *London* v. *Smart*, 127 Me., 377 (143 Atlantic Rep., 466), that it need be but summarized here. The evidence supporting such a motion must be material and not merely cumulative or impeaching. It must have been discovered since the trial, and it must appear that it could not have been discovered before the trial by the exercise of due diligence. It must be such as will probably change the result of a new trial if granted.

The affidavits offered by the defendant fail to meet these tests. The statements of the deponents bring to light no material facts not already in evidence. The statement of Charles R. Payne tends to impeach that of the witness William F. Sheffield. That of James J. Harkins, may be construed as confirming the testimony of the defendant in some details. James H. Trask does no more in his affidavit. Assuming that the defendant exercised due diligence at the trial in gathering his witnesses, it is not clear that upon a re-trial a different verdict would probably result if the purported new evidence were heard.

The mandate must be,

Motions overruled.

STATE *vs.* EVERETT STEWART.

Somerset. Opinion January 16, 1929.

CRIMINAL LAW. MOTIONS FOR NEW TRIAL. EVIDENCE.

Upon conviction in the trial court of keeping intoxicating liquors with intent that the same be sold within the State in violation of law, the respondent brought a bill of exceptions and a general motion for a new trial to the Law Court.

Held:

The Law Court sitting in banc has no jurisdiction in a criminal case of a motion for a new trial on the usual grounds.

In criminal cases a motion to set aside a verdict as against evidence, or the weight of the evidence, is to be decided in the first instance by the Justice presiding at nisi prius.

If the motion is denied in a case involving a felony, the respondent may appeal to the next law term.

If the case involves a misdemeanor only, there is no provision of statute for an appeal and the ruling of the trial judge is final.

The exception reserved presented no error. Evidence as to the whereabouts of the original warrant was excluded. It was immaterial. Its exclusion could not have prejudiced the respondent's cause.

On general motion and exceptions. The respondent was convicted in the trial court of keeping intoxicating liquors with intent that the same be sold within the State in violation of law. During the trial the respondent took exceptions to the exclusion of certain evidence relative to the warrant which the officers had to search the respondent's dwelling house. After verdict respondent filed a general motion for new trial. Motion for new trial dismissed. Exceptions overruled. Judgment for the State.

Harold E. Weeks, County Attorney, for State.

James H. Thorne, for respondent.

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

STURGIS, J. Convicted in the Supreme Judicial Court at nisi prius upon search and seizure process for keeping intoxicating liquor with intent that the same be sold within the State in violation of law, this respondent brings a bill of exceptions and a general motion for a new trial to this Court.

The respondent's general motion has no place in the criminal procedure of this state. This Court sitting in banc has no jurisdiction of a motion in a criminal case for a new trial on the usual grounds. In criminal cases a motion to set aside a verdict as against evidence, or the weight of the evidence, is to be decided in the first instance by the Justice presiding at nisi prius. If the motion is denied in a case involving a felony, the respondent may appeal to the next law term. R. S., Chap. 136, Sec. 28. If the case involves a misdemeanor only, there is no provision of statute for an appeal, and the ruling of the trial Judge is final. *State* v. *Perry*, 115 Me., 203; *State* v. *Gustin*, 123 Me., 307.

The single exception reserved presents no error. Counsel for the respondent sought to ascertain the present whereabouts of the original warrant. The case was heard on appeal from the trial justice, with copies of the whole process filed as required by R. S., Chap. 134, Sec. 18. The bill of exceptions fails to disclose any ground upon which the evidence excluded could have added to the respondent's defense, or its exclusion prejudiced his cause.

Motion for a new trial dismissed.
Exceptions overruled.
Judgment for the State.

STATE *vs.* MARION BARANSKI.

Penobscot. Opinion January 21, 1929.

CRIMINAL LAW. INTOXICATING LIQUORS. EVIDENCE.

Under an indictment for maintaining a liquor nuisance evidence of the finding of liquor by the officers in a cupboard in the dwelling house of the respondent, and a bottle containing alcohol in a bed, and on another visit to the premises by the officers evidence that the housekeeper of the respondent spilled some liquor

from two bottles when the respondent attempted to prevent the officers from interfering with her, and which the officers testified that from the odor the liquor spilled was alcohol, was admitted against the objection of the respondent and subject to his exception. The respondent also took exception to an instruction by the presiding justice that from the fact that liquor was spilled the jurors might find it was intoxicating and intended for sale.

Held:

That the evidence objected to was admissible, notwithstanding on the first visit of the officers the respondent was not at home, as bearing on the allegation that the house of the respondent was a place of resort where liquor was kept, sold, or drank in violation of law, there being abundant evidence that the place was frequented by men in all stages of intoxication; and that with all the evidence tending to prove the house was a place of resort where liquors were kept, sold, drank or dispensed contrary to law, the instruction of the presiding justice excepted to was, under the circumstances, warranted by the evidence.

On exceptions. The respondent was indicted for keeping and maintaining a liquor nuisance at Old Town. The jury returned a verdict of guilty. During the course of the trial respondent took exceptions to the admission of certain testimony, and also to certain portions of the charge given by the presiding Justice. Exceptions overruled. Judgment for the State. The case is sufficiently stated in the opinion.

George F. Eaton, County Attorney, for the State.

George E. Thompson,

Benjamin W. Blanchard, for respondent.

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

WILSON, C. J. The respondent was indicted for keeping and maintaining a place of resort where intoxicating liquors were kept, sold, given away, drunk, and dispensed, or in other words a common nuisance.

In the course of the evidence a state's witness, a deputy sheriff, was asked to describe what took place on one of the visits of the officers to the house in question, which it appeared was the respondent's dwelling house, where he lived with a housekeeper, but at a time when the respondent was absent. Objection was made. The testimony was admitted and exceptions reserved.

A similar objection was taken to the admission of testimony by another witness to the effect that on this visit a half-pint bottle containing liquor was found in a cupboard and in a bed a bottle described as a "Moxie" bottle three-fourths full of alcohol, and that two men were in the house who were under the influence of liquor.

In the course of the judge's charge, he instructed the jury that from the fact that on another visit by the officers the housekeeper spilled some liquor from two bottles the jury might find that the contents of the bottle was intoxicating liquor and intended for sale. To this instruction the respondent's counsel took exceptions. The case is before this Court on these exceptions.

Although the evidence is made a part of the bill of exceptions, no statement of what the testimony of the officers was that was admitted subject to the exceptions appears in the bill of exceptions, except as the Court searches through the entire testimony in the case to find it.

From the evidence, however, it is clear that there is no merit in either of the exceptions.

The ground of the respondent's objection to the admission of the testimony of the officers was because the respondent was not present on that visit. But the record is replete with testimony to the effect that it was his dwelling house, that it was a place of resort in which numerous men on other occasions had been found by the officers or seen leaving in various stages of intoxication and when both the respondent and his housekeeper were present, and that on the occasion when the housekeeper spilled a liquid from bottles, the respondent was present and attempted to prevent the officers from interfering with her in the act, that at the time there was the odor of alcohol on her clothing and the officer sopped up some of the spilled liquid with his handkerchief which also smelled strongly of alcohol.

Under such circumstances and with such evidence before the jury by no possibility could the evidence admitted to which the respondent objected have prejudiced him and was clearly admissible under the facts shown as bearing on the question of whether it was a place of resort where intoxicating liquor was sold, drank, or dispensed.

So, too, the instruction in the light of the testimony was obviously proper. Not only could the jury have properly found it

was intoxicating liquor and intended for sale from the fact of its being spilled under the circumstances shown, but the other evidence in the case clearly warranted such a conclusion.

Exceptions overruled.
Judgment for the State.

McDOUGAL'S CASE.

York. Opinion January 24, 1929.

WORKMEN'S COMPENSATION ACT. WORDS "SUDDEN" AND "ACCIDENT" CONSTRUED.

In the Workmen's Compensation Act the word "sudden" as employed in the definition of "accident" does not mean instantaneous. Disability caused by, and following a few hours after chafing may be properly found to be accidental.

Words are to be construed according to the common meaning of language. When an employee, standing upon a ladder while working, chafes his leg against a rung of the ladder, and there results the following night a swelling of the leg and consequent disablement, such injury is, according to the common use of the word, accidental.

Ferris Case, 123 *Me.*, 193, *differentiated.*

A Workman's Compensation Act case. Appeal from the decree of a single Justice affirming the decree of the Industrial Accident Commission awarding Alva W. McDougal compensation for an injury alleged to have been occasioned in the performance of his duties as an electrician in the Sanford Mills. The petitioner alleged that on the fifth day of February, 1928, while working as an electrician in the employ of the Sanford Mills his duties required him to stand on a stepladder, and necessitated throwing his weight forward against the next step above; that this chafing and friction resulted in the rupture of a blood vessel in his left leg, and bruises of the shin followed by infection. Upon hearing the Associate Legal Member found that petitioner suffered an "accident" as alleged and awarded him compensation for a period of seven weeks at the rate of $17.31 per week.

Appeal dismissed. Decree affirmed. The case sufficiently appears in the opinion.

Alva W. McDougal, pro se.

Harris & Wilson, for respondent.

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

DEASY, J. The Industrial Accident Commission speaking through its associate legal member finds that the petitioner was injured by accident. The defendant contends that the injury was not accidental. If the finding of the Commissioner is based upon any competent evidence there is no issue of law, reviewable by this Court.

On February 5, 1928, the petitioner, an electrician, was engaged in "swinging" a conduit pipe on the ceiling of one of the Sanford Mills. In doing this work he stood for a considerable time upon a ladder with his shin pressed against the next rung above.

That night, from no other apparent cause, his leg, from the knee to the ankle, became painfully swollen. He was thus disabled for some weeks. He received medical treatment. An incision was made and pus removed. He has now recovered.

For purposes of this case it is unnecessary to discuss the precise medical diagnoses. It is sufficient to say that the commissioner was justified, by some evidence, in finding that the petitioner's disability was caused or aggravated by the chafing of his shin against the ladder rung.

The disability followed its causation in a few hours. Sudden does not mean instantaneous. Chafing may have been usual, foreseen and expected. Not however disabling injury by chafing.

Another test leads to the same conclusion. Words are to be "construed according to the common meaning of the language."

R. S. Chap. 1, Sec. 6, 25 R. C. L., 988.

We think that according to the common use of the word, the petitioner suffered an accident. It is so termed in the employers report.

In this respect, if not in others, the instant case is differentiated from the *Ferris Case*, 123 Me., 193.

In that case the petitioner while employed caught a cold which developed into pneumonia.

In common parlance neither pneumonia, nor a cold is spoken of as an injury by accident.

Appeal dismissed.
Decree affirmed.

BERTHA M. MORELAND *vs.* HARRY VOMILAS.

Cumberland. Opinion January 31, 1929.

NEW TRIAL. REMITTITUR. "VACATION," CHAP. 70, P. L. 1923, CONSTRUED. JURISDICTION SUPERIOR COURT CUMBERLAND COUNTY.

Trial Courts, at common law, in the exercise of their discretion, may grant a new trial, when upon motion therefor it appears that the cause for new trial does not arise out of any illegal or erroneous act of the Court.

A new trial can not, however, be claimed as a matter of right. The Court may impose such terms or conditions under which such trial may be granted, as it may consider reasonable.

The principle of remittitur has long been approved, it being considered that an order on a plaintiff to remit a part of damages found to be excessive is a condition which may be imposed by the trial Judge to obviate the necessity for a new trial.

The Superior Court for the County of Cumberland has authority to order a remittitur upon such condition.

The word "vacation" as used in Chap. 70, P. L. 1923, should be construed to mean such time as the Court is not actually in session. A Justice may in vacation render judgment in a matter or cause heard by him in term time next preceding vacation. The Statute gives no authority to the presiding Justice or the Court to render or enter judgment at the term following the vacation.

In the case at bar the Court had authority to order the remittitur and such ruling could have been rendered after the final adjournment of the April Term, but to have been of any avail must have been rendered before the work of the May Term was entered upon. Therefore the ruling rendered during the May Term was of no effect; was null and void.

On exceptions by the plaintiff. After verdict for the plaintiff, on motion for a new trial by the defendant, the Judge reserved decision until past the end of vacation, and during the next term ordered remittitur, or new trial.

To this order, issued after the expiration of vacation, an exception was taken. Exceptions sustained. Judgment on the verdict. The case is fully stated in the opinion.

Berman & Berman, for plaintiff.

Francis W. Sullivan, for defendant.

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

BARNES, J. In the Superior Court for Cumberland County, at the April term, 1928, trial was had on a suit for injuries to the person, and a jury verdict for $2,500.00 returned.

At the same term, on the second day after the filing of the verdict, defendant presented a motion to the Court praying that he set aside the verdict and grant a new trial.

The motion was argued during the same term and decision reserved.

The said April term was finally adjourned on the 19th of May; but at that time no decision on the motion for a new trial had been rendered.

The Superior Court for Cumberland County, by fiat of the legislature, shall hold terms annually in April and in May, as well as in seven other months.

On account of the abundance of litigation awaiting its day in court at the said April Term, the work of that term progressed for forty days, extending through the first two-thirds of the month of May.

And the May term of the court began on the first Tuesday of May, as provided by law.

During the May term judgment in this case was recorded, as follows: "Remittitur for all in excess of Fifteen Hundred Dollars ($1,500.00) ordered on June 11, 1928, being the thirty-fifth day of this Term."

To this judgment exceptions were seasonably taken and allowed.

The motion for new trial was on grounds specified, namely, that the verdict was against the law and the charge of the Court; against the evidence, and the weight of evidence, and because the damages were excessive.

If the judgment of the Court, as recorded, is a lawful judgment, the plaintiff is constrained to accept a less sum in damages than was awarded by the jury, or to undergo the burden and expense of a new trial.

Her exceptions present two questions:

1. Has the Superior Court for Cumberland county authority to order remittitur damnum, or briefly remittitur, remission of the excess in a verdict over and above what the verdict in law, under the evidence, would be?

2. Since no decision was rendered during the April term, nor in the vacation between the April term and the May term following, had the Court, after the adjournment of the April term, and after the passage of many days while continuously busied in the work of the May term, jurisdiction over the case at bar, and authority to act therein?

Taking the questions in their order, we first consider whether the Superior Court had authority to order remittitur.

By statute, the Court could, at the proper time, if convinced that it was just, order a new trial.

Could it go further and order a remittitur, and if no remission a new trial?

Plaintiff contends it had not such power.

The Superior Court is a statutory court, and at its establishment it was endued with certain powers by its creator, the Legislature, some of which are common law powers.

In Sec. 10 of Chap. 151, P. L. of 1868, the act establishing the Superior Court for Cumberland county, language capable of broad interpretation is used relative to its jurisdiction and authority.

That section reads, in part, "the provisions of law relative to the jurisdiction of the Supreme Judicial Court in said county over parties, the arrest of persons, attachment of property, the time and mode of service of precepts, proceedings in Court, the taxation of costs, the rendition of judgments, the issuing, service and return of executions, and all other subjects, are hereby made applicable

and extended to said Superior Court, in all respects, except as far as they are modified by the provisions of this act; and said Superior Court is hereby clothed as fully as the Supreme Judicial Court with all the powers necessary for the performance of all its duties."

"Proceedings in Court," are nowhere else in the Act mentioned by way of definition or limitation of the Judge's authority to rule on a motion for a new trial, or regarding the time within which he should pronounce his decision, and the grant to the Superior Court of jurisdiction over "all other subjects," as comprehensive as in the Supreme Judicial Court is language subject to broad interpretation, as before suggested.

Trial courts, at common law, in the exercise of their discretion may grant a new trial, when upon motion therefor it appears that the cause of new trial does not arise out of any illegal or erroneous act of the Court.

And at an early day in the experience of Maine courts it was so ruled. *Hawes* v. *Baker*, 6 Me., 72; *McLellan* v. *Crofton*, 6 Me., 307; *Bishop* v. *Williamson*, 11 Me., 495; *State* v. *Call*, 14 Me., 421; *Simpson* v. *Simpson*, 119 Me., 14.

"It can not be claimed as a matter of right. And in such cases, it may be done upon such terms or conditions imposed, as the Court may consider reasonable. And such appears to have been the practice." *Tuttle* v. *Gates*, 24 Me., 395.

In proper cases remittitur has long been approved, it being considered that an order on plaintiff to remit a part of damages found to be excessive is a condition which may be imposed by the trial judge to obviate the necessity for a new trial. *Smith* v. *Putney*, 18 Me., 87; *Jewell* v. *Gage*, 42 Me., 247.

It is a well settled practice in this State, and it is our practice for the Law Court to hold that damages are to be found by the jury, and to return the cause in such case for new trial for the assessment of damages only. *McKay* v. *Dredging Co.*, 93 Me., 201, L. R. A. 1915 E., 250.

The authorities generally uphold the power of the trial court, in its discretion, to grant a new trial of a part only of the issues in cases where such power may be exercised by the appellate court; courts frequently stating the rule as to the power to grant a new trial in general terms, implying that it is applicable to either the

trial or appellate court. *Re. Everts*, 163 Cal., 449, 125 Pac., 1058; *Smathers & Co.* v. *Hotel Co.*, 167 N. C., 469, 83 S. E., 844; *Seccomb* v. *Ins. Co.*, 4 Allen, 152; *Woodward* v. *Horst*, 10 Iowa, 120.

When the only issue remaining is the amount of damages, the principle declared in *McKay* v. *Dredging Co.*, supra, is upheld with convincing logic in *Simmons* v. *Fish*, 210 Mass., 563; *Lisbon* v. *Lyman*, 49 N. H., 553; *Zaleski v. Clark*, 45 Conn., 397; *Land Co.* v. *Neale*, 78 Cal., 63; *Top* v. *Standard Metal Co.*, 47 Ind. App., 483; *Burnett* v. *Mills Co.*, 152 N. C., 35, 67 S. E., 30; *Goss* v. *Goss*, 102 Minn., 346, 113 N. W., 690; *Lumber Co.* v. *Branch*, N. C., 73, S. E., 164; *Glass Co.* v. *R. Co.*, 76 N. J., L. 9; *Cramer* v. *Barmon*, 193 Mo., 327; *Austin* v. *Langlois*, 83 Vt., 104; *Clark* v. *R. Co.*, 33 R. I., 83. The case last cited seems especially in point, since it upholds the authority of a superior court, under powers granted by constitution and statute in substance the same as ours.

But when the amount properly recoverable is not definitely ascertainable by computation, as may be the case when to be awarded for injuries negligently inflicted on the person of the plaintiff, a conflict has arisen in the courts of the land.

In the case at bar it is assumed that the Judge concluded the damages were excessive because the jury was influenced by prejudice or some other improper motive, and that he reduced the verdict to as small an amount as any other jury on the same evidence would probably assess in plaintiff's favor, or as the jury which heard the case, had it functioned as by law required, would probably have assessed the same.

The discretion of the trial court, as a determinant de novo, in fixing the amount of money constituting a fair equivalent for the wrongs done to plaintiff, was not made the basis for the judgment complained of, but his discretion respecting the amount which the jury, had they viewed the case properly, would have awarded plaintiff, or the amount which another jury would probably award, resolving reasonable doubts in that regard against the party favored with the option, was made the basis.

Under such assumption the Court, in *Heimlich* v. *Tabor*, 123 Wis., 565, has said, "The practice of treating fatally defective verdicts — the right to recovery being unquestioned — so as not to prejudicially invade the rights of either party, and yet terminate

the litigation without the expense of another trial, is in the interests of public and private justice.

It is a great boon to the parties directly interested, and to the public as well, upon whom, in a great measure, the burden of judicial administration rests. It has become the judicial custom in case of a fatally excessive verdict where the right to recover is clear, whether the error is attributable to perversity or not, and whether the defendant does or does not consent to permit the plaintiff to terminate the controversy without the expense of a new trial by consenting to take judgment for an amount sufficiently under that named by the jury, to cure such error in the judgment of the Court; and also to permit the defendant in such a situation to terminate the litigation, whether plaintiff is willing or not, by consenting to judgment for a sum sufficiently less than the verdict to, in the judgment of the Court, cure the error. That rule with a legitimate basis therefor, has been evolved in the course of years of judicial administration as a most valuable means of 'promptly and without delay' terminating disputes between parties to the end that, so far as due course of law will permit, wrongs may be remedied or prevented without that financial exhaustion which tends to make men surrender valuable rights rather than to persist in efforts to secure them by legal means."

The conflict of judicial opinion is well set out in a note to *Tunnel Mining Co.* v. *Cooper*, 50 Colo., 390, 39 L. R. A. (N. S.), 1064. See also 20 R. C. L., 315.

In some jurisdictions statute law, since the date of opinions cited has been substituted for the discretion of the court, but the principle obtains, unchanged.

We think the rule that the trial court may issue an order denying motion for a new trial upon condition that the party awarded a verdict by the jury will remit a certain sum from the verdict, although the amount remaining is not capable of definite computation from the evidence is the sounder rule, and that the Superior Court for Cumberland county has this authority.

Hence there is no merit in the first exception.

The position of plaintiff in support of her second exception is that, having failed to rule on the motion for a new trial at the term of trial, or within the period of vacation intervening between the

term of trial and the beginning of the next regular term, the Judge had no right or authority, after having formally adjourned the term of trial and after having taken up the work of the subsequent term, thereafterward to rule on the motion.

If her position is tenable the verdict of the jury must stand.

The statute under which the Judge acted, Chap. 70, P. L. of 1923, is as follows: "Any justice of the supreme judicial court or of a superior court may set aside a verdict and grant a new trial in a civil case tried before him, when in his opinion the evidence demands it. But such verdict shall not be set aside by a single justice when two verdicts have been rendered against the applicant.

A motion to so set aside a verdict must be filed at the same term at which such verdict is rendered and shall be heard by the presiding justice either in term time or in vacation at his dscretion; if such action is heard in term time the presiding justice may render his decision in vacation."

"In this country all courts have terms and vacations. The time of the commencement of any term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term." *Bronson* v. *Schulten*, 104 U. S., 410.

Vacation is defined as being "all the time between the end of one term and the beginning of another; it begins the last day of every term as soon as the court rises."

It is also defined as the "intermission of judicial proceedings; the recess of courts; the time during which courts are not held." *Brown* v. *Hume*, 16 Gratt (Va.), 456.

The intent of the legislature in its use of the word "vacation" is what we are seeking. Is it to be understood that when by statute a judge is authorized to render judgment in vacation, he is limited to the time between final adjournment of a term and the beginning of the next term in regular course?

It is presumed that a legislature fixing the times and seasons of court action, within its powers, speaks with definiteness. When prescribing the action of courts the words used in legislative acts are to be interpreted according to their legal meaning, their technical sense; but many words commonly used, in different applications have different meanings.

The subject matter, the circumstances of their use, the require-

ments of human activity, the demands of public welfare may determine the sense in which a word is used.

"We are to consider the Legislature when dealing with subjects relating to courts and legal process, as speaking technically, unless from the statute itself it appears that they made use of words in a more popular sense." *Brayman* v. *Whitcomb*, 134 Mass., 525. "Legislators, in the statutes which they enact, frequently use technical words in their common and popular meaning." *Mace* v. *Cushman*, 45 Me., 250.

"There can not be, we think, a fixed and definite meaning given to the word vacation.

That it ordinarily means the time between terms is undoubtedly true. But whether this meaning should be given to the word in any particular instance depends upon the subject matter, and the necessity which exists that some other meaning should be adopted." *Thompson* v. *Benepe*, 67 Iowa, 79.

At common law the judges exercised in vacation only a limited power, such as ordinarily was conducive to expediting business actually pending in court. 3 Chitty Gen. Pr. 19.

Under the early English statutes, which became a part of the common law of the United States, judges were enabled to exercise powers which they had not theretofore assumed, such as to hear motions and petitions and to make rules and orders thereon. 23 Cyc., 543, 15 R. C. L., 522; *Key* v. *Paul*, 61 N. J. L., 133, 38 Atl., 823.

Recognizing the necessity of granting to judges the right to speak authoritatively in vacation upon many matters, or multiplying the number of courts, such acts as the statute under discussion have been passed.

In many instances the amount, variety and conflict of testimony heard by a judge, require the transcription of the testimony into type, and this, with a mass of exhibits, frequently demands long hours of painstaking, intensive study before a just and proper decision can be rendered.

In the case at bar the requirements of his office oblige the judge to hold annually nine terms of court, each term opening on the first Tuesday of the nine months beginning with September. And the business of that court in 1923 required, as it now requires, that the

terms, whether civil or criminal, overrun the calendar month and encroach upon the term time set for the succeeding month.

The interpretation sought by the plaintiff would render it unavoidable that the judge, at times, should postpone the work of a term while he should devote days to the study of a case such as the one before us. It is agreed that the plaintiff is hurt by postponement of the decision in her case.

On the other hand it is urged that the interests of the public would be better served by the adoption of a reasonable definition of the expression "in vacation."

In a somewhat analogous situation the supreme court of Missouri held, in *Bamberge* v. *Graves*, 126 S. W., 749, that when by statute an appeal bond might be approved in vacation, but not later than 10 days after adjournment, and when that time carried over into the next regular term of the court, it was in the power of the court, during the subsequent term, to approve the appeal bond.

In *State* v. *Denis*, 40 S. D., 219, 167 S. W., 15, on the contention that "vacation" should be limited to the period succeeding adjournment of a term and the beginning of another term, the court decided, "We do not think such a limited meaning is consistent with the theory upon which our system of courts and their work is based. The word 'vacation,' when applied to our circuit courts, should include any period, whether one day or more, during which court might legally have been held, which period elapses between one day's session of court and another day's session, even though both of such days may be days of the same term."

See also *Coe* v. *Hallam*, 173 Ill., 461.

It has been held that a period elapsing between sessions of a term, where adjournment for several days is had, may be considered "in vacation." *Hunnelberger-Harrison Lumber Co.* v. *Kuner* (Missouri) 117 S. W., 42.

Thompson v. *Benepe*, supra, was a case where, under statute, injunction might be ordered by the court (in term time) or by the judge (in vacation); and on the fifth day of a term an injunction was granted by the judge (as in vacation).

On motion to dissolve the injunction, on the theory that in term time the judge can do no act which he is empowered to do only in vacation the court held that, there being no evidence that the act

was done during a session of the court it should stand: that, "the word 'vacation,' as used in the statute, should be construed to mean such times as the court is not actually in session."

All decisions available or to which our attention is directed, however, stop short of declaring that a vacation following one term of court can be extended beyond adjournment of the succeeding term. Such extension is not authorized in this jurisdiction.

That the Superior Court for Cumberland County may be in almost constant session, by the overlapping of its terms, if it works to the detriment of litigants is a situation properly referable to the Legislature.

Interpreting the authority given any justice of supreme or superior court in vacation to render judgment in any case heard by him in term time, this Court has decided — "Undoubtedly the enactment means that he may in vacation render judgment in a matter or cause heard by him in term time next preceding such vacation.

"Does this give authority to the presiding Justice, or the court, to render or enter judgment at the term following the vacation? We think not." *Robinson, Appellant*, 116, Me., 125.

In agreement with this recent opinion we hold that the ruling in the case at bar, could have been rendered after final adjournment of the April term; but, to be of any avail, must be rendered before the work of the May term was entered upon.

From the record it appears that the ruling was rendered during the May term.

Hence it was of no effect; was null and void.

The second exception is sustained.

Judgment on the verdict.

PYRENE MANUFACTURING COMPANY

vs.

HENRY E. BURNELL AND CHARLES W. GEROW.

Cumberland. Opinion February 5, 1929.

SALES. FALSE REPRESENTATIONS. RESCISSION. LACHES.

When a seller is induced to sell goods on credit because of representations on which he relies, made by a buyer, which representations the buyer knows to be false or are false and based on facts within the knowledge of the buyer or susceptible of knowledge by him, the seller may rescind the sale and retake the goods, provided the rights of innocent third parties have not intervened.

When a sale is for cash, and payment is not made on delivery, the rule is that in the absence of waiver the vendor may assert his title.

A sale may be on condition precedent, but if so the condition may be waived. Whether there was such waiver is a question of fact to be determined from the evidence in the case.

In the case at bar the evidence was not sufficient to establish the fact that representations made by the buyer as to its financial responsibility were communicated to the plaintiff's credit manager, and that plaintiff was induced to sell the goods because of representations as to financial standing of the vendee.

The plaintiff's claim that inasmuch as trade acceptances were never signed by the vendee, that the title to the goods never passed is not sustained. Before the delivery of the mail carrying the trade acceptances the goods had arrived and had been placed in stock by the vendee. The public was furnished with reason to believe that the vendee had title. The facts must be construed to determine that the plaintiff either decided to extend credit or by its laches had put itself in a position that proved the existence of a waiver in law.

Heard on report. In replevin. Judgment for defendants. Goods purchased in Portland through a representative of the plaintiff, trading in Newark, New Jersey, were received by the purchaser, and taken in replevin from officers who had attached them on creditors' writs.

Plaintiff attempts to justify on proof of fraudulent representa-

tions of financial standing of purchaser, and that the sale was conditioned on the giving of trade acceptances on delivery. Proof fails on each point.

The case is stated in the opinion.

Thaxter, White and Willey, for plaintiff.

Jacob H. Berman,

Edward J. Berman,

Frank P. Preti,

Forrest E. Richardson, for defendants.

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

BARNES, J. In this case evidence for the plaintiff, stipulations of counsel and exhibits were introduced, and the same was reported that the Law Court may render such judgment as it deems meet and proper upon so much of the evidence as is legally admissible.

From the record we find in uncontradicted evidence or from agreement of the parties that the plaintiff, a corporation whose place of business is in Newark, in the State of New Jersey, for more than a year before the negotiations under review were conducted, had furnished merchandise to United Motor Accessories Stores, Inc., hereinafter for brevity called the vendee, a corporation retailing motor accessories in Portland, in this State:

That on the 9th day of September, 1927, a sales representative of the plaintiff conferred with the vendee, at its place of business about selling to it a supply of merchandise, mainly tire chains, aggregating in value the sum of $5,251.45:

That the officials with whom plaintiff's representative conferred were Albert E. Spiers, treasurer, and James E. Spiers, vice-president of the vendee:

That the vendee desired terms, other than cash on delivery:

That representations of the condition of the vendee, as to financial ability, were made by both officials, comparison of its standing then with that of the year before when one consignment of goods of the value of $5,000.00 had been sold it by the plaintiff, through the same representative, with other sales of lesser magnitude, and proposals and discussion of terms were had:

That the vice-president prepared a list of the articles desired; the sales representative informed him plaintiff would not authorize the desired sale unless vendee were able to take care of its payments more promptly than theretofore, and the vice-president represented that vendee was in a much healthier condition than in the previous season, and would be more prompt in making payments:

That Mr. Albert Spiers, the treasurer and financial man, was interviewed, as to the standing of the vendee, the unsettled account, and the terms to be presented to plaintiff's credit manager, in Newark, in form as follows — "he advised me of the fact that if I would accept a 30-day and a 60-day note, I believe, they would clean up the old account, and that it would be all right to make this shipment on trade acceptances, to be divided into four parts. I told him that that was entirely with the credit manager at the factory. I asked him if he at that time, or his concern, was any better off financially than they had been in the past, and he informed me of the fact that they were, and that in view of the fact that business was getting better, they would be in a better position to meet these payments more promptly; but he didn't want them to conflict with some other trade acceptances that were coming due in the Spring on some tires that he had purchased.

Q. How was the matter finally left with Mr. Albert Spiers as to the method of payment for these claims?

A. The matter was left that there was some discussion as to how many trade acceptances had been issued that previous year, and Mr. James Spiers, I believe, went to the file and brought out the correspondence relative to the sale that had been made on chains the previous year, and produced correspondence to show that there had been four trade acceptances in the previous sale. Therefore I took the order from Mr. Spiers with the understanding that this would also be divided in four payments on trade acceptances, provided that our credit manager at the factory approved of the transaction."

That the representative reported vendee's proposal by a letter—

"PYRENE MANUFACTURING COMPANY

Date Sept. 9th, 1927

From A. D. Storti
To Eastern Division

Subject United Motor Accessories Inc. Portland, Me.

Attention of Mr. R. B. Dickson
Mr. R. L. Smith

Attached hereto please find a Chain order from the above concern. They are giving this order with the hopes of being able to obtain a similar dating as the one that was extended to them last season such as one fourth of the amount due in January one fourth due in February one fourth due in March and one fourth due in April for which they will sign trade acceptances upon our presentation of same. This order was taken with the understanding that it must be approved by the company as I had no such authority to do same.

A. D. S."

and on October 12, 1927, the goods were shipped from Newark, and delivered without bill of lading at vendee's place of business in Portland on October 20:

That on date of the arrival of the goods in Portland, plaintiff enclosed with a letter to the vendee the bill of lading, together with trade acceptances and invoice, all of which were retained by vendee:

That, following the death of his father on October 5th, the treasurer was absent from vendee's place of business until the 10th when he returned for five days; but on the 15th of October resigned his office and abandoned the business:

That the stock and fixtures of the vendee, including the property described in plaintiff's writ, were attached, October 25, on a writ, ad damnum, $7,500.00, and again on October 26, on a writ, ad damnum, $50,000.00, and left in charge of a keeper:

That on October 28, vendee made an assignment for the benefit of creditors, in proper form and legal:

That the statement of the assignees showed liabilities of vendee as $57,000.00 and assets $23,150.00:

That the goods were replevied on October 29, and are the goods shipped by plaintiff:

That defendants were, at date of attachment, duly qualified deputy sheriffs of the county of Cumberland, and acted by virtue of writs regularly issued out of the Superior and Supreme Courts of that county, and

That if plaintiff fails to show title in itself, or right to retake the goods at the time they were replevied, judgment is to be for the defendants and for the return of the property replevied, damages to be fixed at one dollar.

If goods are sold on credit, upon representations made by the buyer as to his financial condition that are false, and known to be false by the buyer, or are false and based on facts within the knowledge of the buyer or susceptible of knowledge by him; if such representations are received and relied upon by the seller; if he is induced by means of such representations to part with the goods, the seller may rescind the sale and retake the goods, provided the rights of innocent third parties have not intervened. *Jordan* v. *Parker*, 56 Me., 557; *Atlas Shoe Company* v. *Bechard*, 102 Me., 197. Representations as to financial condition must be made to the prospective seller. If false representations are not communicated to the seller, he can not well say he sold the goods in reliance on such false representations, or induced by them.

On this point, we can be assured only from the testimony of Mr. Storti, the sales representative of plaintiff. This testimony has been quoted so far as it relates to the agreement and understanding between the representative of the plaintiff and officials of the vendee, at the time the order was given.

The letter written by Mr. Storti and enclosed with the order is here printed in full.

No other communication from representative to principal is testified to. But over and again the representative testifies that he can not extend credit; that there is a man in the home office who passes upon credits; that orders received at the home office requiring the extending of credit are passed along to the credit manager; and he admits that he did not communicate to anyone in the home office any word of what either official of the vendee had told him about the financial standing of the vendee, unless it be found in the letter

printed here. Three days after date of Mr. Storti's letter, plaintiff writes him thereof, stating that time for payment is allowed, and that vendee is to give trade acceptances. This letter closes, as follows, "We believe these liberal terms should be perfectly satisfactory and enable them to meet all obligations promptly." No inference can be drawn from this letter that the signing of trade acceptance should precede the passing of title.

We find as a fact that plaintiff was not induced to sell by any representations as to financial standing of vendee. There is therefore no occasion to discuss fraudulent motive on the part of officials of the vendee.

But it is urged that title to the goods shipped had not passed from plaintiff on October 25, or 26, the days of attachment by the defendants.

With the order the home office received the single request that payment be by trade acceptances, each of one-fourth the selling price, due at intervals of one month beginning in January of the next year.

The goods were shipped October 12, and an invoice apparently made the next day.

But it was not until October 20 that the invoice, with bill of lading and trade acceptances, prepared by plaintiff, were mailed to the vendee.

The trade acceptances were never signed by the vendee, and plaintiff claims that for this reason the title to the goods never passed.

If sale is for cash, and payment is not made on delivery, the rule is that in the absence of waiver the vendor may assert his title. *Stone* v. *Perry*, 60 Me., 48; *Furniture Co.* v. *Hill*, 87 Me., 17; *Berlaiwsky* v. *Rosenthal*, 104 Me., 62.

But conditions may be agreed upon, and after being made they may be waived. So, if a condition be that payment is to be by note, until the note is given title, does not pass. *Seed* v. *Lord*, 66 Me., 580; *Peabody* v. *Maguire*, 79 Me., 572.

A sale may be upon condition precedent, but if so the condition may be waived, and whether waived or not is a question of fact to be determined from the evidence in the case. *Gorham* v. *Holden*, 79 Me., 317; *Furniture Co.* v. *Hill*, supra.

In the latter case, the court says, "The mere fact of delivery without a performance of the condition of payment is some evidence of a waiver of the condition. In this case there was a delivery of the goods without a performance by the purchaser of the terms and conditions of sale, and, without anything being said about the condition, this was some evidence of a waiver by the plaintiffs of their rights.

"It might be controlled or explained by other circumstances, but we think it was a question for the jury."

If the plaintiff, in complying with proposal of purchase submitted in Mr. Storti's letter of September 9, had intended to make a sale, conditioned on receipt of trade acceptances at the time of delivery, it could readily have availed itself of one of several means of securing them. It should have given some evidence of this intention. Without any action except that entirely in accord with sale for cash on delivery, plaintiff elected to make unconditioned delivery.

Eight days thereafter, trade acceptances, ready for signing by the vendee, were addressed to it and mailed, at Newark.

Before the delivery of the mail the goods had arrived and been placed in stock by the vendee.

If plaintiff originally intended sale on credit, which passes title with delivery, it can not interfere with the possession of the defendants.

If, on the other hand, plaintiff had been merely dilatory in forwarding the trade acceptances, the result is the same. The public was furnished with reason to believe that vendee had title; creditors decided to enforce their right; it must be that plaintiff either decided to extend credit, or by its laches put itself in a position that proves the existence of waiver, in law.

Judgment for the defendants:
For the return of property replevied;
For one dollar, as damages.

WILFRED LAMBERT *vs.* FRIDOLIN BRETON.

Androscoggin. Opinion February 23, 1929.

ACTIONS. ABUSE OF PROCESS.

It is a well recognized rule of law that an action will lie for abuse of legal process; and if the process, either civil or criminal, is wilfully made use of for a purpose not justified by law, this is an abuse for which an action will lie.

Abuse of legal process is the malicious perversion of a regularly issued process whereby a result not lawfully or properly attainable under it is secured.

Actions for abuse of process and actions for malicious prosecution are different, although in some cases the two have been confused. The distinctive nature of an action for malicious abuse of process as compared with an action for malicious prosecution, is that it lies for the improper use of process after it has been issued, not for maliciously causing process to issue.

In an action for malicious prosecution a legal termination of the prosecution claimed is essential, but in an action for abuse of legal process, it is not necessary to aver and prove that the action in which the process issued has terminated.

To sustain an action for abuse of legal process, two elements are essential: (1) *The existence of an ulterior motive;* (2) *an act in the use of process other than such as would be proper in the regular prosecution of the charge. The first element may perhaps be inferred from the second, but existence of the first cannot dispense with proof of the second.*

In the case at bar Breton sued Lambert for an amount far in excess of the debt due; he used the writ to terminate a tenancy at will in a manner other than the lawful manner provided by statute. The issues of fact should have been submitted to the jury under proper instructions.

On exceptions. An action on the case for damages for malicious abuse of process in a civil suit. Trial was had before a Jury at the December Term of the Superior Court for the County of Androscogin. At the close of the plaintiff's testimony, on motion of the defendant, the presiding Justice ordered a non-suit. To this ruling the plaintiff seasonably excepted.

Exceptions sustained. The case fully appears in the opinion.

Herbert E. Holmes, for plaintiff.

Belleau & Belleau, for defendant.

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

PHILBROOK, J. About the middle of February, 1927, the plaintiff became a tenant at will of the defendant in a building to be used as a cobbler's shop. Monthly rental of thirty-five dollars was agreed upon. Rent for the balance of February was paid at the close of that month, and apparently, by tacit understanding of the parties, rent day was established as the last day of each month. The agreed rental was paid for the months of March, April and May. During the week of July 4 the landlord called at the shop to collect the June rental. On being told by the tenant that he had not sufficient funds on hand to pay the rent in full, but would make part payment, the landlord replied that if the tenant could not pay the whole sum he should go to his attorney "and see that he would get it." A day or two later a deputy sheriff called, having a civil precept bearing date of July 7, 1927, containing an indebitatus assumpsit count as follows:

"Lewiston, Maine, July 7, 1927.

Wilfred Lambert
To Fridolin Breton, Dr.

1927, July 7, To balance due for use and occupation of store at No. 325 on Lisbon Street in Lewiston, Me. $70.00"

According to Lambert's testimony, the following colloquy took place between him and the deputy sheriff:

> "He came into the shop about nine o'clock in the forenoon, said 'Hello' and I answered him. He says, 'I am sorry but I have got to lock the place up.' 'Now,' he says, 'if you want to you can give me your keys,' and he says, 'in doing so we wont have to put any locks on the outside of the store. It wont show you have been closed up by the sheriff.' Not knowing the law I gave him my keys, took my coat and went out. He locked the doors."

The officer's return upon his precept was that on July 7, 1927, he attached a chip, and a second return that on the same day he attached the stock and fixtures of the shoe repairing shop.

Only one key was given to the deputy sheriff but the tenant had another key to the same door and on the morning following the above incident he opened the shop and went about his work as usual.

On July 9, 1927, the same deputy sheriff called at the shop, having another writ dated July 9, 1927, containing the same indebitatus count as that found in the former precept, but with an omnibus count added, and on this second writ the return showed that on July 13, 1927, the officer attached "the shoe repairing shop" of Lambert. According to Lambert's testimony, the officer had no one with him when he first came on July 9. The following testimony of Lambert is taken from the record:

> "That Saturday when he came to the store he was alone the first time. He ordered me out. Told me he was going to put the locks on. I told him I wouldn't go out and refused to go out; and we talked. Both of us got hot-headed a little and I don't remember the conversation but finally he went out and came back with a keeper."

The officer told Lambert that the keeper was going to stay and take possession of the place. About two hours later, the deputy came back and gave Lambert a written notice, signed by the attorneys for Breton, informing him that the action begun on July 7 was thereby discontinued. Lambert continued to work in the shop until a late hour that night. Nothing further happened until Tuesday morning when Lambert came to the shop, intending to resume work, but found padlocks on both front and back doors. He went to see the attorneys for Breton but obtained no satisfaction. The shop remained locked with the sheriff's lock until August 30 when certain persons who had mortgages on its contents were permitted to remove the same, and Lambert was permitted to remove his property, such as tools and stock which were exempt from attachment. No notice to quit was ever served on Lambert but after the padlocks were placed on the doors he rented another shop in which to carry on his business.

On September 17, 1927, Lambert commenced the action at bar. Jury trial was begun and at the close of plaintiff's testimony the presiding justice granted defendant's motion for a non-suit. The case is before us on exceptions to that ruling.

The record does not disclose the grounds upon which motion for

non-suit was based, nor the reasons for granting the same as they existed in the mind of the presiding justice — hence a more general discussion of the case seems to be required.

By observing the allegations in the plaintiff's declaration, it will be seen that the action is for an abuse of legal process in a civil suit. It is a rule of law of very general recognition that an action will lie for an abuse of such process. *Nix* v. *Goodhill*, 95 Ia., 282; 63 N. W., 701; 58 A. S. R., 434. If process, either civil or criminal, is wilfully made use of for a purpose not justified by the law, this is an abuse for which an action will lie. Cooley on Torts, 2nd edition, p. 220.

The general right to an action is not to be seriously questioned, but the more difficult question is, what is an abuse of process, so as to render it actionable. Before attempting to answer the question by definition, we should be careful to observe a distinction between suing out a writ and the improper use of the writ after it is issued. In *Bartlett* v. *Christhilf*, 69 Md., 219; 14 Atl., 518; the court said: "There are instances in which the writ, regularly and properly sued out, was perverted, abused, and made an instrument of oppression. Either something not warranted by its terms, or something in excess of that which was warranted was done under it. It would, indeed, be a serious reproach to the law, if in such cases it afforded no remedy or redress to the injured party. The denial of a remedy in such cases, upon the ground that the law was incapable of affording redress, would be a most serious reflection upon the remedial efficacy of any system of jurisprudence. It would proclaim to the evil disposed an unrestricted license to vex, harass, and injure without accountability, even though their victims should be utterly ruined in their circumstances."

To resort to definition, we use the words most frequently quoted by law writers and courts, found in 2 Addison on Torts, Section 868, "whoever makes use of the process of the court for some private purpose of his own, not warranted by the exigency of the writ or the order of the court, is answerable to an action for damages for an abuse of the process of the court."

In Ruling Case Law, Vol. 1, page 102, we read that "Abuse of legal process consists in the malicious misuse or misapplication of that process to accomplish some purpose not warranted or com-

manded by the writ. In brief, it is the malicious perversion of a regularly issued process whereby a result not lawfully or properly attainable under it is secured"; citing several authorities.

It will be observed that Addison, *supra*, omits the word "malicious," but the authorities are strong, if not quite uniform, that the unlawful use of the process must be malicious and without probable cause; the rule being akin, in that respect, to actions for malicious prosecution.

But we must not overlook the difference between actions for abuse of process and actions for malicious prosecution, lest confusion arise, as seems to have occurred in some instances. The distinctive nature of an action for malicious abuse of process, as compared with an action for malicious prosecution, is that it lies for the improper use of process after it has been issued, not for maliciously causing process to issue. Note to *Pittsburg etc. R. Co.* v. *Wakefield Hardware Co.*, 3 Am. and Eng. Cas., at p. 722. In an action for malicious prosecution, a legal termination of the prosecution claimed is essential, but in an action for abuse of legal process, it is not necessary to aver and prove that the action in which the process issued has terminated. *Gordon* v. *West*, 129 Ga., 532; 59 S. E., 232; 13 L. R. A. (N. S.), 549.

While the precise requisites of an action for abuse of process have not been very clearly pointed out by court decisions nor law writers, yet it would seem, both from such authorities as we have examined and from reason, that to sustain the action these two elements are essential: (1) the existence of an ulterior motive, and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge. The first of these elements may, perhaps, be inferred from the second, but existence of the first cannot, in reason, dispense with proof of the second; for if the act of the prosecutor be in itself regular, the motive, ulterior or otherwise, is immaterial. *Bonney* v. *King*, 201 Ill., 47; 66 N. E., 377; *Keithley* v. *Stevens*, 238 Ill., 199; 87 N. E., 375; 128 A. S. R., 120. The test is, probably, whether the process has been used to accomplish some unlawful end, or to compel the defendant to do some collateral thing which he could not legally be compelled to do. *Johnson* v. *Reed*, 136 Mass., 421; *Docter* v. *Riedel*, 96 Wis., 158; 65 A. S. R., 40.

Another element in the case may be briefly referred to; namely, whether this defendant should be personally held to answer for the wrongs of which the plaintiff makes complaint.

One who places in the hands of an officer a valid writ without directions as to the manner of service is not liable for trespasses and lawlessness of the officer in the execution of the writ except where he, with knowledge of the facts, advises or assists in an abuse of the process, or subsequently ratifies the officer's acts. *Murray* v. *Mace*, 41 Nebraska, 60; 59 N. W., 387; 43 A. S. R., 664; *Wood* v. *Graves*, 144 Mass., 365; 11 N. E., 567; 59 Am. Rep., 95.

An attorney or agent may be held liable for an abuse of process where the acts complained of are his own personal acts or the acts of others wholly instigated and carried on by him.

See note in 86 A. S. R., at p. 409.

The record seems to disclose, among other things, (a) that Breton sued out an attachment greatly in excess of the debt, which according to Cooley, *supra*, was an abuse of legal process; (b) that Lambert was ordered out, locked out, and kept out of the shop, in other words he was compelled to do what the precept could not lawfully compel him to do. *Grainger* v. *Hill*, 4 Bing., N. C., 212, probably the most oft quoted case on this phase of the law; but (c) the outstanding proposition is that Lambert was evicted from his tenancy in a manner contrary to the provisions of R. S. Chap. 99, Sec. 2.

In view of the issues of fact disclosed, and the law governing the case, Lambert was entitled to have those issues of fact submitted to the jury under proper instructions.

Exceptions sustained.

J. W. WHITE COMPANY *vs.* RUFUS D. GRIFFITH ET ALS.

Franklin. Opinion February 28, 1929.

EQUITY. LIENS. R. S. CHAP. 96, SEC. 29, CONSTRUED.

Under a bill in equity to enforce a material lien, the sitting Justice found that the materials were sold by the plaintiff to a contractor on an open account and his credit alone, and that the plaintiff had no intention to look to the building for his pay; and that the person contracting for the building to be built and who was building it for his son on land belonging to his son did not know the plaintiff was furnishing the materials, held:

That the materials must be furnished with an intent that they be used in some particular building and not for general use;

That if sold for use in a particular building, it would not affect the right to maintain a lien, because they were sold on credit or that the person furnishing the materials had not formed an intent to claim a lien until just prior to its expiration;

That the consent of the owner may be inferred from circumstances; and the owner is required to use reasonable diligence and good faith in ascertaining who furnished the materials, if he desires to give the statutory notice to avoid a lien, or he may be held to have consented thereto;

That the sitting Justice having found that the father had no knowledge that the plaintiff furnished the materials, it follows upon the evidence in this record that he can not be held to have consented to the plaintiff's furnishing it, and a fortiori *that his son and owner did not consent.*

On appeal. A bill in equity brought to enforce a lien in behalf of the plaintiff against the property of Lawrence Shean.

After hearing upon the bill, answer, replication and proof the sitting Justice found that Shean did not know that plaintiff was furnishing material to defendant; that the plaintiff sold the material on open account and on Griffith's credit alone and had no intention of looking to the building for his pay until he discovered the bankruptcy of Griffith; and filed a decree dismissing the bill.

Appeal dismissed with additional costs. Decree below affirmed. The case fully appears in the opinion.

George C. Webber, for plaintiff.

Rufus D. Griffith, pro se.
Benjamin L. Berman,
David V. Berman,
Jacob H. Berman,
Edward J. Berman, for defendants Shean.

SITTING: WILSON, C. J., STURGIS, BARNES, BASSETT, JJ., PHILBROOK, A. R. J. DEASY, J., concurring in the result.

WILSON, C. J. A bill in equity to enforce a lien on a building and land for materials furnished by the plaintiff in the construction of the building.

One of the defendants, Albert Shean, formerly owned a summer cottage at Oquossoc in the town of Rangeley which he had given to his son several years before the building in question was erected. In the summer of 1927 he decided to build a garage on the property for his son, and becoming acquainted with the defendant Griffith engaged him to build the garage and furnish the necessary materials.

Mr. Shean testified before the sitting Justice that Griffith assured him that he had the necessary lumber on hand which Griffith denied. As a matter of fact he had no lumber, but ordered it of the plaintiff.

When the job was completed Shean paid Griffith the amount agreed upon, including his labor and for all material, but Griffith never paid the plaintiff for the lumber.

The plaintiff seasonably filed a notice to preserve its lien and brought this action.

The sitting Justice found as facts:

(1) That Mr. Shean did not know that plaintiff furnished the material.

(2) That the plaintiff sold the material to Griffith on an open account and on his credit alone.

(3) That the plaintiff had no intention to look to the building for its pay until it discovered the bankruptcy of Griffith, and upon these findings ordered the bill dismissed. The plaintiff thereupon appealed.

If the sitting Justice was warranted on the evidence in finding

the above facts, the appeal must be dismissed, since as will appear, if either the first or second was true the plaintiff must fail.

Only one who furnishes labor or materials which are used in the erection, alteration or repair of a building under a contract with the owner or with his consent has a lien thereon under the statutes of this State.

It is unnecessary in the decision of this case to discuss the effect of the ownership of the property by the son, Lawrence Shean, since if the materials were not furnished with the consent of the father, Albert Shean, by no possibility on the evidence could they have been furnished with the consent of the son.

As the materials were not furnished under a contract with the owner, the plaintiff must show that they were furnished with the owner's consent. It must also appear that they were furnished for the construction, alteration or repair of a particular building and were not sold on an open account for general use.

It is only where materials are furnished for the purpose mentioned in the statute that a lien results. *Choteau* v. *Thompson*, 2 Ohio St., 114; *Hill* v. *Bishop*, 25 Ill., 307; *Chapin* v. *Persse et als*, 30 Conn., 461; *Fuller* v. *Nickerson*, 69 Me., 228, 236. While Sec. 29 of Chap. 96 now reads whoever performs labor or furnishes materials *in* erecting, etc., the original lien statute in this State enacted in 1821, Chap. 169, P. L., provided a lien to such as under a contract furnished labor and materials "*for* erecting or repairing a building." The same words "for the erecting, repairing or altering" are found in the Act of 1837, Chap. 273, P. L., and were retained in the revision of 1841 and in the revision of 1857. It was not until the revision of 1871 when the Acts of 1868, Chap. 207, P. L., and of 1869, Chap. 57, P. L., were consolidated that substantially the present language appears; whoever performs or furnishes labor or materials *in* erecting, etc. In view of the history and purpose of this statute we think no change in effect was intended by the substitution of "in" for "for"; since to maintain his lien, if his contract was not with the owner, one, under Sec. 28, Chap. 91, R. S. 1871, was obliged to give notice before furnishing the labor or materials of his intention to claim the lien.

Nor do we think the repeal of this clause requiring notice of an intent to claim a lien before furnishing labor or material in 1876,

Chap. 140, P. L., in any way altered the requirement that the labor or materials where not furnished under contract with the owner must be furnished *for* the purpose of erecting, altering or repairing some particular building even though its exact location might not be then known to the person furnishing the materials; and if sold in the general course of trade on the credit of the purchaser without any understanding that they were to be used in a particular building then under construction, alteration or repair, or under contract with the owner for the construction, alteration or repair, no lien will attach.

Under the statutes in some jurisdictions it has been held that the particular location of the building must be had in contemplation when the materials were sold to a subcontractor, 79 Am. Dec., 273, note; but unless the statute in terms requires it, as ours does not, it is sufficient if the materials, when not supplied under contract with the owner, are supplied with his consent and that they are furnished with the understanding that they are intended for one of the purposes named in the statute. 18 R. C. L., 922, Sec. 52; *Chapin* v. *Persse et als*, supra; *Hill* v. *Bishop*, supra; *Wilson* v. *Howell*, 48 Kan., 150; *Whittier* v. *Puget Sound Loan etc. Co.*, 4 Wash., 666.

The sitting Justice in the case at bar found that the materials furnished were sold on an open account and on the sole credit of the defendant Griffith and with no intent to rely on a lien on a building in which they might be used, which we construe to be a finding that they were sold for general use.

Whether the notation which appeared on the memorandum of the order, "Shean job," was intended to indicate that the materials were furnished with the understanding that they were to be used in the erection or repair of a particular building owned by Mr. Shean, though its exact location was not then known to the plaintiff, other than it was at Oquossoc in the town of Rangeley, or whether it was intended merely as a shipping direction and in no way indicated any intent on the part of the plaintiff to rely on other than the credit of the defendant Griffith, was a question of fact to be determined upon all the evidence. The sitting Justice found against the plaintiff on this point. In view of his other findings it is not necessary to consider whether this finding was warranted by the evidence.

It does not follow as a matter of law that the sale of materials to a contractor on the usual terms of credit in the trade, if it does not extend beyond the limitation of filing notice of a lien, will prevent a lien from attaching, if the vendor knew that they were to be used in the construction or repair of a particular building is shown at the time of sale. Even the taking of a note it has been held was not necessarily a waiver of the lien. *Delano Mill Co.* v. *Warren et als*, 123 Me., 408.

The finding by the sitting Justice, however, under the circumstances of this case, that Albert Shean had no knowledge that the plaintiff furnished the lumber, was sufficient grounds for dismissing the bill.

We do not mean to go so far as to hold that although the owner of a building may not know who actually furnished the materials, he may not by circumstances be put upon his notice that they were not being all furnished by his contractor, and be held to consent thereto, as in the case of *Norton* v. *Clark*, 85 Me., 357, and thereby be required to at least exercise reasonable diligence and good faith in making inquiries in case he desired to give the statutory notice to avoid a lien.

Griffith testified that he informed Albert Shean at the outset where he was obtaining the lumber and in this was to some extent corroborated by the wife, but Albert Shean testified that Griffith assured him that he had the necessary lumber on hand, and that he, Shean, never heard of the plaintiff Company until notice of the lien claim was filed or this action was brought. If Shean's testimony was believed, no consent to the furnishing of the materials by other parties could be implied. The sitting Justice heard the witnesses and accepted Shean's testimony, since if he had believed Griffith, he must have found that the lumber was furnished by the plaintiff with the full knowledge of Shean.

The issue of knowledge and consent on the part of Albert Shean involved purely a question of veracity between witnesses. This Court, unless the testimony of the witness accepted by the Court below is so inherently improbable as not to be susceptible of belief by a reasonable person or is overwhelmed by evidence of other witnesses, will not disturb his findings.

Having accepted Albert Shean's testimony, the materials in this

case can not be held to have been furnished by the plaintiff with his consent, and *a fortiori* can not be held to have been furnished with the consent of Lawrence Shean, the owner of the land.

Appeal dismissed with additional costs.
Decree below affirmed.

STATE *vs.* FRANK GOLDEN.

Penobscot. Opinion March 2, 1929.

CRIMINAL LAW. MOTION IN ARREST OF JUDGMENT. APPEAL TO LAW COURT, WHEN PROVIDED.

A motion in arrest of judgment is not concerned with testimony. It cannot reach matters of evidence.

The remedy of a respondent found guilty by a jury upon insufficient evidence is a motion to have the verdict set aside and a new trial granted. This motion is addressed to the sitting justice whose decision in case of misdemeanors is final. Only in prosecutions for felony is an appeal to the Law Court provided.

Appeal by Frank Golden respondent based upon motion in arrest of judgment and exceptions. Respondent was charged with having in his possession intoxicating liquors unlawfully with intent to sell the same. The jury returned a verdict of guilty, whereupon respondent filed a motion in arrest of judgment which was overruled and exceptions filed and allowed. Exceptions overruled. Judgment for the State. The case sufficiently appears in the opinion.

George F. Eaton, County Attorney for the State.
George E. Thompson,
Benjamin W. Blanchard, for respondent.

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

DEASY, J. The respondent, charged with a misdemeanor, was found guilty by a jury. He filed a motion in arrest of judgment on

the alleged ground that the complaint is "not sufficient in law." The motion was overruled and exceptions saved.

The complaint seems to be in due form and the respondent points to no fault in it.

The real ground of the motion seems to be (quoting the brief) "that an examination of the testimony . . . will disclose that no crime has been committed."

But a motion in arrest of judgment is not concerned with testimony. "It cannot reach matters of evidence." *State* v. *Howard*, 117 Me., 69; *State* v. *Snow*, 74 Me., 354; *State* v. *Gerrish*, 78 Me., 20; 12 Cyc., 759. It is sometimes said that a motion in arrest of judgment "reaches the whole record." But the "record" as the term is thus used "does not include or mean the evidence in the case." *State* v. *Howard*, supra, at 71.

The remedy of a respondent found guilty, by a jury, upon insufficient evidence, is a motion to have the verdict set aside and a new trial granted. This motion must be addressed to the sitting justice whose decision in case of misdemeanors is final. Only in prosecutions for felony is an appeal to the Law Court provided. R. S., Chap. 136, Sec. 28.

Exceptions overruled.
Judgment for the State.

W. S. GILMORE *vs.* CENTRAL MAINE POWER COMPANY.

Androscoggin. Opinion March 2, 1929.

DAMAGES. RULE FOR ASSESSMENT UNDER MILL ACT, R. S., CH. 97, SEC. 9.

Damages in respect to which compensation is provided under the Mill Act must be direct not such as are general or common to the community.

Compensation should be made for all property taken at its full value, not to the taker but to the seller.

The compensation to which the owner is entitled is what the property in question would immediately prior to the taking have produced to him in the open market, not what it might be worth to the defendant taking it.

In the case at bar commissioners appointed to assess compensation under the Mill Act adopted as a rule the following: "In assessing such damages there should be taken into account what would have been the condition of the land there, if no dam had been erected, that comparison is to be made between the present value and productiveness of the land and what it would have been if it had not been injured by the dam, that all direct damage shall be allowed."

This rule adopted was correct and exceptions to the refusal of the presiding justice to reject the Commissioners' report must be overruled.

On exceptions by plaintiff. A flowage complaint under the Mill Act, R. S., Ch. 91. Commissioners were appointed to determine the damages resulting to the plaintiff by reason of the construction by the defendant of Gulf Island Dam.

The plaintiff moved to reject the report of the Commissioners and that the same be recommitted on the ground that they did not adopt a proper or correct rule of assessment of damages. The presiding Justice overruled the motion and accepted the report, to which ruling the plaintiff seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

Frank A. Morey, for plaintiff.

W. B. & H. N. Skelton,

Nathaniel W. Wilson, for defendant.

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

DEASY, J. The defendant, by the erection of its Gulf Island dam, flowed land of the complainant. Commissioners duly appointed under R. S., Ch. 97, Sec. 9, found the complainant's "yearly damage" to be $75, and a "sum in gross" $1,500.

Dissatisfied, the complainant moved that the report be rejected and recommitted. The sitting Justice overruled the motion. The case comes to this Court on exceptions. The complainant, by his motion, presents as reasons for rejection, "that the commissioners in assessing damages did not adopt the rule regulating damages as applied and given in the case of *Ford Hydro-electric Co.*, v. *Neely*, 13 Fed., 2d., 361, and the cases cited in said decision in conjunction with the rule laid down in the Massachusetts case, and that the plaintiff is entitled to the application of the rule in the case of *Ford Hydro-electric Co.* v. *Neely* to the facts in this case."

The only "rule" in the Ford case is quoted from *Boom Co.* v. *Patterson*, 98 U. S., 403, 25 L. Ed., 206, thus:

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what it is worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated."

This is undoubtedly a correct statement of the law. There is, however, nothing in it at variance with the rule adopted by the commissioners, to wit: "That in assessing such damages there should be taken into account what would have been the condition of the land there if no dam had been erected; that comparison is to be made between the present value and productiveness of the land and what it would have been if had not been injured by the dam; that all direct damage shall be allowed."

The commissioners cite as sustaining the rule adopted the following Massachusetts cases: *Palmer Co.* v. *Ferrill*, 17 Pick., 58; *Eames* v. *New England Worsted Co.*, 11 Met., 570; *Howe* v. *Ray*, 113 Mass., 88; *Fuller* v. *Man'fg Co.*, 16 Gray, 46.

In the case of *Ford Co.* v. *Neely*, cited and relied upon by the complainant in his motion, a witness named Newton, called by the land owner, "did not testify to the market value of the land at all, but testified to what he termed fair market value for the water power attributable to the lands taken."

The question passed upon by the Circuit Court of Appeals was whether this testimony was so far irrelevant as to require reversal of the District Court's judgment which was in favor of the land owner. The Court affirmed the judgment upon the ground that the evidence had "a bearing upon what might be paid for it (the land) by one desiring to purchase it, and thus bore upon its market value," and upon the further ground that the motion to strike out the testimony "was too general and indefinite."

Whether this Court would sustain exceptions to such testimony need not be determined because in the instant case no testimony of the kind was offered.

We have quoted above three forms of expressing the standard of just compensation in eminent domain cases: "worth in the market" (*Boom Company* v. *Patterson*); "market value" (*Ford Company* v. *Neely*) and "value" (Commissioners' Report). The word "value," literally construed, is broader than the other expressions. If either party is aggrieved by the use of the unqualified term "value" as a standard it is the defendant. The complainant's real objection to the Commissioners' rule is not that it is incorrect but that it is too concise. It does not, as does the Federal case, specifically and fully define the word "value." But this is not a valid ground for rejecting the report. It is elementary that anything that will affect selling price in the market enters into the term "value." We cannot assume that the Commissioners did not understand the meaning of the words which they used.

The only contention of the complainant which is out of harmony with the rule adopted in this case is stated in the report thus: "The complainant claimed that he should be allowed damages based upon the value of the property to the respondent for water power purposes, and that the Commissioners should consider the land of the complainant as part of a united whole, the whole consisting of all the parcels of land necessary to a completed water power development, which would include the lands taken."

This contention is almost a literal rendition of the theory advanced by the witness Newton who testified in *Ford Co.* v. *Neely* — a theory not adopted or approved in that case or, we believe, in any other.

This theory, if adopted, would make the owner of any land flowed in a hydro-electric development a quasi partner entitled to share in the value of the entire development without sharing in the burden of its cost or the risk of its failure. The "value for water power purposes" theory has no foundation either in reason or authority.

The owner of land taken for a railroad is not entitled to or limited by its value for railroad purposes, a value which sometimes turns out to be zero. When land is taken for streets, sewers or lighthouses, damages are not based upon the value of the land to the public for street purposes, sewer purposes or lighthouse pur-

poses. The same principle applies here. If the taking is required by public exigencies, i. e., public welfare (an issue determined beyond judicial review by the legislature), and if the purpose is public (an issue which in case of the Mill Act is no longer open to question), the rule for assessing land damages is the same, whether the land is taken for free or compensated public use.

Reason dictates that the same rule must apply in either case. The amount of land damages paid is reflected in the price that the corporation is permitted to exact for its product. In the last analysis the pending case is not between the complainant and defendant, but between the complainant and the consuming public which (except under extraordinary conditions) must pay the defendant a fair return upon the entire necessary cost of the development, including compensation paid land owners.

The "value for water power purposes" theory is inconsistent with all authorities to which our attention has been called. "Compensation should be made . . . for all property of every nature taken . . . at its full value, not to the taker but to the seller." *Kennebec Water District* v. *Waterville*, 97 Me., 221. "The real question is, what has the owner lost, not what the taker has gained." *R. R. Co.* v. *Mills*, 144 New York Sup., 646. "The compensation to which the owner is entitled is what the property in question would, immediately prior to the taking, have produced to him in the open market, not what it might be worth to the defendant taking it." *Wadsworth* v. *Water Co.*, 256 Penn St., 106; 100 Atl., 579.

"The owner would not be entitled to demand payment of the amount which the property might be deemed worth to the company; or of an enhanced value by virtue of the purpose for which it was taken; or of an increase over its fair market value by reason of any added value supposed to result from its combination with tracks acquired from others so as to make it a part of a continuous railroad right-of-way held in one ownership." *Simpson* v. *Shepard*, 230 U. S., 451, 57 L. Ed., 1563.

"The value of the land taken to the party taking it is not the test of what should be paid." 10 R. C. L., 131. "Compensation must be reckoned from the standpoint of what the land owner loses by having his property taken, not by the benefit which the property may be to the other party." 20 C. J., 776, and cases cited.

The Commissioners awarded compensation in respect to all di-

rect damages, specifying as illustrations certain items of direct damage.

As damages which are indirect and not compensable they specify "abandonment of neighboring farms, decrease of population and discontinuance of roads and schools." As to this no complaint is made in the motion for recommittal. In his brief, however, the complainant stresses these elements of damage.

When a tract of land is wholly taken or wholly submerged so that nothing is left for the owner's use the only thing to be determined is the market value of the land at the time of taking. 20 C. J., 728. If a part only is taken or damaged market value should first be determined and then there must be found the extent to which such value has been diminished by its flooding or saturation. 20 C. J., 730.

The flooding of other land by the filling of what complainant's counsel aptly likens to a "bowl," may depress or may enhance the value of any parcel of land lying in or near it; it may cause good neighbors (or perchance bad ones) to abandon their farms; it may decrease or perhaps increase population; it may cause the discontinuance of schools or possibly the abatement of nuisances. But these results are also suffered (or perhaps enjoyed) in common with people of the neighborhood whose lands are not reached by the waters of the flooded bowl and who are plainly not entitled to compensation. These results may cause damage, but if so it is indirect and not the basis of recovery. "The damages must be direct, not such as are general or common to others or to the whole community." *R. R. Co.* v. *McComb*, 60 Me., 297.

The indirect damages claimed are of the same kind suffered by a town which finds itself isolated by the construction of a new railroad, or a shopkeeper who by the building of a new avenue is left to share the unprofitable business of an unfrequented street. These are indirect and non-compensable damages which are frequently suffered in a growing country or community.

The complainant also complains that he suffers from noxious odors caused by the flowage. If so, the law of nuisances will afford relief.

Exceptions overruled.

UNION TRUST COMPANY OF ELLSWORTH

vs.

PHILADELPHIA FIRE AND MARINE INS. CO.

UNION TRUST COMPANY OF ELLSWORTH

vs.

NATIONAL FIRE INS. CO. OF HARTFORD.

UNION TRUST COMPANY OF ELLSWORTH

vs.

NATIONAL LIBERTY INS. CO. OF AMERICA.

Hancock. Opinion March 7, 1929.

FIRE INSURANCE. "UNION MORTGAGE CLAUSE" CONSTRUED.

VALIDITY OF POLICY AS TO MORTGAGOR AND MORTGAGEE.

In actions on insurance policies obtained by a mortgagor for the benefit of the mortgagee under a covenant in the mortgage, the policy containing the clause found in the standard policy in this state and usually referred to as the "union mortgage clause," held:

That under such a clause a contract of insurance between the mortgagee and the insurer is created, separate from and independent of that between the insurer and the mortgagor;

That regardless of whether the policy is valid as to the mortgagor, a valid contract of insurance based on a sufficient consideration is created between the insurer and mortgagee under such a clause;

That the mortgagor in obtaining such a policy does not act as agent for the mortgagee in making application for the policy in his own name and the mortgagee is not bound by any representations the mortgagor may make of which the mortgagee has no knowledge, except such as may affect the mortgagee's interest in the premises;

That where the mortgagee has knowledge of facts or circumstances that invalidates the policy he is not protected by such "union mortgage clause"; or if

he has knowledge of facts that would lead a reasonably careful and prudent man to make further inquiries, he is charged with knowledge of all facts he would have ascertained by the exercise of reasonable diligence;

In the case at bar the plaintiff had knowledge of facts that should have induced a reasonably careful and prudent man to make further inquiries and such inquiries would have disclosed facts which invalidated its policies, hence judgment must be entered for the defendant in each case.

On report. Three actions brought by the plaintiff as mortgagee on three policies of fire insurance issued by the defendant Companies to the mortgagor, each policy containing the Maine standard "union mortgage clause."

The cases were tried together and at the conclusion of the evidence, by agreement of the parties, were reported to the Law Court for its determination upon so much of the testimony as is legally admissible.

Judgment for the defendants in each suit. The cases fully appear in the opinion.

Hale & Hamlin,
George E. Thompson, for plaintiff.
William H. Gulliver,
William E. Whiting,
Theodore Gonya, for defendants.

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

WILSON, C. J. These actions brought under Sec. 38 of Chap. 87 by the same plaintiff on policies of fire insurance respectively issued by each of the defendants, were tried together, and if we construe the stipulations of the parties correctly, involve the same issues and may be disposed of by the same mandate in each case, except as to the measure of damages, if the finding should be for the plaintiff.

The testimony was taken out below, and the cases reported to this Court for determination upon the writ and pleadings in the case against the National Fire Insurance Company of Hartford, and so much of the evidence as is legally admissible. Much of the evidence taken out on both sides may not have been strictly ad-

missible, but enough admissible testimony is included in the record to warrant the finding of the following facts:

In August, 1920, one Curtis Durgain of Bangor owned a farm in the town of Sedgwick in Hancock county, and conveyed it by a mortgage deed to the plaintiff to secure a loan of two thousand dollars. Sometime after the giving of the mortgage, there was at least one or more policies of fire insurance on the buildings, one of which policies appears to have been issued by the National Fire Insurance Company of Hartford, one of the defendants in these actions, and which was deposited with the plaintiff bank as mortgagee.

At the time when the mortgage was given, the premises were occupied by one Wessel, son-in-law of Durgain, during the entire year and also by Durgain during a portion of the year. In the fall of 1924, the son-in-law's family having been broken up, the son-in-law went away to work leaving no one in the house. He came back at times to attend to certain of the farm work, but did not occupy the house during the winter and spring of 1924-5.

On April 14, 1925, Durgain went to an insurance agency in Bangor, representing the Philadelphia Fire and Marine Insurance Company and the National Fire Insurance Company of Hartford, Conn., and took out two policies of insurance for $1,900 each on the premises in Sedgwick, the policies being in the standard form required by the statutes of this state and were each made payable to the plaintiff as mortgagee as its interests should appear. It is on these policies that two of the actions are based.

At the time of making application for these polices, Durgain, undoubtedly, represented to the agent that the premises were occupied by his son-in-law. Sometime in April, 1925, a representative of the National Fire Insurance Company of Hartford from its home office wrote its agent in Ellsworth that it was being bound by a policy on farm buildings in Sedgwick, and inquired if it was the same farm as the one bound by a policy previously issued from the Ellsworth agency.

Upon investigation, the agent learned that the buildings were unoccupied, and for the first time that it was mortgaged, as the policy then in force was not made payable to the mortgagee, though it had been delivered to the mortgagee by Durgain.

The Ellsworth agent thereupon sent a notice to Durgain of cancellation of the policy issued through his agency. Durgain then proceeded to obtain an additional policy to the amount of $2,500 in the National Liberty Insurance Co. of America through another agency in Bangor. In applying for this policy, he represented to the agent that the buildings were then occupied by his son-in-law. This policy bears date of May 4, 1925, and is the basis of the third action.

Some days later, this last policy was delivered to the treasurer of the plaintiff bank by Mr. Durgain, who at the same time explained that he had received a notice that the policy then held by the bank issued from the Ellsworth agency would be cancelled on May 12, 1925, and requested that it be delivered up for cancellation, which was done.

On May 16 the buildings were totally destroyed by fire. At this time they were unoccupied according to the definition of that term in *Hanscom* v. *Insurance Co.*, 90 Me., 333, 338, and had been so unoccupied for a period of more than six months, and, therefore, were vacant when Durgain made application for each of the policies involved in these actions; and the treasurer, who was also a director of the company and who represented the bank in its dealings with Durgain, knew that Durgain's son-in-law had not been regularly occupying the premises since the previous fall.

The plaintiff bank on the 16th day of May at the time of the fire had in its possession only the policy issued by the defendant, the National Liberty Insurance Company of America, but after the fire Durgain delivered to it the policies issued on April 14, 1925, by the other two defendants.

In 1924, on May 21, Durgain being sometime in arrears on the mortgage indebtedness, the plaintiff bank began foreclosure proceedings under which Durgain's equity of redemption in the premises expired May 21, 1925, or five days after the fire. No effort, however, was made by either defendant prior to the expiration of the equity of redemption to pay the mortgage indebtedness and take an assignment of the mortgage and note under the provisions of its policy. In fact the defendants from the first notice of the loss have taken the position that they were not liable either to Durgain or the plaintiff upon these policies because of the mis-

representations of Durgain that the premises were occupied as farm buildings, and were in fact unoccupied at the time of the issuing of the policies and at the time of the loss; and though the plaintiff, following the termination of the period of redemption, offered to convey the property to the defendants if paid the indebtedness, each refused to accept the offer, and these actions were brought.

The defendants raise three main issues under a brief statement under the general issue; first, that by reason of Durgain's misrepresentation as to occupancy in applying for the policies no valid contract of insurance ever existed and, therefore, the plaintiff acquired no rights under them, and further that the "union mortgage clause," so-called, in the standard policy, Sec. 5, R. S., Chap. 53: that "no act or default of any person other than such mortgagee or his agents or those claiming under him shall affect such mortgagee's right to recover in case of loss" applies only to acts subsequent to the issuance of the policy, and that a mortgagor in such cases in obtaining the insurance is the agent of the mortgagee, who is bound by his representations; second, that the bank and mortgagee in this instance had knowledge of the facts of unoccupancy or of such facts that should have put it upon its inquiry and amounted to knowledge; third, that by its foreclosure the plaintiff put itself in a position so that it could not comply with the terms of the policy requiring it to assign the mortgage deed and note and, therefore, can not recover.

It is necessary to consider only the first two points. Prior to the enactment in this state in 1895 of the provisions for a standard policy of fire insurance the authorities are all agreed that the protection of the mortgagee under a policy obtained by the mortgagor, though made payable to the mortgagee, might be destroyed by some act or neglect of the mortgagor without the knowledge of the mortgagee. The insurance in such cases was held to be upon the interest of the mortgagor alone and not upon that of the mortgagee, and a "payable in case of loss" clause inserted in or attached to the policy was held to be merely a contingent order assented to by the insurance company and only gave the mortgagee the same right to recover that the mortgagor had. The mortgagor's rights being forfeited, the mortgagee was without protection. *Brunswick Sav.*

Ins. v. *Commercial Ins. Co.*, 68 Me., 313; *Bank* v. *Insurance Co.*, 81 Me., 570.

The authorities are now almost unanimously in accord that by the insertion of the provision now contained in the standard policy and commonly referred to as the "union mortgage clause" a new relation is entered into between the insurer and the mortgagee, *viz:* that of insurer and insured, and independent of the contract with the mortgagor, and insuring the interest of the mortgagee. *Hastings* v. *Westchester Ins. Co. et al*, 73 N. Y., 141; *Eddy* v. *L. A. Corporation*, 143 N. Y., 311; *Smith* v. *Union Ins. Co.*, 25 R. I., 260; *Genesee Falls Sav. & Loan Asso.* v. *U. S. Fire Ins. Co.*, 44 N. Y. S., 979; *Germania Fire Ins. Co.* v. *Bally*, 19 Ariz., 580, 585; *Reed* v. *Firemen's Ins. Co.*, 81 N. J. L., 523, 526; *Magoun* v. *Fireman's Fund Ins. Co.*, 86 Minn., 486, 490; *Hartford Ins. Co.* v. *Olcott*, 97 Ill., 439; *Savings Bank* v. *Ins. Co.*, 146 Ia., 536, 540; *Syndicate Ins. Co.* v. *Bohn*, 65 Fed. R., 165; *Gilman* v. *Ins. Co.*, 112 Me., 528, 535; Cooleys Brief on Ins., 2nd Ed., Vol. 3, pp. 1988-1990; *Federal Land Bank* v. *G. & R. Fire Ins. Co.*, 187 N. C., 97; *Bacot* v. *Phoenix Ins. Co.*, 96 Miss., 223; *Ormsby* v. *Insurance Co.*, 5th So. Dak., 72 (58 N. W., 301, 302). Upon this point, the only case not expressly in accord is *Brewing Co.* v. *Ins. Co.*, 81 Ohio St., 1, 21; but the cases cited by the Court in this case in support of its position were for the most part decided before the adoption of a "union mortgage clause" by the state in which they were decided.

The most common form of "union mortgage clause" provides that if the policy be made payable to a mortgagee as his interest shall appear, the interest of the mortgagee shall not be invalidated by any "act or neglect of the mortgagor or owner," and is usually coupled with certain rights of subrogation, if the insurer sees fit to pay the mortgage indebtedness.

There may also be said to be practical unanimity in the authorities that under such "union mortgage clause" no act or default by the mortgagor or owner after the inception of the policy, if unknown to the mortgagee, though invalidating the policy as to the mortgagor or owner, will invalidate the contract of insurance between the mortgagee and the insurer, as will appear in the cases above cited.

The only material divergence of opinion is as to the effect of a

misrepresentation by the mortgagor, when applying for a policy, as to ownership or occupancy or of any other material fact affecting the risk, so that the policy was never valid as to him.

A strong preponderance of authority, however, is in favor of holding that any acts or neglect of the mortgagor or owner whether prior or subsequent to the inception of the policy will not invalidate the rights of the mortgagee under a "union mortgage clause." *Hastings* v. *Westchester Ins. Co.*, supra; *Eddy* v. *L. A. Corp. et al*, supra; *Smith* v. *Union Ins. Co.*, supra; *Syndicate Ins. Co.* v. *Bohn*, 65 Fed. R., 165; *G. & R. Fire Ins. Co.*, supra; *Bacot* v. *Phoenix Ins. Co.*, supra; *Hanover Fire Ins. Co.* v. *Bohn*, 48 Neb., 743; *Savings Bank* v. *Ins. Co.*, 146 Ia., 536; *Reed* v. *Fireman Ins. Co.*, supra; Cooleys Briefs on Ins., 2nd Ed., pp. 1988-90; also see case note 25 L. R. A. (N. S.), 1226; 14 R. C. L., 1038.

The only cases generally cited to the contrary are *Glen Falls Ins. Co.* v. *Porter*, 44 Fla., 568; *Hanover Fire Ins. Co.* v. *Exchange Nat. Bk.* (Tex Civil Appl.), 34 S. W., 333; *Brewing Co.* v. *Insurance Co.*, supra, and certain New York cases, decided chiefly in the appellate division of the Supreme Court, none of which, however, can be held to overrule *Hastings* v. *Westchester Ins. Co.*, but base their conclusions on different factual conditions, which the court held differentiated the case then at bar from the Hastings case.

In the Hastings case, while the final issue was one of prorating of loss, the question which raised it was a policy placed on the property prior to the inception of the one on which the action was brought and without the knowledge of either the insurer or mortgagee. The court held that it made no difference whether it was placed on prior or subsequent to the insuring of the mortgagee's interest under the "union mortgage clause," the rights of the mortgagee were not affected. The Hastings case has since been invariably considered by all courts as holding that under a "union mortgage clause," at least, like that in New York State, a mortgagee was protected against any act of a mortgagor which invalidated the policy as to him, whether done before or after the issuance of the policy. This construction was also later confirmed by the New York Court in *Eddy* v. *L. A. Corp.*, 143 N. Y., 311, 323, in an opinion written by Justice Peckham, later Justice of the United States Supreme Court.

The first New York case cited by counsel as inconsistent with this

view is *Graham* v. *Fireman's Ins. Co.*, 87 N. Y., 69. The opinion in this case is written by the same judge who wrote the opinion in the Hastings case. No reference to the Hastings case is found in the opinion. The misrepresentation was as to the owner of the building, it being stated that the owner was a widow who was using the building for hotel purposes, when as a matter of fact the owner of the property was an infant child, three years of age, who, of course, did not conduct the hotel. The Court held that an act of misrepresentation could not be made by a child of such tender years, and, that not only the act complained of was not within the terms of the "union mortgage clause" of that state, but it further appeared from the statement of the case that the misrepresentation was made by the mortgagee's own agent.

The other New York cases cited as being contrary to the rule of construction laid down in the Hastings case are those of *Genesee Falls P. Sav. & L. Ass.* v. *U. S. Fire Ins. Co.*, 44, N. Y. S., 979; *Young Men's Lyceum* v. *National B. F. Fire Ins. Co.*, 163 N. Y. S., 226, and the case of *Goldstein* v. *National Liberty Ins. Co.*, but recently decided and not reported. The reasoning in these cases, however, is far from convincing.

In Genesee Falls P. Sav. & L. Ass. case the court without differentiating the facts from those in the Graham case, merely holds that if a misrepresentation as to ownership was not an act or neglect in the Graham case it could not be in the case then at bar, where the misrepresentation by the insured apparently was that the title was in himself, when as a matter of fact it was in himself and wife as tenants by the entirety. In this case it appears that the mortgagee must have known that the representation was false and failed to notify the insurance company, and hence could not recover for this reason, as the court holds. Instead of in any way overruling or modifying the Hastings case, the Court expressly affirmed the ruling in that case as to the nature of the contract with the mortgagee under such a policy, and declared it to be the settled law of the state.

In the Young Men's Lyceum case it was held, though one's reason does not readily accept the conclusion, that a warranty by the mortgagor and owner that there was a hydrant within 500 feet of the building and was not an act of neglect on the part of the owner

or mortgagor and hence was not within the "union mortgage clause." The recent case of *Goldstein* v. *National Ins. Co.* simply follows the last named case in holding that a warranty was not an "act" within the meaning of the "union mortgage clause."

The case of *Baldwin* v. *German Ins. Co.*, 105 Ia., 379, sometimes cited as supporting the doctrine here contended for by the defendants is differentiated in *Savings Bank* v. *Ins. Ass'n*, 146 Ia., 536, 538, and the rule contended for by the plaintiff in the case here at bar was adopted in that state.

This rule is becoming more widely adopted as the true construction of the "union mortgage clause" and is being so recognized by the text writers and annotaters; Cooley's Briefs on Insurance, 2nd Ed., Vol. 3, p. 1998; 14 R. C. L., 1038, see case notes 18 L. R. A. (N. S.), 206; 25 L. R. A. (N. S.), 1226.

It may be well to here note, however, in order that it may not be inferred that it was overlooked, that the clause contained in the standard policy adopted by our state differs in terms from that generally in vogue in other states. The provision in our statute reads: "No act or default of any person other than such mortgagee or his agent . . . shall affect such mortgagee's right to recover in case of loss," while the clause usually found in other states is that no act or neglect by the mortgagor or owner shall invalidate the mortgagee's rights.

Under the "union mortgage clause" contained in the standard policy of this state, therefore, if the mortgagor, under a mortgage containing a covenant to keep the premises insured for the benefit of the mortgagee, in obtaining insurance made payable to the mortgagee, acts as agent of the mortgagee in all respects, a different result might be reached than in the states where the mortgagee by the terms of the "union mortgage clause" is protected against any "act or neglect of the mortgagor or owner."

Notwithstanding the statement in Cooley's Briefs on Insurance, 2nd Ed., Vol. 3, p. 2393, that certain courts have held that a mortgagee was protected only against acts subsequent to issuance of the policy because in obtaining the insurance the mortgagor was acting as agent of the mortgagee and presumably the representations of the agent bound the principal, and citing *Glen Falls Ins. Co.* v. *Porter*, 44 Fla., 582; *Genesee Falls Sav. & Loan Ass'n* v. *U.*

S. Fire Ins. Co., 44 N. Y. S., 979; *Am. Cent. Ins. Co.* v. *Cowan* (Texas Civil Appls.), 34 S. W., 460; *Graham v. Fireman's Ins. Co.*, 87 N. Y., 69, we do not find the statement in the text is sustained in the report of the cited cases. In all these cases the conclusion of the court is based on other grounds and the agency of the mortgagor or owner is not even discussed.

In Massachusetts, however, in *Palmer Sav. Bank* v. *Insurance Co.*, 166 Mass., 189, 194, and in *Union Inst. for Savings* v. *Phoenix Ins. Co.*, 196 Mass., 230, the mortgagor in both cases acting in compliance with a covenant in his mortgage was held to be the agent of the mortgagee, at least, in obtaining insurance for the benefit of the mortgagee. The issue involved in the cases at bar, however, was not involved in either of these cases.

To the extent of arranging for the insurance of the mortgagee's interest under a policy containing a "union mortgage clause" and in compliance with a covenant in his mortgage, the mortgagor may perhaps be regarded as acting as agent of the mortgagee in the insertion of a "payable in case of loss clause" in the policy; but in so far as he acts in obtaining a policy on his own interest and in his own name as owner, he is clearly not acting as agent for the mortgagee. The error of those contending the contrary comes, we think, in holding the two contracts are dependent and not independent, and the insurance of the mortgagee's interest can not be valid without a valid insurance of the interest of the mortgagor; but the insurance of the mortgagee's interest under the clause is a separate and independent contract, as the cases above cited almost unanimously hold, based on a consideration, *viz:* the promise of the mortgagee to pay extra premium if there should be increased hazard not paid for by the mortgagor and to assign the entire mortgage and debt in case the mortgage debt is paid in full by the insurer instead of the amount of the insurance. *Syndicate Ins. Co.* v. *Bohn*, 65 Fed. R., 165, 176; *Hastings* v. *Westchester Ins. Co.*, supra; Colley's Briefs on Ins., 2nd Ed., Vol. 3, p. 2391.

In so far, therefore, as the mortgagor makes representations or warranties in applying for a policy on his own interest, the mortgagee has no control over his acts and may have no knowledge or means of knowledge of the facts upon which the representations or warranties are based. It is only in case representations are made

affecting the mortgagee's interest in the property that he could be said to be bound thereby, if at all.

To hold otherwise would frustrate the very purpose of the "union mortgage clause." Prior to its insertion in the standard policies, the mortgagee might be deprived of his protection by some act or neglect of the mortgagor of which he had no knowledge and to protect himself would be compelled to take out separate insurance in his own name.

It was to avoid this that the "union mortgage clause" was inserted. As soundly reasoned by the courts, which have held that it covered prior as well as subsequent acts or neglect, otherwise no mortgagee could safely accept a policy of insurance obtained by the mortgagor or owner with a "payable in case of loss" clause. To ensure protection, every Bank and Loan and Building Association and mortgagee would have to investigate every representation or warranty made by the mortgagor in obtaining a policy for its benefit, or take out insurance in its own name as before the enactment of this provision.

We think the intent of the legislature was to relieve the mortgagee of this burden and safeguard his interest against every act of a mortgagor of which he had no knowledge or notice, and that the provision in the standard policy of this state should be construed with the same intent in view.

It is the legislative intent which is the law, and a thing within the letter is not within the statute, if contrary to intention, *Carrigan* v. *Stillwell*, 99 Me., 434, which means the intent gathered from the whole statute, text and context, and the purpose it was enacted to accomplish. *Craughwell* v. *Trust Co.*, 113 Me., 531, 535.

We are, therefore, of the opinion that the enactment of this provision in every state where found was with the same purpose in view and with the same intent in mind, and notwithstanding some variation in terms should have a common construction unless the contrary intent clearly appears, which does not in this instance.

The Minnesota Court, which state has a similar "union mortgage clause" to ours, so holds. In *Magoun* v. *Firemen's Fund Ins. Co.*, 86 Minn., 486, 491, it says: "A comparison of the union clause as it appears in policies issued in different states with that now before us will show that there is no substantial difference in them and the authorities are uniform in their construction of such a clause."

In this case this court also says: "the efficiency of the insurance contract with this plaintiff (the mortgagee) was not dependent upon the validity of the contract between the defendant company and the estate of the deceased or her legal representatives," the deceased having been the owner.

In any event, this Court in *Gilman* v. *Insurance Co.*, 112 Me., 528, in both the majority and minority opinion, though the precise issues here raised are not involved, apparently assumed that the language of our standard policy had the same effect as that of other states, and that the accepted construction was that it protected the mortgagee against any act or neglect of the mortgagor either at or subsequent to the inception of the policy unless the same was known to the mortgagee.

But in reason and based on the authorities, a mortgagee under such a clause is protected only where the act or neglect of the mortgagor or owner is unknown to him. *Eddy* v. *L. A. Corp.*, 143 N. Y., 311, 324; *Syndicate Ins. Co.* v. *Bohn*, supra, p. 177; *Genesee Falls P. Sav. & L. Ass'n* v. *U. S. Fire Ins. Co.*, 44 N. Y. S., 979, 981; Cooley's Briefs on Ins., 2nd Ed., p. 2391. If he has actual knowledge of any act or neglect that would invalidate the policy, or such knowledge of facts as would induce a man of ordinary prudence to make further inquiries, which would have disclosed acts or neglect by the mortgagor that would void the policy, either at its inception or afterward, then the provisions of the "union mortgage clause" will not protect him. He is in such cases chargeable with knowledge of all facts which by the exercise of reasonable diligence he would have ascertained. The means of knowledge under such circumstances are the same as knowledge itself. *Knapp* v. *Bailey*, 79 Me., 195, 204; *Morey* v. *Milliken*, 86 Me., 464, 475; *Coleman* v. *Dunton*, 99 Me., 121; *Hudson Structural Steel Co.* v. *Smith & Rumery Co.*, 110 Me., 123.

We think from the record in the case at bar it is clear, and we so find, that the plaintiff bank must be charged with such information as to the unoccupied condition of these buildings not only prior to and at the time the policies sued on were issued, but afterwards, and prior to the loss, that it should have investigated farther, in which case it would have learned facts that would have disclosed the invalidity of any policies of insurance issued in place of the one it had.

The treasurer of the plaintiff bank, who represented the bank in the dealings with Durgain, admitted according to the record that prior to the fire he was advised that the old policy was cancelled for some irregularity in the form, though his testimony in this respect seemed disingenuous rather than frank. He was quite sure that before the fire he inquired of the agent why it was cancelled, but did not recall the reason given. The agent, however, testified that if he was asked, unoccupancy was given as the reason.

The treasurer, however, testified that he knew that Durgain lived in Bangor and that his son-in-law Wessel was not living on the premises regularly since the fall before the fire, though he understood he was returning there from time to time.

A part of his testimony on this issue was as follows:

Q. "And you knew that Wessel was not living there regularly, didn't you?"

A. "Yes, at the last of it. I knew he wasn't living there regularly. I knew he was away working."

And in further testifying he stated in answer to similar questions:

A. "I knew that during a part of the time he was not living there regularly. The latter part of it I knew he was not living there regularly."

Q. "You knew that the place was unoccupied, so far as Wessel was concerned from the fall before up to the time of the fire, didn't you?"

A. "Why, I knew he wasn't occupying it regularly."

From the admission and testimony of this official, the plaintiff must be held to have had knowledge of facts which should have led a careful and prudent man who was relying on policies of insurance for protection to make further inquiries as to the occupancy of these premises.

Any inquiry would have disclosed that Wessel left the premises in the fall of 1924 to work away and did not return there again before the fire, except to pick the apples in the fall and occasionally visit the premises during the winter, but never again to take up his abode there — conditions which under the rulings in *Hanscom* v. *Insurance Co.*, 90 Me., 333, 338, and *Knowlton* v. *Insurance Co.*, 100 Me., 486, 487, would have voided any policy of insurance on the buildings.

Having failed to make such inquiries, the plaintiff must be held to be charged with full knowledge of these conditions which by the exercise of ordinary diligence it would have obtained.

For this reason judgment must be entered for the defendant in each suit.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

PETER A. PEARSON, APPELLANT,

IN THE MATTER OF THE PROPOSED WILL OF AGNES E. PERSSON.

Penobscot County. Decided April 14, 1928. An instrument purporting to be the last will and testament of Agnes E. Persson, late of Bangor, deceased, was duly approved and allowed by the Judge of Probate for Penobscot County on February 22, 1927.

Upon appeal to the Supreme Court of Probate at the April term, 1927, the decree below was affirmed, the will was approved and allowed, and the cause remitted to the Probate Court. Exceptions reserved to this decision bring the case before this Court.

The findings of a Justice of the Supreme Court of Probate in matters of fact are conclusive if there is any evidence to support them. It is only when he finds facts without evidence that his finding is an exceptionable error in law. *Cotting* v. *Tilton*, 118 Me., 91; *Packard*, Applt., 120 Me., 556; *Rogers*, Applt., 123 Me., 459, 461.

The contestant asserts that the testatrix when she made the purported will was of unsound mind, and the execution of the instrument was procured by undue influence. The sitting Justice found to the contrary, and his findings upon both of these issues are fully supported by the evidence. The exceptions cannot be sustained. Exceptions overruled. *Henry W. Mayo*, *Bradley, Linnell & Jones*, for proponents. *Arthur L. Thayer*, for contestant.

COMMERCIAL ACCEPTANCE CORPORATION *vs.* LLOYD V. PRINCE.

Cumberland County. Decided July 10, 1928. In this action by the indorsee of a negotiable promissory note against the maker, the maker unsuccessfully defended in the trial court on the ground that the plaintiff was not a holder in due course without notice and that the defendant was not liable because of total failure of consideration, contention below being that the title to the automobile for which the note was given was defective.

Three exceptions by the defendant to the exclusion of evidence, of which one was later abandoned, and exception to the granting of the motion made by the plaintiff at the close of the evidence for the direction of a verdict in his favor have brought the case to this Court.

The trouble immediately vital to the exceptions is that there was no evidence whatever of defect in title. Exceptions overruled. *Berman & Berman,* for plaintiff. *Oakes, Skillin & Tapley,* for defendant.

JOHN KING *vs.* METROPOLITAN BUILDING INC.

Cumberland County. Decided July 18, 1928. On an appeal in equity, findings of fact by the sitting Justice must stand, unless it clearly appears from the record that they are erroneous. The ground on which this Court is asked to sustain the appeal is that the sitting Justice erred in his conclusion that the plaintiff was entitled to recover any sum from the defendant, the defendant contending that he had already overpaid the plaintiff. The issue was over the amount of metal lathing laid by the plaintiff in a building of the defendant and certain hours of additional labor, for which the plaintiff claimed there was still a balance due him of $272.39. The sitting Justice found the plaintiff was entitled to recover the sum of $207.72 and had a lien on the defendant's building for that amount. Just what items of the plaintiff's bill the sitting Justice

disallowed does not appear; but he apparently rejected the defendant's method of keeping account of the amount of lathing laid and adopted that of the plaintiff. From the record this court can not say that his finding as to the amount due was clearly wrong.

The mandate will be, Appeal dismissed. Decree below affirmed. *John J. Devine*, for complainant. *Harry S. Judelshon, Edward J. Harrigan*, for respondent.

HIRAM W. VINING, PRO AMI

vs.

AMOS D. BRIDGES SONS CO., INCORPORATED.

Franklin County. Decided July 18, 1928. In 1926 the defendant was engaged in building a state road in the town of Strong near the house owned by Elbridge Vining and occupied by himself with his son and the plaintiff, his grandson. In the prosecution of the road building work, a large tool chest was used which was moved on as the work progressed. A few days before the accident, without the express consent of the land owner, but apparently without objection, the chest was placed in the yard of the Vining house. Among the contents of the chest was a tin box containing dynamite caps. The box was marked "blasting caps." On August 18, 1926, the plaintiff, a lad then thirteen years of age, went to the chest, found the box of caps, took one out, carried it to the back of the house, held it with his fingers and applied a lighted match to it. The explosion caused severe injuries to the boy's hand. In this suit to recover damages for such injuries the presiding Justice ordered a verdict for the defendant. The ruling must be sustained.

Assuming that the defendants were guilty of a technical trespass upon the Vining land, neither such trespass nor any negligence on the part of the defendant's servants but rather the boy's own rash act was the proximate cause of the accident.

That boys will indulge in their propensity to climb shade trees should be anticipated by electric power companies on stringing

their high voltage wires. So held by this Court in *Chickering* v. *Power Company*, 118 Me., 415, relied upon by the plaintiff's counsel. But it would be utterly unreasonable to hold that the defendant was bound to anticipate the plaintiff's rash and mischievous conduct and the consequences of it.

In the Chickering case it is said that tree climbing is one of "boyhood's legitimate pleasures and adventures." Filching dynamite caps and exploding them in his hand is not one of a boy's legitimate pleasures and adventures. *Chickering* v. *Power Company* does not support the plaintiff's case. The other authorities cited differ from it even more widely. Exceptions overruled. *Frank A. Morey*, for plaintiff. *Oakes & Farnum*, for defendant.

ERNEST L. MORRILL *vs.* NAPOLEON SPENARD.

York County. Decided August 7, 1928. This suit was brought to recover one-half of the amount received by the defendant for the sale of a patent. The sale was made on March 14, 1924, the amount of the sale price was $5,000, and the jury returned a verdict for plaintiff in the sum of $2,500 with interest from the date of sale. The case comes before this court on general motion.

Defendant invented and patented a machine used in the manufacture of shuttle eyes and previous to 1921 assigned one-half interest in the same to plaintiff, the assignment being properly recorded in the United States Patent Office. For some time thereafter, plaintiff and defendant as co-partners manufactured shuttle eyes in a shop owned by the partnership and with machinery owned by the partnership. Later, the partnership business was extended to embrace an automobile business. The patent was not assigned to the partnership. Later on, a corporation was formed for the purpose of carrying on the business of the partnership, the stock in the corporation being originally in equal shares to plaintiff and

defendant. The patent was not assigned to the corporation which after its organization engaged solely in the automobile business, the manufacture of shuttle eyes having been discontinued. Shortly after the organization of the corporation, defendant purchased all of the stock which had been issued to plaintiff, paying him therefor the sum of $9,737.

In 1924 defendant sold to the Draper Company the patent, together with two machines used in making the eyes and a dozen sample eyes, for $5,000. In order to complete the transfer to the Draper Company, it became necessary for the plaintiff to join in the assignment of the patent, which he did. Plaintiff then demanded one-half of the amount received from the Draper Company, which defendant declined to pay.

Defendant claims that the patent was the property first of the partnership and then of the corporation; and that plaintiff, having no interest in the corporation at the time the same was made, is not entitled to any part of the proceeds of the sale. But the patent was never transferred to the partnership nor to the corporation and remained the property of the plaintiff and defendant as individuals up to the time of the transfer to the Draper Company. The evidence entirely justified the jury in so finding.

Defendant also claims that the sale to the Draper Company embraced other property than the patent, and that, therefore, a verdict for the full amount claimed cannot in any event be allowed. He says that in addition to the patent, the $5,000 included the purchase price of two machines and a few shuttle eyes; and that those articles were plainly the property of the partnership in the first instance and by it were transferred to the corporation in which plaintiff now has no interest. There may be merit in this contention, but defendant offered no evidence of the value of these articles or the price at which they were sold, if any price was fixed on them between the corporation and the Draper Company. The jury, therefore, had no opportunity to make a deduction on account of these items. If defendant desired that to be done, it was his duty to present sufficient evidence to enable the jury to make the computation. Under the circumstances, the verdict for the amount found by the jury must stand. Motion overruled. *John G. Smith*, for plaintiff. *Joseph R. Paquin*, for defendant.

BANO SAVAGE
JAMES MORRISSEY
MAYLAND CLARK
MILFORD GREEN
(AS SEVERAL PLAINTIFFS)

vs.

WILLIAM D. GRANT AND PULP-WOOD

CONTINENTAL PAPER AND BAG MILLS CORPORATION, CLAIMANT.

Franklin County. Decided August 9, 1928. These four cases are ruled by the decision in the case of *Linwood Bisbee* v. *William D. Grant* and pulp-wood and claimant announced this day.

On the authority of the Bisbee Case, and the stipulation by counsel in each of the above cases, in each of said above cases the mandate will be, Exceptions sustained. Judgment for claimant. *Currier C. Holman*, for plaintiffs. *Ralph T. Parker*, for Continental Paper and Bag Mills Corporation.

PEARL B. TEBBETTS *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot County. Decided August 22, 1928. The plaintiff recovered a verdict awarding damages for injuries alleged to have been suffered because of the negligent operation of one of the defendant's trains, as she was about to alight at a railway station.

This verdict was set aside and a new trial granted. 126 Me., 596.

When the testimony had been fully taken out at the second trial, a motion was addressed to the Court to direct a verdict for the defendant. The motion was granted, verdict set aside, and the plaintiff has taken appeal.

Another exception was saved to the plaintiff during the trial, but since it was not argued, we are concerned only with the issue whether verdict was properly directed.

The attention of the Court is called to the time and manner of

leaving the train. The same witnesses as at the former trial repeat their testimony, with all the evidence of contributory negligence formerly adduced, and in some instances rendering it more apparent; and one, husband of the plaintiff, heard for the first time at the second trial, brings additional proof of such negligence of the plaintiff.

No new material fact as to the conditions existing at the time of the accident or the acts of the parties was presented.

Under such circumstances, upon motion for directed verdict, but one course was open to the presiding judge. *Bryant* v. *Paper Co.*, 103 Me., 32. Exceptions overruled. *L. B. Waldron and Fred W. Brown*, for plaintiff. *George E. Fogg*, for defendant.

JANE B. COOMBS *vs.* HOWARD A. MARKLEY.

Androscoggin County. Decided October 8, 1928. While the plaintiff was riding by invitation with her husband in his automobile a collision occurred between that automobile and the automobile of the defendant, to the personal injury of the plaintiff.

Men of equal intelligence and impartiality might honestly differ in their conclusions upon the question whether the defendant under the circumstances was actionably negligent. In such cases the law invokes the judgment of a jury.

On the trial of this case the jury found the proof to fall short of establishing legal liability on the part of the defendant for the unfortunate occurrence. It follows that the motion of the plaintiff that another trial be held must be overruled. Motion overruled. *George C. Webber*, for plaintiff. *Reginald W. Harris, Perkins & Weeks*, for defendant.

VENCENZO MARTRICIANO

vs.

CAMILLO PROFENNO AND MARYLAND CASUALTY CO.

Cumberland County. Decided October 8, 1928. Appeal by the defendants from a decree affirming an award for compensation under the Workmen's Compensation Act.

The petition for award which gave rise to the present case was dated October 27, 1927. In that petition it is alleged that on the 20th day of November, 1926, while working as a laborer in the employ of the defendant he was struck by an automobile as a result of which he "received concussion of the skull, abrasions, and *was ruptured.*" (Italics by the court).

Following the accident of November 20, 1926, the petitioner received compensation by agreement, which compensation had ceased by decree of the Industrial Accident Commission, but the findings now under consideration were based upon the aforesaid petition alleging that the claim was based upon a period of incapacity subsequent to that for which compensation had already been paid. The present incapacity of the petitioner is due to a hernia.

The issue, as stated by the claimant, "Is the disability, that claimant now has, one that is attributable to the accident of November 20, 1926."

The defendants state the issue in slightly different language saying that "The issue in this case is whether or not the recurring femoral hernia on the right side is a result of the accident sustained by the petitioner on November 20, 1926, when he received an injury while being employed by the defendant as a result of which he suffered a femoral hernia on the left side." And the defendant further states as his contention that there was no evidence, outside of surmise and conjecture, which could connect the left femoral hernia with the recurrence of the right femoral hernia, in as much as the original femoral hernia on the right side, which occurred in Italy, was the cause of all the trouble on the right side.

Taking either of the statements as to the issue, it is quite plain that the issue was one of fact and was decided by the Industrial Accident Commission in favor of the petitioner.

In reaching its conclusion the Industrial Accident Commission evidently determined that either from congenital conditions or from the early hernia suffered in Italy there was a physical condition which was accelerated or excited by the accident on November 20, 1926, and using this as a basis the compensation prayed for was granted.

The record in the case is quite extended and consists of testimony of laymen as to the capacity of the petitioner to labor, and particularly lengthy as to medical evidence.

To enter into a detailed discussion of this evidence would be of little interest except to the parties. The defendants urge that the Commission was not only unjustified in finding facts which would connect the recurring hernia with the accident of November 20, 1926, but that the findings are based wholly upon guess, conjecture, surmise and impressions.

The petitioner contends that the accident on November 20, 1926, aggravated his diseased condition and thus produced his present disability, or at all events brought it on at a much earlier time than it otherwise would have resulted.

This court has held that it is sufficient to sustain a finding for the injured employee if the accident "hastened a deep-seated disorder," *Lachance's Case*, 121 Me., 506, or "so influenced the progress of an existing disease as to cause disablement," *Mailman's Case*, 118 Me., 180, or "caused an acceleration or aggravation of a preëxisting disease," *Harlow's Case*, 125 Me., 137. We have also repeatedly held that in determining questions of fact the Industrial Accident Commission may draw all reasonable inferences from the evidence and circumstances; that the evidence should be taken most favorably for compensation to the claimant on appeal; and that the Compensation Act, being remedial, should be given a broad interpretation in carrying out the purpose of the act.

The Massachusetts court, in one of its leading cases, *Saunder's Case*, 224 Mass., 558, declared that in determining the sufficiency of evidence doubts should be resolved in favor of the petitioner.

While it may be said that there is room for doubt as to the finding of the Industrial Accident Commission in this case yet, in the absence of fraud, we should ever bear in mind the decisive force of the tribunal which, by statute, is declared to be the ultimate judge of the weight and effect of the testimony.

A careful examination of all the records disclose that there is some evidence from which reasonable inferences may be drawn sustaining the finding of the Industrial Accident Commission and therefore the mandate will be, Appeal dismissed, decree below affirmed. *Joseph E. F. Connolly, Frank P. Preti,* for claimant. *George H. Hinckley, Wm. H. Tribou,* for defendant.

STATE *vs.* HARRY WOOD.

Aroostook County. Decided November 23, 1928. Upon the respondent's conviction of manslaughter under an indictment in which he was charged with murder, a motion for a new trial upon the usual grounds was made and denied by the presiding Justice, and an appeal taken.

The case presented only questions of fact.

The jury saw and heard the witnesses. Notwithstanding the denial of the respondent of his firing his rifle, and his producing the same number of unexploded cartridges as he claimed he took with him that evening; and it was testified that the opening in the back of the neck caused by the bullet which was presumably what is termed a soft nose bullet, was smaller than the opening in the face, and the testimony of witnesses that such bullets always "mushroomed" and the opening of exit was always larger than the entrance; and his explanation of his flight, that he believed they were being held up by bandits or gunmen; and his claim and that of his wife and one of his companions that the other officer fired the shot from behind that killed the deceased, the jury from the evidence may have found as facts: that the respondent and a friend and their respective wives during the evening of the shooting had been on a hunting trip on which the respondent and his friend had been hunting deer with a jacklight, which is prohibited by statute; that the respondent and his friend had been summoned from their illegal hunting by their wives, because of an automobile appearing near the locus where they were hunting and which had disappeared up the road along

which they must pass on their return; that on their return, they were stopped by the deceased and another game warden; that as soon as the car stopped, the respondent stepped out with a loaded rifle on his arm, facing the deceased; that the moment the respondent started to leave the car, the other occupants called upon him not to shoot; that almost immediately a shot was heard, and the deceased went backward and fell; that following the shot, the respondent fled, armed, and leaving his wife to the tender mercies of the gunmen, if they were such; that as he started to flee, he ejected an empty shell from the rifle, and an empty shell was found the next day near the scene of the shooting and on the course of the respondent's flight, which was fired in the rifle carried by the respondent; that the other officer did not fire his revolver until the respondent started to flee; and that the bullet entered the face of the respondent and passed out the back of his neck.

We think it can not be said upon all the evidence, even with the added burden of proof upon the state required in criminal cases, that the jury were not warranted in arriving at their verdict. Appeal denied. Judgment for the State. *Cyrus F. Small*, County Attorney *and Raymond Fellows*, Attorney General, for the State. *J. F. Burns, Herbert T. Powers*, for respondent.

WILLIAM F. HANSCOM *vs.* WILLIAM COLBY.

Penobscot County. Decided December 27, 1928. Action of crim. con. Verdict for plaintiff for $250. The wife of the plaintiff, testifying in his behalf, gave evidence that the defendant had raped her; that after this alleged outrage she "went around with him" (the defendant) for several years; that he was a frequent visitor at her house and that she did not inform her husband of the defendant's criminal conduct until she became jealous by reason of the defendant's attentions to another woman.

Mrs. Hanscom's story of the alleged rape strains credulity to the breaking point. However, there was sufficient evidence in the

case to justify the jury in believing and finding that illicit sexual relations had existed between the defendant and the plaintiff's wife. This was sufficient to justify the verdict. The amount is clearly not excessive. There is no merit in the exceptions. Motion and exceptions overruled. *Clinton C. Stevens*, for plaintiff. *George E. Thompson*, for defendant.

CLARENCE M. BRADEEN *vs.* CHARLES C. FOWLER ET AL.

Waldo County. Decided December 27, 1928. In a case like this, involving only issues of fact, an extended opinion with discussion of reasons would have no value as a precedent. It is sufficient to say that the Court perceives no manifest error in the verdict of the jury. Motion overruled. *Buzzell & Thornton*, for plaintiff. *Ross St. Germain*, for defendant.

FRANCES E. CLOSTER *vs.* PERCY H. WILLIAMS.

Penobscot County. Decided January 4, 1929. Action of trover for the conversion of an automobile. The case is before this Court on a general motion and exceptions.

An examination of the record discloses testimony which, if believed, warranted a finding by the jury that the plaintiff, as owner of the automobile in controversy, entrusted the car to her employer to be let for hire on her account, and that on August 28, 1926, without her knowledge or consent the employer sold the car to the defendant and appropriated the proceeds. That the defendant subsequently exercised a dominion and ownership over the car is uncontroverted.

It is not clear that the evidence supporting the plaintiff's claim is so unreasonable or incredible as to warrant this Court in setting the verdict aside and ordering a new trial. The verdict is not clearly wrong. It must stand.

The exceptions reserved by the defendant are without merit. The evidence excluded was immaterial and irrelevant. Its admission would have been gross error. Motion overruled. Exceptions overruled. *Daniel I. Gould*, for plaintiff. *F. Harold Dubord*, for defendant.

SOLOMON ANSUR *vs.* BENJAMIN A. PEAKES.

Piscataquis County. Decided February 12, 1929. An action to recover for injuries received from alleged negligence of defendant in creating a nuisance within the limits of a highway. The allegations are that the defendant piled wood during the winter season within the limits of the highway which caused snow to drift against the pile of wood adjoining the traveled way as prepared for winter travel.

Plaintiff was injured in turning out on meeting another team opposite the pile of wood and by one of the runners of his sleigh being forced upon the alleged drift overturning his sleigh and throwing him out.

The issues were solely issues of fact. The pile of wood was an obstruction. If the drift was caused by it in the natural course of events and the overturning of the sleigh was caused by the drift and the plaintiff was not guilty of contributory negligence the defendant was liable.

The printed record even with the plan accompanying it is very inadequate. So much of the testimony bearing on the conditions consists of witnesses indicating locations and directions on the plan by the words "here" and "there."

If this Court could have heard and seen the witnesses, it might have arrived at a different conclusion than did the jury, not only on the question of the cause of the accident, but on the issue of the plaintiff's contributory negligence.

There was, however, testimony in the record on which the jury could have based its finding of the defendant's negligence, and, if it believed the plaintiff, on which it could have absolved him from contributory negligence. The jury, drawn as juries are, must have been familiar with conditions on country roads in the winter season and what a reasonably prudent man would do under conditions such as were shown to exist in this case. We do not feel that the verdict is so clearly wrong, having in mind that it is the peculiar province of the jury to pass on the credibility of the witnesses, that this Court should disturb it, or on the same reason that the damages must be regarded as excessive. Motion overruled. *James H. Hudson, John P. White*, for plaintiff. *Charles W. Hayes, Harold M. Hayes*, for defendant.

INDEX

ABUSE OF PROCESS.

ACTIONS.

ADOPTION.

In a petition for the adoption of a child by the grandmother it was alleged that the mother was not a suitable person to have custody of the child, which at the time the petition was filed was the only ground on which the consent of the mother could be dispensed with. The Probate Court found as a fact that the mother was not a suitable person to have custody and against her protest granted the petition for adoption.

On appeal, the Supreme Court of Probate reversed the finding of the Probate Court as to the fitness of the mother, but it appearing that since the filing of the petition in the Probate Court the mother had obtained a divorce in another state, and that previously the Probate Court in Cumberland County had given custody to the father, the Supreme Court of Probate dismissed the appeal on the ground that under the statutes of this State, Sec. 36, Chap. 72, R. S., when a divorce has been decreed and custody has been given by some Court having jurisdiction to one of the parents the consent of the other parent is not necessary in order to grant a petition for adoption, held:

That where a statute is general in its terms and not expressly limited in its application to conditions existing at the time of the enactment, it will be held to apply to cases within its terms or purview that arise or come into existence subsequent to its passage.

That the petition of the Probate Court, being the foundation upon which its jurisdiction and that of the Supreme Court of Probate is based, must allege sufficient facts to show the authority and power of the Court to make the decree prayed for.

That while the ruling of the Supreme Court of Probate was correct upon the question of a parent's consent in a petition for adoption, having found that the only allegation set forth in the petition on which the Probate Court was warranted in dispensing with the mother's consent was not true, the Supreme Court of Probate should have sustained the appeal.

Cummings Appl't from Judge of Probate, 418.

ADVERSE POSSESSION.

One who seeks to overcome a record title by a claim of adverse possession assumes the burden of proof.

One who by mistake occupies for twenty years, or more, land not conveyed by his deed, with no intention to claim beyond his actual boundary wherever that may be, does not thereby acquire title by adverse possession to land beyond the true line.

The intention of the possessor to claim adversely is an essential ingredient to disseizin.

In the case at bar the defendant, himself, unqualifiedly testified that he only intended to occupy to the true line wherever that line might be. He could gain no title by such occupation.

Landry v. *Giguere*, 264.

AGENT.

See Principal and Agent.

ALIENATION OF AFFECTIONS.

Damages for alienation of affections are to be assessed by the jury.

London v. *Smart*, 377.

ATTACHMENT.

See *Frothingham* v. *Maxim*, 58.

The right to attach and hold property of a defendant to satisfy a judgment which a plaintiff may recover rests solely on statute, explained by a usage founded on the Colonial Ordinance.

An attachment is a part of the remedy provided for the collection of a debt. To what actions the remedy of attachment may be given is for the Legislature to determine.

An attachment is not an absolute right, but creates a lien upon the estate which may be made available to the creditor after judgment. It does not destroy title or right to sell subject to that lien.

While an attachment may deprive one of property, yet conditional and temporary as it is and part of the legal remedy and procedure by which property of a debtor may be taken in satisfaction of a debt, if judgment is recovered, it is not the deprivation of property contemplated by the constitution.

It is not deprivation without "due process of law," and the Maine Statutes do not contravene the provisions of the Fourteenth Amendment of the Constitution of the United States.

McInnes v. *McKay*, 110.

See *Davis* v. *Cass*, 167.

An attachment of a portion of a large mass of material, leaving the mass exactly as found and without in any way designating the attached from the unattached and setting the one apart from the other, is not valid.

Bisbee v. *Grant, Pulp Wood*, 243.

See Intervention — *Patridge* v. *Marston*, 380.

ASSIGNMENT.

ASSUMPSIT.

ASSUMPTION OF RISK.

ATTACHMENT OF REAL ESTATE.

AUTOMOBILES.

AUTOPSY.

BANKS AND BANKING.

BANK DEPOSIT.

BANKRUPTCY.

BENEFICIAL ASSOCIATIONS.

BILLS AND NOTES.

The note in question was given many months after the debt was contracted, and dated back to the time of the original transaction. A payment made on the note was by mistake overlooked and the note made for the full amount. Under such statement of facts the payment should be properly allowed against the note although only the plea of the general issue was filed.

Hibbard v. *Collins*, 383.

BONA FIDE PURCHASER.

See Sales — *Cadwallader* v. *Shaw*, 172.

BONDS.

An indemnity bond given to protect an officer in making an attachment is void as against public policy if the attachment or levy involves the intentional and known commission of a trespass, crime or wrong.

When, however, the act against the consequence of which the indemnity is given, though in fact illegal, is performed under a claim of right and a belief on the part of the indemnitee that it is a legal act, the indemnity is valid and enforceable.

Frothingham v. *Maxim*, 58.

BRIDGES.

See *Kerr* v. *State of Maine*, 142.

BROKERS.

A broker procuring insurance is the agent of the insured, and the insured is chargeable with any fraudulent representations or concealment of acts material to the risk made by the broker on the strength of knowledge imparted to him by the insured.

Giberson v. *Fire Insurance Co.*, 182.

BURDEN OF PROOF.

See *Fitts* v. *Marquis*, 75.

See *Landry* v. *Giguere*, 264.

The burden of proving such knowledge as is necessary to create a waiver of the terms of an insurance policy and establish the liability, is upon the policy holder or his representative.

Handley v. *Insurance Company*, 361.

CERTIORARI.

CHARGE OF PRESIDING JUSTICE.

The Court is not required to give its instruction to the jury in words selected by excepting counsel. It is enough that they are correct as applied to the issues of the case.

Gilman v. *Bailey Carriage Co.*, 91.

A party is not entitled to have a requested instruction given unless it is sufficiently supported by facts admitted or proved, nor unless it appears that such instruction is correct and not misleading, that it is not covered by the charge and that refusal to give it would be prejudicial to him.

Investment Company v. *Cratty*, 290.

In an action brought by a corporation indorsee of a promissory note, the general issue being the only defense pleaded, a requested instruction to the effect that the action is barred by Act of 1925, Chapter 193 (prohibiting corporations other than banks from doing banking business), was properly refused.

Investment Company v. *Cratty*, 290.

CHARITABLE INSTITUTIONS.

CHECKS.

Authority of an agent or manager to indorse checks for deposit in his principal's account extends only to indorsement for the purposes of the principal's business and not to a transfer of the checks to agent personally or for his individual use.

Sales Co. v. *Trust Co.*, 65.

A bank is not bound to pay a check on presentation unless it has on deposit sufficient funds of the drawer to cover the same. In the absence of an ar-

CONTRACTS.

One who seeks to take advantage of a contract, either simple or under seal, made for his benefit by another, takes it subject to all legal defenses and all inherent equities arising out of the contract, unless the element of estoppel has entered.

Frothingham v. *Maxim,* 58.

A provision in a building contract made between that the Chief Engineer of the State Highway Commission or his assistant shall have supervision of the work during progress, and that the decision of the Chief Engineer as to the quality or sufficiency and the quantities of performance and other practical questions in the execution of the contract shall be final and conclusive is binding and valid, subject to the limitation that the law writes into a provision of such nature that the engineer must exercise his honest judgment.

Kerr v. *State of Maine,* 142.

Expectations of a contractor as to the physical conditions involved in and surrounding his work, of whatsoever nature, unproduced by fraud, nor brought about by conduct so gross as to imply bad faith, cannot relieve a contractor from contractual obligation.

Kerr v. *State of Maine,* 142.

A contractor under contract to excavate to a specified grade at a cubic yard price is not entitled to recover for excavation incidental to the performance of the contract.

Kerr v. *State of Maine,* 142.

In an action on a contract express or implied, individual liability of defendant may be established though the action is brought as on a joint liability. Discrepancy between the contract declared on, and that proved, constitutes no variance.

Day v. *Scribner,* 187.

A contract made by an attorney-at-law with a husband to begin and prosecute a libel for divorce in behalf of the latter's wife is against public policy and invalid.

Berman v. *Bradford,* 201.

When two parties made mutual promises the performance of one or both may depend upon a condition precedent, such condition being sometimes called a condition suspensory, because its non-fulfillment suspends the operation of the promise to which it is attached.

CONTRIBUTORY NEGLIGENCE.

CORPORATIONS.

COUNTY COMMISSIONERS.

COURTS.

See *Davis* v. *Cass*, 167.

See New Trials — *Moreland* v. *Vomilas*, 493.

CRIMINAL LAW.

If the motion is denied in a case involving a felony, the respondent may appeal to the next law term.

If the case involves a misdemeanor only, there is no provision of statute for an appeal and the ruling of the trial judge is final.

The exception reserved presented no error. Evidence as to the whereabouts of the original warrant was excluded. It was immaterial. Its exclusion could not have prejudiced the respondent's cause.

State v. *Stewart,* 487.

Under an indictment for maintaining a liquor nuisance evidence of the finding of liquor by the officers in a cupboard in the dwelling house of the respondent, and a bottle containing alcohol in a bed, and on another visit to the premises by the officers, evidence that the housekeeper of the respondent spilled some liquor from two bottles when the respondent attempted to prevent the officers from interfering with her, and which the officers testified that from the odor the liquor spilled was alcohol, was admitted against the objection of the respondent and subject to his exception. The respondent also took exception to an instruction by the presiding justice that from the fact that liquor was spilled the jurors might find it was intoxicating and intended for sale.

Held:

That the evidence objected to was admissible, notwithstanding on the first visit of the officers the respondent was not at home, as bearing on the allegation that the house of the respondent was a place of resort where liquor was kept, sold, or drank in violation of law, there being abundant evidence that the place was frequented by men in all stages of intoxication; and that with all the evidence tending to prove the house was a place of resort where liquors were kept, sold, drank or dispensed contrary to law, the instruction of the presiding justice excepted to was, under the circumstances, warranted by the evidence.

State v. *Baranski,* 488.

The remedy of a respondent found guilty by a jury upon insufficient evidence is a motion to have the verdict set aside and a new trial granted. This motion is addressed to the sitting Justice whose decision in case of misdemeanors is final. Only in prosecutions for felony is an appeal to the Law Courts provided.

State v. *Golden,* 521.

DAMAGES.

In an action by an administratrix to recover for personal injuries resulting in the death of the intestate the underlying general rule upon which damages are given is based on the single idea of compensation.

The elements of damages for conscious physical pain and mental suffering can-

DEEDS.

DEMURRER.

DESCENT AND DISTRIBUTION.

DISQUALIFICATION OF JUDGE.

presence is the only inference which can be drawn from the testimony in support of a motion to transfer, it can not be said on exceptions that there is an error in law in a denial of the motion.

Bond v. *Bond*, 117.

DIVORCE.

While parties to a libel for divorce are by statute now permitted to testify, it does not render admissible strictly privileged communications between husband and wife, but to be privileged the communication must have been of a confidential nature and induced by the marital relations.

The rule that conscious motive to cause a libellant mental suffering is essential to establish cruel and abusive treatment is not adopted. It is sufficient if a libellee knew the effect of his acts upon the libellant or should have known it.

The legislature of this State has directed the Courts to grant an absolute divorce whenever it is shown that the acts of one spouse have so affected the other that his or her health is seriously jeopardized.

Bond v. *Bond*, 117.

A contract made by an attorney at law with a husband to begin and prosecute a libel for divorce in behalf of the latter's wife is against public policy and invalid.

Such contract while not necessarily establishing collusion, is consistent with it, suggestive of it, and goes far toward proving it.

Berman v. *Bradford*, 201.

Where divorce was decreed against the libelee and by agreement or consent of libelant alimony and support of herself and minor child was granted the libelee, the power to make further decree respecting the support of minor children without the consent of the libelant still remains in the Court. Where the presiding Justice found facts for which there was sufficient evidence on which to base his findings, no error of law appears.

The terms "care and support" in the divorce statute must be construed in the light of the purpose of the legislative body enacting the statute.

"Care and support," under the divorce statute, must be held to include not only food, shelter and clothing, but whenever a parent is able, suitable training to fit a child for a vocation in life.

While upon a decree for divorce without any order for the custody or care and support of minors a father's common-law liability remains, when an order for care and support is made, a statutory liability is substituted for that of the common law.

Whether the expense of a musical training of a minor can be deemed a necessity for which a father is liable at common law is not determinative of the power of the Court to order a father to contribute for the care and support of a

ESTOPPEL.

EVIDENCE.

EXCEPTIONS.

FEDERAL BOILER INSPECTION ACT.

See Master and Servant.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Master and Servant.

FINDINGS OF FACT.

The finding of fact by a Justice below sitting without a jury are not reviewable by the Appellate Court. A judge sitting without a jury is the exclusive judge of the credibility of witnesses and the weight of evidence. Only when he finds facts without evidence, and contrary to the only conclusion that may be drawn from the evidence, is there any error of law in his findings.

Bond v. *Bond*, 117.

Where there is nothing in the record of the cause to indicate that the jury disregarded the law as properly given to them by the presiding Justice, or that they failed to weigh the evidence presented, or that they were swayed by prejudice or wrong motive, their findings should be conclusive.

Chesebro v. *Capen*, 232.

FORECLOSURE.

A mortgage given for support of the mortgagee upon the premises may be foreclosed by any of the statutory methods and the mortgagee's burden of proving breach is not shifted by the method adopted. The words "by any of the methods now provided by law" in the covenant of the mortgage in the case at bar are only declaratory of the rights given by the statutes.

Weston v. *McLain*, 218.

The assignee of a mortgage has a right to foreclose the same not only by virtue of the statutes of this State but at common law.

This is true although he holds the mortgage as pledgee and as collateral security. His right to so foreclose is not exclusive. The assignor may foreclose the same in his own name, even though the assignment is absolute in form, provided that (1) the mortgage debt is larger in amount than the note for which it stands as security, (2) with the consent of the assignee, (3) when the assignee unreasonably refuses to foreclose.

Rosenberg v. *Cohen*, 260.

FRAUD.

See Fraudulent Representation — *Dubovy* v. *Woolf*, 269.

See Banks and Banking — *Morris Plan Bank* v. *Winckler*, 306.

See Equity — *Gatchell* v. *Gatchell et al*, 328.

FRAUDULENT CONVEYANCES.

Obtaining money through fraudulent representations is not a conveyance of property in fraud of creditors, but rather an acquisition of property in fraud of one not then a creditor.

FRAUDULENT REPRESENTATIONS.

GIFT INTER VIVOS.

To create a gift inter vivos there must be an absolute surrender by the donor of control of the subject matter and completed delivery to the donee.

Garland, Appl't, 126 Me., 84, followed.

In the case at bar delivery necessary to constitute a gift was wholly lacking.

The intestate stated that he did not wish to give the money outright as he might need it. It was an attempt to retain control of the money and dispose of it after his death. The unities necessary to create a joint tenancy were lacking. The funds, therefore, belonged to the estate.

Heard v. *Gurdy,* 480.

GUARANTY.

A guaranty is a separate undertaking from that of the principal and in an action on the guaranty, the principal need not be joined.

Without an assignment to the guarantor a claim by the principal for damages for a breach of contract can not be set off by the guarantor or a recoupment be had in an action at law against the guarantor alone.

Where a guaranty is absolute and not conditional on the amount guaranteed being found due, and the defendant in an action on the guaranty in a brief statement as an equitable matter of defense sets up an unliquidated counter claim of the principal, but no assignment of the claim of the principal to the guarantor is alleged or that the guarantor has no remedy against the principal, nor the principal joined in the action, a special demurrer to the brief statement must be sustained.

Rumery Company v. *Trust Company,* 298.

HIGHWAYS.

See Ways and Bridges — *Cole* v. *Wilson,* 316.

INDEMNITY BOND.

See *Frothingham* v. *Maxim,* 58.

INDICTMENT.

See Criminal Law.

INSTRUCTION TO JURY.

See Jury — *Gilman* v. *Bailey Carriage Co.*, 91.

See *Investment Company* v. *Cratty*, 290.

See Exceptions — *Colbath* v. *Lumber Company*, 406.

INSURANCE.

In the absence of fraud the acts of an agent of an insurance company in filling out the application for insurance are the acts of the company, and it is estopped from controverting the truth of the statements in the application in an action on the policy.

Giberson v. *Fire Insurance Co.*, 182.

Concealment, in the law of insurance, is the designed and intentional withholding of any fact material to the risk which the insured in honesty and good faith ought to communicate. A fraudulent concealment is tantamount to fraudulent misrepresentation.

The mere failure of the insured to give information as to matters with reference to which no questions are asked is not necessarily a concealment which will avoid the policy. To have such effect the undisclosed matter must not only be material, but there must be a fraudulent intent to deceive.

Giberson v. *Fire Insurance Co.*, 182.

The statutes of this State do not prohibit extra-territorial insurance by domestic companies and non-compliance with the laws of another country regulating foreign insurance companies must be affirmatively proved. The court has no judicial knowledge of such regulations.

Giberson v. *Fire Insurance Co.*, 182.

Whether or not a building insured as a dwelling house was used for the conduct of a liquor business thereby altering the "situation and circumstances," and whether the risks were thereby increased, violating the terms of the policy are questions of fact for the jury to determine.

Giberson v. *Fire Insurance Co.*, 182.

An insurance company is not bound, though his agent may be, by promises, assurances or representations of such agent not contained in the policy. Knowledge of the agent may, however, read itself into the insurance contract. The burden of proving such knowledge as is necessary to create a waiver of the terms of the policy and establish the liability claimed, is upon the policy holder or his representative.

INTERVENTION.

Under R. S., Chap. 87, Sec. 32, intervention is authorized to enable the intervenor to defend against the allegations in the declaration, but not to defend against an allegation of fraud contained in the direction to the officer endorsed on the writ.

Independently of statute intervention is authorized only when rights of the intervenor are directly involved and only when necessary to preserve or protect such rights.

In the case at bar the petitioner's rights, which by intervention she sought to defend, were not directly involved, and intervention was not necessary to protect them. Whether or not the conveyance was fraudulent could be determined by appropriate procedure. The defendant, Frank L. Marston, who presented the bill of exceptions, was in no way aggrieved by the rulings.

Patridge v. *Marston,* 380.

INTERPLEADER.

The remedy of interpleader requires four elements:

(a) The same thing, debt or duty, must be claimed by all the parties against whom relief is demanded; (b) All of their adverse titles must be dependent on or derived from a common source; (c) The person asking the relief must not have nor claim any interest in the subject matter; (d) Plaintiff must have incurred no independent liability to either of the claimants.

Sec. 5, Chap. 150, P. L. 1923, is intended to supplement, not to supersede, interpleader. It may be applied where interpleader will not lie. It may be invoked in certain cases as a concurrent remedy with interpleader. It is permissive. It provides a means by which the title to a bank deposit, under some circumstances, may be litigated. But the remedy of interpleader is still an appropriate remedy, where interpleader will lie, notwithstanding the adoption of this statute.

The mere fact that a contractual relation exists between plaintiff and defendant under which the fund is required to be paid to such claimant, does not, of itself, defeat the right of interpleader. The obligation referred to in the rule must be independent of the title or right of possession of the fraud in question. The obligation must be such that the litigation between the defendants will not determine it, in order to warrant the dismissal of the bill.

In the absence of statutory enactment, the privity rule is binding upon this court. But this rule only properly applies when the title asserted by one claimant is wholly paramount to and independent of the claim of the other. Interpleader will be denied on ground of want of privity when the conflicting titles are so wholly independent of, unrelated and antagonistic to, each other, as to destroy, contradict, or defeat the right by which one asking for the interpleader holds possession of the thing in controversy.

In order that interpleader will lie, it must appear that the fund or property in dispute came lawfully into the hands of the stakeholder; in the case of a

LACHES.

LANDLORD AND TENANT.

LARCENY.

See Criminal Law.

LAST CLEAR CHANCE.

See *Page* v. *Moulton*, 80.

LEASE.

See Landlord and Tenant — *Waterville* v. *Kelleher*, 32.

LICENSE.

An agreement to pay a patentee for a license to manufacture and sell a particular machine, made when it is uncertain whether the machine is covered by the patent or not, is binding and enforcible as an absolute promise to pay for exemption from disturbance by the patentee and immunity from claim under his patent. *Spinney* v. *Allen*, 7.

LIEN.

Attachment to enforce lien — *Bisbee* v. *Grant & Pulp Wood*, 243.

Under a bill in equity to enforce a material lien, the sitting Justice found that the materials were sold by the plaintiff to a contractor on an open account and his credit alone, and that the plaintiff had no intention to look to the building for his pay; and that the person contracting for the building to be built, and who was building it for his son on land belonging to his son, did not know the plaintiff was furnishing the materials, held:

That the materials must be furnished with an intent that they be used in some particular building and not for general use.

That if sold for use in a particular building, it would not affect the right to maintain a lien, because they were sold on credit or that the person furnishing the materials had not formed an intent to claim a lien until just prior to its expiration;

That the consent of the owner may be inferred from circumstances; and the owner is required to use reasonable diligence and good faith in ascertaining who furnished the materials, if he desires to give the statutory notice to avoid a lien, or he may be held to have consented thereto;

That the sitting Justice having found that the father had no knowledge that the plaintiff furnished the materials, it follows upon the evidence in this record

LIFE INSURANCE.

LOGS AND LOGGING.

LOGS AND LUMBER.

MALICIOUS PROSECUTION.

See Actions — *Lambert* v. *Breton*, 510.

MANDAMUS.

The granting of a writ of mandamus is not of right but discretionary with the Court and exceptions do not lie to the issuance or the refusal unless there is a clear abuse of discretion.

Pratt v. *Dunham*, 1.

MASTER AND SERVANT.

When a workman makes a contract to do dangerous work in a dangerous place he contracts with reference to that danger and assumes the risk of such dangers as are normally and necessarily incident to the occupation. This is a contractual assumption of risk under which the employer, with reference to risks covered by the contract, can not be guilty of negligence. There may, however, be a voluntary assumption of risks, not contractual, by the workman, arising from the failure of the employer to perform his duties. This may accur when the workman becomes aware of them or they are so plainly to be seen that he must be presumed to have known and appreciated them. In such case, if negligence of the employer is established, voluntary assumption of risks arising therefrom must be proved by the defendant.

McLaughlin Admx. v. *Bangor & Aroostook Railroad Company*, 24.

A railroad is not an insurer of the safety of the place which it furnishes for the use of its employees. Its duty is to use due care to provide a reasonably safe place, and having done so it fulfills its legal obligation to its servant.

In safeguarding its employees from injury a railroad is bound to use due care to make its cars and their loads reasonably safe for the passage of its brakemen, but it is not bound to anticipate and guard against every possible danger, or such as no prudent person would reasonably expect to happen.

Morey v. *Railroad Co.*, 190.

Whether or not an employer has fulfilled his obligation to exercise due care in furnishing a suitable place in which employees may do their work, depends, in a large degree, on the nature of the employment. The degree of safety provided must be consistent with the peculiar circumstances of each case.

When a place of work originally safe is rendered unsafe by the acts of employees, the employer is not liable.

The question of negligence of either plaintiff or defendant ordinarily of fact,

becomes one of law and for the court, when the facts are undisputed and but one inference can be properly drawn therefrom.

Blacker v. *Oxford Paper Co.*, 228.

In this State employers are by statute divided into two classes, small employers and large employers. A small employer is one having five or less workmen in the same industry or business, or when he has different businesses, five or less workmen regularly employed in a business single in kind. Common law rules govern actions between a small employer and his employees.

Whether plaintiff was an employee of the defendant was a question of fact and for the jury.

The degree of care which an infant employee must exercise is the ordinary care a reasonably prudent person of his age and intelligence would exercise under like circumstances. The law holds him to no higher obligation.

In the case at bar the evidence clearly established that the plaintiff was fully acquainted with the nature of his work and the sort of machinery with which he worked, that he was likewise aware of all the defects in the machinery. He saw fit, though fully aware of the danger, to operate the machine in its dark corner location, near the end of the working day. His conduct was hence unmarked by the ordinary prudence of a boy as old as he was. His contributory negligence barred any recovery of damages.

Moore, Pro Ami v. *Isenman*, 370.

Under the Federal Employers' Liability Act the employer is liable for any negligence chargeable to it which caused or contributed to cause the decedent's death; and the decedent will not be held guilty of contributory negligence, or to have assumed the risks of his employment if a violation of Section 2 of the Boiler Inspection Act contributed to cause his death.

Under the last named section the employer is absolutely bound to furnish what before, under the common law, it was his duty to exercise ordinary care to provide. The burden rests on the plaintiff to prove the defendant's violation of the act.

In the case at bar the testimony plainly showed that a hot box on the locomotive would not alone produce conditions which would make the engine and its appurtenances such it could not be used without "unnecessary peril to life or limb." Therefore the condition of the locomotive was not the sole proximate cause of the injury. Nor was it a contributing cause. A contributing cause is one which under the same circumstances would always be an element aiding in the production of an accident. The burden imposed upon the plaintiff required her to show that the condition of the engine was either the sole proximate cause of the injury or a contributing proximate cause. These she failed to do.

The weight of authority sustained the claim of the defendant that when the deceased stepped in front of a moving train on the east bound track, he created

MILL ACT.

MONEY HAD AND RECEIVED.

MORTGAGES.

MOTION FOR NEW TRIAL.

MOTION IN ARREST OF JUDGMENT.

MOTOR VEHICLES.

confer the right of way without reference to the distance of the vehicles from the intersecting point, their speed, and respective duties.

The driver of a motor vehicle approaching an intersection must use reasonable watchfulness and caution to have his vehicle under control.

If a situation indicates collision, the driver, who can do so by the exercise of ordinary care, should avoid doing injury, though this involve that he waive his right of way. The supreme rule of the road is the rule of mutual forbearance.

A right of way, like a burden of proof, will establish precedence when rights might otherwise be balanced.

Fitts v. *Marquis*, 75.

Registration of an automobile made in the office of the Secretary of State is not constructive notice as to the ownership of the car, the Statutes of this State not requiring that the applicant for registration shall be the owner of the car.

Cadwallader v. *Shaw*, 172.

In order to recover for damages sustained in an automobile collision where the defendant is not driving nor a passenger in the car, the plaintiff must show that the person driving the car at the time of the accident was the servant or agent of the defendant and in the performance of duties arising from such relationship.

Iles v. *Palermino*, 226.

In the case at bar although the car was registered in the name of the defendant and he was part owner thereof, the evidence failed to show any relationship of servant or agent between the defendant and the driver of the car at the time of the accident.

Iles v. *Palermino*, 226.

A driver of an automobile encountering a heavy fog may proceed on his way, at reasonable speed, and in the exercise of due care. He is not obliged to stop and wait for the fog to lift in order to escape the charge of negligence.

But the failure on the part of a driver of an automobile, blinded by the light from another vehicle so that he is unable to distinguish objects in front, to bring his car to a stop, raises a prima facie presumption of negligence on his part.

Contributory negligence need not be specially pleaded unless the case falls within the provisions of Sec. 48, Chap. 87, R. S. 1916. With that exception it is a proper defense under the general issue.

Sidewalks are for the exclusive use of pedestrians but the remaining portion of the highway is not for the exclusive use of vehicles. In the absence of statutory or municipal regulations to the contrary, the pedestrian has equal rights on the street with the operator of an automobile.

A pedestrian proceeding longitudinally on the right hand side of the highway,

MUNICIPAL CORPORATIONS.

SEE ALSO TOWNS.

An order that a town be allowed three years to open and make a way is unauthorized. The statute limits such period to two years.

Phippsburg v. *Sagadahoc County*, 42.

Liability on school employment contract, see *Michaud* v. *St. Francis*, 255.

NEGLIGENCE.

In cases involving automobile collisions the fact that the defendant was on his extreme left hand side of the road raises a prima facie presumption of negligence on his part, which may, however, be rebutted by his reasonable explanation.

Raymond v. *Eldred*, 11.

To establish liability under the Federal Employers' Liability Act, when no question arises as to compliance with the Safety Appliances Act, negligence on the part of the defendant must be affirmatively shown.

The duty of the employer is to see that ordinary care is exercised, that the place where work is to be performed is reasonably safe for the employees. The carrier does not guarantee the safety of the place to work.

The federal act does not eliminate the defense of assumption of risk.

When a workman makes a contract to do dangerous work in a dangerous place he contracts with reference to that danger and assumes the risk of such dangers as are normally and necessarily incident to the occupation. Under a contractual assumption of risks the employer can not be held guilty of negligence.

McLaughlin Admx. v. *Bangor & Aroostook Railroad Company*, 24.

See *Fitts* v. *Marquis*, 75.

See *Page* v. *Moulton*, 80.

In safeguarding its employees from injury a railroad is bound to use due care to make its cars and their loads reasonably safe for the passage of its brakemen, but it is not bound to anticipate and guard against every possible danger or such as no prudent person would reasonably expect to happen.

Morey v. *Railroad Co.*, 190.

Whether or not an employer has fulfilled his obligation to exercise due care in furnishing a suitable place in which employees may do their work, depends, in large degree, on the nature of the employment. The degree of safety provided must be consistent with the peculiar circumstances of each case.

When a place of work originally safe is rendered unsafe by the acts of employees, the employer is not liable.

The question of negligence of either plaintiff or defendant ordinarily of fact, becomes one of law and for the court, when the facts are undisputed and but one inference can be properly drawn therefrom.

Blacker v. *Oxford Paper Co.*, 228.

A driver of an automobile, encountering a heavy fog, may proceed on his way, at reasonable speed and in the exercise of due care. He is not obliged to stop and wait for the fog to lift in order to escape the charge of negligence.

But the failure on the part of a driver of an automobile, blinded by the light from another vehicle so that he is unable to distinguish objects in front, to bring his car to a stop raises a prima facie presumption of negligence on his part.

A pedestrian proceeding longitudinally on the right hand side of the highway, on a dark, foggy night, and in a section where automobile traffic is considerable, must exercise vigilant watchfulness.

A pedestrian walking on the gravelled shoulder of the road, keeping watch of approaching and overtaking cars and stepping back on the grass to the edge of the deep ditch as such cars drew near, can not be said, as a matter of law, to be guilty of contributory negligence, even though there was a sidewalk, which was passible, though uncomfortable, upon which she might have walked, and although the night was dark and foggy and automobiles passing frequently in both directions.

Cole v. *Wilson*, 316.

When a person is required to act in an emergency and in a place of impending personal peril the law will not declare that reasonable care demands he must choose any particular one of the alternatives presented. Such is for the judgment of the jury.

Unless in extreme cases and where the facts are undisputed, which of two alternatives an intelligent and prudent person traveling the highway should select as a mode of escape from collision the law will not say, but will send to the jury the question whether the traveler acts with ordinary care.

A traveler is not necessarily guilty of negligence because he turns to the left in an attempt to avoid another vehicle approaching from the opposite direction on the wrong side, with which a collision is threatened, but whether negligence exists depends upon the particular nature of the case.

It is a question of fact for jury determination whether the conduct of the driver of a motor vehicle measures up to the standard of common caution for the driver of a motor vehicle under like conditions and circumstances.

The driver is exonerated if the course which he takes in an emergency is one which an intelligent and prudent man would take.

When the facts are such that reasonable men may fairly differ upon the ques-

NEW TRIAL.

NOTICE.

OFFICER.

PLEADING AND PRACTICE.

limited in his proof by such specification. This is the very purpose of a specification. It gives the defendant information of what charges he must be prepared to meet.

The limitation is in the pleading, not in the rule; it affects the precedure, not the right; it is self-imposed, not law-imposed.

Carey v. *Penney*, 304.

Where a contract for sale of an automobile provides that "if said motor car is not ready for delivery as specified, the cash deposit shall be returned to me on demand together with used car deposited in part payment, if any, or proceeds thereof, if sold, less cost of repairing said used car and 15% of sale price for handling," in an action of general assumpsit brought by the prospective purchaser to recover the allowed net cash value of the used car deposited in part payment, there being no cash deposit;

Held:

If plaintiff did not receive notification that the new car was ready for delivery yet under his contract, his remedy, if any there was, would not be in assumpsit to recover the allowance in cash but to demand his car, or the proceeds, if sold, less deductions already above recited.

In the case at bar the declaration was not based on a claim for proceeds nor was there any evidence that there was any sale of the used car and a consequent right to recover under the omnibus count.

Perry v. *Motor Corporation*, 365.

Where there are two or more counts in the declaration it is not necessary that the evidence should support all the counts; if the evidence is sufficient to support one good count the general verdict will stand.

London v. *Smart*, 377.

A matter of equitable defense must be pleaded by brief statement.

The defense of payment, however, is open under the general issue.

Hibbard v. *Collins*, 383.

Where a statute sets forth a certain wording as being sufficient in law for a complaint or declaration under its provisions, but not specifically excluding other forms, any other form which in substance is the same may be equally valid.

The chief purpose of a complaint is not notice, but the detention of a person charged with crime until examination can be had. Formal precision and exhaustive detail are not necessary.

Commission of crime must be stated with substantial accuracy.

In a complaint charging the sale of intoxicating liquor, testimony of the purchaser as to what the contents of the bottle in question tasted like, is admissible.

PRACTICE.

PRESUMPTIONS.

PRINCIPAL AND AGENT.

PRIVILEGED COMMUNICATIONS.

PROBATE COURT.

QUANTUM MERUIT.

QUESTION OF FACT.

When the facts are such that reasonable men may fairly differ upon the question as to whether there was negligence or not the determination of the matter is for the jury.

Coombs v. *Mackley*, 335.

RAILROADS.

See *McLaughlin Administratrix* v. *Railroad Company*, 24.

See *Morey* v. *Railroad Company*, 190.

See *Terminal Co. and Railroad Co.* v. *Railroad*, 428.

See *Thomas* v. *Railroad Company*, 466.

REAL ACTIONS.

See *Weston* v. *McLain*, 218.

The defendant in a real action may show title in another person, and when the plaintiff fails to show title in himself, and the defendant shows title in another, under whom he had possession, judgment for the defendant is warranted.

Bowman v. *Geyer*, 351.

REAL ESTATE ATTACHMENT.

See *Ross* v. *Richards*, 5.

See *Frothingham* v. *Maxim*, 58.

See *McInnes* v. *McKay*, 110.

RESCISSION.

A mere refusal to pay money, even when the money is due, is not the repudiation of a money contract and does not warrant a rescission.

Lynch v. *Stebbins*, 203.

See *Leventhal* v. *Lazarovitch*, 222.

For Fraudulent Representation, see *Dubovy* v. *Woolf*, 269.

See Sales — *Manufacturing Company* v. *Burnell*, 503.

REDEMPTION.

REMITTITUR.

The principle of remittitur has long been approved in this State, it being considered that an order on a plaintiff to remit a part of damages found to be excessive is a condition which may be imposed by the Trial Judge to obviate the necessity for a new trial.

The Superior Court for the County of Cumberland has authority to order a remittitur upon such condition.

Moreland v. *Vomilas*, 493.

RES ADJUDICATA.

RULES OF COURT.

Where an action has been dismissed for want of prosecution under a rule of court and judgment has been entered dismissing the case, the case can not be restored to the docket at a subsequent term either by the court or by agreement of counsel, especially when the rights of third parties are affected. The judicial power of the court has been exhausted.

Davis v. *Cass*, 167.

SALES.

An affirmation by the seller that the goods are his or that he is the owner, constitutes an implied warranty of title.

A purchaser of chattels may have satisfaction from the seller if he sells them as his own and the title proves deficient, without any expressed warranty for that purpose.

Where the seller declares that the title and ownership of a motor vehicle, parts and accessories called for, and to be furnished under the terms of the contract of sale, shall remain in the vendor until full and final payment therefor shall have been made by the purchaser, such language fairly amounts to an assertion of title by the vendor.

McDonald v. *Mack Motor Truck Co.*, 133.

A bona fide purchaser is one who at the time of his purchase advances a new consideration, surrenders some security or does some other act which leaves him in a worse position if his purchase should be set aside, and purchases in the honest belief that his vendor had the right to sell, without notice actual or constructive, of any adverse rights, claims, interests or equities of others in or to the property sold.

Cadwallader v. *Shaw*, 172.

At common law it is well settled that one having possession of personal property as an ordinary bailee can give no title thereof to a purchaser although the latter acts in good faith, parts with value, and is without notice of the want of title in his seller.

So long as the possession of the goods is not accompanied with some indicia of ownership, or of right to sell, the possessor has no more power to divest the owner of his title or affect it, than a mere thief.

The Uniform Sales Act reaffirms the above, subject to the condition that the owner of the goods be not precluded by his conduct from denying the seller's authority to sell.

The mere surrender of possession is not sufficient to estop the party surrendering it from subsequently asserting title against a purchaser from the person to whom possession is surrendered.

Cadwallader v. *Shaw*, 172.

See Pleading and Practice — *Perry* v. *Motor Corporation*, 365.

When a seller is induced to sell goods on credit because of representations on which he relies, made by a buyer, which representations the buyer knows to be false or are false and based on facts within the knowledge of the buyer or susceptible of knowledge by him, the seller may rescind the sale and retake the goods, provided the rights of innocent third parties have not intervened.

When a sale is for cash, and payment is not made on delivery, the rule is that in the absence of waiver the vendor may assert his title.

A sale may be on condition precedent, but if so the condition may be waived. Whether there was such waiver is a question of fact to be determined from the evidence in the case.

Manufacturing Company v. *Burnell*, 503.

SCHOOLS AND SCHOOL COMMITTEES.

To constitute a legal employment of a public school teacher, under the provisions of Sec. 7, Chap. 186, P. L. 1917, there must be a nomination by the superintendent and approval of the nomination by the school committee, and an employment by the superintendent of the teacher so nominated and approved.

SHERIFF.

SHERIFF'S SALE.

SIDEWALKS.

STATUTE OF FRAUDS.

STATE HIGHWAY COMMISSION.

STATUTES, CONSTRUCTION OF.

Crushing, grinding and preparing rock, gravel and sand for market is not manufacturing, and machinery used for such purposes is not "employed in any branch of manufacture."

Leeds v. *Gravel Company*, 51.

A corporation carrying on along lines of its own election, the diffusion and inculcation of the Christian religion is primarily a benevolent and charitable institution. The fact that it may carry on social and vacational activities along with its educational and devotional meetings does not deprive it of this primary character.

The real property of such corporation, when occupied for its own purposes, is exempt from taxation. When the property of an institution is by legislative grant exempted from taxation, the exemption applies only to such property as is occupied by the institution for its own purposes.

Property of such institution from which a revenue is customarily derived, can not be considered to be occupied by the institution for its own purposes within the meaning of the statute, and such property is taxable.

Park Association v. *City of Saco*, 136.

TESTIMONY.

While the Appellate Court does not pass on the credibility of witnesses, the testimony to sustain a verdict must be credible to mind and consistent with reasonable probabilities and with the circumstances proven by uncontradicted testimony.

Page v. *Moulton*, 80.

See *Motor Company* v. *Pillsbury*, 85.

The introduction of testimony of a witness who testified at a former hearing or trial under oath with full opportunity for cross examination by the accused, but who since the former hearing has died or left the jurisdiction of the court, either permanently or for an indefinite period, does not violate the provisions of Section 6, Article 1, of the constitution.

The rule permitting the introduction of testimony of a witness who has since died, given at a former trial under oath and subject to cross examination, already recognized in this State, is extended to the testimony of a witness who since the former trial has left the jurisdiction of the court either permanent or for an indefinite period.

Whether a sufficient predicate for the introduction of such testimony has been shown is a question for the trial court. The Appellate Court will not disturb findings of the trial judge on this question unless there has been a clear abuse of judicial discretion.

Under Sec. 177, Chap. 87, R. S., the notes of the official stenographer of the

court duly certified are competent evidence of the testimony given at a former trial and require no further identification than his official certification.

State v. *Budge*, 234.

TOWNS.

In a bill in equity brought by ten taxable inhabitants under the provisions of Chap. 82, Sec. 6, clause 13, it must appear in the allegations of the bill that the municipality has done some of the acts enumerated in the statute, or that some "officer" or "agent" is "attempting" to misappropriate the money of the municipality.

Copeland v. *Starrett*, 18.

An order that a town be allowed three years to open and make a way is unauthorized. The statute limits such period to two years.

Phippsburg v. *Sagadahoc County*, 42.

A school committee alone has no authority to employ teachers, and contracts of employment by it do not bind the town.

One teaching under contract with the committee can not recover from the town on a quantum meruit even though services were actually rendered and the price charged reasonable. Persons acting under the employment of town or city officers must take notice at their peril of the extent of the authority of such officers.

Michaud v. *St. Francis*, 255.

TRESPASS.

A barn connected by a shed to a house is a part of the "dwelling house" and the breaking of the outer door of such barn, against the will of the owner, for the purpose of making an attachment in a civil suit, is a trespass.

Frothingham v. *Maxim*, 58.

TRUSTEE PROCESS.

The contingency referred to in R. S., Chap. 91, Secs. 36 and 55, relative to trustee process, is one which may prevent the principal from having any claim whatsoever or right to call the trustee to account or settle with him. It is not a contingency as to whether anything may be found due from the trustee to the principal, who has an absolute right to call upon the trustee to render the account and make the settlement.

The right of a legatee to a legacy and the interest of an heir in the distributive

TRUSTS.

ULTRA VIRES.

See Corporations — *Investment Co.* v. *Cratty*, 290.

UNDISCLOSED PRINCIPAL.

See Principal and Agent.

VENDORS.

VERDICT.

WAIVER.

WARRANTY.

WATER COMPANIES.

WATER RATES.

WAYS AND BRIDGES.

When a way is laid out and established the land owner is entitled to just compensation for the rights in his land acquired by the public. These rights include not merely the use of a strip of land to be travelled over, but also the right to build the way and fit it for safe and convenient use, even though such acts are certain or probable or likely to cause a change or increase in the flow of surface water upon adjacent land to its injury.

In determining just compensation there are to be considered the damage suffered by the owner through the subjection of his land to such public rights, assuming their proper exercise, and on the other hand any special and particular benefits accruing thereto.

Boober v. *Towne*, 332.

WIDOW'S ALLOWANCE.

A widow's allowance under R. S., Chap. 70, Sec. 14, takes precedence over any distribution of the personal estate. The amount allowed rests in the reasonable judicial discretion of the Judge of Probate, subject to review on appeal.

Prior to decree of the Judge of Probate granting a widow's allowance, it is not subject to trustee process. Resting in the sound discretion of the Judge of Probate it is not a matter of right. It is contingent and uncertain. It is not a debt due from the estate nor a distributive share of it.

Hussey v. *Titcomb*, 423.

WILLS.

WORDS AND PHRASES.

"It appeared in evidence" — *Spinney* v. *Allen*, 7.

WORKMEN'S COMPENSATION ACT.

In cases under the Workmen's Compensation Act, in the absence of fraud, the decision of the commissioner upon all questions of fact is final, provided there is some competent evidence to support a decree. It may be slender but it must be evidence, not speculation, surmise or conjecture.

The decision of the commissioner will not be reversed when the finding is supported by rational and natural inferences from proved facts.

An occurrence to be accidental must be unusual, undesigned, unexpected, sudden.

An internal injury that is itself sudden, unusual, unexpected, is none the less accidental because its external cause is a part of the victim's ordinary work.

It is the unusual, undesigned, unexpected or sudden results of the strain, not necessarily the strain itself, which make the accidental injury necessary under the law.

Prior good health is evidence to be taken into consideration.

The Maine Workmen's Compensation act has no provision for an autopsy. Refusal of the petitioner to consent to holding one is not a bar to receiving compensation.

Mamie Taylor's Case, 207.

A finding based on speculation, surmise or conjecture will not be sustained.

The value of opinion evidence is dependent on the reasons given for it. When based on supposition, or on conclusions at variance with rational deductions from undisputed facts it has no probative value.

While expert medical testimony is of great value and importance it is not absolutely essential in the establishment of truth, nor is it always essential to the making of sound deductions.

The conclusions of the Commissioner if natural and rational will be sustained notwithstanding its supporting evidence is not viseed by an expert.

In the case at bar the finding of the Commissioner that the strain caused the

appendicitis was upon the evidence in the case and in the light of medical testimony a conclusion of speculation, surmise or conjecture and not based on competent evidence.

Syde's Case, 214.

Under the Workmen's Compensation Act "accident" is defined as an unusual, undesigned, unexpected and sudden event resulting in injury.

Disease to be compensable must be interpreted both as an "injury" and an "accident."

An occupational or industrial disease is one normally peculiar to and gradually caused by the occupation in which the afflicted employee is or was regularly engaged, and to which everyone similarly working in the same industry is alike constantly exposed.

Under the statute in this State cases of occupational disease or industrial poisoning can not be regarded as accidental since they lack the element of a sudden or unexpected event, and are hence as a matter of law non-compensable.

Dillingham's Case, 245.

Under the Workmen's Compensation Act when it appears that the Commission member based his conclusions on the evidence as it stood, to be or not to be believed by him, his findings are final and will not be disturbed except for fraud.

When it appears, however, that the member misunderstood or misstated the testimony in an important respect and upon that misunderstanding based his decision, such determination may be reversed as legal error.

Farwell's Case, 249.

The term "mistake" as used in the Workmen's Compensation Act must be construed to mean one of fact and not of law.

A mistake of fact takes place either when some fact which really exists is unknown, or some non existent fact is supposed to exist.

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 party 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 Section 20 of the Workmen's Compensation Act for failure to give notice of the accident as required in Section 17 of the Act, provided that notice is given within a reasonable time after the latent injury becomes apparent.

In the case at bar the claimant's failure to give notice can not be held to be the result of mistake. He fixed the date of his accident as January 29, 1927. Within a few days thereafter he consulted his physician and the nature and results of his injuries were clearly apparent and fully diagnosed, yet he failed to give notice within the following thirty days.

The decree of the Commission was error of law and subject to review by the Law Court.

Crawford's Case, 374.

In the Workmen's Compensation Act the word "sudden" as employed in the definition of "accident" does not mean instantaneous. Disability caused by, and following a few hours after chafing may be properly found to be accidental.

Words are to be construed according to the common meaning of language.

When an employee, standing upon a ladder while working, chafes his leg against a rung of the ladder and there results the following night a swelling of the leg and consequent disablement, such injury is, according to the common use of the word, accidental.

Ferris Case, 123 *Me.,* 193, *differentiated.*

McDougal's Case, 491.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF UNITED STATES.

CONSTITUTION OF MAINE.

STATUTES OF THE UNITED STATES.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

ERRATA.

Substitute "429" for "249" in ninth line from top of page 45.

Substitute "cause" for "case" first paragraph of syllabus, page 294.

Substitute "cause" for "case" in fourth line of paragraph one of the syllabus on page 304.

Substitute "Markley" for "Mackley" on page 335.

Substitute "mother" for "motion" sixth line from bottom of page 419.