MAINE REPORTS

128

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

MARCH 8, 1929, TO FEBRUARY 24, 1930

EDWARD S. ANTHOINE

REPORTER

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PORTLAND, MAINE

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

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HON. LUERE B. DEASY, CHIEF JUSTICE[2]

HON. WILLIAM R. PATTANGALL, CHIEF JUSTICE[3]

HON. CHARLES J. DUNN

HON. GUY H. STURGIS

HON. CHARLES P. BARNES

HON. NORMAN L. BASSETT

HON. FRANK G. FARRINGTON

[1] Resigned October 7, 1929

[2] Appointed October 12, 1929; Resigned February 7, 1930

[3] Appointed February 7, 1930

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HON. WARREN C. PHILBROOK

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to January 1, 1930

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Under P. L. 1929, Chap. 141

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REPORTER OF DECISIONS

EDWARD S. ANTHOINE

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1929-1930

LAW TERMS

BANGOR TERM, First Tuesday in June.

Sitting: WILSON, Chief Justice; DUNN, DEASY, BARNES, BASSETT, and PATTANGALL, Associate Justices.

PORTLAND TERM, Fourth Tuesday in June.

Sitting: WILSON, Chief Justice; DUNN, DEASY, STURGIS, BASSETT, and FARRINGTON, Associate Justices.

AUGUSTA TERM, First Tuesday in December.

Sitting: DEASY, Chief Justice; DUNN, STURGIS, BARNES, PATTANGALL, and FARRINGTON, Associate Justices.

AUGUSTA TERM, Fourth Tuesday in January.

Sitting: DEASY, Chief Justice; DUNN, STURGIS, BARNES, PATTANGALL, and FARRINGTON, Associate Justices.

PORTLAND TERM, Fourth Tuesday in February.

Sitting: PATTANGALL, Chief Justice; DUNN, STURGIS, BARNES, and FARRINGTON, Associate Justices; MORRILL, Active Retired Justice.

TABLE OF CASES REPORTED

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

THE INHABITANTS OF THE TOWN OF FRANKFORT

vs.

WALDO LUMBER CO.

Penobscot. Opinion March 8, 1929.

TAXATION. POWERS OF MUNICIPAL OFFICERS. R. S., CHAP. 10, SEC. 77. R. S., CHAP. 11, SECS. 18 AND 20.

The levying of taxes is a power of sovereignty.

When assessing or collecting taxes municipal officers are the agents of the State, which is sovereign. They proceed only under such agency, and must act strictly as authorized and empowered.

A Municipal corporation has no element of sovereignty, having only those powers which are clearly and unmistakably granted by the law-making authority.

When any power has been granted and the mode of its existence is prescribed, that mode must be strictly pursued.

The power of taxation is an attribute of sovereignty, and is essential to the existence of government. This power is not transferable. Whenever taxes are imposed, whether by a municipality or by the State, it is, in legal contemplation, the act of the State, acting either by her own officers or other agents designated for the purpose.

Taxes are to be collected in money. A promissory note can not be accepted in payment of taxes, its acceptance is against public policy, and a note so given for taxes can not discharge them.

The municipal officers can not ratify an unauthorized act of their agent in the collection of taxes.

Attorneys may be retained to collect taxes by suit, but they have no authority to abate, exempt, or compromise the claim.

Under the Constitution of Maine the State may never, in any manner, suspend or surrender the power of taxation.

Abatement of taxes may only be made by assessors proceeding strictly under the rules set forth in the statutes.

A tax is not a "demand." It is not a debt nor in the nature of a debt, but is an impost levied by authority of government upon the citizens or subjects, for the support of the State. It is not founded on contract or agreement.

Authority to remit, abate or settle a tax must be in conformity to some provision of the statute, otherwise it is void.

On exceptions by defendant. An action of debt for the collection of taxes, submitted to the Court below on an agreed statement of facts, the right of exceptions being reserved to both parties on matters of law. To the Court's determination and rulings on matters of law the defendant seasonably excepted. Exceptions overruled. The case fully appears in the opinion.

Mayo & Snare, for plaintiff.

Gillin & Gillin, for defendant.

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

BARNES, J. Action of debt for taxes.

This case was submitted to the court below upon the writ, pleadings and an agreed statement of facts, each party reserving the right to be heard on exceptions to determination of questions of law.

The suit was brought for balances of taxes lawfully assessed against the defendant in the years 1923 and 1924, still due, unless plaintiffs are barred by action of attorneys to whom such taxes were properly committed for collection.

These attorneys brought suit for a portion of the taxes here declared upon, entered the writ in court, and later accepted of one I. G. Stetson his promissory note on one year for the amount they

assumed to be due from defendant; gave a receipt for the face of the note, in the name of plaintiffs, as being "in full payment for all outstanding balance on taxes assessed by the town of Frankfort on the real and personal property of said (defendant) Company for the years 1923-1924"; and agreed that the suit already brought should be finally terminated, with the entry "neither party no further action for same cause," which entry was made at the April term of court, 1925.

In the fall of the year 1927 the municipal officers of plaintiff, in writing, duly authorized an action for the collection of the same taxes and the writ in the present case was sued out December 1 of that year.

Before bringing the suit here considered, the municipal officers of the plaintiff sued the Stetson note and recovered default for face, interest and costs, by agreement; and although execution issued no part of such judgment has been paid, and no payment has been made on the taxes sued for in the present action.

On April 28, 1928, the court below rendered judgment for the plaintiff in the sum of $982.33, and defendant filed exceptions.

By its exceptions it presents as error in law the finding that the action was maintainable, against, and that any sum was recoverable from the defendant.

More fully stated, defendant argues that the demands sued on were aforetime fully settled by plaintiff's attorneys, who, accepting for the town, their employer, a valuable consideration, to wit, a promissory note, gave, for said town and as its agents, a receipt for all taxes then due, the taxes here sued for being included, and that plaintiff is barred from recovery here because the former suit was ended, as evidenced by the usual entry in such case with admission that no other suit could be brought for the same cause, and that such payment by promissory note was ratified and confirmed by the plaintiffs, when their municipal officers authorized suit on the promissory note.

We hold the law to be other than as interpreted by defendant.

The levying of taxes is a power of sovereignty.

Municipal officers annually levy or assess taxes on persons and property within their bounds, for the state, their county and their municipality.

When assessing and collecting such taxes municipal officers are the agents of the State, which is sovereign.

And in so doing they proceed only under such agency, and they shall proceed strictly as authorized and empowered.

"A municipal corporation has no element of sovereignty. It is a mere local agency of the State, having no other powers than such as are clearly and unmistakably granted by the law-making power."

A doubtful corporate power, it has been said does not exist; and when any power is granted, and the mode of its existence is prescribed, that mode must be strictly pursued.

Now the power of taxation is not only an attribute of sovereignty, but it is essential to the existence of government.

Nor, strictly speaking, is this power of the Legislature transferable, for, as we shall presently see, whenever taxes are imposed, whether by a municipality or the State, it is, in legal contemplation, the act of the State, acting either by her own officers or other agents designated for the purpose.

"Hence, when delegated by the Legislature to a municipal corporation, the latter is considered as *pro hac vice*, the agent of the State, acting for the benefit of the municipality. In other words, the municipality, in the eye of the law, is the hand of the State by which the tax is laid and collected." *Whiting* v. *West Point*, 88 Va., 905; 29 A. S. R., 750; 15 L. R. A., 860.

When lawfully assessed, taxes are, by the agents of the municipality, to be collected in money.

A promissory note can not be accepted in payment of taxes; accepting it is against public policy; a note given for taxes does not discharge them; the town treasurer can not accept a note in discharge of taxes. *Embden* v. *Bunker*, 86 Me., 313.

Promissory notes would not keep the poor from suffering want, nor pay for the education of youth; nor police the municipality; nor build a mile of state aid road.

If the municipal officers may not accept promissory notes in lieu of taxes, they can not, by ratification of an agent's acceptance, release the person taxed from his liability to pay.

Means of collection in money are provided under the law.

The goods of one taxed may be seized and sold, or, he who re-

fuses or neglects to pay his tax may be committed to jail "until he pays it, or is discharged by law." Sec. 18 and 20, Chap. 11, R. S.

Attorneys may be retained to collect by suit, but they have no authority to abate, exempt, or compromise the claim.

"The city attorney could not effect a compromise and take less than is shown to be due from the taxpayer, neither before nor after suit brought; his powers and duties are fixed by the charter provision, and when the delinquent taxes come to him for collection the matter must be adjusted by a judgment, unless the full amount be paid." *Louisville* v. *Louisville Ry. Co.*, 111 Ky., 1; 63 S. W., 14; 98 Am. St. Rep., 387.

Under our Constitution, Art. IX, Sec. 9, the State may never, in any manner, suspend or surrender the power of taxation.

The collection of taxes it delegates to the municipalities. The State may exempt classes of property; it provides that a municipality may abate taxes assessed, but assessors attempting abatement must proceed under rigid rules set out in R. S., Chap. 10, Sec. 77, or other appropriate statute.

It follows that the attorneys of the plaintiffs could not release the defendant from the burden of its tax.

But it is said that having brought a suit, prior to the suit at bar, and having terminated that suit, as above expressed, the town can not maintain the present suit, by virtue of a statute, Chap. 87, Sec. 63, which reads: "No action shall be maintained on a demand settled by a creditor, or his attorney entrusted to collect it, etc."

A tax is not a "demand," as the word is used in the statute quoted.

Demand as there used is synonymous with debt, amount due.

"A tax, in its essential characteristics, is not a debt, nor in the nature of a debt. A tax is an impost levied by authority of government, upon its citizens or subjects, for the support of the state. It is not founded on contract or agreement. It operates *in invitum*. *Pierce* v. *Boston*, 3 Met., 520. A debt is a sum of money due by certain and express agreement. It originates in, and is founded upon, contract express or implied." *Camden* v. *Allen*, 26 N. J. L., 398.

Even the municipal officers could not discharge defendant from

the payment of its just share of taxes assessed by any such agreement as that attempted by their agents. *Peter* v. *Parkinson*, 83 Ohio St., 36; 93 N. E., 197.

If they have any authority to remit, abate, settle or compromise a tax it must be in conformity to some provision of the statute giving to them that power, else their action is without authority of law and void.

Exceptions overruled.

ARTHUR M. CLOSE BY HIS NEXT FRIEND

vs.

PORTLAND TERMINAL COMPANY.

Cumberland. Opinion March 11, 1929.

FEDERAL EMPLOYERS' LIABILITY ACT. DAMAGES RECOVERABLE BY MINOR.

The Federal Employers' Liability Act is paramount and exclusive in all causes involving liability to employees for injuries sustained while engaged in interstate transportation by rail. Its passage by Congress supersedes all state laws upon that subject.

Liability under the Act can neither be extended nor abridged by common or statutory laws of the state.

A father does not have under the Act a right of action for expenses and loss of service resulting from his minor son's injuries.

A minor has under the Act and suing by his father as next friend a right of action for his personal injuries.

A minor, unemancipated and living with his father, and suing by the father as next friend, may recover under the Act for expenses and loss of wages resulting from his injuries.

On exceptions by plaintiff. An action on the case for personal injuries brought under the Federal Employers' Liability Act. The plaintiff, a minor, seventeen years of age, unemancipated by his father, received the injuries complained of while engaged in inter-

state commerce. To the ruling of the presiding Justice that the plaintiff was not entitled to recover for hospital expenses, medical attendance and medicine and loss of wages the plaintiff seasonably excepted. A verdict in the sum of three hundred dollars was rendered for the plaintiff. Exceptions sustained.

The case fully appears in the opinion.

William A. Connellan, for plaintiff.

Charles B. Carter, for defendant.

SITTING: PHILBROOK, DEASY, BASSETT, PATTANGALL, JJ.

DUNN, STURGIS, BARNES, JJ., nonconcurring.

BASSETT, J. Action on the case for personal injuries, brought under the Federal Employers' Liability Act by a minor seventeen years of age, unemancipated and living with his father, by the father as next friend.

The plaintiff claimed in his writ and declaration to recover for pain and suffering, hospital expenses, medical attendance and medicine required by reason of the injuries and for loss of wages due to the injuries, and offered evidence of such claims. The presiding Justice ruled that the plaintiff could not recover for the hospital and medical expenses and loss of wages, and excluded the evidence offered thereon, exceptions to which were duly taken by the plaintiff.

The jury returned a verdict for $300. The case comes up to this court on exceptions by the plaintiff to the rulings.

The Federal Employers' Liability Act, 35 Stat., 65, c. 149, was adopted April 22, 1908, and was amended April 5, 1910, 36 Stat., 291, c. 143, 8 U. S. Comp. Stats. Ann. 1916, Secs. 8657-8665; *Second Employers' Liability Cases*, 223 U. S., 6-10.

Section 1 of the original Act and unchanged provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such em-

ployee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, and other equipment."

The Act provided for two distinct and independent rights of action, primarily resting upon the common foundation of the same wrongful injury, act or neglect, but based upon altogether different principles. The injured employee is given the right, if his injuries are not immediately fatal, to recover for his personal loss or suffering, for his expense, loss of time, suffering and diminished earning power; and his personal representative, if his injuries immediately or ultimately result in death, is given the right to recover for the pecuniary loss sustained by designated relatives. By the amendment, without abrogating or curtailing either right, the former right of action survives, in case of his death, to his personal representative for the benefit of the same relatives for whose benefit the latter right is given. *Michigan Central Railroad* v. *Vreeland*, 227 U. S., 59; *St. Louis & Iron Mountain Railway* v. *Craft*, 237 U. S., 648.

By the Act, "Congress has undertaken to cover the subject of the liability of railroad companies to their employees while engaged in interstate commerce." *Michigan Central Railroad* v. *Vreeland*, supra, 66. This Act is "paramount and exclusive," *Ibid.* 67; it is "comprehensive and also exclusive." *New York Central Railroad Company* v. *Winfield*, 244 U. S., 147, 151; *Northern Coal & Dock Co.* v. *Strand*, U. S. Oct. Term, 1928. "Congress took possession of the field of employers' liability to employees in interstate transportation by rail; and all State laws upon that subject were superseded." *Chicago, Milwaukee & St. Paul Railway Company* v. *Coogan*, 271 U. S., 472, 474.

Liability under the statute "can neither be extended nor abridged by common or statutory laws of the State." *New York Central & Hudson River Railroad Company* v. *Tonsellito*, 244 U. S., 360, 362.

A state can not regulate even in respect to injuries occurring without fault, as to which the federal act provides no remedy; and

an award under a state workmen's compensation act for injuries not attributable to negligence can not be upheld. *New York Central Railroad* v. *Winfield*, supra; *Erie Railroad Company* v. *Winfield*, 244 U. S., 170.

The question before us is — can under this statute an unemancipated minor maintain an action brought in his name by his next friend to recover loss of earnings and expenses resulting from a personal injury?

We do not find that it has been decided by any of the United States courts. One state court has decided that such minor could not recover for loss of wages. *Cook* v. *Virginia Railway Company* 125 S. E., 106 (W. Va., 1924).

The United States Supreme Court has decided that a parent can not recover under the statute for the loss of services of the minor son and for his expenses because the parent was not an injured employee and the statute was not to be extended by the common law right of the parent to recover for such loss of services and expenses. *New York Central & Hudson River Railroad Company* v. *Tonsellito*, supra.

That court has also decided that the minor suing by his father as next friend may recover for his personal injuries. *New York Central & Hudson River Railroad Company* v. *Tonsellito*, an infant, etc., 244 U. S., supra.

Neither of these cases carries any implication that the minor can not maintain an action for loss of wages and expenses. That the parent has no right of action only is decided.

The statute does not limit or define the person suffering injury. The carrier is made liable "to any person" so suffering. A minor is a person. The statute literally applies equally without distinction to majors and minors. Nor is there any definition or limitation of "damages." The carrier is made liable "in damages to any person suffering injury."

Only by reading into the statute a difference at common law between majors and minors, when the common law has been superseded by the statute, is a limitation imposed which diminishes the effect of the statute and its comprehensive terms.

Under the common law, an employer for breach of his duty to exercise due care for the safety of his employee is liable for the

pain, expense, immediate disablement and permanent disablement. If the employee is a major, the employer is liable in one action to that employee for all these items of damage. If the employee is a minor, the employer is liable for them, but in two actions, one to the minor for the pain, for the reasonable expense incurred by the minor on his own credit as necessaries and for permanent disablement, and the other to the parent for the expense, excepting that just defined, and for immediate disablement. The whole liability for the breach of duty is enforced by one remedy in the case of a major employee, by two in the case of a minor employee. The dual remedy is logical but it is cumbersome and is not necessary. But if the construction of the statute is as contended by the defendant, Congress, while taking possession of the field comprehensively and exclusively without extension or abridgment by the common law, nevertheless must be held to have recognized still the dual remedy and to have left a part of the liability unenforceable. Such construction leaves a right without a remedy. There may have been such *casus omissus* by Congress, but it should not be held to exist unless there is no other reasonable construction to be given by the statute. There is no such *omissus* until limiting words have been interpolated. No further words are necessary to include minors. Words have to be supplied or understood as supplied to exclude them.

The defendant emphasizes the term "in damages," contending that at common law a minor can recover only for pain and permanent disablement and that therefore his damages are so defined. This would define damages as used in the Act to mean the damages recoverable at common law by the employee. But the words of the Act are, "Every carrier shall be liable in damages." Therefore, damages in the Act are those for which the carrier is liable, and at common law he is liable for pain, expense, immediate and permanent disablement. If Congress be held to have had in mind damages at common law, it appears to have had in mind full liability of the carrier, rather than recoverability by the employee in the particular case.

But the construction contended for by the defendant rests upon the theory that at common law a minor can not recover for loss of wages during minority because his services and earnings then be-

long to his parent, primarily to the father. Such was the doctrine of *Comer* v. *Ritter Lumber Co.*, 53 S. E., 906 (W. Va., 1906), which expressly declined to follow the doctrine of *Baker* v. *Flint & P. M. R. Co.*, 51 N. W., 897 (Mich., 1892) — referred to below — and held that "it does not follow because the father is barred that transfers the right of action to the son," and that a minor could not recover for loss of services during minority "for want of legal title." Citing this one case for support, the court in *Cook* v. *Virginia Railway Company*, supra, which was brought under the Federal Employers' Liability Act and was also a West Virginia case, held that the jury should have been instructed that the plaintiff, a minor suing by his father as next friend, "in no event could recover anything for wages during minority."

But in some states the right of the parent to the earnings during minority and to bring an action for them is held to be a "privilege," a turning point in the reasoning of many of the cases, rather than a matter of absolute right; and such privilege may be "waived" or "relinquished" or "voluntarily surrendered" and the minor allowed to recover in his own name; and the parent is conclusively presumed to do so by bringing an action as next friend and prosecuting it and testifying in it; and in such action entire damages for the loss of the minor's time may be recovered. The note in 8 Am. & Eng. Ann. Cases, 1108, states that it must appear from the petition or complaint in the action that it is specifically founded upon a claim by the minor for loss of services during minority.

The rule was laid down with cogent reasons for uniting into one suit the two actions of father and infant in *Abeles* v. *Bransfield*, 19 Kan., 16 (1877), and was followed in *Baker* v. *Flint & P. M. R. Co.*, supra; *Chesapeake & O. Ry. Co.* v. *Davis*, 60 S. W., 14 (1900, Ky.), which called the rule "sound and just"; *Chesapeake & O. Ry. Co.* v. *Wilder*, 72 S. W., 353 (1903, Ky.); *Zongker* v. *Peoples Union M. Co.*, 86 S. W., 486 (1905, Mo.); and *Daly* v. *Everett Pulp & Paper Co.*, 71 Pac., 1014 (1903, Wash.).

Whether the true basis of the common law rights of the parent be absolute right or privilege, we would, if we make the extent of liability under the Act depend on common law, find a different construction of that law by the states. In Kansas there would be full recovery by the minor if the suit were brought by his father as

next friend; in some states full recovery in any event; in other states no full recovery.

But the Act was designed to secure uniformity which should not be disturbed. *New York Central Railroad Company* v. *Winfield*, supra. Certainly the intended uniformity would be disturbed by the construction which the defendant contends for. A part of the remedy for breach of the carrier's duty would be left to be administered by the state court when no part of it was left to the state. In some states such part would be, and in other states it would not be, enforced.

We think that the more reasonable construction of this Act is the construction by our court of a statute analogous to it. The statute provided, "If any person shall receive any bodily injury or shall suffer any damage in his property through any defect . . . in any highway he may recover in a special action on the case . . . the amount of damage sustained thereby." In *Sanford* v. *Augusta*, 32 Me., 536, an action brought by a wife, in which her husband joined, for an injury to her from a defect in the highway, our court held,

> "A father can not recover upon the statute for the loss of the services of his minor son in his employ or for expenses incurred for medical aid, occasioned by an injury received in consequence of a defect in a highway. *Reed* v. *Belfast*, 20 Me., 246. Nor can a husband maintain an action by virtue of the statute, for the loss of the services or society of his wife; or for expenses incurred on account of such an injury to her; for it would not be an injury to his person, nor a damage to his property, within the meaning of the statute.
>
> "Unless the person injured through a defective highway can recover in every instance where an action is maintainable, the whole damages sustained, in many cases an important part of the damages, could never be recovered, and the provisions of the statute would be unavailing. The more reasonable construction of the statute, however, and that which will best comport with its spirit and design, and give to it full force and effect, is, that it was intended to relieve those suffering, from the common law disabilities in this respect, and in all cases where an action can be maintained, to allow the person

injured to recover the entire damages sustained by the injury, by a suit in proper form. The wife, when injured, to sue with her husband, and the minor by guardian, or next friend."

In *Starbird* v. *Frankfort*, 35 Me., 89, it was held that the action under the statute for injury done the wife could not be in the name of the husband alone.

So we think that the more reasonable construction of this statute, and that which will best comport with its comprehensiveness, its exclusiveness, its design of uniformity, its purpose and spirit, is not that the carrier should be relieved from a part of the liability which but for the Act would rest upon it; not that an employee born on Wednesday could, but one born on Friday following could not, recover for all the damages naturally flowing from the injury, expenses, loss of time, diminished earning capacity, bodily pain and mental suffering; but that all employees should recover all such damages. Otherwise age would prevent the recovery of what in most of the cases are a most important part of the damages: expenses and loss of earnings.

The Act determines substantial rights. As regards the form of suit or procedure, the common or statutory law, as administered by the State, may properly govern. The requirement that a minor shall bring suit by next friend is a matter of form or procedure. The amount of liability is a matter of substantial right, with reference to which the Act alone must govern. An action by the minor by next friend is maintainable under the Act. *New York Central & Hudson River Railroad Company* v. *Tonsellito*, an infant, etc., supra.

The question for our determination is one entirely of the construction of a federal statute. The common or statutory law of this State with reference to minors has not been changed by our conclusion. That such law has been superseded by this statute in actions brought under it does not change the state law.

We think that the exceptions to the ruling that loss of wages and medical expenses could not be recovered in the action were well taken.

The mandate must therefore be

Exceptions sustained.

ISAAC M. BATES, EXECUTOR *vs.* JULIA SCHILLINGER ET AL.

Penobscot. Opinion March 11, 1929.

"CHURCH" AND "SOCIETY" DEFINED. CHARITABLE TRUSTS. EQUITY. EVIDENCE.

When referring to religious organizations the terms "church" and "society" are popularly used to express the same thing, namely, a religious body organized to sustain public worship.

Evidence to identify a devisee or legatee is admissible.

The definition of a charitable trust set forth in Jackson *v.* Phillips, 14 *Allen*, 539, 550, *and in* Haskell *v.* Staples, 116 *Me.*, 103, *adopted.*

The beneficiaries of a charitable trust who may become beneficiaries must be an indefinite, unascertained, uncertain, fluctuating body of individuals. The beneficiaries who at a given moment are the beneficiaries entitled to receive the benefit of the trust and whom the trustee selects therefor must be ascertainable.

Evidence of the membership of a voluntary unincorporated association is not confined to records. Records are primary evidence but if not available, secondary evidence is admissible.

A valid charitable bequest must be for a purpose recognized in law as charitable. A religious purpose is a charitable purpose and has been uniformly so recognized by this court.

The term "church" imports an organization for religious purposes and property given to it eo nomine *in the absence of all declaration of trust or use must by necessary implication be intended to be given to promote the purposes for which a church is instituted.*

If it appears that the intention of a testator was that a bequest, primarily for charitable uses, could be used for other than charitable purposes, the bequest is invalid. If a part may be so otherwise used, all of it may be.

The words of a specific bequest "for the said Society in any way it may deem best" are words of limitation on the way or manner in which the bequest can be used and necessarily imply a use for the object and purpose of the society. The purpose of such specific bequest is therefore valid.

A court of equity will not allow a gift for charitable uses, otherwise valid, to fail for want of a trustee but will itself administer the trust or appoint a trustee to administer, although the gift for such use is to a voluntary association or unincorporated society, which is uncertain, indefinite and fluctuating.

In the case at bar the evidence established an intention of the testatrix to designate as legatee a voluntary unincorporated association of individuals in Corinna, known as, and generally called, the Methodist Episcopal Church but also called the Methodist Episcopal Church Society.

The will taken as a whole and read in the light of the surrounding circumstances discloses an intent to give both bequests to the association as an indefinite, continuing religious body with membership indefinite and fluctuating and not as constituted at her decease. The beneficiaries were therefore indefinite.

The words "for the said Society" were impliedly to be found in the language of the residuary bequest as they were expressly used in the specific bequest. The purpose of the residuary bequest was therefore valid.

On report. A bill in equity for the construction of a will and the determination of the validity of certain bequests. Hearing was had on the bill, answer and proof and on its conclusion was reserved by the sitting Justice with the consent of the parties for decision by the Law Court on the legally admissible evidence in the record. Bill sustained. Decree in accordance with opinion. The case fully appears in the opinion.

J. W. Manson,
W. B. Pierce, for plaintiff.
Henry W. Mayo,
Gillen & Gillen,
Steuart & McCaughan, for defendants.

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

BASSETT, J. Bill in equity brought by the executor of the will of Lovina White, late of Corinna, to construe the will and to determine whether a specific bequest under the seventeenth paragraph and the bequest of the residue under the nineteenth paragraph of the will are valid. The will was executed July 21, 1920. She died October 30, 1925. The case was reserved by the sitting Justice with the consent of the parties for decision by this court on the legally admissible evidence of the record.

The will, after providing for specific bequests to fourteen individuals and a bequest in trust to the Town of Corinna for the

perpetual care of her family lot, provided in paragraph seventeenth, "I give and bequeath unto the Methodist Episcopal Church Society of Corinna, Maine, the sum of two hundred dollars, to be used for the said Society in any way it may deem best."

Paragraph nineteenth provided that the residue be held in trust to use the income to aid a niece during her life as in the discretion of the trustee it was from time to time needed for that purpose, "and at her decease I give and bequeath all such principal and the income not so used under the trust, unto the Methodist Episcopal Church Society of Corinna, Maine, to be used as shall seem best in the discretion of said Society. Should said Society not be in existence at the termination of said trust, then and in that case, I give and bequeath said remainder unto such Society as shall be the successor of said Methodist Episcopal Church Society, and the same directions as to its use shall apply as I have made in behalf of said Methodist Episcopal Church Society."

The niece died during the life of the testatrix.

From the admissible evidence, it appeared that at the date of the will and of the death of Mrs. White and for many years prior thereto, there was in Corinna a voluntary, unincorporated association of individuals known as and generally called the Methodist Episcopal Church, but also called the Methodist Episcopal Church Society. The association was the only one in Corinna known or called by either of these names. It occupied and used a church edifice in which were held meetings and religious services of the association, conducted by a resident pastor who was a minister of the Methodist Episcopal Church. Such services had been attended by Mrs. White up to and for many years prior to her decease.

Meetings called "Quarterly Conferences" were held annually in and for the "District" in which Corinna was located, and such Conferences were held in 1923 and 1924 and attended by the "District Superintendent" whose duty it was to attend them. Failure to produce the original records of these meetings was duly accounted for, and by proper secondary evidence it appeared that there was submitted to the Superintendent at each of the Conferences for his approval, the nomination of Lovina White as "steward" of the Corinna association, that he approved the nomination, and that she was elected.

It is a matter of common observation that the terms "church" and "society" are popularly used to express the same thing, namely, a religious body organized to sustain public worship. *Church and Congregational Society* v. *Hatch*, 48 N. H., 393, 396; *Josey* v. *Union Loan & Trust Co.*, 32 S. E., 628 (Ga.). They were used interchangeably as to this association. *Brackett* v. *Brewer*, 71 Me., 484.

Evidence is admissible to identify a devisee or legatee. *Preachers' Aid Society* v. *Rich*, 45 Me., 552; *Howard* v. *American Peace Society*, 49 Me., 288; *Ladd* v. *Baptist Church*, 124 Me., 386; *Norwood* v. *Packard*, 125 Me., 220; *Trust Company* v. *Pierce*, 126 Me., 67; *First Parish in Sutton* v. *Cole*, 3 Pick., 232; *Tucker* v. *Seaman's Aid Society*, 7 Met., 188; *Church and Congregational Society* v. *Hatch*, supra.

The evidence above stated is sufficient, without considering the admissibility of other evidence to the admission of which objection was made, to establish that Mrs. White intended to designate as her legatee this one association with which she had been connected and called by the name of either the Methodist Episcopal Church or Methodist Episcopal Church Society.

It was not established by admissible evidence that there were duly elected "stewards or trustees of the Methodist Episcopal Church" or "trustees of the local Methodist" church within the provisions of Rev. Stat., Chap. 17, Sec. 19. Nor was there evidence that a corporation was organized as therein provided. The bequests therefore do not appear to be gifts to a corporation under the statute. In *Ladd* v. *Baptist Church*, supra, referred to by counsel, the opinion states that the church was incorporated and no question appears to have been raised about its incorporation.

This court in *Pushor* v. *Hilton*, 123 Me., 227, reserved decision of the question whether a devise or bequest directly to a voluntary association can be upheld. The association in that case was admittedly not a charitable organization. Neither shall we consider the question of the validity of such a direct bequest even to an organization assumed to be charitable.

The only question we shall consider is whether these bequests are valid charitable trusts. Charitable trusts are always favorites of the law and in construing them, a liberal policy has been con-

stantly and consistently maintained by this court, *Bills* v. *Pease*, 116 Me., 100; *Prime* v. *Harmon*, 120 Me., 303, in harmony with the general rule, *Jackson* v. *Phillips*, 14 Allen, 539, 550; 5 R. C. L., 352, Sec. 89; 11 C. J., 307, Sec. 12.

The definition of a "charitable trust" or a "public charity" as given in *Jackson* v. *Phillips*, supra, has been adopted and applied in this state. *Bills* v. *Pease*, supra; *Haskell* v. *Staples*, 116 Me., 103. "A charity in the legal sense, may be more freely defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature."

The heirs at law deny that valid charitable trusts were created by the will, contending, in the first place, that the beneficiaries of a charitable trust must be indefinite but capable of being ascertained; that they can not be ascertained here because the society has no records disclosing who constitute it and the trustee can not select, as he must, the members of a society which has no record of its membership, and therefore that the trust fails; but further that, if the members were accurately ascertainable, they would no longer be indefinite, and therefore again the trust fails.

The major premise of this argument, that the beneficiaries must be indefinite but capable of being ascertained, contains a fallacy. Beneficiaries is there used with two meanings, one for the qualifying word "indefinite," another for the qualifying words "capable of being ascertained." The former looks to the future and means the beneficiaries who may be such. They must be indefinite, "an unascertained, uncertain, fluctuating body of individuals." *Doyle* v. *Whalen*, 87 Me., 425; *Hospital Association* v. *McKenzie*, 104 Me., 327; *Bills* v. *Pease*, supra. The latter looks to a given moment and means the beneficiaries then entitled to receive the benefit of the trust and whom the trustee selects therefor. In a valid public charitable trust at a given moment, all the beneficiaries who may

in the future become such can not and ought not to be ascertainable, but the beneficiaries who are such must be ascertainable.

If, therefore, the members of this association had records by which its membership at the death of Mrs. White could be accurately ascertained, such present ascertainability would not have *ipso facto* made definite the required indefiniteness of the beneficiaries in the future with consequent failure of the trust, as contended by the heirs.

If Mrs. White had intended to give the bequests to the society, as it was at her decease comprised of its then and ascertainable members, a different question would be presented. The members, if held to be beneficiaries of a trust, would have been certain and designated individuals, known persons or class of persons and the question of a "private," as distinguished from a public or charitable, trust would have arisen. *Doyle* v. *Whalen*, supra.

The test therefore is whom did Mrs. White intend to designate as beneficiaries of her bounty and not the record of the membership of the Society. We think, as considered below, that she had in mind and intended the indefinite, fluctuating membership of the Society, not its actual then membership at her decease.

The contention, however, that members of the society can not be ascertained because there are no records, errs in two respects. It can not be said there are no records of the association. There was at the hearing a record book in the possession of the association not put into evidence by the association or by the heirs. What the book showed did not appear. Again, records would be primary evidence of membership, but if not available, secondary evidence would be admissible. Evidence of the membership of a voluntary unincorporated association is not confined to records. There was uncontradicted admissible evidence that the Methodist Episcopal Church of Corinna had a definite membership "capable of being determined from its record or *by other means.*"

The heirs contend, in the second place, that the purpose of a charitable trust must be limited to charitable objects; that if the trustee is given discretion to apply the trust property to purposes not charitable — and that there was such discretion here — the trust fails.

A valid charitable bequest must be for a purpose recognized in

law as charitable. A religious purpose is a charitable purpose and has been uniformly so recognized and by this court. *Maine Baptist Missionary Convention* v. *Portland*, 65 Me., 92; *Straw* v. *East Maine Conference*, 67 Me., 493; *Prime* v. *Harmon*, supra. The very term church imports an organization for religious purposes, and property given to it *eo nomine* in the absence of all declaration of trust or use must by necessary implication be intended to be given to promote the purposes for which a church is instituted. *Baker* v. *Fales*, 16 Mass., 488; *Sears* v. *Attorney General*, 193 Mass., 551, 555; 11 C. J., 320, Sec. 24.

Bequests therefore to a Methodist Episcopal Church Society without declaration or restriction as to the use to be made of the subject matter of the gift must be deemed a gift for the promotion of the objects of the Society and given for a charitable purpose.

The purposes for which such bequest can be used must be charitable only. If the intention of the testator was that the gift could be used for other than charitable uses, it is fatal to the validity of the bequest. If a part may be so otherwise used, all of it may be. *Fox* v. *Gibbs*, 86 Me., 87, 94; *Tappan* v. *Deblois*, 45 Me., 122, 129; *Murdock* v. *Bridges*, 91 Me., 124, 132; *Prime* v. *Harmon*, supra, 301.

The purpose of the specific bequest in paragraph seventeenth was expressed in these words, "to be used *for* the said Society in any way it may deem best." "For," not "by," was used. "For" connotes "the end with reference to which anything is, acts, serves, or is done." *Webster's International.* The Society can in its discretion select the "way," the particular, specific form or forms of use, but any such use must be "for the said Society." These words constitute a limitation on the manner in which the bequest could be used. *Pratt* v. *Miller*, 37 N. W., 263, 265 (Neb.). The limitation necessarily implies a use for the object and purpose of the Society and these are religious and charitable. The purpose of this bequest is therefore clearly and wholly charitable.

The purpose of the residuary bequest in paragraph nineteenth is "to be used as shall seem best in the discretion of the Society."

"For" was not used; but neither was "by" used. The will taken as a whole indicates clearly an intent to provide bequests for the benefit of the various donees only. The income of the trust for the

niece "must be used only for her personal aid and comfort and not for the help of any other member of her family." Two paragraphs following the nineteenth completed her will, the twenty-first appointing the executor, and the twentieth as follows: "I hereby declare it to be my intention, and I do hereby debar every person whether of any degree of kindred or not, except those named herein either individually, the Town of Corinna or the said Society, from sharing in any way in the distribution of my estate, real, personal or mixed. Meaning that all named herein shall be all that shall have a distributive share in my estate." To find in the language of paragraph nineteenth an intent of the testatrix to provide for the Society a bequest differing from the preceding specific bequest and, after limiting the latter to the purpose and object of the Society, to permit the Society to use the residuary bequest for any purpose whatever with unlimited discretion and whether for its benefit or not, is to find an intent that does not harmonize with the will as a whole and read in the light of the surrounding circumstances. We do not so construe the language. We think that the words, "for the said Society," are impliedly to be found in paragraph nineteenth as they were expressly used in paragraph seventeenth and that both bequests were given for the purpose and object of the Society. The purpose of the residuary bequest was therefore wholly charitable.

So, too, taking the will as a whole, the intent of the testatrix to give the bequests to the association with a membership indefinite and fluctuating, and not as constituted at her decease, seems clear. The amounts of the specific and residuary bequests differ, but there is no direction or implication for any immediate use of either for the church as then constituted. She intended a specific bequest to this religious association and then more if there were a residue unused for the niece. We do not find any different intent, express or implied, in either bequest. Further, the residuary bequest, if the Society were not in existence at the expiration of the trust for the niece, was given to the successor of the Society. In both bequests, she appears to have had in mind an indefinite, continuing religious body.

The bequests were valid charitable trusts in their purposes and beneficiaries.

No trustee is named in the will, but a court of equity will not allow a gift for charitable uses, otherwise valid, to fail for want of a trustee but will itself administer the trust or appoint a trustee to administer, *Wentworth* v. *Fernald*, 92 Me., 291; *Hospital Association* v. *McKenzie*, 104 Me., 327; 11 C. J., 332, Sec. 48, although the gift for such use is to a voluntary association or unincorporated society which is uncertain, indefinite and fluctuating. *Swasey* v. *American Bible Society*, 57 Me., 523.

It may appear upon further hearing by the court below that there are trustees of the association, or trustees may be elected by or for the association, legally empowered to receive the property of these trusts and administer them. If not, the court may appoint.

The plaintiff may have costs and reasonable counsel fees to be determined by the sitting Justice and paid out of the estate.

The mandate will be

Bill sustained.
Decree in accordance with opinion.

JAMES SIMPSON ET AL

vs.

RICHMOND WORSTED SPINNING COMPANY ET AL.

Sagadahoc. Opinion March 11, 1929.

JOINT ADVENTURE. PARTNERSHIP. ACCOUNTING.

Sharing in profits and losses does not necessarily constitute a partnership.

A joint adventure is a special combination of two or more persons, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation.

Joint adventure is not identical with partnership but is so similar in its nature and in the contractual relations created thereby that the rights as between the adventurers are governed practically by the same rules that govern partnerships.

Joint adventure is a contractual relation, and whether the relation of joint adventure or some other relation between parties obtains, depends upon their

actual intention, to be determined in accordance with the ordinary rules governing the interpretation and construction of contracts. Such a contract need not be express. It may be implied from the conduct of the parties.

Furnishing of capital by the parties is not necessary. The mere fact that some pay all the expenses or furnish all the money does not exclude associates from sharing in profits. But there must be some contribution by each co-adventurer of money, material or service, something promotive of the enterprise. Sharing of losses is not essential. Sharing of profits is not sufficient.

Persons engaging in a joint adventure stand, each to the other, and within the scope of the enterprise, in a fiduciary relation, and each has the right to expect and to demand the utmost good faith in all that relates to the common interests.

No member may secure or accept secret profits, commissions or rebates to the disadvantage of others, and holds gains acquired by any breach of faith for the common benefit of his associates in proportion to their respective interests.

The law presumes that each of the parties to a joint adventure has an equal interest in the property purchased for its use, notwithstanding the inequality of their contribution to the purchase price or the fact that one or more of the parties may have contributed only his or her services; but this presumption is rebuttable by proof of an agreement between or amongst them fixing their interest in unequal proportions.

An equitable action for an accounting is a proper remedy of a party to a joint adventure to recover his share of the profits.

Money advanced by one party to a joint adventure is held to be a loan to the venture for which the party is entitled to be reimbursed out of the proceeds of the adventure, but such advance does not entitle the party, so acting, to any superior right against his co-adventurers.

In the case at bar Simpson was in duty bound to disclose to Pond the agreement, which he made with Haddon and Smeeton. Pond was under no duty to cross examine Simpson but had a right to rely on full disclosure in good faith by Simpson and this breach of duty by Simpson was actionable fraud.

From the evidence it appeared that Pond executed the release in ignorance of the facts and would not have done so had he known them. The release therefore did not bar action for an accounting.

On appeal by Harry L. Pond, Intervenor from final decree denying his right to relief. Appeal sustained. Decree reversed. Case remanded for proceedings in accordance with opinion.

The case fully appears in the opinion.

George W. Heselton, Fred F. Lawrence, for complainant.

Pulsifer & Ludden, J. E. Regan, for Intervenor defendant.

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

BASSETT, J. On appeal by an intervenor in proceedings in equity from the final decree of the sitting Justice denying his right to relief.

The original bill was brought by James Simpson against Alexander H. Haddon and Edward L. Smeeton, who are non-residents and have never submitted themselves to the jurisdiction of this court, and the Richmond Worsted Spinning Company, a Maine corporation formed in December, 1923, by Haddon and Smeeton and located at Richmond.

Haddon and Smeeton had conveyed to the corporation mill property which Simpson claimed had been assets of a partnership to carry on a yarn spinning business and which had been formed in August, 1921, by Haddon, Smeeton and himself and terminated by the first two in November, 1923. The controversy between them as to whether Simpson was a partner and as to the amount to which he was entitled had been conditionally settled by an agreement in writing dated November 20, 1923, by which Haddon and Smeeton agreed to pay Simpson in settlement $43,000 payable in three promissory notes of varying maturity. The last note of $16,500 due January 20, 1924, not having been paid and the agreement for adjustment having been broken, Simpson on March 30, 1925, brought this bill asking that Haddon and Smeeton and the corporation be adjudged liable for the unpaid note and the interest and, if not paid, that he be adjudged a partner in the business and an equitable owner of one-sixth interest in it, that Haddon and Smeeton be ordered to account to him and that the property of the corporation be charged with an equitable lien for the amount which should be found due him.

Pending these proceedings, Harry L. Pond on June 10, 1925, petitioned to intervene as plaintiff, alleging that he and Simpson on June 11, 1921, became equal co-owners of a sixty day option to purchase the mill property in Richmond, which had been conveyed to Haddon and Smeeton and by them to the corporation, under an oral agreement between him and Simpson that each would endeavor to sell the property and the option on it and divide the proceeds

equally; that the claims which Simpson sought to enforce in the bill arose out of the sale of the option by Simpson; and that he was entitled to an accounting by Simpson.

Pond was permitted to intervene as a party defendant and answer.

It appears from the final decree that the liability of the defendant corporation had been fixed in a former decree in accordance with which $18,760.50 and $97.39 costs of suit had been paid into court by the corporation in discharge of its obligation. The parties assented to it, have acted upon it, and the sitting Justice in his final decree recognized it as settling all controversies, excepting those between Pond and Simpson, and with the acquiescence of all parties within the jurisdiction of this court and affected by its decree.

Hearing was held on the issues raised by Pond's answer.

From the evidence, it appeared that Simpson, an experienced superintendent of textile manufacture, became in 1920 superintendent of a carpet mill in Roxbury, Massachusetts, where Pond was employed as checker in the wool house at a weekly wage of twenty-three dollars. Hearing rumors of the mill shutting down, Simpson and Pond began to consider engaging in a yarn spinning business themselves if they could raise the money therefor. Pond, who had formerly worked in a broker's office, thought he could raise it. The project was discussed considerably but their testimony differs as to what each had in mind for form of organization and their interests in it if established. The necessity of finding an available mill for any plan becoming manifest, Pond learned through mill brokers of a mill at Richmond, Maine. He and Simpson went there to examine it. On the way home, it was agreed that Pond should try to get from the brokers an option, and he arranged for a sixty day option dated June 11, 1921, for the purchase price of $20,000, of which $500 was to be paid on the delivery of the option. Simpson and Pond went together to the broker's office. Simpson paid the $500, and the option, in which both were named as the optionees and payors of the consideration, was executed by both and delivered to them. Simpson made no objection to the form of the option. After the option was obtained, they discussed what would be their business relations if they succeeded in financing their

project. Their versions differ. Simpson testified that he refused Pond's suggestion of "fifty-fifty" but agreed to allow him twenty per cent if he raised the money. Pond testified to an unconditional agreement that he would have fifty per cent of the profits of the mill. But there was undisputed testimony of a broker that during the option period, a tentative plan, which did not go through, was worked out by Simpson, Pond and the broker for organizing a corporation, to be financed by the sale of preferred stock, with common stock as a bonus, and to be controlled by a majority of the common stock, which was to be issued in equal shares to Simpson and Pond and chiefly for the option.

Pond tried to effect the financing but did not succeed. About two weeks before the option period expired, Simpson undertook to raise money.

On July 27 he met Haddon, whose possible interest in the plan Simpson had learned a few days before, and went with him to Richmond. Negotiations between Simpson, Haddon and Smeeton followed and resulted in a written agreement dated August 8, hereafter considered.

During these negotiations, Pond was informed by Simpson that he had a prospective customer but was not told any of the details, or asked to take any part, and did not take part.

On August 6 Simpson telephoned Pond that Haddon and Smeeton would not go through with any plan if another besides Simpson was a party and asked him to release his interest in the option. Their versions of what each said to the other differ. On August 8, before the written agreement was executed, both met Haddon and Smeeton. After Simpson had conferred alone with them, Pond was informed that Haddon and Smeeton would pay him $1,000 for a release and employ him. He agreed to sign the release and on November 15, after he had begun to work in the mill for a weekly compensation, was given a check for $1,000 by Haddon and Smeeton. Pond signed the release, which was as follows:

> "I, Harry L. Pond, of Natick, Massachusetts, hereby acknowledge receipt of one thousand dollars ($1,000) paid me by Richmond Worsted Spinning Co. in recognition of the fact that I have transferred to them any rights I may have had

under a certain option by and between Bloomsburg Silk Mill, James Simpson and myself, dated June 11, 1921, and in consideration thereof I hereby release unto said Richmond Worsted Spinning Co. and the partners doing business under said name any and all claims and demands of any sort whatsoever which I now have or ever have had against said Richmond Worsted Spinning Co. or said partners, arising from any cause whatsoever up to the present time.

In Witness Whereof I have hereto set my hand and seal this 15th day of November, 1921."

Pond never saw, and Simpson told him nothing about, the written agreement. The option and the property covered by it were conveyed to Haddon and Smeeton. They agreed to refund to Simpson the $500 paid by him. Pond continued in their employment until October, 1922. He first learned of the terms of the agreement in November, 1923, from Haddon when it was terminated and Simpson left Richmond. Pond made a demand on Simpson for an accounting in December, 1923. The decision of the sitting Justice was as follows:

"Upon a careful examination of the evidence in this case I am of the opinion that the release . . . signed by Harry L. Pond, intervenor, bars him from any right to recover any part of the option for value thereof or any part of the receipts of the real estate or other property embraced within the terms of the option. However were it not for the legal bar effectuated by the said release, I think the evidence would fairly show that Pond was co-owner of the option with Simpson. A decree may be drawn in accordance with this finding."

The decree denied that Pond was equitably entitled to any part of the proceeds of the notes given to Simpson or of the money paid into court or to any accounting from Simpson. The case comes up on appeal from this decree.

First. Was Simpson a partner of the Richmond Worsted Spinning Company on November 15, 1921, when the release was given and therefore within its express terms?

The written agreement of August 8 was between Haddon and

Smeeton, co-partners of a partnership to be conducted under the name of the Richmond Worsted Spinning Company, parties of the first part, and Simpson, party of the second part. It recited that Simpson desired to enter the employ of the partnership and "had sold to the partnership certain assets owned or controlled by him" and provided that he should be employed at a monthly salary and "as additional compensation over and above said monthly salary" be credited at the end of each calendar year with one-sixth of the net profits, or debited with one-sixth of the deficit, for the year before deducting his compensation. Upon the termination of the agreement by either party, there should be paid to Simpson "in payment of the balance due him upon the assets sold to the partnership and as full payment of said additional compensation the sum of $40,000 plus any amounts standing to the credit of said party of the second part in said open account or minus any debit balance there may be in said open account."

Simpson did not become a partner by this agreement. It was an agreement for his employment as a superintendent.

The mere fact that Simpson was to share in the profits and losses did not necessarily constitute a partnership. *Dwinel* v. *Stone*, 30 Me., 384; *Bailey Company* v. *Darling*, 119 Me., 326, 330.

But the plaintiff alleged in his bill that on August 5 Haddon, Smeeton and he mutually agreed to engage in the business of spinning yarn and that it was the intention of the parties to form a partnership to carry on the business; that on August 8, intending to reduce into written form the partnership contract so agreed on, the written agreement of August 8, copy of which was annexed and marked as Exhibit A, was jointly executed, but that it did not by mutual mistake fully incorporate or express the true intention of the parties because not clearly expressing the plaintiff's right to a full one-sixth interest in the capital and assets of the partnership; that the insufficiency of the written agreement in this respect was afterwards recognized by Haddon and Smeeton in correspondence between them so as to make certain that the plaintiff should at all times be entitled to one-sixth interest in the property and assets of the partnership as well as to participate in the profits. All of these allegations were admitted in Pond's answer. The correspondence or other proof of the allegations was not offered. The defendant

therefore admitted that a parol agreement for a partnership was entered into on August 5, and put into written form by the agreement of August 8, and subsequently modified in writing to conform to the original parol agreement. We are bound by these admissions and must hold that Simpson was a member of the partnership.

Second. What were the interests of Pond and Simpson in the option?

The sitting Justice found that Pond was a co-owner of the option with Simpson. We think this is fairly supported by the evidence, and that they had acquired and were holding the option with the relation of joint adventurers, a doctrine which has become well recognized in American courts (33 C. J., 841, Sec. 2), and is now considered by this court for the first time.

Joint adventure has been defined as "an association of two or more persons to carry out a single business enterprise for profit." 2 Rowley's Modern Law of Partnership, Sec. 975; *Fletcher* v. *Fletcher*, 172 N. W., 436, 440 (Mich.); *Keiswetter* v. *Rubenstein*, 209 N. W., 154, 157 (Mich.); *Elliott* v. *Murphy Lumber Co.*, 244 Pac., 91, 93 (Or.); 4 Words & Phrases (Third Series), 587; as "a special combination of two or more persons where in some specific venture a profit is jointly sought without any actual partnership or corporate designation." Schouler's Pers. Prop. (5th Ed.), 167a; 33 C. J., 841; *Perry* v. *Morrison*, 247 Pac., 1004, 1006 (Okla.); *Champion* v. *D'Yarmett*, 293 S. W., 587 (Tex. Civ. App.); as "where persons embark on an undertaking without entering on the prosecution of the business as partners strictly but engage in a common enterprise for their mutual benefit." *Hey* v. *Duncan*, 13 Fed. (2nd), 794, 795; "To constitute a joint adventure two parties must combine their property, money, efforts, skill or knowledge in some common undertaking." *Wilson* v. *Maryland*, 189 N. W., 437 (Minn.).

Joint adventure is not identical with partnership but is so similar in its nature and in the contractual relations created thereby that the rights as between the adventurers are governed practically by the same rules that govern partnerships. 15 R. C. L., 500; Amer. and Eng. Ann. Cas., 1916 A, 1210, note.

It is a contractual relation. *National Surety Co.* v. *Winslow*,

173 N. W., 181 (Minn.); *J. E. Trouant etc. Co.* v. *Weitz Sons*, 191 N. W., 884 (Ia.). Whether the parties to a particular contract have created, as between themselves, the relation of joint adventurers or some other relation depends upon their actual intention, which is determined in accordance with the ordinary rules governing the interpretation and construction of contracts. 33 C. J., 845, Sec. 16. Such a contract need not be express; it may be implied from the conduct of the parties. 2 Rowley's Modern Law of Partnership, Sec. 976; *Jackson* v. *Hooper*, 74 Atl., 130 (N. J. Ch.); *Goss* v. *Lanin*, 152 N. W., 43 (Ia.); *Saunders* v. *McDonough*, 67 So., 591 (Ala.). The acts and conduct of the parties engaged in the accomplishment of the apparent purposes may speak above the expressed declarations of the parties to the contrary. *O. K. Boiler etc. Co.* v. *Minnetonka Lumber Co.*, 229 Pac., 1045 (Okla.).

As in cases of partnership, various tests are resorted to in cases of joint adventure to determine whether the parties so intended. One term of the contract or one aspect of the relationship can not be fastened on to the exclusion of other parts. The whole scope of the arrangement must be examined and each of its parts considered in relation to all the other parts to ascertain the real intent of the parties. *Rosenblum* v. *Springfield Prod. Brokerage Co.*, 243 Mass., 111, 116.

Furnishing of capital by the parties is not necessary. *VanTine* v. *Hilands*, 131 Fed., 124, 128; *Boqua* v. *Marshall*, 114 S. W., 714, 717. The mere fact that some pay all expenses or furnish all the money used does not exclude associates from sharing in profits. *Saunders* v. *McDonough*, supra; *Streat* v. *Wolf*, 119 N. Y. S., 779; *Migel* v. *Hiler*, 136 N. Y. S., 969; Am. and Eng. Ann. Cas., 1916 A, 1213. But there must be some contribution by each co-adventurer of money or material or service, something promotive of the enterprise. *Brewer* v. *Ewart*, 97 So., 910 (Ala.). Sharing of losses is not an essential. *Keiswetter* v. *Rubenstein*, supra, and cases cited; *Jackson* v. *Hooper*, supra. Mere sharing of profits is not sufficient. *Atlas Realty Co.* v. *Galt*, 139 Atl., 285 (Md.).

But as by its nature joint adventure is a common undertaking or common enterprise for mutual benefit, there must be, as a general rule, community of interest and participation in the benefit or profits. *McDonough et al* v. *Bullock*, 2 Pearson (Pa. Eq.), 191;

McDaniel v. *State Fair*, 286 S. W., 513 (Tex.). Contribution of money, material or services, joint ownership or proprietary interest, or joint control over the subject matter of the adventure, or the manner in which it is to be carried out, sharing of losses, sharing of profits are evidence of the common enterprise.

In the instant case, it seems clear from the evidence that a joint adventure was intended by Simpson and Pond. They had a common purpose to establish a business in which each was to have some interest. It was not necessary that their respective interests and share in any profits or benefits be definitely settled. *Goss* v. *Lanin*, supra. They took and held jointly the interest in the property by means of which they hoped and intended to establish their enterprise. Pond contributed services to the acquisition of the option and tried to raise money to finance the undertaking. That he expected to share in the profits and that Simpson so understood and felt some obligation about it, are clearly shown.

Third. What were the relations between the joint adventurers and how did such relations affect the release?

The persons engaging in a joint adventure stand each to the other and within the scope of the enterprise in a fiduciary relation and each has the right to expect and to demand the utmost good faith in all that relates to the common interests. 33 C. J., 851, Sec. 36; 15 R. C. L., 501; *Jackson* v. *Hooper*, supra; *Hey* v. *Duncan*, supra; *Botsford* v. *VanRiper*, 110 Pac., 705 (Nev.).

Each member of the group owes to every other member the duty of fair, open, honest disclosure and no member by connivance, deceit or suppression of facts within the right or to the advantage of any other member to know can secure or accept secret profits, commissions or rebates to the disadvantage of others, and he holds gains acquired by his breach of faith for the common benefit of his associates in proportion to their respective interests. *Goldman* v. *Pryor*, 179 N. W., 673 (Wis.).

The law presumes that each of the parties to a joint adventure has an equal interest in the property purchased for its use, notwithstanding the inequality of their contribution to the purchase price or the fact that one or more of the parties may have contributed only his or their services; but this presumption is rebuttable by proof of an agreement between or amongst them fixing

their interest in unequal proportions. 33 C. J., 858, Sec. 56; *Botsford* v. *VanRiper*, supra, and cases cited.

The venture originally intended was not carried through and Pond had no part in the business which was established and therefore the proportionate parts of the completed venture were not determined. But up to the time that the option was conveyed to Haddon and Smeeton, it was held jointly by Simpson and Pond. The legal presumption of equal interest was supported by the evidence. There was no agreement fixing the interest in other than equal proportions.

It is clear from the evidence that the price for the option, agreed to be paid to Simpson as between him, Haddon and Smeeton and which eventually was paid to him, was $40,000. Simpson did not disclose this agreement. He was in duty bound to do so whether or not Pond asked for information. Pond was under no duty to cross examine. He had a right to rely on full disclosure in good faith by Simpson. Simpson's breach of duty was actionable fraud on his part. *Goldman* v. *Pryor*, supra; 33 C. J., 857. An equitable action for an accounting is a proper remedy of a party to a joint adventure to recover his share of the profits. 15 R. C. L., 507, Sec. 11.

We think it is clearly shown that Pond executed the release in ignorance of the facts, and would not have done so had he known them. It was not until two years after he had signed the release that he learned the facts and a month later demanded an accounting. The release therefore did not bar the action within the rules of *Barrett* v. *L. B. & B. St. Ry. Co.*, 110 Me., 24, 30; *Redman* v. *Bryant Company*, 125 Me., 183.

It was contended that the finding of the sitting Justice that the release was a bar necessarily implied an adverse finding on a claim of fraud. Even if that be so, we think that fraud within the principles of this decision is so clearly shown that a finding to the contrary could not be upheld.

Pond was therefore entitled to recover from Simpson one-half of the forty thousand dollars paid to Simpson for the option and of the interest on the notes given in payment. Pond was not entitled to recover any part of the profits of the partnership which may have been paid to Simpson since it does not appear that any definite agreement between them with reference to profits was made. Such

profits can not be held to be profits of the option or dividends thereon. Pond, contending that the agreement between Simpson, Haddon and Smeeton was only the written agreement of August 8, claimed that profits over and above his salary as superintendent were proceeds of the option. But Simpson was admittedly a partner and any profits he received can not be held to be necessarily proceeds of the option.

It does not appear from the evidence whether Simpson was reimbursed by Haddon and Smeeton for the $500 paid by him for the option, in accordance with their agreement with him as he testified. Nor does it clearly appear whether or not he and Pond considered the money was advanced by him as a loan to the venture. Money advanced by one party to a joint adventure is held to be a loan to the venture for which the party is entitled to be reimbursed out of the proceeds of the adventure, but such advance does not entitle the party, so doing, to any superior right against his co-adventurers. *Botsford* v. *VanRiper*, supra. If Simpson made an advance and was not reimbursed, he would be entitled to reimbursement of $500 from the proceeds of the option.

Pond was, on the foregoing principles, under obligation to pay to Simpson one-half of the thousand dollars received by him for his interest in the option.

The court below will determine the interest to be paid upon the foregoing amounts received at different times by Simpson and Pond as proceeds of the joint venture.

The mandate must therefore be

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

THOMAS SEARLES *vs.* BAR HARBOR BANKING & TRUST CO.

Hancock. Opinion March 12, 1929.

CORPORATIONS. BY-LAWS. STOCKHOLDERS. R. S., CHAP. 51, SECS. 49, 50, 53. P. L. 1923, CHAP. 144, SECS. 87, 96.

The defendant company voted a stock dividend and passed a by-law providing that the stock issued in payment of said dividend, if it came into the hands of any person by will or descent or by conveyance taking effect after death, should be first offered for sale to such party as the directors of the company might designate, at a value to be fixed by appraisers, the option to continue for thirty days. The plaintiff took no part in the adoption of the by-law, returned the certificate of stock when it was issued to him, but later accepted a cash dividend declared thereon, and neglected for a period of six months to take any action seeking to have the by-law declared invalid and stock issued to him without any restriction attached thereto, held:

That, under the statutes of this state at the time the by-law was adopted the authority of the bank to adopt such a by-law is lacking, but that voluntary acceptance of the stock with the restriction constituted a contract binding on the holder which can be enforced:

That this court, even though the by-law be invalid, can not direct the defendant to issue stock in payment of a stock dividend of a different character from that which its directors and stockholders voted.

Having accepted and retained a cash dividend paid on the new stock issued to him in payment of such stock dividend, the plaintiff can not now be heard to deny that he has accepted the stock with its restrictions.

The plaintiff having accepted a cash dividend paid on the stock since its issuance and neglected to take steps to prevent the issuance of such stock until it was practically all issued and in the hands of parties who are bound by the restriction is now estopped from asking the bank to issue to him stock without the restriction.

On report on an agreed statement. A bill in equity brought to determine the rights of a stockholder in defendant corporation, under a by-law adopted by defendant corporation, restricting the sale and transfer of its stock. Plaintiff contended that the by-law was invalid and that the stock should be issued to him free from the

restrictions. Bill dismissed with costs. The case fully appears in the opinion.

H. L. Graham, for plaintiff.

Lyman & Rodick, for defendant.

SITTING: WILSON, C. J., PHILBROOK, BARNES, BASSETT, PATTANGALL, JJ. DUNN, J., concurring in the result.

WILSON, C. J. A bill in equity brought, as the prayers set forth, to declare a by-law of the defendant company invalid and that the defendant be required to issue to the plaintiff stock free of any of the restrictions against free alienation imposed by the by-law.

The case is reported to this court on an agreed statement of facts.

The defendant is a Trust Company organized under a special charter granted by the legislature in 1887. On March 14, 1927, its capital stock was $100,000, its surplus $300,000 with undivided profits of $214,973.49. On the above date, the plaintiff was the owner of ten shares of the capital stock.

With a view of distributing its stock among a larger number of holders, it obtained from the legislature in 1927, Chap. 126 of the Private and Special Laws, an amendment to its charter under which it was authorized to increase its capital stock and determine the terms and manner of its disposition.

However, before this act went into effect on July 15, 1927, the officers of the bank proposed to its stockholders that the capital stock be increased to $200,000, as it has the power to do under its original charter, Sec. 2, Chap. 196, P. & S. Laws, 1887, and that 1,000 shares be issued to the stockholders in proportion to their holding and against the undivided profits.

A meeting of the stockholders was duly called on April 11, 1927, the call for which included only notice of a proposed increase in capital stock to $200,000. This meeting was continued to July 11 and a call for another meeting to be held on the same date was duly issued to act on a proposed change in the by-laws, restricting the alienation of the new stock under certain conditions.

The plaintiff executed a proxy to attend the meeting called for April 11 to vote on the increase in the capital stock, but did not

execute a proxy for the meeting called for July 11 to vote on the change in the by-laws.

On July 9, however, he wrote to the Treasurer of the defendant company, protesting against the proposed change in the by-laws, but did not attend the meeting or authorize any person to attend and vote his stock against the adoption of the proposed by-law.

At the meeting held on July 11, 1927, it was voted to increase the stock as proposed in the call for the meeting and that the new shares be issued to the old stockholders in proportion to their present holdings and charged to undivided profits, it being in the nature of a stock dividend; and also to adopt the following by-law restricting the alienation of the new stock when coming into the hands of any person by will, inheritance, or by a conveyance to take effect after death:

"Any person acquiring through will, or descent, or by conveyance to take effect at death, any stock of this corporation issued after the passage of this by-law shall be bound to offer the same for sale and transfer to any party appointed by the Trust Company Directors at a fair value of such stock as determined by said Directors, or if said value is not satisfactory to the estate; at the fair value of said stock as determined by three appraisers, one to be chosen by the estate, one chosen by the Directors and one chosen by those two, but any and all appraisers must be chosen from and be when chosen, stockholders in said Trust Company.

"Such obligation shall continue thirty days and no longer after such holder shall offer his stock for sale as above. If any such holder shall fail or refuse to sell and transfer his stock acquired as aforesaid at its fair value thus determined, no dividend shall be thereafter due or paid upon such stock until it shall be so offered for sale. Such stock shall have no right to vote until so offered. The passage of this by-law is to keep the stock, so far as may be, in the hands of persons whose patronage or influence may be helpful to the bank."

Certificates for 968 shares of the new stock were issued and accepted subject to the restrictions by nearly one hundred stockholders, and a certificate for ten shares was issued to the plaintiff August 24, 1927, with the above by-law printed on the back. The plaintiff on September 1 following returned it to the defendant

company, but not with an absolute refusal to accept, but "pending the determination of the right of the Trust Company to restrict the free transfer of the stock."

On January 1, 1928, the regular dividend was declared on all the outstanding stock of the company, including the new shares issued to the plaintiff as his share of the stock dividend; a check was sent to the plaintiff covering his dividend on both his former holdings and the ten shares to which he was entitled as a stock dividend, which check he accepted and cashed without protest so far as the record shows.

No action was taken by the plaintiff to determine his rights until March 20, 1928, when this bill was brought. In the meantime not only all of the new stock, excepting thirty-two shares, had been issued and accepted by the persons entitled thereto without protest, but several transfers of the new stock by and to parties accepting it were recorded on the books of the company.

Of the Bank's authority to declare the stock dividend there is no question in the absence of any statute prohibiting it; In re *Heaton*, 89 Vt., 550; Fletcher Cyc. of Corporations, Vol. 6, Sec. 3682; *Gen. Invest. Co.* v. *Beth. Steel Corp.*, 87 N. J. Eq., 234, and is not questioned by the plaintiff.

It is contended by the plaintiff, however, that such a by-law was not within the power of the defendant company to adopt, that it is contrary to public policy inasmuch as it constitutes a restraint upon the free alienation of his property and is, therefore, void.

There is a seeming lack of harmony among the authorities on the question involved. As a general rule, the cases holding invalid by-laws restricting the alienation of stock are cases where alienation is made dependent on the consent of all the other stockholders or the Board of Directors or some official of the company: In re *Klaus*, 67 Wis., 401; *Miller* v. *Farmers Milling & El. Co.*, 78 Neb., 441; *Chouteau Spring Co.* v. *Harris*, 20 Mo., 383; *Bank of Atchison Co.* v. *Durfee*, 118 Mo., 431; *McNulta* v. *Corn Belt Bank*, 164 Ill., 429, 447; *Bloede* v. *Bloede*, 84 Md., 129; or such restriction is held invalid by reason of lack of legislative authority to pass such a by-law. *Ireland* v. *Globe Milling & Reduction Co.*, 19 R. I., 181; 21 R. I., 9; *Feckheimer* v. *Nat. Ex. Bk.*, 79 Va., 80, 83.

The cases in which a limited restriction upon alienation of stock

issued after the passage of the by-law have been upheld have been either under by-laws adopted under legislative authority and providing only for an option to the corporation or other stockholders to purchase for a limited period, *Nicholson* v. *Brewing Co.*, 82 Ohio St., 94; *Chaffee* v. *Farmers Co-op. Elevator Co.*, 39 No. Dak., 585; *Sterling Co.* v. *Litel*, 75 Colo., 34; or where even without express legislative authority to enact, the acceptance of stock issued in pursuance of such a by-law is held to constitute an enforceable contract between the corporation and a stockholder if the by-law is reasonable and its purpose the promotion of the purposes of the corporation. *New England Trust Co.* v. *Abbott*, 162 Mass., 148; *Barrett* v. *King*, 181 Mass., 476; *Longyear* v. *Hardman*, 219 Mass., 405; *Weiland* v. *Hogan*, 177 Mich., 626; *Farmers M. & S. Co.* v. *Laun*, 146 Wis., 252; *Baumohl* v. *Goldstein*, Vol. N. J. Eq., 124 Atl., 118; *The Model Clothing House* v. *Dickinson*, 146 Minn., 367; *Blue Mt. Forest Asso.* v. *Borrowe*, 71 N. H., 69; also see *Sterling* v. *Litel*, supra.

Additional authorities pro and con may be found in R. C. L., 262-3; 14 Cyc., 668; Fletcher Cyc. of Corporations, Vol. 1, Sec. 513, Vol. 6, Secs. 376-2.

The by-law in this case is not objectionable on the ground that it imposes an absolute restriction on alienation without the consent of the officers or other stockholders. It does not even impose any restriction on present holders or during the lifetime of any one acquiring the stock by purchase. Only in case it is acquired by will or inheritance or a conveyance taking effect at death is the person so acquiring obliged to give such person as the directors may designate thirty-day option thereon. If not exercised in that period all restrictions are removed.

We are of the opinion, however, that under the statutes in force in this state at the time of its enactment, authority is lacking for the adoption of such a by-law. The only statutes bearing thereon are Secs. 49, 50 and 53, Chap. 51, R. S., and Secs. 87 and 96, Chap. 144, P. L., 1923.

Secs. 49 and 50 of Chap. 51 and Sec. 87 of Chap. 144, P. L., 1923, merely authorize in general terms the adoption of by-laws that are not inconsistent with the laws of the state. These sections relate, we think, to such by-laws as may be essential for the general

management of the corporation and can not be construed as authorizing the imposing of any restrictions upon the alienation of its stock other than such as may be necessary to ensure the corporation having a record of its stockholders and to prevent fraud in the transfer of its stock. Nor do we think that Sec. 53 of Chap. 51 in authorizing the creation of two classes of stock was intended to authorize the creation of two kinds in respect to a freedom of alienation. Such statutes have a well-defended purpose in corporation law in authorizing classes of stock with differences as to preferences and voting power. Such legislative authority has not been construed or invoked so far as we know to authorize the creation of different classes of stock in respect to freedom or limitation of alienation.

The power to enact by-laws under the general corporation law is not an unlimited one, *Kennebec & Portland R. R. Co.* v. *Kendall*, 31 Me., 470; *Jay Bridge Corp.* v. *Woodman*, 31 Me., 573; *Sargent et al* v. *Franklin Ins. Co.*, 8 Pick., 90; *Ireland* v. *Globe Milling Co.*, supra.

However, the weight of the authority and we think the tendency of the more recent decisions, as the reasons for maintaining the integrity of the stockholding body have become more manifest, is to sustain such restrictions if reasonable and the stock has been accepted following the adoption of the restriction and with knowledge of its provisions, whether valid as a by-law or not, on the ground that it constitutes a valid agreement between the stockholder and the corporation, especially if it goes no farther than to give an option on the stock for a limited period. *New Eng. Trust Co.* v. *Abbott*, supra; *Weiland* v. *Hogan*, supra; *Model Clothing House* v. *Dickinson*, supra; *Blue Mt. Asso.* v. *Borrowe*, supra, and other cases above cited.

Restricted limitations on the alienation of the stock such as are contained in this by-law can not be held to be against public policy, especially in case of bank stock. The provisions of the charter of this bank make each holder of stock liable to the par value of his stock for the debts of the corporation. Sec. 9, Chap. 96, P. & S., 1887. It, therefore, is important that its stockholders should be persons of responsibility as well as actively interested in the welfare of the Bank. Such a restriction as was contained in the by-law when

the stock comes into the hands of persons other than by purchase may well be promotive of the public interests.

As the Court said in *Dane* v. *Young*, 61 Me., 160, 167, "As stockholders are made liable for the debts of the bank to the amount of their shares, it is important for them to know whether their associates are responsible or worthless."

The plaintiff, while he returned the certificate issued to him, did not couple it with an absolute refusal to accept but pending the determination of the right of the corporation to enact such a by-law. When the regular cash dividend was declared and paid on the old and new stock then outstanding in January, 1928, he accepted and retained it.

If he did not accept the stock, he was not entitled to the dividend and should have returned it. By retaining it, we think he must be held to have accepted the stock with the restrictions.

Lastly, we think this plaintiff has no standing in a court of equity. He has not only accepted the benefits of the stock which he now seeks to have issued to him free of all restrictions, but before bringing action to determine whether such was valid, he delayed until at least 968 shares of the stock were issued and accepted subject to the by-law by those entitled thereto and without objection, and several of the shares have since been transferred to purchasers with full knowledge of the restriction.

The stockholders were not entitled to any stock with or without restrictions as a matter of right but only in pursuance of the vote of the directors. It was not purchased. In voting to issue the new stock, the directors authorized only the issuance of stock with a restriction upon future alienation. Their vote can not be construed by this court as authorizing the issuance of stock without the restriction, even if the by-law is held invalid.

The directors in effect declared a dividend payable in stock with certain limitations on its alienation. A vote authorizing the issuance of stock restricted as to alienation as a method of dividing up the profits is not a vote to issue stock free of any restrictions. Because the directors voted to issue stock so restricted for this purpose, as a method of distributing the profits, it does not follow they would have taken the same action if the stock must be issued without any such restriction.

For a holder of ten shares out of one thousand after such delay and having accepted the dividend thereon to now ask a court of equity not only to declare this by-law invalid but to require the bank to issue new stock to the plaintiff without such restriction would leave all the other stockholders who have accepted the stock bound by the restriction.

This court, therefore, can not, even if the plaintiff were not held to have accepted the stock, now direct the bank to issue to him stock of another character from that authorized by the directors and now held by his associates who have in good faith accepted it with the limitation.

The plaintiff's laches in taking action renders it unconscionable to grant the remedy prayed for. *Fieldin* v. *Lancashire and Yorkshire Ry.*, 64 Eng. Reprint, 237. *Gen. Invest. Co.* v. *Beth. Steel Corp.*, supra, p. 245.

Bill dismissed with costs.

ALFRED C. GAUNT *vs.* ALLEN LANE CO.

Franklin. Opinion March 12, 1929.

MORTGAGES, CHATTEL AND REAL. CONDITIONAL SALE. FIXTURES.

When mill machinery is installed in a mill and attached thereto in such manner as to become part of the realty, the title to such machinery is in the mortgagee of the real estate although the machinery may have been sold to the mortgagor under a conditional sale, provided the sale is subsequent to the date of the mortgage.

The so-called Massachusetts rule prevails in this state, which rule holds that a contract between a mortgagor and a third person, preserving the chattel character of property added to real estate during the life of the mortgage thereon, is ineffective as against the mortgagee unless he is a party to the transaction; and the question of whether it can or can not be removed without injury to the realty is immaterial.

In the case at bar the record disclosed that the machinery was installed in the mill in such manner as to make it a part of the realty under the rules of law governing such installation.

As to machinery not included under the chattel mortgage, the record showed that the said machinery became fixtures under the modern rule of fixtures relating to mill machinery; that they passed to the mortgagee by affixation and that the title thereto was complete when the mortgagee took possession of the real estate under foreclosure proceedings.

On report. An action of trover brought for the conversion of various articles of machinery added to the mill property of the Gledhill Woolen Co.

All of this machinery was placed in the mill by the Gledhill Woolen Co. after its first mortgage was given to the defendant corporation and before a second mortgage was given to the plaintiff. The machinery was, however, sold on conditional sale with the proviso that it should remain personal property.

Defendant took possession of the property under foreclosure proceedings.

Plaintiff claimed title to all the machinery placed in the mill subsequent to the first mortgage under his conditional sale agreement.

At the conclusion of the evidence the cause was reported to the Law Court.

Judgment for the defendant.

The case fully appears in the opinion.

Ralph W. Crockett, for plaintiff.

C. N. Blanchard,

Frank W. Butler, for defendant.

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

PHILBROOK, J. On report. Action in trover to recover damages for the alleged conversion of mill machinery. Demand and refusal are conceded. The property described in the plaintiff's declaration is as follows:

Twelve looms, including loom motors, harnesses, beams, shuttles, reeds, 82″25 harness 4 x 4 box, heavy worsted, with motors, 1 HP 550 volt, together of the value of seventy-two hundred dollars, one Universal Winder of the value of two hundred dollars, one 60KW generator and connection, of the value of eight hundred dollars, five motors, together of the value of six hundred dollars, two

Houston sewing machines, together of the value of one hundred dollars, one 20th Century dryer, of the value of two thousand dollars, one piece dye kettle, of the value of fifty dollars, one power pump, of the value of fifty dollars.

For convenience and brevity of expression, we divide the above enumerated property into two groups, the first containing the twelve looms and motors of the alleged value of seventy-two hundred dollars, and the second containing all the remaining articles.

On July 1, 1922, and for a long time prior thereto, the defendant corporation was the owner of the East Wilton Woolen Mill, so-called, at East Wilton, Maine, with all buildings thereon, all machinery therein, and the water power therewith connected. On the above date the defendant conveyed all of said property to the Gledhill Woolen Company, receiving in payment a promissory note for the full amount of the purchase price, secured by a mortgage covering all the property conveyed. Both deed and mortgage were properly recorded in the Franklin County Registry of Deeds.

At the time of the sale the plaintiff, Gaunt, was owner of a majority of the capital stock of the Gledhill company, one of its directors, its treasurer and financial backer. He also held a controlling interest in a New York corporation known as Alfred C. Gaunt and Company.

On November 29, 1924, the Gledhill company gave a second mortgage of the property to the plaintiff, Gaunt, for the sum of fifteen thousand dollars, subject to the first mortgage given the defendant on July 1, 1922, and "subject to any lien or liens which the said Alfred C. Gaunt has on the looms and other machinery used in connection with the mill on said premises."

Between the dates of the first and second mortgages, the Gledhill company made changes in the mill machinery, substituting new for old, and particularly brought to the mill the looms and motors which are comprised in the so-called first group.

The Gledhill company failed to meet its obligations under the first mortgage, given to the defendant in July, 1922, and on July 7, 1927, the mortgagee began foreclosure of that first mortgage by publication, the date of the last publication being July 26, 1927. In the plaintiff's brief it is admitted that under this foreclosure proceeding, the Allen-Lane Company took possession of

the mortgaged property; and it is further admitted that all the items of machinery mentioned in plaintiff's writ were in the mill and in the possession of the defendant at the date of the writ, and still in its possession, with the exception of the Houston sewing machines, concerning which there is some dispute.

Under date of April 9, 1927, the plaintiff began foreclosure of the second mortgage by service of notice on the president of the Gledhill company.

Group I, of the property alleged to be personal property and as such converted by the defendant, will be first considered.

On September 1, 1922, about sixty days after the first mortgage was given to the defendant, and while the same was in full force and effect, Alfred C. Gaunt & Company, by conditional sale, conveyed the looms and motors mentioned in Group I to the Gledhill company. These looms and motors were immediately installed in the mill at East Wilton and attached to the building in such manner as to become part of the realty.

The instrument of conditional sale stipulated that the conditional vendee was to place the machinery in the East Wilton mill "and there to hold the same as the sole and exclusive property of the conditional vendor." This instrument was duly recorded in the office of the Town Clerk of Wilton. On April 6, 1927, the conditional vendor commenced foreclosure. There was no redemption and on August 11, 1927, long after the time for redemption had expired, Alfred C. Gaunt & Company sold the looms and motors to Alfred C. Gaunt, the plaintiff. The latter now claims that the steps taken, as above set forth, under ordinary circumstances, would give him perfect title so far as Group I is concerned. On the other hand, the defendant claims that this group became fixtures, lost their character as chattels, and being part of the realty passed to it under the first mortgage.

This raises the question of title to chattels between the mortgagee of real estate and the vendor of chattels sold to the mortgagor under a conditional sale, the sale being subsequent to the real estate mortgage and the chattels having been affixed to the realty. There are two well defined doctrines on the subject, one being directly opposed to the other. In some jurisdictions it has been held that the conditional sale is valid, and that the various articles

so sold retain their character as chattels, while in other jurisdictions the courts of last resort have reached a contrary result. The former doctrine is commonly known as the New Jersey rule, the leading case in support thereof being *Campbell* v. *Roddy*, 44 N. J. Eq., 244; 6 Am. St. Rep., 889; 14 Atl., 279, where the two doctrines are discussed at great length. The latter is known as the Massachusetts rule, now firmly established by the opinions of the court in that commonwealth as well as by those in other states which have adopted it. So far as numbers are concerned, the jurisdictions are more numerous in which the New Jersey rule obtains, but it should be noted that decisions supporting that rule emanate largely from the equity side of the court, not from the common law side. Indeed, the court in *Campbell* v. *Roddy*, supra, gives the following statement as a reason for the rule:

> "It is difficult to perceive any equitable ground upon which the property of another, which the mortgagor annexes to the mortgaged premises, should inure to the benefit of a prior mortgagee of the realty. The real estate mortgagee had no assurance at the time he took his mortgage that there would be any accession to the mortgaged property. He may have believed that there would be such an accession, but he obtained no right, by the terms of his mortgage, to a lien upon anything but the property as it was conditioned at the time of its execution. He could not compel the mortgagor to add anything to it. So long, therefore, as he is secured the full amount of the indemnity which he took, he has no ground for complaint. There is, therefore, no inequity toward the prior real estate mortgagee, and there is equity toward the mortgagee of the chattels, in protecting the lien of the latter to its full extent so far as it will not diminish the original security of the former."

At an early date, in *Franklin* v. *Moulton*, 5 Wis., 1, citing *Corliss* v. *McLagin*, 29 Me., 115, decided in 1848, the Wisconsin court adopted the Massachusetts rule, but it is interesting to note that in *Fuller-Warren Co.* v. *Harter*, 101 Wis., 80, 85 N. W., 698, 84 Am. St. Rep., 867, that court said:

> "The judicial policy of this state having been, established for nearly half a century, as indicated, it is considered that

we are not permitted to question it now. The opposite doctrine (the New Jersey rule) may be the most equitable. It is probably supported by the greater weight of authority if that is to be determined by the number of decisions. Possibly it may be by the better reasoning, though the indications, it is believed, from a study of the numerous cases that have dealt with the subject in recent years, are that it has been losing rather than gaining grounds. The tendency of courts is to fence it within as narrow limits as practicable."

As an example of this tendency, our attention has been called to *McFadden* v. *Allen*, 134 N. Y., 489, 32 N. E., 21, decided in 1892, where that court adopted the Massachusetts rule in its entirety, with the possible exception of where an interest in the accession to realty is reserved as security for purchase money. In all other cases it was distinctly held that a contract between a mortgagor and a third person, preserving the chattel character of property added to real estate as an improvement thereof during the life of the mortgage thereon, is ineffective as against the mortgagee unless he is a party to the transaction; and that the question of whether it can or can not be removed without injury to the realty is immaterial.

The invalidity of a contract between a mortgagor of realty and his vendor of chattels to be annexed, and which are annexed, to the mortgaged property, preserving the chattel character of the accession, has been maintained by the Federal Courts. *Phoenix Iron Works Co.* v. *New York Security & Trust Co.*, 83 Fed., 757; *Porter* v. *Pittsburg, etc.*, 120 U. S., 649; 122 U. S., 283, in which court the Massachusetts rule obtains. It may be of interest to the legal profession, at least, to say that in the Phoenix case, among those sitting on the bench were Justices Taft and Lurton, one of whom later became Chief Justice and the other an Associate Justice in the United States Supreme Court.

In effect the Massachusetts rule was adopted by our court in a very early case, *Smith* v. *Goodwin*, 2 Me., 173, decided in 1822, and the adoption amplified and emphasized by repeated decisions during the century which has elapsed since that time. We still adhere.

The Massachusetts rule has been already stated in *McFadden* v.

Allen, supra, and need not be repeated. In the case at bar, the mortgagee was not a party to the transaction whereby Group I was purchased by conditional sale, nor has the plaintiff shown by preponderating evidence that the mortgagee consented that Group I should be installed as chattels and retain chattel characteristics as distinguished from fixtures.

In discussing Group II, we make no reference to the Houston sewing machines since the evidence does not fairly preponderate in favor of the claim that they were in the mill when demand and refusal were made as prerequisites to this suit. The element of conditional sale does not exist in this group. The record abundantly shows that the articles enumerated in this group became fixtures under the modern rule of fixtures relating to mill machinery. They passed to the mortgagee by affixation and title thereto was complete when the mortgagee took possession of the real estate under foreclosure proceedings. *Hopewell Mills* v. *Taunton Savings Bank*, 150 Mass., 519; *Hawkins* v. *Hersey*, 86 Me., 394.

Judgment for defendant.

BUTLER'S CASE.

York. Opinion March 13, 1929.

WORKMEN'S COMPENSATION ACT. COURSE OF EMPLOYMENT DEFINED.

Under the Workmen's Compensation Act an injury to be compensable must arise out of and also in the course of employment.

An accident arises in the course of the employment if it occurs, as to time, place and circumstances, during employment, or in the course of activities incidental thereto, at a place where the workman may properly be found and under circumstances that negative the idea of voluntary self infliction or any statutory bar.

The course of employment covers the period between the workman's entering his employer's premises and his leaving them within a reasonable time after his day's work is done.

In the case at bar it nowhere appears in the evidence that the employer knew and allowed the practice of parking automobiles by its employees on its grounds.

The employee on the day of the accident had parked his car in a hazardous place. No evidence appeared that using this place and such parking was customary among the employees, so that the employer was chargeable with knowledge of the practice. The injury was therefore not compensable.

On appeal. A workmen's compensation case where injuries received by an employee were sustained while cranking his automobile parked on his employer's premises. Employee contended that the premises wherein parking was had without objection of the employer, were not safe for the purpose.

The cause was heard on an agreed statement of facts. Compensation was awarded and an appeal taken. Appeal sustained. Case remanded for further evidence.

The case sufficiently appears in the opinion.

Francis R. Butler, pro se.

Harris & Wilson, for respondent.

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

BARNES, J. Appeal from a decree awarding compensation under the Workmen's Compensation Act, on the sole ground that the injury complained of did not arise out of and in the course of the workman's employment.

Instead of testimony as to the occurrence of the accident and the circumstances attendant thereon, we have an agreed statement of facts, from which we learn that the employee was a factory worker whose automobile was parked on his employer's premises, and that there was no rule prohibiting employees from parking there:

Further, that in front of the car, as it stood when the employee at the end of the day's work approached it, was a three foot drop in the ground and about eight feet distant therefrom the wall of the factory building:

That, failing to set the engine of his car in motion by means of the starter, the employee pulled up the emergency brake and proceeded to "crank" the car; that the car rolled forward, took the

drop and pinned its man against the building, breaking his wrist.

To be compensable an injury to a workman must arise out of and also in the course of his employment.

An accident arises in the course of the employment if it occurs, as to time, place and circumstances, during employment, or in the course of activities incidental thereto, at a place where the workman may properly be found, and under circumstances that negative the idea of voluntary self infliction or any statutory bar.

Westman's Case, 118 Me., 133; *Mailman's Case*, 118 Me., 172; *Albert E. White Petr.*, 120 Me., 62; *Johnson* v. *State Highway Commission*, 125 Me., 443.

That the course of his employment covers the period between the workman's entering his employer's premises and his leaving them within a reasonable time after his day's work is done, is settled, in *Robert's Case*, 124 Me., 129.

As to time and place of the accident the employee is within the coverage of the statute.

But there must be evidence that the accident arose out of the employment, and for this we have only the agreed statement to enlighten us. The associate legal member announced in his decree: "The automobile used seems apparently necessary in going to and from employee's home." No such fact is stated among those agreed upon. And it nowhere appears that the employer knew and allowed the practice of parking on its grounds.

The statement goes only so far as to say, "there was no rule prohibiting the employees from parking on the respondent's premises." The employee, on the day of the accident, had parked his car in a hazardous place. If there were evidence that the employer had provided this place for the parking of cars by his employees, or evidence that using this place for such parking was customary among the employees, so that the employer was chargeable with knowledge of the practice, the inference drawn would have some basis in fact.

Appeal sustained.
Case remanded for further evidence.

CLAIR W. FOSTER *vs.* CONGRESS SQUARE HOTEL COMPANY.

Cumberland. Opinion March 19, 1929.

WORKMEN'S COMPENSATION ACT. RIGHT OF EMPLOYEE TO BRING COMMON LAW SUIT AGAINST A TORTFEASOR. P. L. 1921, CHAP. 222, SEC. 8. EXCEPTIONS. MOTION FOR NEW TRIAL.

By applying for and accepting compensation under the amended Workmen's Compensation Act, the injured person does not lose his right to bring common law action against the tortfeasor who is other than the employer.

If the employer or insurance carrier within ninety days after written demand so to do fails or neglects to bring suit against the tortfeasor, the injured employee may bring such action; but his right to do so is suspended during the ninety-day period.

The right of the injured employee to bring common law action does not require the declaration to allege that the plaintiff had exercised his option and had been awarded compensation, nor that the employer or insurance company failed to pursue its remedy against the tortfeasor within ninety days after written demand by the plaintiff so to do.

The employer or insurance company may waive its right to bring action against the tortfeasor before the expiration of the ninety-day period, but such waiver does not affect the rights of the employee to bring his common law suit.

In order to sustain an exception, it must be clearly shown that the rights of the excepting party have been prejudicially affected.

Where an exception is taken to the instructions given by the presiding Justice in his charge, the entire charge must be included in the record; excerpts from that charge favorable to the excepting party are not sufficient.

A motion for a new trial will not be granted unless the moving party clearly shows that the jury in rendering its verdict was moved by passion, prejudice, or failure to comprehend the evidence.

In the case at bar although the plaintiff was awarded compensation against his direct employer for the same injuries for which he sought a recovery from defendant, inasmuch as his employer or insurance carrier, within ninety days after demand to do so, failed to bring action against the defendant, plaintiff was entitled to maintain such an action under the provision of Chap. 222, Sec. 8, P. L. 1921.

No error appeared in the instructions given to the jury and a careful examination of the testimony disclosed no reason to overturn their findings.

On exceptions and general motion for new trial by defendant. An action on the case to recover damages for personal injuries sustained by plaintiff in an accident caused by the alleged negligence of defendant company.

The defendant pleaded the general issue with the brief statement to the effect that the plaintiff claimed and was awarded compensation against his employer for the same injuries for which he is now seeking recovery, and under such circumstances was barred from bringing this common law action.

The jury rendered a verdict for the plaintiff in the sum of $5,000.

To the refusal of the presiding Justice to admit certain testimony and to certain instructions given, the defendant seasonably excepted, and after verdict, filed a general motion for new trial.

Motion and exceptions overruled.

The case fully appears in the opinion.

Cook, Hutchinson, Pierce & Connell, for plaintiff.

Hinckley, Hinckley & Shesong, for defendant.

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

PHILBROOK, J. This is an action brought to recover damages for personal injuries sustained by the plaintiff because of the alleged negligence of the defendant.

Epitomizing his amended and substituted declaration, contained in three counts, it is the plaintiff's claim that on the ninth day of January, 1927, and for some time prior thereto, the defendant was engaged in constructing a hotel building and in connection with, and as an aid to that construction, owned, maintained and operated a hoisting elevator located in said building and running from the top floor thereof to the basement, said elevator being used to raise and lower materials and workmen to and from different floors of the building during the process of construction. He describes the control of the elevator by means of attachments to the engine used to raise and lower the same, which attachments, in part, consisted of a steel cable wound around a drum having ratchets

and pawl which, when kept in proper repair, held the drum and prevented the elevator from descending or falling. He claims that at the time of the accident, and for some time prior thereto, the defendant had carelessly and negligently permitted the pawl to become worn, bent, out of shape, defective, unfit, and unsafe, so that it did not properly hold the drum stationary, and at times due to its defective condition, slipped out of place, thereby permitting the drum to revolve, the cable to unwind, and the elevator to fall or descend, all of which the defendant knew or in the exercise of reasonable care should have known.

On January 9, 1927, so says the plaintiff, he was employed by a sub-contractor on the building, Leo I. Bruce by name, and on that day, as part of the regular duties incident to his employment, was engaged in straightening some heavy steel jacks on the elevator which was then standing at the twelfth floor of the building; that due to the defective condition of the pawl, and without negligence on his part, the elevator fell suddenly and without warning to him; that by reason thereof he lost his balance, plunged forward into the elevator shaft just above the descending elevator and dropped a distance of approximately thirteen stories. His injuries were severe and the jury awarded him a verdict for five thousand dollars. The case comes to us on the usual formal motion alleging that the verdict is against law, against the charge of the Justice presiding, against evidence, against the weight of evidence, and because the damages are excessive. A bill of exceptions also accompanies the motion.

Defendant pleaded the general issue "and for a brief statement of special matter of defense to be used under the general issue pleaded, the said defendant further says that the plaintiff, who was the injured employee, claimed and was awarded compensation against his employer for the same injuries for which he is now seeking recovery, and under such circumstances is barred from bringing this common law action."

Exceptions. Nine exceptions were allowed but exceptions two and three were not pressed. The first exception is to the refusal of the presiding Justice to direct a verdict for the defendant. This exception is based upon the legal questions raised by the brief statement of special matter of defense just quoted, which, in effect, is a

plea in bar. In his brief counsel for defendant frankly states that since this exception would be argued in detail he did not deem it necessary to consider the general motion. The validity of this exception depends upon the interpretation and application of Section twenty-six of our Workmen's Compensation Act.

Omitting certain parts not bearing upon the present controversy, that section in its latest amended form, P. L. 1921, Chap. 222, Sec. 8, reads as follows:

> "When any injury, for which compensation is payable under this act, shall have been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee may, at his option, either claim compensation under this act or obtain damages from or proceed at law against such other person to recover damages; and if compensation is claimed and awarded under this act, any employer having paid the compensation, or having become liable therefor, shall be subrogated to the rights of the injured employee to recover against that person." . . . "The failure of the employer or compensation insurer in interest to pursue his remedy against the third party within ninety days after written demand by a compensation beneficiary, shall entitle such beneficiary or his representatives to enforce liability in his own name, accounting for the proceeds in the manner further provided by the act."

The plaintiff admits that with reference to this accident he did file with the Industrial Accident Commission a petition for award of compensation against his employer, Leo I. Bruce, and that he received compensation for a period of time under an award made by the Commission. Therefore the defendant claims that this proceeding for compensation on the part of the plaintiff deprives him of any right of common law action against the Congress Square Hotel Company; that any right of action he might have against this defendant must arise out of the statute known as the Workmen's Compensation Act; and being dependent upon the statutory action, his writ must show that the action is brought under the statute and must be in conformity thereto.

Hence, the defendant argues that the plaintiff should set forth,

in his declaration, the following essentials in order to present a proper action under the statute:

First — That he was an employee of Leo I. Bruce.

Second — That he exercised his option and elected compensation.

Third — That compensation was claimed and awarded.

Fourth — That the employer or compensation insurer in interest failed to pursue his remedy against the third party within ninety days after written demand by the plaintiff.

None of these allegations appear in plaintiff's writ.

In the light of the statutory provision, whereby the injured person may enforce liability in his own name against the tortfeasor, upon the failure of the employer or compensation insurer to pursue his or its remedy against the third party within ninety days after written demand by a compensation beneficiary, the first exception raises four points for consideration:

I. By choosing to apply for and accepting compensation under the Workmen's Compensation Act, does the injured person, *ipso facto*, lose his right to bring a common law action against a tortfeasor, who is other than the employer.

II. If he thereby loses that right, and is confined to an action to be brought only when the employer or insurance carrier has refused or failed to bring action after the written request above referred to, what must he allege in his declaration.

III. What is the effect upon the right of the injured person to bring suit if the employer or insurance carrier waives the right to bring action under the statute.

IV. If such waiver is shown may the injured person bring suit before the expiration of ninety days after the written demand provided for by statute?

No one of these four points has ever been presented to this court for decision.

The right of the compensation beneficiary to bring action against the tortfeasor, when the employer or compensation carrier fails to bring such action within ninety days after written demand by the beneficiary so to do, is provided by the amendment made in 1921. As our Compensation Act stood before this amendment, we should not hesitate to say that by the overwhelming weight of authority

the beneficiary would be barred from bringing suit against the tortfeasor if he applied for and was awarded compensation. The amendment of 1921 introduced a new and radical change in favor of the injured person.

Examination of the compensation acts of forty-three states and three territories, the other five states having no such acts, reveals the fact that in only one of them, Wisconsin, is to be found any provision similar to that in our amendment of 1921. While the Wisconsin court has ruled upon many provisions of its compensation act, it has not, so far as we can discover, ruled upon any of the four points here being considered. The paucity of cited authorities is therefore thus explained.

The amendment of 1921 is remedial and like other acts of that nature is to be so construed as most effectually to meet the beneficial end in view and to prevent a failure of the remedy. *Quimby* v. *Buzzell*, 16 Me., 470. The liberal construction rule imposed by the legislature, with a view to carrying out the general purpose of the Act, applies to Section 26. *Donahue* v. *Thorndike & Hix*, 119 Me., 20.

An injured employee, applying for and receiving compensation, when his injuries result in total disability, may recover only for a fixed amount and for a fixed time. His recovery is also limited to cases where the usefulness of a member or any physical function thereof is permanently impaired. In cases where disability is less than total, proportionate limitations exist. It is common knowledge that tortious injuries may result in damages exceeding in amount, and varying in kind from, any damages recoverable under the Compensation Act.

In *Borgnis* v. *Falk Company*, 147 Wis., 327; 133 N. W., 209; 37 L. R. A. (N. S.), 489, a case frequently cited, the Wisconsin court refers to its workmen's compensation act as follows:

> "The legislature, in response to a public sentiment which can not be mistaken, has passed a law which attempts to solve certain pressing problems which have arisen out of the changed industrial conditions of our time. It has endeavored by this law to provide a way by which employer and employee may, if they so choose, escape entirely from that very troublesome and economically absurd luxury known as 'personal injury litiga-

tion,' and resort to a system by which every employee not guilty of wilful misconduct may receive at once a reasonable compensation for injuries accidentally received in his employment, under certain fixed rules, without a law suit and without friction."

Under compensation acts not having provisions like the 1921 amendment of our Act, if the injured employee suffers damage through the tort of a third person, but to avoid the "absurd luxury known as personal injury litigation," seeks compensation at the hands of his employer, he finds himself faced with a plea in bar if he later seeks to obtain from the tortfeasor such additional damages as he would be entitled to had he chosen to first bring suit at common law. Moreover, under such compensation acts, if the employer, subrogated to the right of the employee to bring suit, declines to indulge in the "absurd luxury known as personal injury litigation," then the tortfeasor may thereby enjoy immunity from his wrong.

Under the rules of construction just above stated, we do not hesitate to say that the inability of the injured person to obtain full damages, and the immunity of the tortfeasor, are among the evils which the legislature intended to remedy by the amendment of 1921.

That amendment, granting an employee the right to bring a common law action, even though compensation had been awarded and received, when the employer fails to pursue the subrogated right, after written demand to do so, clearly shows that the legislature did not intend that the employee should lose his right of common law action against the tortfeasor, but the right to institute such suit is suspended during the period specified in the statute, and revived if the employer fails to act in accordance with the demand. During the ninety-day period after demand to bring suit, no one but the employer could institute the action against the tortfeasor which the common law gave the employee the right to institute. But the right of the employer to bring suit came to an end, not by the passage of time, but by the voluntary relinquishment of that right through express waiver. Such waiver is both possible and allowable. *Smith* v. *Boiler Co.*, 119 Me., 552. The provision for subrogation in the Compensation Act was made for the benefit of the employer

and the insurance carrier. "A statutory, or even a constitutional provision, made for one's benefit, is not so sacred that he may not waive it." *Bank* v. *Marston*, 85 Me., 488.

If, instead of waiving the subrogated right, the employer or insurance carrier had chosen to bring suit, he or it would have the full ninety days after demand in which to institute the action, or could have done so on the very day of demand. If waiver was the answer to demand to bring suit, why could not the employee proceed at once? The statute contains no provision forbidding it. The liability of the tortfeasor is not affected by the ninety-day provision and provides him no adequate defense in this action.

After the waiver, the plaintiff commenced the instant action "in his own name" as the statute provides. He did not sue a statutory action. He sued the action which the common law gave him when and because he became injured. One suing a statutory action must allege and prove defined conditions, but that is not this case. When the right of the employer to bring suit had expired by waiver, then the employee sued the common law action which he possessed.

Subrogation, under the statute, is a matter of defense, and the defendant apparently appreciated that fact when it pleaded as it did by way of brief statement. Since the Workmen's Compensation Act is remedial, and directed toward simplification of procedure, such simplification would be denied if it should be held that the plaintiff should allege and prove the four essentials, as above claimed by defendant. The issues of fact in the case at bar center about tortious liability of the defendant, as governed by familiar legal principles, and the plaintiff should not be required to allege and prove those matters which are not issues.

This case is easily distinguishable from *Donahue* v. *Thorndike & Hix*, supra, and *Creamer* v. *Lott*, 124 Me., 118. In the former the action was brought in the name of an injured employee by and for the benefit of the insurance carrier. The Court there said that the action "is in form an action at common law." The defendant objected to all evidence tending to show payments to the plaintiff by the insurance carrier on the ground that there was no allegation of any such payments in the declaration. The evidence was received *de bene*, the contention of the defendant being that the action could not be maintained for the benefit of the insurance carrier

without such allegation and proof. At the close of the evidence, the plaintiff offered an amendment declaring that she had received compensation, and that at the time of her injury she was in the employ of a person who was an assenting employer under the Workmen's Compensation Act. The Court held that the liability of the tortfeasor to pay damages was not affected by the election of the injured person to receive compensation, and that the essential allegations as to defendant's liability must be the same whether the action be brought in the name of the employer or employee. The Court further held that the amendment, though allowable, was unnecessary and the evidence of payment by the insurance company immaterial.

In *Creamer* v. *Lott*, supra, there was no proof that compensation had ever been claimed and awarded, and the Court held that the action, being for the benefit of the insurance company, could not be maintained since claim and award of compensation were conditions precedent to instituting the suit then at bar. In the Donahue case, compensation had been paid but there was no allegation thereof, and the court did not require technical accuracy of pleading. In the Creamer case, no compensation had been paid. But in both cases, the actions were brought under statutory provisions, without which the two actions could not have been brought. In the case at bar, the plaintiff brings an action which is his right to bring under the common law.

In *McGarvey* v. *Independent Oil and Grease Co.*, 146 N. W., 895, the Wisconsin court says, "It is conceded, as the fact is, that in case of an employee in course of his employment being injured by the actionable negligence of a third person, a *statutory* remedy accrues to him for compensation against his employer, and a *common law* remedy against such third person." (Italics ours.) This shows error in the defendant's claim that the action at bar is statutory. Since it is an action at common law, the claim of the defendant as to the four essentials in the declaration is not well founded. The first exception can not be sustained.

By its fourth exception the defendant objects to any parole attempt to prove the contents of a letter unless it first be shown that the same has been lost or destroyed, or in the hands of the adverse party who fails to produce it after proper notice.

From the record we learn that under date of June 15, 1927, the plaintiff, by his attorneys, wrote the insurance carrier and the plaintiff's employer, making demand that they pursue their subrogated right to bring action against the tortfeasor. (Ex. 1.) Under date of June 27, 1927, (Ex. 2) the insurance carrier answered the letter of June 15, waiving its right to bring such action. In that letter the writer distinctly stated the subject of his communication as "Re: *Clair Foster* v. *Leo I. Bruce.*" In the body of the letter he inadvertently used the name of Bruce where the name of Foster should have been used. Counsel for plaintiff asked the writer, "After that (meaning after June 27) did you receive a letter from me confirming your understanding and suggesting to you that where you had used the name 'Bruce' in the first paragraph of your letter you had probably made a mistake and meant 'Foster'?" The witness testified that he did make that mistake. The last named letter was not offered in evidence, nor was it shown to have been lost or destroyed, nor in the hands of the adverse party who failed to produce it after proper notice. Against objection the question and answer were admitted. In the present case that ruling could not possibly prejudice the rights of the defendant. While the testimony was technically inadmissible and could properly have been excluded, it was practically harmless. To sustain exceptions for such a cause would be more nice than wise. *Bessey* v. *Herring*, 121 Me., 539; *Hovey* v. *Hobson*, 59 Me., 256, 273.

Exceptions five and six may be properly discussed together. Exception five arose from interrogation of S. F. Prime, agent of the insurance carrier, authorized to adjust claims in Maine, as to whether he had authority to state in Exhibit 2 that the insurance carrier would not bring action under its right by subrogation. Exception six arose from interrogation of the same witness as to the intention of his company in the future not to bring action against the tortfeasor. The agency and general authority of Mr. Prime as to adjustment of claims was practically admitted by the abandonment of exceptions two and three, and in argument of exceptions five and six the defendant relies only upon the ground of immateriality. The admission of testimony that is merely irrelevant or immaterial, and which is not shown to have been prejudicial, is not the subject of exception. *Davis* v. *Alexander*, 99

Me., 40. In the case at bar the defendant asserts but does not show the admitted testimony to be prejudicial.

Exception seven relates to the exclusion of a certain interrogatory in the deposition of Arthur W. Allen, who was employed by the defendant as its construction manager on the building being erected in January, 1927, being the building where the accident to the plaintiff occurred. The deposition was offered, and the excluded interrogatory made, by the defendant. The excluded interrogatory is as follows:

"Q. If any of the teeth in this particular ratchet had been broken, or worn to any extent, so that they would not hold, would you have noticed it from your examination?

Mr. Connell (Counsel for plaintiff): The inspection up to that time had been casual.

Mr. Hinckley (Counsel for defendant): Here is a straight question, whether he would have noticed it.

The Court: I shall exclude it."

The condition of the teeth of the ratchet was a fact to be decided by the jury, under proper testimony, but to allow the witness to state whether he would have noticed it is invading the province of the jury. Proper inquiries as to the extent of his observation, his opportunity to do so, and the circumstances surrounding his opportunity, would have been admissible to show whether he, or any proper person, could have determined whether the teeth in the ratchet had been broken or worn to any extent. These inquiries would also lay a foundation for the jury to determine whether the witness would have noticed the condition of the teeth. This issue could then be decided by the jury and not by the opinion of the witness. The question, in the form in which it stands, was properly excluded.

Exception eight relates to the exclusion of certain questions addressed to Augustus G. Lejonhud who, in substance, had testified that he was a hoisting engineer; that he had made a careful examination of all parts of the machinery used in connection with the operation of the elevator in question; that he had been a hoisting engineer for fifteen years, two-thirds of that time employed in this kind of work; that he was thoroughly familiar with this particular kind of a hoisting engine and its workings. While giving

his testimony, he was shown the dog used in holding the ratchet, it being claimed that this had been bent on account of the weight while holding the elevator in the ordinary way.

The excluded questions are as follows:

"Q. Having in mind, of course, the dog used in connection with the operation, in what ways could it be bent? (Objected to.)

The Court: That is uselessly general. Come right down to something definite.

Q. Assuming that the elevator started to drop, and the dog was thrown into the ratchet, would that bend it? (Objected to.)

The Court: There is no testimony that he knows how this machine was geared and rigged at the Portland plant. (Question excluded.)

Q. Then I will ask again: Can you conceive of any way that it could be bent except by throwing it into the ratchet while the elevator was descending? (Objected to.) (Excluded.)

Q. Would there be any possible way, that you can think of, of bending it while it is in place? (Objected to.)

The Court: That is, engaged in the ratchet?

Q. Yes, engaged in the ratchet. While it is still in the ratchet performing its ordinary work of holding the elevator, would there be any possible way of bending it while there? (Objected to.)

Q. Would there be any way that that could be bent while in its place holding the elevator in the ordinary way?"

After brief discussion between counsel, these questions were excluded.

In argument of such exclusion, defendant urges that it was an abuse of judicial discretion to refuse its admission. No other ground in support of the exception is advanced. We can not sustain the exception upon this ground.

Exception nine, as it appears in the bill of exceptions, begins with this language:

"At the close of the charge of the Presiding Justice the defendant took exceptions as follows: (Exceptions taken by the defendant to that part of the charge stating effect on dog

under different uses, and especially to that part of the charge to the effect that the dog would be bent under certain pressure.) Part of the Judge's charge covering this matter is as follows."

Then follows only an excerpt from the charge. The entire charge does not appear in the record. If charge is objected to, it must be printed; quoting objectionable language in the bill of exceptions is insufficient. Exceptions have never been allowed to the alleged part of the charge contained in the bill of exceptions. *State* v. *Winslow*, 102 Me., 399.

Motion. Since the record does not show that any errors occurred in the charge with reference to the ordinary defenses, such as burden of proof, contributory negligence, assumption of risk, and negligence of fellow servant, we must assume that the law covering these points was correctly stated and that under proper instructions these issues of fact were decided by the jury in favor of the plaintiff. After a careful examination of testimony, we are unwilling to overturn the findings of the lawfully ordained arbiters of issues of fact.

Motion and exceptions overruled.

ANDREW WILLBAND *vs.* KNOX COUNTY GRAIN CO. ET ALS.

Knox. Opinion March 19, 1929.

EQUITY. EASEMENTS. COVENANTS RUNNING WITH LAND. FINDINGS OF FACT.

Under a bill in equity to enjoin the defendant, Knox County Grain Co., from interfering with the use of an easement of passage over the land of the plaintiff and the adjoining land of the defendant created for joint benefit of both, held:

That the findings of fact by the sitting Justice being based on evidence sufficient to support them must stand;

That his ruling that an easement where its width was not definitely determined by the parties in the instrument creating it must be held to be of such width as is reasonably necessary to serve the use for which it was created, was correct;

That this court is not the proper tribunal to pass on the alleged preferential nature of the contract between the plaintiff and the defendant Maine Central Railroad.

On appeal. A bill in equity brought by plaintiff to restrain defendant from removing or having removed by the Maine Central Railroad, what was known as spur track No. 42 at Rockland, Maine.

Premises of the plaintiff adjoined premises of the defendant, and plaintiff contended that an agreement made by prior owners of the several parcels created an easement on a portion of the land owned by defendant company, which easement ran with the land now owned by the plaintiff.

After hearing on the cause, the sitting Justice found for the plaintiff and filed a decree sustaining the bill and enjoining and restraining the defendant from removing the spur track while the contract between the plaintiff and the Maine Central Railroad remained in force.

Appeal was thereupon taken by defendant.

Appeal dismissed. Decree affirmed with additional costs.

The case fully appears in the opinion.

G. Allen Howe,

Harry Manser, for plaintiff.

Locke, Perkins & Williamson, for defendant.

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

WILSON, C. J. This case originated in a bill in equity, and after a decree *pro confesso* had been taken against the Maine Central Railroad Company, a hearing was had upon the bill, answer of the Knox County Grain Company and replication and proof. From the decree of the presiding Justice sustaining the bill, the Knox County Grain Company appeals to this court.

The principal issue involved is the plaintiff's right to use for railroad switching service an easement of way, of which the center line was found by the sitting Justice to be the dividing line between the premises of the plaintiff on the north and the premises of the Knox County Grain Company on the south, in accordance with the provisions of an agreement for the use thereof entered into by and

between the predecessor in title of the plaintiff and the predecessors in title of the Knox County Grain Company; and the plaintiff seeks to restrain the Knox County Grain Company from now removing or having removed the railroad track constructed by the Maine Central Railroad over and along said way.

The evidence is principally documentary and there seems to be very little in dispute between the parties as to any of the facts of the case which, so far as material to the decision of this case, are as follows: The premises now owned by the plaintiff and the premises now owned by the Knox County Grain Company, at one time comprised an entire undivided tract of land owned in fee simple by one L. N. Littlehale, who, while such owner, on November 14, A. D. 1908, entered into a written agreement with the Maine Central Railroad for the construction and operation of a spur track across the premises so owned by him. This spur track was thereafter constructed upon its present location on the face of the earth, and was used and operated by the Maine Central Railroad for the benefit of Littlehale and his tenants until December 31, 1910, when Littlehale by his deed of that date conveyed a portion of the premises so owned by him, viz.: that part or portion thereof lying southerly of the southerly track of the before mentioned spur track to the L. N. Littlehale Grain Company, which corporation by its deed dated December 31, A. D. 1913, conveyed all property acquired by it from Littlehale to one E. B. McAllister and one Ross L. Stevens upon certain trusts, but with power to convey by deed. Stevens resigned as such trustee and McAllister as the remaining trustee, by trustee's deed dated March 9, 1921, conveyed the property so conveyed to him in trust to one Charles M. Richardson and one Fred T. Studley; and the L. N. Littlehale Grain Company by its deed dated March 9, 1921, given for the apparent purpose of confirming the title to the premises so conveyed by McAllister, trustee, conveyed to Richardson and Studley the same premises conveyed to them by McAllister, trustee, except that the northerly boundary line of the premises so conveyed is described as the center line of the spur track. The Knox County Grain Company thereafter by proper mesne conveyance acquired all of the premises so conveyed to Richardson and Studley.

On March 26, 1921, and while Littlehale was the owner in fee

simple of all of the premises lying northerly of the southerly line of the spur track and Richardson and Studley were the owners of all of the premises lying southerly thereof, Littlehale, as party of the first part and Richardson and Studley as parties of the second part, entered into a certain written agreement concerning the operation and use by them of said track, and in this agreement it is provided, "that whereas the aforesaid parties are owners in common of a right of way between property recently conveyed by parties of the first to the parties of the second part, and the Armour Building, so-called, owned by said party of the first part, said right of way being used by the Maine Central Railroad for a spur track used in common by parties of the first and second part, agree that said right of way shall not be disturbed or changed in any way by either party of the first or second part without the consent of both parties to such change, and that so long as either party may desire to use said right of way or any part of it for the purpose for which it is now used and has heretofore been used, neither party shall interfere in any way except by reason of necessity with the peaceable use of said right of way for the aforesaid purposes; and it is mutually understood that this agreement shall remain in full force perpetually and shall be binding upon our administrators, executors, successors or assigns until discontinued by mutual agreement." This agreement was duly recorded under date of March 28, 1921, in the Knox County Registry of Deeds.

After the premises lying southerly of the southerly line of the spur track had been conveyed to Richardson and Studley, the plaintiff became interested in the purchase of all the premises lying northerly of said spur track, but would not consummate a purchase thereof until the rights of Littlehale on the one part and Richardson and Studley on the other part in and to the use of the spur track had been fixed and determined by proper agreement, and after the spur track agreement dated March 26, 1921, had been duly executed and delivered and had been exhibited to the plaintiff and had been recorded in the Knox County Registry of Deeds, he accepted a conveyance from Littlehale of all the premises lying northerly of the center line of the spur track. In the deed from Littlehale to the plaintiff conveying this property to him dated March 26, A. D. 1921, certain easements were also conveyed de-

scribed therein as follows: "Also the free and uninterrupted use of the driveway on the easterly side of the Armour Building aforesaid, and the free and uninterrupted use of any and all other rights of way appurtenant or belonging to the premises herein conveyed, with particular reference to all rights in the right of way lying southerly of the aforesaid premises and occupied by the spur track of the Maine Central Railroad Company.

This deed from Littlehale to the plaintiff was duly recorded under date of March 30, 1921, in the Knox County Registry of Deeds, and the plaintiff claims that by virtue of the provisions of the spur track agreement dated March 26, 1921, an easement of way for spur track facilities was created, which, until terminated in accordance with the provisions of this agreement, would run as appurtenant to the land now owned by the plaintiff, and that such easement was assigned, transferred and conveyed to the plaintiff by virtue of the provisions of the deed from Littlehale dated March 26, 1921, and that the Knox County Grain Company at the time of the purchase of the property now owned by it had constructive notice of all of the plaintiff's rights so acquired by reason of these instruments being then duly of record in the Knox County Registry of Deeds.

It further appears, although Littlehale had assigned all of his rights and interests in the spur track agreement with the Maine Central Railroad dated Nov. 14, 1908, to the Knox County Grain Company by assignment dated April 1, 1921, that on and after December 10, 1910, the date of conveyance of the land owned by Littlehale lying southerly of the southerly line of the spur track, until the 12th day of March, 1923, this spur track was amicably used in common by Littlehale and the plaintiff as his successor in title on the one part, and by Richardson and Studley and their successors in title, including the Knox County Grain Company on the other part; that on the 12th day of March, 1923, the Knox County Grain Company notified the plaintiff that it had discovered that the plaintiff had "no valid right to spur track between the two properties" and notified the plaintiff to cease setting cars on same until these rights had been established. This notice was apparently ignored by the plaintiff, who continued to use the track for the benefit of himself and his tenants.

The original agreement with the Maine Central Railroad having been duly terminated and the Knox County Grain Company declining to renew the same or enter into another agreement with the Maine Central Railroad or with the plaintiff in regard to the further and continued use and operation of the spur track, the plaintiff under date of December 21, 1926, entered into an agreement with the Maine Central Railroad for the continued use of the spur track for supplying spur track service to the plaintiff and its tenants.

This latter agreement with the Maine Central Railroad provided, *inter alia*, not only for the same width of graded roadway as was contained in the original agreement with the Maine Central Railroad, viz.: of not less than 16 feet in width on excavations and 14 feet on embankments, but in addition provided for sufficient clearance space for the passage along the track of the cars of the Maine Central Railroad Company, which provisions for clearances the plaintiff alleges are the usual and proper requirements for clearances for spur tracks in similar situations and the usual requirements of the Maine Central Railroad.

The Knox County Grain Company then threatening to remove or cause to be removed so much of the spur track as was constructed and located over and upon its premises, the plaintiff proceeded by proper process for appropriate relief. The Knox County Grain Company, although admitting the ownership of the premises, with boundaries and acquisitions as hereinbefore set forth, and the execution, delivery and existence of the spur track agreement dated March 26, 1921, contends:

That the plaintiff is not before the court with clean hands;

That the spur track agreement dated March 26, 1921, did not create an easement that would run as appurtenant to the land now owned by the plaintiff;

That whatever rights of way or otherwise the plaintiff acquired under the deed from Littlehale to him dated March 26, 1921, such rights were only those created by and existing under the terms and provisions of Littlehale's agreement with the Maine Central Railroad Company dated November 14, 1908;

That if the plaintiff by the provisions of the spur track agreement dated March 26, 1921, and the deed from Littlehale to him

dated March 26, 1921, acquired any easement over and upon the land now owned by the Knox County Grain Company, he did not acquire an easement greater in extent or use than the one existing on March 26, 1921, the date of the execution and delivery of the spur track agreement, and that the clearance provisions of the plaintiff's contract with the Maine Central Railroad dated December 21, 1926, provides for the use of such easement to a greater extent.

That the agreement entered into by and between the plaintiff and the Maine Central Railroad Company dated December 21, 1926, is preferential and therefore in violation of the terms and provisions of the Interstate Commerce Act, Chap. 104, Sec. 3, 24 Stat. 380, as amended February 28, 1920, U. S. Compiled Statutes (1926), Chap. 49, Sec. 3.

We will consider these defenses interposed by the Knox County Grain Company in order as set forth above.

The Knox County Grain Company says that the plaintiff is not in court with clean hands and submits citations from many decisions in support of the well-known maxim that "He who comes into equity must come with clean hands," and directs the attention of the Court to excerpts from the testimony wherein it appears that the plaintiff on March 26, 1921, was and for a long time prior thereto had been engaged in a business of similar kind and character to the business then carried on by Richardson and Studley; that the plaintiff or corporations in which he was a stockholder and an officer thereof, were creditors of the L. N. Littlehale Grain Company, of which "Littlehale was the principal owner," and that they had been insisting upon payment of the account then due and owing from said L. N. Littlehale Grain Company; that the plaintiff knowing, as the Knox County Grain Company alleges, that Richardson and Studley would not enter into an agreement relating to the use of the spur track, if they appreciated the fact that they were to have a competitor "next door," insisted that Littlehale should obtain such an agreement before the plaintiff would purchase from Littlehale the premises conveyed to him by deed dated March 26, A. D. 1921.

The Knox County Grain Company, also in connection with this matter, calls the attention of this court to a certain non-competing

agreement, so called, which was entered into under date of March 9, 1921, by and between Littlehale and the L. N. Littlehale Grain Company on the one part, and Richardson and Studley on the other part, whereby, in brief, it was agreed that Littlehale and the L. N. Littlehale Grain Company would not directly or indirectly enter into or engage within a limited time and territory in any business in competition with that then carried on and conducted by Richardson and Studley, which agreement was thereafter duly assigned to the Knox County Grain Company, but as the Knox County Grain Company admits that the plaintiff did not have any knowledge of this non-competing agreement at the time the spur track agreement dated March 26, 1921, was executed and delivered, this court is of the opinion that any rights acquired by the Knox County Grain Company or its predecessors in title under the provisions of this agreement can not be of avail to it in this instance.

Moreover, after a careful examination of all the acts and conduct of the plaintiff in connection with this matter as set forth in the evidence, this court deems such acts and conduct as merely those of ordinary care and prudence, and that they did not approximate that unjust, unfair, unreasonable, unconscionable or inequitable conduct which has induced courts of equity to withhold their aid from those, seeking relief therein, guilty of such conduct.

This court is further of the opinion that the spur track agreement dated March 26, 1921, did create an easement which until terminated in accordance with the provisions thereof would run as appurtenant to the land now owned by the plaintiff. No other interpretation can be put upon the language set forth in this agreement. *Douglass* v. *Riggin*, 123 Md., 18. No uncertainty or doubt can arise as to the intention of the parties where the parties have expressly declared that "this agreement shall remain in full force perpetually and shall be binding upon our administrators, executors, successors and assigns until discontinued by mutual agreement." Any other interpretation would be in violation of the common and ordinary understanding of the language set forth and contrary to the plain intent of the parties so expressed. In *Whitney* v. *Union Railway*, 11 Gray, 359, cited with the approval of this court in *Herrick* v. *Marshall*, 66 Me., 435-439, the court says:

"When, therefore, it appears by a fair interpretation of the words of a grant that it was the intent of the parties to create or reserve a right in the nature of a servitude or easement in the property granted, for the benefit of other land owned by the grantor, and originally forming with the land conveyed one parcel, such right will be deemed appurtenant to the land of the grantor and binding on that conveyed to the grantee, and the right and burden thus created will respectively pass to and be binding on all subsequent grantees of the respective lots of land."

The claim of the Knox County Grain Company to the effect that the deed from Littlehale to the plaintiff conveyed in addition to the land therein described only such rights as Littlehale might have acquired under the terms and provisions of his agreement with the Maine Central Railroad Company dated November 14, 1908, is entitled to but brief consideration on our part, for it is plainly evident from an examination of the provisions of the deed from Littlehale to the plaintiff that the parties intended that the easement of way created under the spur track agreement dated March 26, 1921, was to be conveyed and not the transient use and occupation thereof.

Consideration has been given to the contention of the Knox County Grain Company that if the plaintiff acquired any easement of way over and upon the land now owned by the Knox County Grain Company by reason of the provisions of the spur track agreement dated March 26, 1921, and by deed from Littlehale to the plaintiff dated March 26, 1921, he did not acquire an easement greater in extent or use than the one existing on March 26, 1921, the date of the execution and delivery of the spur track agreement.

This court is familiar with the decisions of the courts of other states wherein it has been held that where a grant creating an easement is silent as to its use and limits, and a right of way at the place prior to the grant has been used for the purposes mentioned or intended in the grant, in such circumstances the limits of the way then existing are frequently adopted as the limits of the way granted. An examination, however, of these decisions shows that there were existent on the face of the earth at the time of the grant creating such way, certain natural boundaries or demarcations defining a right of way then existing, and the courts have held

in such cases that it was the intention of the parties to the grant that these boundaries or demarcations should be the limitations of the granted way.

Although we do not find any case exactly in point, we are of the opinion that the true rule applicable to the question immediately under consideration has been expressed by the courts in decisions upon questions submitted to them analogous to that now under consideration, extracts from which decisions, so far as pertinent, are as follows:

"But in those cases where there has existed no previous passage or way that can be regarded as in contemplation of the parties, then the intent of the parties must be determined by the condition of the property and the uses to which the property is to be put, and it will be held that such a way was in contemplation of the parties as was reasonably necessary and proper for the intended uses." *Barber* v. *Allen*, 212 Ill., 125.

"Where the width of a road or way granted be not defined in the deed, it will be construed to be a grant of so much as is reasonable for the purposes for which it is granted." *Davis* v. *Watson*, Appellant, 89 Mo. App., 15.

"It is well settled that where the grant of a road or way is silent as to its width, it will be held to be of the width suitable and convenient for the ordinary uses of free passage to and from the granted land, and if the particular object of the grant is stated the width must be suitable and convenient with reference to that object." *Drummond* v. *Foster*, 107 Me., 401-404; *Atkins* v. *Bordman*, 2 Met., 457.

"When an easement arises from unrestricted grant or reservation, the measure of right or use is its availability for every reasonable use to which the dominant estate may be devoted, which may vary from time to time with what is necessary to constitute full enjoyment of the premises." *Mahon* v. *Tully*, 245 Mass., 571.

We are, therefore, of the opinion that when an easement of way is created by express grant, reservation or exception, and the purpose or purposes for which it is to be used are set forth, but it is not otherwise limited or defined and no way is existent with definite limitations or boundaries upon the face of the earth where the proposed way is to be located, that it was within the contem-

plation of the parties creating such an easement that the limits of said way should be such as might from time to time be reasonable, suitable and convenient for the particular objects of the grant.

To apply this rule to the instant case, we hold that whereas there is no dispute between the parties as to the particular objects of the grant, viz.: railroad side track facilities, it was within the contemplation of the parties that the spur track should be used in every suitable and convenient way to give the parties reasonable side track facilities, and that its use might vary from time to time to conform to the reasonable rules and regulations of the Maine Central Railroad, or such other railroad company or carrier as might operate or run its trains or cars over and along the way for the benefit of the parties or either of them.

It is true that the servient tenement can not be burdened with the occupation of a greater width than is reasonably necessary for the use for which the right of way is granted, but as the presiding Justice in this case has found that the width of the clearances provided for in the contract between the plaintiff and the Maine Central Railroad dated December 21, 1926, are reasonable, and his decision on this matter being a finding of fact, is not to be reversed upon appeal unless clearly wrong, and as the appellant upon whom is the burden has not convinced us that this finding of the presiding Justice is clearly wrong, we hold that the present use of the easement by the plaintiff in conformity with the provisions of his contract with the Maine Central Railroad dated December 21, 1926, is in accordance with the rights heretofore acquired by him.

This court is not the proper tribunal to which, in the first instance, the alleged preferential nature of the contract between the plaintiff and the Maine Central Railroad Company dated December 21, 1926, should be submitted, for it is to be noted that it is not every discriminatory preference and prejudice which is declared illegal by the United States Commerce Act, but only those that are undue and unreasonable. Mr. Justice Brandeis in discussing certain disputed questions arising under the construction of the commerce act in *Great Northern Railroad* v. *Merchants Elevator Co.*, 259 U. S., 291, has said:

"Whenever a rate, rule or practice is attacked as unreasonable

or unjustly discriminatory, there must be preliminary resort to the commission."

Chief Justice Taft also has said in the case of *Western & Atlantic Railroad, Apt.* v. *Ga. Pub. Service Commission*, 267 U. S., 493: "The question whether the continuation of the service on this industrial track violates the interstate commerce act as unduly discriminatory, is one that involves issues not primarily for the Court, but is for the interstate commerce commission."

Appeal dismissed: Decree affirmed with additional costs.

REYNOLD'S CASE.

Kennebec. Opinion March 21, 1929.

WORKMEN'S COMPENSATION ACT. MENTAL DISABILITY.

Under the Workmen's Compensation Act a mental disability of an employee, which is the sequence of an injury received in the course of his employment and arising out of it, and which incapacitates him to do the work of his employment, is compensable.

On appeal. Petition of injured employee for further compensation, after having given "settlement receipt."

Further compensation was awarded, and from this decree appeal was taken, on the alleged ground that petitioner was not at the time of the hearing incapacitated by reason of a personal injury by accident arising out of and in the course of his employment.

Decree affirmed. Appeal dismissed.

The case sufficiently appears in the opinion.

Emery O. Beane, for claimant.

Robinson & Richardson, for respondent.

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

BARNES, J. This is an appeal from decree of the sitting Justice sustaining the finding of the Industrial Accident Commission, ordering payment of compensation, on petition of the employee, after termination of compensation for total disability.

On the third day of December, 1927, petitioner was employed as a carpenter, and, while installing forms, a part of his duties, he fell, injuring his left shoulder.

For this he received compensation until the second day of the following June, when he signed a "settlement receipt" with the insurance carrier, which was duly approved by the Commission.

Two weeks later he petitioned for further compensation on account of the same injury, and, under date of October 16, 1928, the Commission ordered compensation for temporary total incapacity from and including June 2, 1928, to and including October 10, 1928; any further compensation, total or partial to result from employee's own demonstration of his capacity.

The record proves that petitioner suffered both physically and mentally.

His bodily disability had progressed toward cure from total incapacity, while his left arm and shoulder were "fixed in a flexed position," by the application of a splint, adhesive plaster and bandages, through manipulation and electric treatment to the point where it was recommended that he begin using his arm.

Mental disability, if a sequence as the effect of injury to a great nerve centre, received in the course of his employment and arising out of it is compensable.

No citations of authorities are needed; from complete paralysis, or coma, down through the grades of disability that lessen an operative's capacity to do the work of his employment, mental inefficiency is to be considered in appraising the economic value of a man.

Petitioner here, a man of sixty years was, by the record, when hired, entirely efficient neither bodily nor mentally.

Due to a fracture of the ulna, his left arm was in an abnormal condition; and, on the testimony of the expert introduced by appellant, a cerebral abnormality had been affecting him for ten years.

In all apparent honesty of purpose petitioner, in the spring of 1928, attempted to take up the lightest and simplest of carpentry.

Promptly thereupon an agent of the carrier secured his signature to the "settlement receipt."

The record presents that petitioner was unable to work at the time of last hearing.

His mental deficiency was by appellant's expert termed cerebral congestion.

By whatever term named, if it prevented him from using his limbs or fingers to such degree that he could not do carpenter's work, or other labor, whether pressure on nerve centers of the brain, or mental pain or anguish, the record proves the disability then existed.

"Worry" is the term used by the Commissioner to express the mental abnormality.

He found the fact. He found it was either caused by the injury, or that a preëxisting state of mental abnormality or sub-normality was excited and caused to flame up with overpowering vigor by the injury.

The Commissioner's language is not technical. More precise diction might have been used by another.

But we find in the record evidence tending to substantiate the decree, as we understood it.

Hence the mandate must be,

Appeal dismissed.

STILLMAN ARMSTRONG *vs.* BANGOR MILL SUPPLY CORPORATION.

Washington. Opinion April 1, 1929.

CONTRACTS. DAMAGES.

The law implies an undertaking on the part of one contracting to do repair work, to perform the work in a reasonably skilful and workmanlike manner.

In the case at bar the plaintiff, owner and operator of a lath mill, sent a broken crankshaft to defendant's mill for repairs.

The work was improperly done, necessitating its return for realignment. Plaintiff's mill was shut down for six days with resultant loss of earnings and expenses of maintenance.

The jury were justified in finding that the defendant's obligation imposed by its contract was not fulfilled, and in including in their award of damages, loss of regular profits as well as operating costs.

On motion for new trial by defendant. An action in assumpsit based upon an implied warranty to perform labor in a workmanlike manner. Trial was had at the October Term, 1928, of the Supreme Judicial Court for the County of Washington, and at its conclusion the jury rendered a verdict for the plaintiff in the sum of $662.61. A general motion for new trial was thereupon filed by the defendant. Motion overruled.

The case sufficiently appears in the opinion.

Herbert J. Dudley, for plaintiff.

William S. Cole, for defendant.

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

STURGIS, J. General motion for a new trial in an action for damages resulting from the defendant's failure to repair a crankshaft from the plaintiff's lath mill in a workmanlike manner.

There is evidence to support the plaintiff's claim that in February, 1927, he sent a broken crankshaft from his lath mill at Vanceboro to the defendant's machine shop in Bangor for repairs, and that in making the repairs the defendant's workmen left the shaft out of alignment, necessitating its return from Vanceboro for realignment. The plaintiff's mill was shut down six days with resultant loss of earnings and expenses of maintenance. For these losses and expenses incidental to the crankshaft repairs he has a verdict.

It is an elementary principle that in the defendant's contract to repair the crankshaft the law implies an undertaking on its part to perform the work in a reasonably skilful and workmanlike manner. *Hattin* v. *Chase*, 88 Me., 237, 239; *Leighton* v. *Sargent*, 27 N. H., 460, 59 Am. Dec., 390; Williston on Contracts, Sec. 1014.

Upon the facts here in evidence the jury were justified in finding that this undertaking was not fulfilled.

The damages awarded were not excessive. Wages, fuel, board of men and horses, and other fixed operating charges, continued through the shut-down period. The mill, with an established business yielding regular profits, was "impeded in its efficient operation" by the defendant's failure to fulfill the obligations impliedly imposed by its contract. The jury could properly include this element of loss in their award. *Fibre Co.* v. *Electric Co.*, 95 Me., 318, 327; *Brown* v. *Linn Woolen Co.*, 114 Me., 266, 268. The damages awarded do not exceed the losses sustained.

Motion overruled.

PHILOMENE HACHEY *vs.* HERBERT J. MAILLET.

Androscoggin. Opinion April 1, 1929.

DAMAGES RECOVERABLE BY MARRIED WOMAN. MEASURE OF DAMAGES.

In an action to recover damages for personal injuries, a married woman living with her husband, can only recover for her suffering, mental and physical, resulting from the defendant's negligence.

She is not entitled to recover for loss of ability to do domestic labor in her home, nor for expenses for her medical or surgical treatment necessitated by the accident, for which she has not undertaken to be personally responsible.

There is no standard by which physical and mental suffering can be measured. It is in the determination of the jury to award such damages as seem to them to be fair compensation. It is, however, the duty of the Court to see that what should be regarded as the ultimate bounds of fair compensation are not greatly overstepped.

The standard by which to test the validity of an award of damages is the present worth of our money.

In the case at bar the plaintiff, a married woman, living with her husband, received a permanent displacement of the sacroilias joint with resulting nerve tension, justifying the opinion that she would be a permanent and chronic sufferer from sciatic pains. The veins of her leg were ruptured, developing varicose veins of a permanent character. For these injuries the jury award of damages in the amount of $4,806.67 was not excessive.

An action of tort to recover for personal injuries sustained by the plaintiff, a pedestrian, through the alleged negligent operation by the defendant of his automobile.

The jury rendered a verdict for the plaintiff in the sum of $4,806.67. A general motion for new trial was filed by the defendant. Motion overruled.

The case sufficiently appears in the opinion.

Clifford & Clifford, for plaintiff.

Harris & Wilson, for defendant.

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

STURGIS, J. General motion for a new trial after verdict for the plaintiff in a personal injury case. The grounds relied upon are that the verdict is contrary to the evidence and the damages awarded are excessive.

The evidence is somewhat lengthy and the material facts are in dispute. A detailed analysis of it here can neither prove necessary nor useful. It is sufficient to say that it has not been made to appear that the jury manifestly erred upon the issue of liability.

A careful reading and study of the record convinces us that the amount of damages awarded is not grossly excessive. The plaintiff, a married woman living with her husband, while not entitled to recover for loss of ability to do domestic labor in their home nor for the expense of her medical or surgical treatment for which she has not undertaken to be personally responsible — *Felker* v. *Railway & Electric Co.*, 112 Me., 255, 257 — may recover for all her suffering, mental and physical, caused by the accident.

It is admittedly difficult to measure pain and suffering in dollars and cents. This court has said in *Felker* v. *Railway & Electric Co.*, supra, "There is no standard by which physical and mental suffering can be measured. In the end the question must be left to the sound sense and good judgment of the jury, to award such damages as seem to them to be fair compensation." This statement of law, of course, is subject to the rule that "It is the duty of the Court to see that what should be regarded as the ultimate bounds are not greatly overstepped." *Ramsdell* v. *Grady*, 97 Me., 322; *O'Brien* v. *J. G. White & Co.*, 105 Me., 308, 316.

According to the opinions of the physicians in the case the weight which the jury may properly have given to this evidence, it appears that the plaintiff has received a permanent displacement of the sacroiliac joint with a resulting nerve tension, justifying the opinion that she will be a permanent and chronic sufferer to some degree from sciatic pains. The veins of her leg were ruptured, developing varicose veins of a permanent character. She continues in a nervous condition, and is "run down physically." She has taken repeated electric treatments, with an assurance only of relief, not of cure. She can recover only in this action for her suffering resulting from this accident. Measured in the present worth of our money, which is the standard by which to test the validity of this award, *Vallely* v. *Scott*, 126 Me., 597, we can not say that the jury has so greatly overstepped the ultimate bounds of just compensation for the injuries which this plaintiff received as to warrant a reversal of her verdict.

Motion overruled.

CECIL F. CLARK *vs.* ERNEST L. MORRILL.

York. Opinion April 1, 1929.

DECEIT. FALSE REPRESENTATION.

In an action of deceit, held:

That representations as to value are not actionable.

To sustain such an action, the statements must be as to matters of fact substantially affecting the subject matter and not a matter of opinion, or expectation;

A representation that a concern was doing a profitable business, if the party making it knew it was false and made it intending to induce action by another to his disadvantage, may be actionable;

Where, however, the party alleging he was deceived had an equal opportunity to learn the facts with the party who he alleges deceived him, he can not complain if he fails to use his own eyes and judgment. He has no right to rely on

representations of the facts which are within his own observation, or if he has equal means of ascertaining the truth, or by the exercise of reasonable diligence could have ascertained it, or is not induced to forego further inquiry which he otherwise would have made.

One who has full opportunity for ascertaining the facts can not rely on the statements of another, however close may be their relations, provided their relations are not fiduciary in their nature.

On exceptions and general motion for new trial by defendant, and on motion for new trial based on newly discovered evidence. An action on the case for deceit. Plaintiff contended that he was induced by certain false representations made by the defendant to purchase four hundred ninety-eight shares of the capital stock of the Crescent Towing Line.

Trial was had at the January Term, 1928, Supreme Judicial Court for the County of York. To certain rulings of the presiding Justice excluding certain testimony the defendant seasonably excepted, and at the conclusion of the trial, after the jury had rendered a verdict for the plaintiff in the sum of seven thousand dollars, filed a general motion for a new trial and likewise filed a motion for new trial on the ground of newly discovered evidence.

General motion for new trial sustained. New trial granted.

The case fully appears in the opinion.

Emery & Waterhouse, for plaintiff.

Willard & Ford, for defendant.

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

WILSON, C. J. An action of deceit. The allegations are that the defendant on August 20, 1920, as an inducement for the plaintiff to purchase of the defendant four hundred and ninety-eight shares of the capital stock of the Crescent Towing Line, a corporation doing a towing business chiefly in New York Harbor, falsely represented to the plaintiff that the stock was of great value; that the company "was doing a thriving and profitable business" and that the four hundred and ninety-eight shares were worth a large amount of money, to wit: seven thousand dollars.

The plaintiff further alleged that he was induced to convey

certain real estate to the defendant in exchange for said four hundred and ninety-eight shares of stock by reason of the false representations of the defendant that the Crescent Towing Line was a solvent corporation doing a "healthy and profitable business"; and that as a further inducement the defendant exhibited to the plaintiff the books of account of the company which showed a "healthy financial condition" which representation and books the plaintiff relied on, but that said representations were false and the books of the company exhibited to the plaintiff did not contain a true statement of the financial condition of the company, but "were grossly wrong and intended to deceive innocent purchasers and especially the plaintiff."

The jury awarded a verdict for the plaintiff in the sum of seven thousand dollars. The case comes to this court on a general motion for a new trial and on exceptions to the admission and exclusion of certain evidence, and on motion based on newly discovered evidence.

It is unnecessary to consider the bill of exceptions or its form, of which the defendant complains, or the motion based on the newly discovered evidence, as the general motion must be sustained. The jury must have failed to appreciate the nature of the allegations and the issues raised thereby and the burden resting on the plaintiff in such cases.

So far as representations as to value of the stock are concerned, if such were made, the law is well settled in this state "that the statements of the vendor as to value, or the price which he has given or been offered for it, are so commonly made by those having property to sell in order to enhance its value that any purchaser who confides in them is considered too careless of his own interests to be entitled to relief even if the statements are false and intended to deceive." *Palmer* v. *Bell*, 85 Me., 352; *Long* v. *Woodman*, 58 Me., 49, 52; *Bishop* v. *Small*, 63 Me., 12; *Bourn* v. *Davis*, 76 Me., 223; *Braley* v. *Powers*, 92 Me., 203.

An action of deceit can not be based on every false representation or statement. To sustain an action, the statement must be as to matters of fact substantially affecting the subject matter and not as to matters of opinion, judgment or expectation. *Martin* v. *Jordan*, 60 Me., 531.

As to the allegation that the Crescent Towing Line was solvent and doing a profitable business, if the evidence sustained the allegation and the plaintiff had no opportunity to investigate; it was false; and the defendant knew it was false and made it intending to deceive, it might be actionable, *Chellis* v. *Cole*, 116 Me., 283, but the evidence does not sustain this allegation.

While there was a conflict of testimony between the plaintiff and the defendant as to what was said preliminary to the exchange of the stock for real estate, we must assume the jury accepted the plaintiff's story as true. His only testimony, however, was that sometime in July, 1920, at a conference between them the defendant said: "That the property was bothering him out there a lot and he wanted someone interested with him in taking care of it; that if it was well to continue operating to go on with it, and if not liquidate. We then looked over the accounts which he discounted certain of those items and on his own figures gave me a slip showing that if we liquidated the corporation one-third of that would be worth seventy-six hundred dollars."

We have searched the record for other statements by the defendant supporting this or the other allegations but find none.

Surely there is nothing in the above statement to the effect that the company was doing a profitable business or was in a healthy financial condition. Rather, doubt is expressed. Such a statement couched in the plaintiff's own language should have put any man experienced in business affairs, as the evidence shows the plaintiff was, on his guard. Not only was this statement suggestive of doubt as to the success of the business, but for nearly six months prior thereto the plaintiff had been in touch with the business, had examined on several occasions the books of the company at the suggestion of the defendant, and seen its principal assets, consisting of boats; had installed a new system of keeping the accounts of the business and prepared a form for making monthly reports of the status of the business with a trial balance which was furnished the plaintiff each month, and all for the purpose of more clearly disclosing, by the books of account and by monthly reports, the true state of the business.

It does not appear from the testimony that the defendant had any better information on which to base an opinion of the result of

liquidation than the plaintiff. At least the means of obtaining information as to the condition of the business and the probable result of liquidation was at all times open to the plaintiff.

"In cases where misrepresentations are made in reference to material facts affecting the value of the property and not merely expressions of opinion or judgment, the law holds that the person to whom such representations are made has no right to rely on them, if the facts are within his observation, or if he has equal means of knowing the truth, or by the use of reasonable diligence might have ascertained it and is not induced to forego further inquiry which he otherwise would have made." *Palmer* v. *Bell*, supra, p. 353.

"The common law affords to every one reasonable protection against fraud in dealing, but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly or a careless indifference to the ordinary and accessible means of information." 2 Kent Com., *485.

There is no evidence that the books did not correctly disclose the nature of the assets and the extent of the liabilities, and the daily transactions of the company. The only evidence in the case as to the value of the boats is that in July, 1920, they would have sold for sufficient to realize nearly if not quite the amount the plaintiff stated the defendant estimated in arriving at the liquidation value of the stock; but within a year the value of shipping fell off in case of old boats, as one of these was, to a small percentage of their value in 1919 and the first half of 1920. Be that as it may, full opportunity to ascertain the value of the assets was open to the plaintiff. He had free access to the books, could ascertain for himself by inquiry the value of the boats. He must be held at fault if he did not, under the circumstances, avail himself of the means at hand of informing himself before purchasing.

There were no fiduciary relations between him and the defendant. They may have been business associates and friends. In this transaction they were dealing as strangers. *Hoxie* v. *Small*, 86 Me., 23, 27-8.

The only other allegation of deceit or fraud is that the defendant exhibited to the plaintiff books of account which were false and known to be false by the defendant and were shown to the

plaintiff for the purpose of deceiving him and inducing him to purchase the stock in question.

Neither does this allegation appear to be sustained by the plaintiff's evidence. The books were not exhibited to the plaintiff by the defendant in the sense in which the language of the declaration charges. According to the plaintiff's testimony, before any proposal of offer of sale of stock was made, the defendant asked the plaintiff to examine the accounts of the company with a view to reporting on its condition and making such changes in the system of bookkeeping as the plaintiff deemed necessary. This he did, following an audit by an independent auditing concern, and blanks for monthly reports were prepared by him; and from February, 1920, until July, at least, monthly reports were made in accordance with the plaintiff's recommendation, which if not made directly to the plaintiff were turned over to him by the defendant. The testimony shows that it was in connection with a monthly report and not upon the books that the estimate of the results of liquidation was made.

The plaintiff evidently had sufficient knowledge of accounting so that the defendant requested him, and he undertook, to make an examination of the books, and the officers of the company accepted his recommendations as to methods, and employed a bookkeeper at his suggestion. There is no evidence that anything was concealed from him. In fact there is no evidence in the record that the books were intentionally falsified, nor that they did not contain a true record of the daily transactions of the company. The evidence is to the contrary.

An analysis of the monthly reports forwarded should have shown him that the liquidation value of the stock depended entirely on the future business of the company, and even in the spring and summer of 1920 its finances and business were in an uncertain rather than healthy condition.

In April, 1920, one of the boats carried on the books at a value of $10,000 was sold, and netted the company only $600. There is no evidence this was concealed from the plaintiff. The uncontradicted testimony shows the sale and the net receipts therefrom appeared on the books, and must have been disclosed in the monthly reports, if analyzed, which the plaintiff had each month.

The trial balance contained in the June report showed a loss in tangible assets since the March report, which are the only ones in evidence, of approximately $20,000, with an increase in accounts and notes payable of $2,000. No one purchasing stock of a company could shut his eyes to such facts and claim he was deceived by the values at which the assets were carried on the books.

The plaintiff made an unfortunate investment as many other men did in anticipation of war business and war values continuing. His loss, however, was due to his failure to avail himself of information readily accessible to him and his reliance on opinions and estimates of a business associate and friend.

To sustain an allegation of fraud, the evidence should be clear and convincing. *Barrows* v. *Sanborn*, 114 Me., 71, 74-5. The jury must have been prejudiced by the defendant's testimony, or his manner of testifying, and disregarded the instructions of the Court as to the essential elements of an action of this kind and the degree of proof necessary to sustain allegations of fraud and deceit. No exceptions to the Judge's charge being taken, we must assume that he fully and correctly instructed the jury as to what are actionable misrepresentations and the degree of proof necessary to establish them.

Taking all the testimony of the plaintiff as true, we find it fails to establish any false representations or acts that, in view of the plaintiff's knowledge and means of obtaining full information, are actionable at law.

Motion sustained.
New trial granted.

GOOCH'S CASE.

Washington. Opinion April 9, 1929.

WORKMEN'S COMPENSATION ACT. "ARISING OUT OF." CONSTRUED AND DEFINED.

The words "arising out of" in the Workmen's Compensation Act mean that there must be some causal connection between the conditions under which the employee worked and the injury which he received.

The injury must not only have been received while the employee was doing the work for which he was employed, but in addition thereto such injury must also be a natural incident to the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence, and directly connected with the work.

If the injury is sustained by reason of some cause having no relation to the employment it does not arise out of the employment.

In the case at bar to hold that an employer ought to have realized that a dog, not his own, would be likely to be upon the premises and to harm persons thereon, and should have provided means to always guard against the presence of such an animal would put an unreasonable responsibility upon the employer when he had made a rule that such an animal should not be allowed on the premises and had frequently ordered its removal.

The accident in this case did not "arise out of" the employment. There was no causal connection between the injuries inflicted by the dog and the employment in which the petitioner was engaged.

On appeal. A workmen's compensation case.

The petitioner, an employee of the R. J. Peacock Canning Co. of Lubec, Maine, while going to her bench to work, was bitten by a dog lying under the bench. The dog was owned by a fellow employee, who had previously been several times warned by the foreman of the factory to keep the dog off the premises. Compensation was awarded and an appeal taken. Appeal sustained. Decree below reversed.

The case fully appears in the opinion.

Gelanor L. Gooch, pro se.

H. H. Murchie,

Robert Payson, for respondent.

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

PHILBROOK, A. R. J. This is an appeal by the employer and insurance carrier from the decree of a single Justice confirming an award of compensation under the Workmen's Compensation Act.

On the 18th of February, 1928, the petitioner, regularly employed as a cartoner of sardines by the R. J. Peacock Canning Company at Lubec, Maine, went to her bench as usual to begin her work and was bitten by a dog which was lying under the bench. Neither the company nor the officers of the company had any interest in the animal. It was the individual property of one Mullett who had worked in the factory for about ten years. Emery L. Rice, foreman of the factory, testified that dogs were not allowed on the premises and that he had told Mullett to keep his dog away; that after being so told Mullett kept the animal away for a long time but sometimes it would get out of the Mullett house, come down to the factory, and get into the shed; that whenever it was seen there by Mr. Rice he made it a rule to remind Mullett that he should not have his dog there; that on the day of the accident Rice knew the dog was there, before the biting occurred, but on that particular morning he had not told Mullett to put the animal out.

The appellant admits that the injury was accidental, and that it was suffered in the course of the petitioner's employment, but denies that it arose out of the employment.

In *Westman's Case*, 118 Me., 133, we held that the great weight of authority sustains the view that the words "arising out of" mean that there must be some causal connection between the conditions under which the employee worked and the injury which he received. In *McNichol's Case*, 215 Mass., 497, the Court said, "Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated, by a reasonable person familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment. But it excludes an injury which can not fairly be traced to the employment as a contributing, proximate cause, and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger

must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant."

In *Coronado Beach Company* v. *Pillsbury*, 158 Pac., 212, the Court said, "The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work, or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment."

It may be argued that because the foreman of the company, on the morning of the accident, knew the dog was in the factory and did not specifically order its removal at that particular time, the presence of the animal was a menace to safety, a risk, a trap, and hence created a liability known to and permitted by the employer. In *Isabelle* v. *Bode*, 213 N. Y. S., 185, an accident occurred by reason of unruly boys being in a lumber yard and while there threw a piece of wire through an open office door, striking an employee in the eye. The petitioner urged that the employer knew that lawless boys were accustomed to come upon the premises and because they were not excluded it subjected him to a risk which could have been avoided if proper preventive measures had been taken. The employer replied that the boys had no right or business there; that he had caused them to be driven away, and had made a rule that children were not to be allowed upon the premises. The Court held that the boys were trespassers whose presence had been forbidden, that the injury did not arise out of, and was in no wise incidental to, the employment; that no employment brought the injured claimant and the boys together; and especially said, "To hold that the employer ought to have realized that mischievous boys would be likely to harm persons in his office, and should have provided means to *always* guard against intrusion upon the premises by such boys, would put an unreasonable responsibility upon the employer." We approve the reasoning in that case and regard it applicable to the case at bar.

In *Gouch* v. *Industrial Commission*, 322 Ill., 586; 153 N. E., 624, the petitioner was a helper on an ice delivery truck. While walking from the truck to a customer's residence, he was struck in the eye by a dart shot by a small boy. The Court there said, "To be within

the Compensation Act the accident must have had its origin in some risk of the employment. There must be some causal relation between the employment and the injury. It is not enough that the injured person be present at the place of the accident because of his employment, unless the injury itself is the result of some risk of the employment. The injury must be incidental to the nature of the employment. If the injury is sustained by reason of some cause having no relation to the employment, it does not arise out of the employment."

In most cases arising under Workmen's Compensation acts, where right to compensation has depended upon risks incident to the employment, those risks have been occasioned by inanimate conditions, or conditions arising through human agencies, but we are not entirely without precedents where conditions like those at bar have been considered, although no such precedent has yet appeared in the decisions of our court.

In *Rowland* v. *Wright*, 1 Kings Bench Division, 963, we have this situation. The petitioner was a teamster who had taken the horses of his employer to the stable for their midday meal, and he then proceeded to eat his own dinner in the stable. While he was thus eating, a stable cat sprang at him and bit him. He was not teasing the animal, nor was he feeding it on that occasion, although at other times he had thrown bits of food to it. The bite resulted in blood poisoning followed by necessary amputation of a portion of a finger. Cozens-Hardy, M. R., said, "In my opinion this is a reasonably plain case. The workman was employed in a stable. He was taking a meal in the stable where he was entitled to be and which was his proper place. Part of what may be called the necessary furniture of a stable is a stable cat. There is no suggestion that this cat was known to be especially vicious. The employment of the man took him into the stable, where to the man's knowledge and to the knowledge of the employer a cat was habitually kept. If the cat had been a strange cat the case would have presented a totally different aspect, and I hope that nothing I have said will lend itself to the conclusion that if the man had been walking along the street and a cat had bitten him his master would have been liable. The present case is the same as if the man had been an ordinary domestic servant whose duties took him into the place where the cat was.

Neither the employer nor the man expected the cat to bite, but the man's duties took him into the place where the cat was." Farwell, LJ., added, "The cat was part of the farm establishment and the workman was properly in the stable to eat his dinner. If it had been proved that the workman was using his dinner to incite the cat this decision might have been different. Here the evidence is that he was doing nothing but sitting in the stable eating his dinner and the cat sprang at him." In that case the decree awarding compensation was sustained, but it is easily distinguishable from the case at bar where the dog was not kept by the canning company as "necessary furniture" of the factory, was not "part of" the establishment; and moreover the petitioner said, "I must have stepped on him."

In *Ryan* v. *City of Port Huron*, 234 Mich., 648, 209 N. W., 101, a street cleaner, employed by the city, sought shelter from a rainstorm in a nearby private garage. When he was a few feet from the garage he was attacked and bitten by a dog, from which injury he died. His widow made claim for compensation, and like claim was made by a dependent daughter. Both claims were allowed and appeals taken. In both cases the appellate court reversed the decrees and denied compensation on the ground that the accident did not arise out of the employment of the deceased. In that case the court said, "If it be said that the workman's act, in seeking shelter from the storm, did not break the employment, and that he was then still in the course of his employment, it does not follow that the accident arose out of the employment. To justify a finding that it arose out of the employment it must appear that the injury received was a risk to which he was exposed by the nature of his employment."

In support of the latter case, the Court cited *Hopkins* v. *Michigan Sugar Co.*, 184 Mich., 87, 150 N. W., 325; L. R. A., 1916 A, 310, where the opinion of the Court was stated thus: "An employee may suffer an accident while engaged at his work, or in the course of his employment, which in no sense is attributable to the nature of, or risks involved in, such employment, and therefore can not be said to arise out of it."

In *Thier* v. *Widdifield*, 210 Mich., 355, 178 N. W., 16, quoting from an English case, the Court said, "A lineman who, while at his work, is bitten by a snake, will not be allowed to trace his injury

to his employment even though he would not have been bitten had he been elsewhere than where his employment called him. . . . It is not enough for the applicant to say 'the accident could not have happened if I had not been engaged in the employment, or if I had not been in this particular place.' The applicant must go further and say 'the accident arose because of something I was doing in the course of my employment, and because I was exposed by the nature of my employment to some particular danger.'"

It is not sufficient to sustain an award that the employment occasioned the presence of the employee where the injury occurred. *Isabelle* v. *Bode*, supra.

The injury must not only have been received while the employee was doing the work for which he was employed, but in addition thereto such injury must also be a natural incident to the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence, and directly connected with the work. *Heitz* v. *Ruppert*, 218 N. Y., 148; 112 N. E., 750; L. R. A., 1917 A, 344.

If the injury is sustained by reason of some cause having no relation to the employment it does not arise out of the employment. *Gouch* v. *Industrial Commission*, supra.

Applying the above tests to the case at bar, it is clear that the accident did not arise out of the employment. Being bitten by the dog can not be traceable to the nature of the employment in which this petitioner was engaged. There is not the slightest causal connection between them. The risk of being thus bitten was no greater to her, because of her employment, than it was to any member of the public who chanced to be in the locality. *Ryan* v. *City of Port Huron*, supra.

Appeal sustained.
Decree below reversed.

ELIZABETH A. HUMPHREY *vs.* HENRY G. HOPPE.

Kennebec. Opinion April 9, 1929.

EVIDENCE. RULES OF COURT. MOTOR VEHICLES. NEGLIGENCE. INVITED GUESTS.

Evidence of injuries sustained in a later accident is only admissible in trial of an action to recover damages for injuries previously sustained as tending to show that the later accident resulted from conditions created by the earlier one, and was a natural consequence thereof, thereby showing the extent of the injuries caused by the earlier accident and affecting the amount of damages recoverable.

The burden of proof in such issue is on the plaintiff.

Under Rule XLIV of the Superior Court for the County of Kennebec exceptions to any opinion, direction or omission of a presiding Justice in his charge to the jury must be noted before the jury retires or all objections thereto will be regarded as waived.

A gratuitous passenger must exercise due and reasonable care for his or her protection.

One riding as a passenger or guest may not place his or her safety entirely in the keeping of the driver.

In the case at bar a careful examination of the evidence disclosed no reason to overturn the findings of the jury on the question of liability and amount of damages.

On exceptions and general motion for new trial by defendant. An action of tort to recover damages for personal injuries alleging negligence of defendant and plaintiff's freedom from contributory negligence.

To the admission of certain testimony and to certain instructions given by the presiding Justice the defendant seasonably excepted, and after the jury had rendered a verdict for the plaintiff in the sum of $2,000, filed a general motion for new trial. Motion and exceptions overruled.

The case fully appears in the opinion.

Ralph Farris, for plaintiff.

George W. Heselton, for defendant.

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

PHILBROOK, A. R. J. This is an action in tort to recover damages for personal injuries suffered by reason of the alleged negligence of the defendant. The plaintiff recovered a verdict for $2,000. The case comes to the Law Court on defendant's exceptions and general motion for a new trial.

The parties were joint owners and managers of an enterprise known as "Slumberland," which consisted of wayside lodging camps located on a public road leading from Augusta to Waterville. The road ran in a northerly and southerly course. Their residence, store and camps stood on the westerly side of the road and a barn, used as a garage, stood on the easterly side. Along the easterly side of the road runs an electric car track. The distance between the westerly sill of the barn and the easterly iron of the track is about four or five feet. Electric cars, upon regular schedule time, passed the barn hourly, going north about twenty minutes after, and south twenty before the hour. Both parties had lived on the premises about four years and it would be a reasonable presumption that each had knowledge as to the passing time of the electric cars; although the defendant denied having such knowledge at the time of the accident.

On the afternoon of August 9, 1927, the defendant invited the plaintiff to ride to Augusta with him in his automobile. In accordance with the invitation the plaintiff crossed the road, entered the barn, and took a seat in the automobile, which was standing with its front end toward the open door. After she had become seated, the defendant closed the car door on the side where the plaintiff was sitting, went to the other side of the car and, as he says, "looked down and up the street and stepped into the car on my own side of the car," but saw no electric car coming. There is credible testimony in the record tending to show that one standing in front of the barn and looking northerly could plainly see an approaching electric car at a distance of eleven or twelve hundred feet. The plaintiff testified, "I asked him if he looked to see if a car was coming and he said he had." The defendant then drove his automobile out of the barn, on to the electric car track, and collided with a

southbound electric car which was "very near on time" as testified by the conductor. As a result of this collision the plaintiff suffered her injuries. No negligence on the part of those operating the electric car is claimed. The negligence herein complained of is the failure of the defendant driver to use that degree of care which he owed to a gratuitous passenger. In addition to the plea of not guilty, the defendant alleged contributory negligence on the part of the plaintiff.

Exceptions. In the course of the trial the plaintiff claimed that on several occasions, after she was able to go about, her right leg gave out and she would fall down. By her counsel she was asked, "Referring to those spells you had in your leg when it let you down, state whether or not on November 30th your leg gave out on you as you described it?" This question was objected to by defendant's counsel and after discussion was withdrawn but immediately following that interrogatory, and the discussion of the same, other questions were asked, objected to and admitted, the nature of which may be better understood by calling attention to the fact that her right leg was injured by the accident of August 9, but in her fall of November 30 she broke her left ankle. Hence counsel for defendant objected to testimony regarding the injury of later date, and her suffering on account thereof, because it was an accident distinct from and independent of the one occurring on August 9, and for which no claim for damages was made in the declaration. From these questions, it appears that her several falls prior to November 30 occurred thus, to quote her own words, "I would be walking along, sometimes from the house to the store, and all at once I would have a pain take me across my back and down through my leg and I would fall." If the later accident was, in fact, distinct from and independent of the earlier one, then these questions and answers would have no proper place under the declaration; but if that later accident resulted from conditions created by the earlier one, and was a natural consequence thereof, then the testimony was admissible as showing the extent of the injuries caused by the earlier accident and as affecting the amount of damages to which the plaintiff might be entitled. The burden of proof as to this issue was upon the plaintiff. One of the medical witnesses called by the plaintiff, whose diagnosis of the case included inflammatory con-

dition of strain in the sacroilliac joint, testified that it might cause weakness of the leg which would be so marked as to occasionally cause falling. This was not expressly contradicted by any other medical witness, although those called by the defendant denied that there was any strain of the joint. Referring again to the question which was withdrawn, during discussion thereof, counsel for the plaintiff said that he was not claiming additional compensation for suffering on account of the fracture caused by the fall on November 30, that being at a time and place other than the accident on August 9, but to show that the original accident caused the leg to give out. Whereupon the Court said in the presence of the jury, "I will allow you to show her condition on November 30, as showing her physical condition at that time, and for that purpose alone. I will allow you to show that this suffering existed at that time, but with the understanding that I shall instruct the jury that they will not be justified in considering that about the question of damages." Although the question was withdrawn, yet as to the questions which followed, the defendant, in argument, complains that no instruction was given the jury to remedy the situation, and that appropriate instructions should have been given regarding separate and intervening causes. At the close of the charge, a long list of requested instructions was presented by defendant but in that list there is found no request for instruction as to separate and intervening causes, and no exception taken by reason of the failure of the presiding Justice to so instruct. This case was tried in the Superior Court and rule XLIV of that court provides that exceptions to any opinion, direction or omission of the presiding Justice in his charge to the jury must be noted before the jury retires, or all objections thereto will be regarded as waived.

The only other exception now relied upon (requested instruction number 4) is based upon the refusal of the Court to instruct that the duty of the gratuitous passenger, if she would avoid contributory negligence, is to exercise an independent care and warn the driver.

Upon that point the Court instructed the jury as follows: "One riding as a passenger or guest may not place his or her safety entirely in the keeping of the driver, but he or she must exercise due and reasonable care for his or her protection. If the plaintiff in

this case did exercise such a degree of care as a reasonably careful person would have done, and if the defendant was negligent, then she is entitled to a verdict for such damages as have been proved."

This instruction is in harmony with the law as declared by our court in so many cases that citations are not necessary, and we are of opinion that it was sufficient in this case.

Motion. Permeating the arguments of counsel are suggestions as to the relations between the parties, motives prompting the suit, the fact that the record defendant is only nominally such, and that the real defendant is an insurance company.

Such suggestions, if true, might be urged as affecting the credibility of the parties as witnesses, but from all the evidence the jury found for the plaintiff upon the questions of liability and amount of damages. From a careful study of the record, we do not feel that the Court should invade the province of the fact finders by overturning their verdict.

Motion and exceptions overruled.

CONSOLIDATED RENDERING COMPANY

vs.

RAPHAEL MARTIN, GLORIEUSE MARTIN, PAUL MARTIN AND LEVITE MARTIN.

Aroostook. Opinion April 10, 1929.

REAL ACTIONS. SHERIFF'S DEEDS. EVIDENCE. FRAUD. PLEADING AND PRACTICE.

In trial of title on a writ of entry sheriff's deeds are admissible though containing no statement that the judgment debtor was known to be an inhabitant of the state.

Levy by auction sale, where fraudulent conveyance is impeached by a creditor of the grantor, gives seizin and right of possession.

To the general rule that declarations of a grantor or vendor, made after the conveyance, are not admissible in evidence to impeach the title of the grantee, there is a well established exception, that in cases where creditors are seeking to annul the conveyance upon the ground of fraud, where evidence is offered tending to show a prima facie *case of combination or conspiracy between the grantor and the grantee to defraud creditors, the declarations of the grantor, after the deed, may be admitted.*

A declaration, which, when made, is directly contrary to the pecuniary interest of the person making it is admissible in evidence.

A conveyance where the consideration is in whole or in part future support may be impeached as fraudulent as against creditors.

When at the trial on the writ of entry it is represented that one of the defendants is dead, notice should be ordered on all interested in the estate of the deceased.

The service of such notice is a prerequisite to a valid judgment.

In the case at bar, having testimony tending to show intent to defraud creditors, together with testimony of an interest in the land at the time of making a declaration the jury were entitled to the recital of the declaration as evidence.

Upon the death of the grantor, his widow had an "interest" in the lands of her husband; a "fee" in the proportion prescribed by the statutes. Wherefore a valid judgment for demandant could be for not more than two-thirds of the land claimed. The judgment was therefore void as to the widow, and being void in part is void in all and must be reversed.

On exceptions and general motion for new trial by defendants. A writ of entry brought to gain possession of a farm located in Madawaska, in the County of Aroostook. Both the plaintiff and the defendants claimed title under Raphael Martin, who was the undisputed owner of the premises until March 21, 1924, on which date, he, while indebted to the plaintiff in a sum exceeding $6,000, conveyed the farm to his sons Paul and Levite, taking back a mortgage for his support and that of his wife Glorieuse Martin. There was no other consideration for the deed.

Plaintiff on July 16, 1924, attached all the real estate owned by the defendant Raphael Martin, specially attaching the premises involved in this suit, alleging the record title to be in Levite Martin and Paul Martin.

Principal issue in the suit was whether or not the conveyance to the sons was in fraud of plaintiff.

To the admission in evidence of a sheriff's deed and to certain testimony offered by plaintiff's witnesses, the defendants seasonably excepted, and after the jury rendered a verdict for the plaintiff, filed a general motion for a new trial. Motion sustained. New trial granted.

The case is very fully stated in the opinion.

Herbert T. Powers, for plaintiff.

N. F. Stevens,

W. R. Roix,

A. S. Crawford, Jr., for defendants.

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

BARNES, J. This case is on a writ of entry brought to gain possession of a farm located in Madawaska in the county of Aroostook.

Both plaintiff and defendants claim title under Raphael Martin, named as one of the defendants, who, it is agreed, was the owner of the premises on May 21, 1924. On that date he was indebted to the plaintiff in an amount exceeding six thousand dollars, and he then gave deeds of the farm to his sons Paul and Levite, one-half to each in severalty, and received from them a mortgage conditioned for the support of himself and his wife, Glorieuse, for their lifetime, and for the support of an invalid son, Felix, "until he shall have recovered." Felix is dead. The father died after this suit was brought and before trial. At the trial term discontinuance was allowed as to the father, Raphael.

Glorieuse, the wife of Raphael, joined in the execution of the deeds, for the purpose of relinquishing to the grantees her right and title by descent.

No consideration for the deeds was paid by either Paul or Levite at the time of the conveyances.

On July 16, 1924, while Raphael was living with his son, Paul, in Madawaska, on the premises conveyed by him to this son, the plaintiff made an attachment of all the real estate and all the right, title and interest in any and all real estate in said county of Aroostook owned by Raphael Martin, and at the same time specially attached

the premises involved in this suit, alleging the record title to the premises to be in Levite Martin and Paul Martin.

After obtaining judgment, the land was seized and advertised for sale by a deputy sheriff of the county, and a sale of all the right, title and interest of Raphael Martin to the plaintiff was made on May 18, 1925.

The premises were not redeemed and this action was brought on July 19, 1926.

The case was tried at the September term, 1927.

Defendants pleaded the general issue. Verdict was for the plaintiff, and the case is before the court on exceptions, and the general motion for a new trial by the defendants.

The first exception is to the admission of the sheriff's deeds, as evidence, because no recital appears in either of the deeds, nor in the sheriff's return of sale on the execution that the judgment debtor was known to be an inhabitant of this state. We are not aware of any statute requiring a sheriff's deed to contain recitals as to notice to the execution debtor, and in like situation it has been held that such a deed is not inadmissible as evidence because it contains no recital of the sheriff's advertisement of sale, the statute not requiring it. Den ex dem. *Newcomb* v. *Downam*, 13 N. J. L., 135.

It has been held, at least in one case, that a sheriff's deed, though silent as to service of notice, makes out a *prima facie* case that notice was given. *Burnett* v. *Austin*, 10 Lea (Tenn.), 564.

In a recent case, *Cutting* v. *Harrington*, 104 Me., 96, when the statute provided that the notice to the debtor might be "forwarded to him by mail postage paid," and the officer recited he "Sent to the said (debtor) a written notice by mail," in upholding validity of the sale, the Court said: "We find no previous decision of this court in cases of levy by sale compelling us to construe the officer's recitals in this case so strictly and technically as the plaintiffs would have us."

Cases cited in defendants' brief do not by any fair reading render the deeds defective.

Pratt v. *Skofield*, 45 Me., 386, where the officer's deed was held defective for want of sufficient recitals, the defects not being stated, can not guide us here. *Stimson* v. *Ross*, 51 Me., 556. *Lumbert* v.

Hill, 41 Me., 475, was a bill to correct an error in description of real estate conveyed by sheriff's deed after levy, and was refused because it called for reform of levy and deeds.

In *Stimson* v. *Ross*, supra, there was a good and sufficient return on the execution; and objection was made that the sheriff's deed did not show compliance with statutory requirements in regard to notice. Here again the defects are not specified, but the Court goes on to say, "It is not necessary that it should. The officer's return on the execution shows that the proper notices were given, and that is sufficient. *Welsh* v. *Joy*, 13 Pick., 477."

"When the debtor's land is taken on execution and transferred to the creditor by levy, or sold at auction, the general rule is that the officer's return shall state in substance that every act was done, required by statute to constitute a valid levy or sale.

"It is not necessary, however, that the officer should state in his return in direct terms the performance of such acts. No particular phraseology is required. It is sufficient if it appears by the language used, or can be reasonably and fairly inferred from it that the act was done." *Millett* v. *Blake*, 81 Me., 531.

"An allegation of fact by an officer is sustained by the ordinary presumption of correctness which attaches to the proceedings of officers. The law seeks to uphold official acts. In all reasonable cases, it presumes that officers have acted legally. It affords ample aid and encouragement to an officer who is honestly endeavoring to execute a public trust. We think there are excellent reasons for the doctrine." *Snow* v. *Weeks*, 75 Me., 105.

Exception one appears to have been taken for the assumed reason that there is not sufficient legal evidence that the officer gave to the judgment debtor the notice of sale provided by the statute.

It is not denied that the alleged owner received the notice of sale, "left at the last and usual place of abode of the said Raphael Martin." There was also due public notice. The argument of counsel for defendant is that in his return of sale, and in the recitals in his deeds, the officer should have specifically recited that defendant Raphael Martin was at the time of giving notice of the sales an inhabitant of the state.

This we think is a nicety of construction of the statute authorizing conveyance of title seized on execution not required. The

notice is the thing. The question is whether or not the alleged owner was given notice of the impending sale.

The privilege accorded the officer of giving the personal notice by mailing, postage prepaid, to an owner not inhabitant of the state, is a proviso attached, to make effective service in the exceptional case, when the alleged owner is not an inhabitant.

The giving of notice may be shown *prima facie* by recitals in the sheriff's deeds. *Cutting* v. *Harrington*, supra, 36 A. L. R., 998.

In the return of sale, made by the officer on May 18, 1925, under authority naming Raphael Martin, of Frenchville, in the county of Aroostook, as the judgment debtor, an exhibit in the case, the officer endorsed on the body of the commission giving his authority to proceed, that he took "real estate and all the right, title and interest which the within named Raphael Martin had in and to the same," and that he seasonably "left at the last and usual place of abode of the said Raphael Martin a written notice," of coming sale by public auction. The officer's deeds severally recite that on a judgment recovered "against Raphael Martin of Frenchville in the county of Aroostook and State of Maine," he seized and sold the real estate.

The statute, Chap. 81, Sec. 33, prescribing procedure prerequisite to sale on execution provides, "The officer in such case shall give written notice of the time and place of sale, to the debtor in person, or by leaving the same at his last and usual place of abode, if known to be an inhabitant of the state, and cause it to be posted in a public place in the town where the land lies, and in two adjoining towns, if so many adjoin."

The objection is that the notice was not properly served, because the officer who made the alleged service did not include in his return, and did not recite in his official deeds that Raphael Martin was known to be an inhabitant of Maine.

We hold that the omission of a statement that the debtor was known to be an inhabitant of the state does not vitiate the notice, especially since we find no denial that the debtor received the notice. *Briggs* v. *Hodgdon*, 78 Me., 514. It follows that, despite this objection, the deeds were admissible as evidence.

The second exception is to the admission of the sheriff's deeds in evidence on the ground, as alleged, that when proceeding under

statute, Chap. 81, Sec. 14, in order to give the creditor the right to bring a writ of entry, the sheriff must proceed, under the execution, by levy and setting off, or appraisement, and not by levy and sale.

At the time of the offer of the deeds in evidence, defendant objected to their admissibility because given in judicial sale upon levy. We think the ruling right.

It has always been in accordance with the spirit of the American law to place within the power of the creditor the means of reaching both the real and personal estate of the debtor.

The appraising of real estate and rights to redeem, is said to have had its origin wholly in the colony of Massachusetts Bay.

And the Act of 1647 is cited as the original statute upon the subject. Washburn on Real Property, 5th Ed., 82.

In our commonwealth of Massachusetts the taking of lands on execution was originally only by appraisement and setting off to a judgment creditor.

But as later provided by statute there, Chap. 188, laws of 1874, any judgment creditor was authorized to levy and sell, and by either method he could secure the fruits of his attachment. *Woodward* v. *Sartwell*, 129 Mass., 210; *Cowles* v. *Dickinson*, 140 Mass., 373.

Foster v. *Durant*, 2 Gray, 538, cited by defendant was the law until the statute of 1874.

In Maine, it may be said that by common law levy on real estate could only be extended on land of the judgment debtor by appraisement and setting off.

Laws of 1821, Chap. 60, Sec. 17, provided that rights of redeeming real estate mortgaged might be taken in execution, sold at auction to the highest bidder, and good and sufficient deeds be delivered by the officer, procedure continued by authority of subsequent legislatures until the present day.

By Chap. 80, P. L. of 1881, it was enacted that real estate attachable might be taken on execution and sold, in the same manner as rights of redeeming real estate mortgaged, are taken and sold.

It further provided that no other lawful mode of levy by execution was by it repealed.

Thus was enacted a statute that any real estate attachable might

be conveyed at public sale, when such conveying would perfect the lien evidenced by execution.

The same legislature by resolve provided for revision of the statutes, and the revision of 1883, presented, in Chap. 76, Sec. 1, authority for taking real estate attached by appraisement and setting off; in Sec. 32 of the same chapter authority for taking rights of redeeming lands mortgaged, by sale; and reënacted Chap. 80 of the laws of 1881 as Sec. 42.

In the revision of 1903 the two sections, 32 and 42, of Chap. 76, 1883, were consolidated, becoming Sec. 32 of Chap. 78, now Sec. 32, Chap. 81, R. S.

As has been formerly stated by this court no change of legislative purpose is to be inferred from a mere condensation of prior statutes in a subsequent revision. So the language of the section as now expressed in the Revised Statutes, when traced to the original enactments for the purpose of ascertaining its meaning, gives authority for levy by seizure and sale.

From an early date in our history the right in a judgment creditor to take on execution land of his debtor fraudulently conveyed has been recognized, as expressed in Sec. 14, Chap. 81, R. S., the statute under which demandant in the case at bar secured its execution.

In fact, by the Maine court such conveyances have been held void under the common law. *Tobie and Clark Mfg. Co.* v. *Waldron*, 75 Me., 472. A more accurate phrase might be, voidable at the instance of a creditor defrauded. And the case at bar is an ordinary case where fraudulent conveyance is impeached by grantor's creditor.

Livery of seizin may be had as well through public sale as by setting off by appraisers.

To entitle the plaintiff, demandant here, to recover, it must show, in itself, a sufficient legal title to authorize the maintenance of its action, and if it fails so to do the tenants must prevail in their defense. *Spencer* v. *Bouchard*, 123 Me., 15.

The cases cited by defendants in their brief are not helpful, several being as to land to which title was never in the debtor, and all being upon levy made before the passage of the statute of 1881.

We find no case discussing the precise objection raised here.

Levy by appraisement is still necessary in certain cases, and is still available, but that the officer who levies under an execution by auction sale as in the case at bar has not seizin and can not deliver seizin to the purchaser we can not agree.

It should be said that no question is raised as to the bona fides of this creditor purchaser.

Referring to proceedings under the two statutes here to be construed, the Court, in *Coal Co.* v. *Goodwin*, 95 Me., 246, says, "If a conveyance is fraudulent and void as to creditors, the title is regarded as remaining in the fraudulent grantor, and the judgment creditor by a levy acquires such seizin as enables him to maintain a real action against the fraudulent grantee."

"It is well settled by numerous decisions that where the title to real estate was once in the debtor but has been conveyed by him for the purpose of defrauding his creditors, an attachment may be made and the property subsequently seized upon execution, precisely as if no such conveyance had been made or attempted, a conveyance under these circumstances being regarded as void as to a creditor who was intended to be defrauded. After title has been acquired by the levying creditor, he may maintain an action at law to recover possession of the premises, or he may resort to equity to have the apparent cloud upon his title removed." *Fletcher* v. *Tuttle*, 97 Me., 491.

"A fraudulent conveyance is no transfer of the title as against creditors.

"The demandant, therefore, by his levy, acquired a legal title to the estate of Amos Wyman, upon which he had levied." *Wyman* v. *Richardson*, 62 Me., 293.

Caldwell v. *Blake*, 69 Me., 458, and *Cutting* v. *Harrington*, supra, appear to be cases where auction sale, under execution, is held good by the court.

The conveyances to the two sons and their mortgage back for life support were executed on May 21, 1924.

At the trial a witness was produced by the plaintiff, to testify that in the month of June, 1924, while debtor and his wife were living with one of their sons on one of the farms conveyed, debtor stated to him, in the absence of either of the sons, that he had transferred the farms to the sons for the purpose of securing life sup-

port. He was to be interrogated as to a subject that may be proven by parol evidence.

To this testimony objection was made and exception saved, as being a declaration after parting with title, and hence not admissible.

"It is a general rule that declarations of a grantor or vendor, made after the conveyance, are not admissible in evidence to impeach the title of the grantee. This general rule is elementary. But there is an exception to it in cases when creditors are seeking to annul the conveyance upon the ground of fraud. In such cases, where evidence is offered tending to show a *prima facie* case of combination or conspiracy between the grantor and the grantee to defraud creditors, the declarations of the grantor, after the deed, may be admitted." *Dixon* v. *Dixon*, 123 Md., 44; Ann Cas., 1915 D., 616. To the same effect, see *Rizan* v. *Rizan*, 139 La., 364, 71 S., 581; *Marowitz* v. *Laud*, 130 Md., 514, 100 Atl., 783; *Wilson* v. *Terry*, 70 N. J. Eq., 231, 62 Atl., 310; *Jones* v. *Simpson*, 116 U. S., 609; *Philpot* v. *Taylor*, 75 Ill., 309; *Chicago Lumber Co.* v. *Cox*, 94 Kan., 563, 147 Pac., 67; *Coburn* v. *Storer*, 67 N. H., 86; *Walker* v. *Harold*, 44 Or., 205, 74 Pac., 705; *Tibbals* v. *Jacobs*, 31 Conn., 428; *Qunin's Administrators* v. *Halbert*, 57 Vt., 178; *Johnson* v. *Spoonheim*, 19 N. D., 191, 41 L. R. A. (N. S.), 1; *Wyman* v. *Fox*, 59 Me., 100; *Carter* v. *Clark*, 92 Me., 225; *Dee* v. *Foster*, 21 Hawaii, 1; Ann. Cas., 1914 C., 973; 12 R. C. L., 676, 22 C. J., 366. In a somewhat analogous case, *Wentworth* v. *Wentworth*, 71 Me., 72, where suit was brought for dower, and defendant introduced a prenuptial agreement to bar right of dower, testimony on the part of the plaintiff, of the husband's declarations in relation to that agreement, was admitted; the Court saying: "The husband's declarations were properly admitted, to show that he fraudulently obtained the agreement about dower. They were admitted and could be used for no other purpose. That question opened a wide field for testimony."

It is claimed by plaintiff that the debtor who retained all rights under a mortgage conditioned upon support of himself and his wife for their several lives had, at the time of the declaration proffered, an interest in the land and for this reason the declaration was an admission which should be recited to the jury.

"A declaration, which, when made, is directly contrary to the pecuniary interest of the person making it is admissible in evidence." *Johnson* v. *Peterson*, 101 Neb., 504, 163 N. W., 869, I. A. L. R., 1235.

If the consideration of the conveyance impeached were in whole or in great part future support, such conveyance is fraudulent as against creditors.

Evidence on this point was introduced, without objection, when Mr. Daigle, the scrivener who drafted the conveyances, was asked what the debtor said he proposed to do at the time he outlined the terms of the conveyances.

Mr. Daigle testified: "Well, the exact words that were said there of course I won't intend to quote, but if I remember well, Mr. Martin explained to me the object of his visit in this way, that he being sick and two boys that were working with him, it was nothing but natural he would do something for them, and he intended to divide the farm, the Dionne farm, so called, between the two, and as the customary thing, take a mortgage back for his support, his wife's support and an invalid boy by the name of Levite, I think."

This testimony had a tendency to show fraudulent intent; and having this, and testimony of an interest in the land, the jury were entitled to a recital of the declaration objected to, as an admission on the part of the grantor.

On the motion, it should further be said that evidence was presented that the tenants, sons of the grantee, 25 and 26 years old respectively, and both married, had since attaining their majority remained with their father and labored as farm hands on the farms attached in demandant's suit.

Each young man testified that the 1924 deeds were made in accordance with their father's agreement with them when they were minors, that if they would stay with their father and work for him, he would buy the Dionne farm; they would work together and pay for it, and when it was paid for he would give them each a deed, and that he, with his wife and invalid son, would live with the tenants.

Testimony as to the nature and amount of work done by the tenants was fully given, to a jury familiar with such work. The jury found against the contention of the tenants, and we find no evidence that would justify us in holding that the jury miscon-

strued the evidence, or were swayed by passion or prejudice.

It might be fairly concluded from the testimony that the tenants, at the time of the conveyance, knew of the father's indebtedness and entered into a combination or conspiracy to attempt to perpetrate a fraud upon his creditors, and the determination of whether or not there was a contract, under such circumstances, and, if so, what such contract was has been held to be "peculiarly the province of the jury." *Saunders* v. *Saunders*, 90 Me., 284; *Bryant* v. *Fogg*, 125 Me., 420. Again, it is urged that the judgment can not stand because it is against the law in that the Court, when at trial it was represented to him that Raphael Martin, one of the defendants, was dead, did not order notice served upon all interested in the estate of the decedent, as is provided in R. S., Chap. 109, Sec. 16.

The service of such notice, in like cases, seems a prerequisite to a valid judgment. *Bridgham* v. *Prince*, 33 Me., 174; *Trask* v. *Trask*, 78 Me., 103. Lastly, upon the death of her husband Glorieuse Martin had an "interest" in the lands of her husband, a "fee" in the proportion prescribed by the statutes. *Richardson* v. *Wyman*, 62 Me., 280; *Longley* v. *Longley*, 92 Me., 395; *Pinkham* v. *Pinkham*, 95 Me., 71; *Davis* v. *Poland*, 99 Me., 345; *Whiting* v. *Whiting*, 114 Me., 382; *Coombs* v. *Coombs*, 120 Me., 103; *Campbell* v. *Whitehouse*, 122 Me., 414. Wherefore, a valid judgment for demandant could be for not more than two-thirds of the land claimed. *Chandler* v. *Wilson*, 77 Me., 76. Hence the judgment is void as to Glorieuse, and being void in part is void in all and must be reversed. *Buffum* v. *Ramsdell*, 55 Me., 252.

Motion sustained.
New trial granted.

WAUKEAG FERRY ASSOCIATION, PETR.

vs.

MILTON S. AREY ET ALS, COUNTY COMMISSIONERS.

Hancock. Opinion April 11, 1929.

FERRIES. DAMAGES. COUNTY COMMISSIONERS. R. S. CHAP. 82, SEC. 3. CHAP. 92, PRIVATE AND SPECIAL LAWS OF 1919. CHAP. 120, PRIVATE AND SPECIAL LAWS OF 1921.

All ferries in this state are governed by statute, either special or general, regulating their establishment, licensing and control by county commissioners.

The grant of a ferry franchise by the legislature, unless limited by some general law or restrictive provision in the grant, is necessarily exclusive to the extent of the privilege conferred.

The property with which the franchise of a ferry is made available and the franchise itself are private property subject like other property to the power of eminent domain but within the constitutional inhibition against such taking without just compensation.

A franchise is a contract between the state and the grantee, binding upon both, the obligation of which can not be impaired by the legislature and any subsequent act so doing is void.

The franchise grant will be construed strictly in favor of the sovereign and against the grantee, and such grant will not be deemed exclusive unless expressly so stated in the grant itself and unless such conclusion necessarily arises by implication from the express language of the grant.

In assessing damages it must be considered that the franchise is the right to take tolls. Evidence of such value should be considered and should be shown by proof of the income, revenue and earnings derived by the owner of the ferry for several years preceding the opening of the bridge, causing the damage.

Damages should also include the diminution in the value of the boats and equipment used in the operation of the ferry caused by their being rendered useless for ferry service at its location.

In the case at bar the County Commissioners could not revoke the vested right to operate the ferry at their discretion or in any arbitrary way but only upon and after legal procedure, petition, hearing and determination. The question of revocation must be raised by direct proceedings therefor. It could not

be raised collaterally in proceedings to determine damages under Sec. 6 of the Bridge Act.

The damages suffered by reason of the construction of the bridge were those resulting from the natural and necessary consequences of the erection and use of the bridge. The opportunity afforded the public of evading the use of the ferry of necessity not only injuriously affected but entirely destroyed the value of the franchise of the ferry.

The County Commissioners had no right to draw a line between the damage to the boats and the franchise and their determination was in error.

The County Commissioners acted not as persons but in their official capacity as a board, and judicially. So acting, the Supreme Judicial Court had under R. S., Chap. 82, Sec. 3, jurisdiction to correct their error and the petition in the case at bar was proper procedure to bring the matter before the court.

On report. A petition under the provisions of R. S., Chap. 82, Sec. 3, to revise and correct the proceedings of the County Commissioners of Hancock County in determining the damages suffered by the owner of Waukeag Ferry by reason of the construction of the Hancock-Sullivan Bridge upon the ferry site, the western terminus of the bridge and ferry being identical.

As provided in Sec. 6, Chap. 120, Private Laws of 1921, hearing was had before the County Commissioners, who assessed the damages suffered by the Petitioner in the sum of $3,200.

Petition was thereafterward brought before the Supreme Judicial Court under provisions of R. S., Chap. 82, Sec. 3, and comes by agreement before the Law Court on report.

Case remanded to court below to be further remanded to the County Commissioners.

The case is very fully stated in the opinion.

Ryder & Simpson,

Wood & Shaw, for petitioner.

W. B. Blaisdell, for Bridge District.

Raymond Fellows, Atty. General, for State Highway Commission.

H. L. Graham,

D. E. Hurley, for County Commissioners.

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

BASSETT, J. This is a petition to the Supreme Judicial Court under the provisions of R. S., Chap. 82, Sec. 3, which confers upon the court the power of general superintendence of all inferior courts for the prevention and correction of errors and abuses where the law does not expressly provide a remedy. It was brought to revise and correct the proceedings of the county commissioners of Hancock County in determining the damages suffered by the petitioner by reason of the construction of the Hancock-Sullivan Bridge. The case comes by agreement before this court on report upon the petition, answer and replication, a copy of the original petition of the plaintiff to the county commissioners, notice thereon and the report of county commissioners to the State Treasurer.

From this record and two special acts of the legislature in 1919 and 1921, the following appears:

Chap. 92 of the Private and Special Laws of 1919 authorized by its first section Bradbury Smith and his assigns "to establish and maintain a ferry for the space of ten years from and after February fifteenth, nineteen hundred and twenty-one between the towns of Sullivan and Hancock . . . across Taunton Bay, or Sullivan River, so called, from the terminus of the road now existing on the Hancock shore" with the right to keep and maintain the necessary boats, landings and other property to operate the ferry. The act established rates of toll, and provided that no other ferry should be operated "within three fourths of a statute mile above or below the ferry established by this act."

Section 6 of the act provided that the county commissioners should have supervision of all matters pertaining to all apparatus used in operating the ferry and its service, and upon petition and hearing might order the same to be improved and, if the order were not complied with to their satisfaction, should so determine and decree and in such case all the powers, rights and privileges granted by the act should terminate and the commissioners should appraise the boats, apparatus and other property used in operating the ferry at its fair value, and the powers, rights and privileges granted by the act should inure to and become vested in such person or persons and their assigns as the commissioners should appoint, provided such appointee or appointees paid the amount of the appraisal within the time specified by the commissioners. The section

further provided "Said commissioners shall also have the power, at any time, during the continuance of this charter, after petition and hearing when in their judgment the public interest demands it to revoke all the powers and privileges granted by this act, and thereupon they shall appraise all the boats, apparatus, and all other property . . . used in . . . operating said ferry at its fair value and any person who may be appointed to run said ferry under the statutes of Maine shall purchase said property as (at) said appraisal; provided, however, that if the said Smith or his assigns shall, within a reasonable time, be able to dispose of said property at an advance over the value as appraised by the county commissioners, he or his assigns shall have the authority and right to do so."

Smith established the ferry and maintained and operated it from February 15, 1921, until May 1, 1924, when he lawfully assigned it, the franchise, boats and entire equipment to the petitioner.

By Chap. 120 of the Private and Special Laws of 1921, the towns of Hancock, Sullivan, Sorrento, Gouldsboro and Winter Harbor were incorporated as a "public municipal corporation under the name of the Hancock-Sullivan Bridge District for the purpose of taking advantage of the provisions of chapter three hundred and nineteen of the public laws of nineteen hundred and fifteen," (the "Bridge Law" so called) and of acts amendatory thereto by applying through its board of trustees "for the construction of a bridge between the towns of Sullivan and Hancock . . . across Taunton Bay or Sullivan River, so called, from the terminus of the Waukeag Ferry road now existing, on the Hancock shore."

Section 6 of the act provided as follows:

> "Sec. 6. Damages to be paid owners of Waukeag Ferry; how adjusted. The county commissioners of Hancock County are hereby authorized to determine on petition therefor by said trustees or by the owner or owners of Waukeag Ferry, so called, after notice and hearing, the damages suffered by said owner or owners by reason of the construction of said bridge. When said damages are so ascertained the said county commissioners shall certify the same to the state treasurer who

shall forthwith pay the amount thereof to the said owner or owners from the joint construction fund."

Pursuant to this act, a free bridge was constructed in the designated location, completed and opened for public travel May 17, 1926, with the result that the travel by ferry was entirely diverted to and across the bridge and the ferry business of the petitioner wholly destroyed.

In accordance with Section 6 of the act, the petitioner on May 14, 1926, petitioned the county commissioners to determine the damages suffered by it by reason of the construction of the bridge. Notice of hearing was duly given, and the hearing held on June 19, 1926.

At the hearing the petitioner claimed that the county commissioners in determining the amount of damages suffered must consider the diminished value of the boats and equipment which were left useless by the construction of the bridge, and the loss of prospective profits from tolls and revenues from May, 1926, when the bridge was opened to the public, with consequent complete and permanent destruction of the ferry business to February 15, 1931, when the right to operate the ferry would expire. Evidence was introduced in proof of these claims.

The commissioners ruled as a matter of law that the petitioner had not suffered any damage within the intent of Chapter 120 by being deprived of tolls and revenues and was not entitled to compensation for loss of prospective profits.

They determined that the damages suffered were to six boats amounting to $3,200, and so certified to the state treasurer July 13, 1926.

To correct their ruling and determination, this petition was brought May 16, 1927.

The final question to be determined is the meaning of the words "the damages suffered by said owner or owners by reason of the construction of said bridge" in Sec. 6 of Chap. 120 of the Laws of 1921, which may be referred to as the bridge act. The legislature had obviously in mind that the owner of the ferry would suffer damages by the construction of the bridge and expressly provided for their determination and payment. The question presented is therefore not the same as in those cases where the owner of

the ferry sought to recover damages by reason of the construction of a bridge when there was nothing in the statute law, under which the bridge company derived its right to erect and operate the rival bridge, which indicated that the legislature intended to grant it the authority so to do but with liability for damages.

Prior questions for determination are, what were the rights of the petitioner under Chap. 92 of the Laws of 1919 which may be referred to as the ferry act, and, how were those rights affected by the construction of the bridge?

All ferries in this state are governed by statute either by special act of the legislature or by the general statute regulating the establishment, licensing and control of ferries by county commissioners, which may be referred to as the general ferry statute and under which the licenses granted are revocable at the pleasure of the county commissioners. Common law rights of ferries are not involved here and the general statute does not apply, except so far as considered below. *Ferry Co.* v. *Casco Bay Lines*, 121 Me., 111.

The petitioner's ferry was established by special act of the legislature and we must examine that act to ascertain the scope and limits of its rights and powers.

The petitioner claims, and that is the foundation upon which all its contentions rest, that the ferry act granted an exclusive right or franchise to maintain a ferry between the towns of Hancock and Sullivan as located and for a distance of three-quarters of a mile above and below that point until February 15, 1931.

The grant of a ferry franchise by the legislature of a state, unless limited by some general law or some restrictive provision in the grant itself, is necessarily exclusive to the extent of the privilege thus conferred. *Mills* v. *County of St. Clair*, 7 Ill., 197.

Section 1 of the ferry act, taken by itself, granted an exclusive ferry franchise for a term of ten years, Lewis on Em. Dom. (3rd Ed.), Sec. 214. But Section 6 provided for revocation during the continuance of the charter, not, as was contended by the county commissioners, at any time *or* when in their judgment the public interest required but "at any time . . . when in their judgment the public interest demands it" and then only "after petition and hearing." In such case the commissioners had not the right, as contended by the county commissioners, but "the power . . . to re-

voke." And the public interest which determined revocation was not public interest generally but interest that the ferry should be run properly. The county commissioners were under the duty of appointing someone to run the ferry, whether they determined their orders for proper improvement of service had not been complied with or that public interest demanded a revocation of the franchise of Smith or his assigns. In the former case, the franchise by the act inured to and became vested in the appointee. In the latter, the franchise was terminated and a license would be granted to an appointee under the general statute. In either case, the boats and other property of Smith or his assigns must be appraised and the appointee must take them at appraisal. The ferry would continue to run.

The commissioners contended that Section 6 modified Section 1 and the two sections taken together negatived any claim to vested rights for the full space of ten years and that the owners of the ferry held it from day to day subject to revocation at any time or when public interest required.

We think the two sections must be taken together and the exclusiveness of the first section was modified by the second, but only to this extent. The franchise was at the outset an exclusive vested right to operate a ferry and so continued unless and until the power of revocation for the purposes above stated was exercised. The county commissioners could not revoke at their discretion or in any arbitrary way but only upon and after legal procedure, petition, hearing and determination. The question of revocation must be raised by direct proceedings therefor. It could not be raised collaterally in the proceedings to determine damages under Section 6 of the bridge act. 12 Enc. of Law, 1104, 1115; *Coombs* v. *Sewell*, 59 S. W., 526 (Ky. Appl.); *Lamar* v. *Commissioners' Court*, 21 Ala., 772; *New York* v. *Starin*, 12 N. E., 631 (N. Y.); *Billings* v. *Breinig*, 7 N. W., 722 (Mich.); *Menzel Estate Co.* v. *City of Redding*, 174 Pac., 48 (Cal.).

There was no claim or suggestion that the petitioner, up to the time the operation of the ferry stopped, had been guilty of any negligence or misconduct such as would justify the revoking of its franchise and the appointing by the commissioners of another to run the ferry, and no proceedings to revoke the powers and privi-

leges of the ferry act have been instituted. So far as any revocation is concerned, the petitioner still owns the franchise, which is still an exclusive ferry franchise, and since it is reasonably certain that no proceedings will be brought to revoke the petitioner's franchise in order to license another ferry, which it would not pay to maintain or to operate, the petitioner will continue to own the franchise until February 15, 1931.

The petitioner claims that its rights and franchise were impaired by the construction of the bridge.

It is settled that the property with which the franchise of a ferry is made available and the franchise itself are private property subject like all other property to the power of eminent domain, but within the constitutional inhibition against such taking without just compensation. Lewis on Em. Dom., Secs. 213, 215.

It is also settled that the franchise is a contract between the state and the grantee binding upon both, the obligation of which can not be impaired by the legislature and any subsequent act so doing is void. Lewis on Em. Dom., *supra*; *Rockland Water Co.* v. *Camden and Rockland Water Co.*, 80 Me., 544, 561; *Propr's Machias Boom* v. *Sullivan*, 85 Me., 345; *Mills* v. *County of St. Clair*, supra.

The franchise to the extent of the rights granted is thus protected, and the extent of the grant depends upon its construction.

The rule universally applied to such construction is that the grant will be strictly construed in favor of the sovereign and against the grantee and such grant will not be deemed exclusive unless expressly so stated in the grant itself or such conclusion arises by necessary implication from the express language of the grant. Lewis on Em. Dom., Sec. 214; *Snidow* v. *Board of Supervisors*, 96 S. E., 810 (Va.); *Larson* v. *South Dakota*, U. S. Sup. Court, Oct. Term, 1928.

The petitioner contends that a free bridge can not be erected within the limits of an exclusive ferry franchise without violation of the rights of the ferry.

It claims that this was so settled in Massachusetts as early as 1798 by *Chadwick* v. *Proprietors of Haverhill Bridge*, 2 Dane's Abridgment, 686, and that in *Pierce* v. *Bangor*, 105 Me., 413, 425, our court decided that the common law of Massachusetts is the law of the land which controls the interpretation of our constitution.

Chadwick v. *Proprietors of Haverhill Bridge* was considered by the Justices of the Massachusetts Court in the famous case of *Charles River Bridge* v. *Warren Bridge*, 7 Pick., 344. Chadwick, the owner of an admittedly ancient ferry, brought an action of case for building a bridge within forty rods of the ferry. Upon his representation to the legislature, provision was made for his indemnity by commissioners. He preferred an action at law which was submitted to reference, Mr. Dane being chairman of the referees, and an indemnity was awarded him. In *Charles River Bridge* v. *Warren Bridge,* Chief Justice Parker said (p. 516), "There was no decision of the Court but it may be inferred that the action was considered as rightly brought. As that is the only case to be found on our judicial records, it is unfortunate there was no decision of principles. All we can know is, that by the erection of the bridge the ferry was entirely destroyed, and that upon such question it was intimated by the court that a party so situated had a right to his trial by jury. . . . At most the case is authority only for a decision, that if a bridge be built by license of the legislature within forty rods of an ancient ferry over the same river, the proprietor of the latter is entitled to indemnity."

Justice Putnam said (p. 485), "I consider this to be a case of great importance, notwithstanding the judgment was rendered upon a report of referees. . . . It may not under the circumstances be considered as *binding* upon the court. But if it is considered merely as the award of the American Coke upon a question of legal right, it is to be treated with great respect."

Justice Wilde (p. 472) said, "But this case was not decided by the court but by referees and it does not appear that any objection was made to their report. And besides, provision was made in the defendant's charter for compensation to the owner of the ferry, so that the only questions in that case were as to the amount of compensation and by whom it should be ascertained."

In the decision of *Charles River Bridge* v. *Warren Bridge* in the Supreme Court of the United States, 11 Pet., 496, Justice McLean said (p. 568) of *Chadwick* v. *Proprietors of Haverhill Bridge*, "This award was sanctioned by the Court. Under the circumstances of this case, at least as great a weight of authority belongs to it, as if the decision had been made on the points involved."

Justice Story said (p. 647), that he considered the case of the very highest authority "notwithstanding all I have heard to the contrary."

But our own court considered the Chadwick case in *Day* v. *Stetson*, 8 Me., 365 (1832), where the plaintiff, claiming to be the owner of an ancient ferry, brought an action of case for setting up a horse ferry at the same place. The Court, holding that all ferries in Massachusetts and Maine "except such as were stated and settled as early as 1695" depend upon the general law and that the plaintiff's ferry so depended, said of the Chadwick case (p. 368), "The action was referred. The referees awarded in favor of the plaintiff and their report was accepted by the Supreme Judicial Court. From this and another action of the same character, Mr. Dane deduces that some ferries in Massachusetts are considered as private property, and as estates in fee and not as appendant to any corporeal estate. Whether this opinion is well founded in law would depend on facts, which we have no means of investigating and which we are not called upon to decide. We are not advised of any ferries of this description in Maine and it may be doubted whether any such exist here. It is very manifest that the ferry in question (the instant case) is not of this character. . . . (p. 370). We have examined the acts authorizing the erection of bridges in Massachusetts and Maine. In very few instances has provision been made for compensation to the persons receiving the emoluments of the ferry. Whether in any case without such provision anything could be recovered at law of the bridge corporation might admit of great question. Where the ferry was private property holden in fee as appears to have been the fact in the case cited by Mr. Dane, perhaps it might; although that was one of the few cases, where the act of incorporation required satisfaction to be made to the owner of the ferry. There may be cases where such provision for a licensed ferryman (under the general law) may be equitable, which if seen and understood by the legislature, would probably always be enjoined by the legislature. But it would be a condition imposed not upon but by them; not arising from a limitation of their power but depending upon the exercise of their discretion."

It appears that the Justices of the Massachusetts court did not

agree as to what the Chadwick case was an authoritative decision of. Our Court was of the opinion, as was Chief Justice Parker, that it was a decision upon an ancient ferry of which there was none in Maine. The case can not be said therefore to have settled for Maine courts the broad principle, for which the petitioner contends, in its favor.

Nor is that principle supported by the weight of authority in the cases, which are conflicting.

The question is whether a grant of a ferry franchise, exclusive within stated limits, should be construed as a grant of transportation by ferry only or as covering all methods of travel and transportation across such water.

A general discussion of the law is found in 11 R. C. L., 925, Sec. 15; 59 L. R. A., 541, 548; 12 Am. & Eng. Cas., 255.

The latest decision is *Larson* v. *South Dakota*, supra. The Supreme Court of South Dakota had held that the fair and reasonable construction of a statute, providing for ferry leases and that no other lease should be granted within four miles from the ferry landing across the same stream, was that it referred "solely to transportation by ferry" and that "nowhere in the statute can be found or implied a provision that the state was binding itself not to construct, nor authorize the construction of, a bridge across the river, within the four mile area or not to permit carriage by aviation across it." On appeal to the United States Supreme Court, it was held in an opinion by Chief Justice Taft, which cites fully the authorities and carefully distinguishes them, that the judgment of the Supreme Court of South Dakota be affirmed. The opinion says, "We can hardly say, therefore, from the weight of authority, that an exclusive grant of a ferry franchise, without more, would prevent a legislature from granting the right to build a bridge near the ferry. Following the cases of this Court in its limited and careful construction of public grants, it is manifest that we must reach in this case the same conclusion."

But it is not necessary to decide whether the legislature could grant the right to build this bridge without providing for compensation because it expressly did provide for compensation for damages suffered.

The petitioner claimed that the bridge was constructed upon the ferry site and that the western termini of the bridge and ferry were identical. But the record is not clear upon this point. The western point of the ferry was "the terminus of the road now existing on the Hancock shore"; of the bridge "the terminus of the Waukeag Ferry road now existing on the Hancock shore."

It does not appear, however, whether or not the bridge was built upon and occupied the site of the ferry. The ferry obviously continued to run during the construction of the bridge and until it was opened to public travel. The diversion of traffic to the free bridge, not its physical obstruction, appears to have been the cause of the ferry's ceasing to operate. Nor does it appear that any property of the petitioner was directly taken or that the bridge was a physical obstruction to the exercise of the ferry franchise, its approaches, landings or navigation. If the locus occupied by the petitioner for its ferry had been taken in whole or in part and it was not left to the enjoyment of an exclusive right of ferry as before by the construction of the bridge, there would have been a taking of its franchise. *Mason* v. *Harpers Ferry Bridge Co.*, 17 W. Va., 396, 419; *Piscataqua Bridge* v. *N. H. Bridge*, 7 N. H., 35, 59; *Snidow* v. *Board of Supervisors*, supra. Provision in the bridge act for just compensation would then have been the duty of the legislature and must have been intended.

On the other hand, if there was no such direct taking and the petitioner still had the right to use its ferry and solicit and obtain all the patronage it could and was not prevented from using its ferry as before, the legislature had the right to provide payment for damages suffered indirectly and consequentially by the construction of the bridge, whether it considered that it could not on the doctrine of some of the authorities legally authorize the construction of the bridge without providing for the payment of damages or that on the doctrine of other authorities it could so authorize, but nevertheless made provision "equitable, which, if seen and understood, would probably always be enjoined by the legislature." *Day* v. *Stetson*, supra, 370.

"It was quite competent for the legislature, in providing for the prosecution of a great public work to require compensation to be made to persons injuriously affected by it though not a case coming

within the express requisitions of the bill of rights." *Dodge* v. *Co. Comm'rs*, 3 Met., 380.

The "damages suffered by reason of the construction of the bridge" are those resulting from the natural and necessary consequences of the erection and of the use of the bridge. If the petitioner was left with the boats and the right of ferrying across the river such passengers as chose to go and take toll for the service thus rendered, the opportunity afforded to the public of evading the use of the ferry of necessity not only injuriously affected but practically entirely destroyed the value of the franchise of the ferry. *Columbia Delaware Bridge Co.* v. *Geisse*, 35 N. J. L., 558; *Queen* v. *Cambrian Ry. Co.*, L. R., 6 Q. B., 422.

The franchise was the right to take tolls. Evidence of such value must be considered, Lewis on Em. Dom., Sec. 721, and would be shown by proof of the income, revenue, and earnings derived by the petitioner from the ferry for several years preceding the opening of the bridge. *Columbia Delaware Co.* v. *Geisse*, 38 N. J. L., 39, 43; *Montgomery County* v. *Schuylkill Bridge Co.*, 20 Atl., 407 (Pa.). And while it is proper in estimating the value of a franchise to consider that it is subject to a forfeiture, when such is the fact, *Westchester etc. Plank Road Co.* v. *County of Chester*, 37 Atl., 905 (Pa.), we do not think, for the reasons above stated, that the franchise could reasonably be held to be subject to what was practically forfeiture on the part of the petitioner, either by the franchise being divested from the petitioner and vested in another or by its being revoked for the purpose of licensing another. The franchise was therefore a right to continue to take tolls to the end of the term.

The damages would also include the diminution in the value of the boats and equipment used in the operation of the ferry caused by their being rendered useless for ferry service at this location.

The commissioners had no right to draw a line between the damage to the boats and to the franchise. If they intended to apply the provisions of Section 6 of the ferry act for an appraisal of boats and other property, that section was not the measure of damages and did not apply to Section 6 of the bridge act. That the provisions of the former section for such appraisal were not repeated in the bridge act shows clearly that the legislature omitted to do so intentionally because it recognized the difference between

the franchise to operate a ferry being continued in and by a succeeding ferryman and the petitioner's being left with a useless franchise or having it taken from him to be replaced by a bridge.

The ruling of the commissioners was therefore incorrect, and their determination of the damages suffered erroneous.

The remaining question is whether the Supreme Judicial Court had superintendence of the county commissioners to correct the errors above stated.

By Section 4 of the bridge act, the bridge district was given the right to take by eminent domain necessary land or real estate, and damages therefor upon petition of the owner or trustees of the district should be assessed by the county commissioners "in the same manner and under the same conditions, limitations, restrictions and rights of appeal as are by law prescribed in cases of damages for the laying out of highways." The commissioners contend that had the legislature intended to give a right of appeal to the owners of the ferry under Section 6, it would have written into the section the same provisions for appeal as in Section 4.

The legislature obviously did not intend to give the same right of appeal as in case of highways under which the damages may be determined by a committee of three disinterested persons. The legislature intended that damages to the ferry should be determined only by the county commissioners. These proceedings are not an appeal.

It is also contended that the commissioners acted only as individuals, as referees or arbitrators, and therefore their determination was final and conclusive.

But from the record they appear to have acted not as individuals but as the board of county commissioners. The petition was addressed to the "Board of County Commissioners of the County of Hancock." Notice of hearing was ordered by the "County Commissioners" to be given to the trustees of the bridge district and the state highway commission and was given by the clerk, who is the Clerk of Courts, 107 Me., 518; *Levant* v. *County Commissioners*, 67 Me., 436. Their determination of the damages suffered, and certificate of the same was signed by the three commissioners as "County Commissioners of Hancock County." The petition, order for hearing determination and certification were filed in their office.

They were not requested to act as individuals and did not assume to. They appeared to have intended to act as the board of county commissioners.

In *Machias River Company* v. *Pope*, 35 Me., 19, the charter of the plaintiff corporation authorized it to improve the Machias River for driving purposes and to charge toll proportionate to the expenditures for the improvements and required the amounts of expenditures to be audited by the "County Commissioners." The court held that the commissioners, when auditing, were acting not in their official capacity but as individuals; in the proceedings there were no adversary parties; and the auditing, which was without hearing and notice, consisted only of an examination of an account, comparing it with vouchers, adjusting the same and stating the balance, and was in the nature of a special commission and not a judicial act.

In *State* v. *Bangor and Brewer*, 98 Me., 132, special acts of the legislature authorized the taking and purchasing of the toll bridge of a private corporation by the defendant cities, the value of the bridge to be determined by three disinterested persons, appointed by the Chief Justice of the Supreme Judicial Court, whose award should be subject to confirmation by the Chief Justice or recommitted for the correction of errors if justice required, and was conclusive as to amount; and if the defendant cities could not agree upon the proportions in which they should pay the amount of value so determined, the proportions should, upon petition of either city and notice to the other and hearing, be determined by the county commissioners. The court held, on the authority of *Machias River Company* v. *Pope*, that the acts conferred the power on the county commissioners as persons, not on the board of commissioners as a board, that they were not to act officially, and that their determination was final and conclusive except for fraud or mistake of material facts, neither of which was claimed.

We do not think that the constructions put upon the special acts in these two cases are conclusive upon the construction of the act in the instant case.

In the former case, the duties of the county commissioners were practically clerical. In the latter, the value of the property taken for public uses and the amount to be paid therefor had already been

judicially determined as provided in the act, and the duty of the commissioners was to apportion the payment of this amount.

Whether or not the construction placed by the court upon the duties of the commissioners in the latter case would now be followed, we do not think that the legislature in the act in the instant case, after providing in Section 4 for proceedings judicial in their nature before the county commissioners acting officially as a board for determining damages for land or real estate taken by eminent domain for the purposes of a free public bridge, then proceeded to provide in Section 6 following for determining the damages suffered by the ferry owner by reason of the same public purpose by the same commissioners but acting only as persons, as referees, and not as a board; that the commissioners acted judicially in the one case but not so in the other. We think they acted in the same capacity under both sections.

The board of county commissioners is a court. *Chapman* v. *County Commissioners*, 79 Me., 269; *Nicholson* v. *R. R. Co.*, 97 Me., 43.

The Supreme Judicial Court therefore had jurisdiction under Rev. Stat., Chap. 82, Sec. 3, to correct the errors of the county commissioners in the proceedings under Section 6 of the bridge act and the petition brought here was appropriate procedure. *Levant* v. *County Commissioners*, 67 Me., 429; *Norris* v. *McKenney*, 111 Me., 33.

The case should be remanded to the court below in order that it may be further remanded to the county commissioners to determine upon further hearing and in accordance with this opinion the damages suffered by the petitioner by reason of the construction of the bridge.

Case remanded to court below to be further remanded to county commissioners.

BASIL C. EMERY *vs.* STANWOOD E. FISHER.

York. Opinion April 22, 1929.

EVIDENCE. RULES OF COURT, XXXIX.

Rebutting evidence repels or counteracts the effect of evidence which has preceded it. It replies directly to that produced by the other side. Evidence which does not contravene, antagonize, confute, or control the inference sought to be drawn by new facts introduced by the adverse party at the next previous stage is not rebutting evidence, and under rule XXXIX is not admissible.

In the case at bar plaintiff's rebuttal testimony did not tend to meet and offset the affirmative matter set up by his opponent, nor had it tendency to discredit, impeach or otherwise disparage the preceding witness; or show the improbability of his story. It was not relevant. The testimony was purely collateral and therefore not properly admissible.

On exceptions and motion for new trial by defendant. An action on the case to recover for alleged malpractice of defendant surgeon. Hearing was had at the September, 1928, Term of the Supreme Judicial Court for the County of York, resulting in a jury verdict for the plaintiff in the sum of $2,000. To the admission of certain rebuttal testimony of the plaintiff the defendant seasonably excepted, and after the jury verdict had been rendered, filed a motion for new trial. Exception sustained.

The case fully appears in the opinion.

Emery & Waterhouse, for plaintiff.

Locke, Perkins & Williamson,

Edward S. Titcomb, for defendant.

SITTING: DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

DUNN, J. Defendant is a throat specialist. He removed the plaintiff's tonsils. The present action was for malpractice. Plaintiff gained the verdict. The case is up on defendant's exception and motion.

Negligence was alleged in using a mouth gag, a rubber tube from one of the prongs of which became detached, during the surgical operation, and passed into and infected the bronchus of the plaintiff; also in the failure to discover the tube and relieve the pain and suffering its presence caused.

There was evidence by the defendant: The anesthetist said suddenly that the plaintiff, who was being prepared for the operation, was affected with cyanosis. Defendant hastened to plaintiff's assistance. When plaintiff was restored, defendant missed the tube. He suspected it to be in the body of the plaintiff. In consequence of this, and before proceeding to operate, continued the defendant, his instruction to the attending physician was that, after the operation, he examine the stools from the plaintiff, and any vomits, for the tube.

At the time of the trial the attending physician was dead.

Only rebutting evidence was in order when the plaintiff's turn came again. Rule XXXIX; 102 Me., 535; 103 Me., 534; 105 Me., 565; 114 Me., 367.

Plaintiff testified, against objection, and though cautioned that the particular testimony might be held remote, that he never had been told by the attending physician to search into the evacuation and vomits.

The objected evidence was not rebutting evidence. The noted exception must be sustained.

Definitions of rebutting evidence, gathered from various judicial sources, are collected in Words & Phrases. Rebutting evidence repels or counteracts the effect of evidence which has preceded it. It replies directly to that produced by the other side. Evidence which does not contravene, antagonize, confute, or control the inference sought to be drawn by new facts introduced by the adverse party at the next previous stage is not rebutting evidence.

Defendant testified that his instruction concerning what should be done was given to the attendant physician; the testimony stopped there.

Plaintiff's testimony did not tend to meet and offset the affirmative matter set up by his opponent, nor test it and merely minimize or destroy its probative force, nor had it tendency to discredit, impeach, or otherwise disparage the preceding witness; or show the

improbability of his story. It was not relevant. Chamberlayne, Law of Evidence, Sec. 379.

Nor is this all. The testimony may have prejudiced the jury. It may have been argued to prove that the defendant had been negligent or unskillful; it could have been argued to raise in ulterior effect a false issue of veracity between the defendant and the dead doctor, to the obfuscation of the real issues of the case.

True, the evidence may not have weighed with the jury for much, but the admissibility of evidence is not measured by its seeming weight; the measurement is by other principles. The testimony was purely collateral, and therefore not properly admissible.

Inasmuch as sustaining the exception sends the action back for another trial, it is unnecessary to consider defendant's general motion.

Exception sustained.

ALBEE'S CASE.

Knox. Opinion April 22, 1929.

WORKMEN'S COMPENSATION ACT. DEPENDENCY CONSTRUED, (SECTION I, VIII A). DESERTION.

The conclusive presumption established in Section 1, *VIII (a) of the Workmen's Compensation Act, may be construed to be merely a rule of law declaring a particular fact to be true under particular circumstances.*

It has been long established in this State that in the absence of fraud, findings of fact in a compensation proceeding, having competent evidence to support them, are conclusive on review.

Justifiable cause which will excuse a wife from living apart from her husband ordinarily involves, on the part of the husband with respect to the wife and to her knowledge, conduct inconsistent with the marital relation; not necessarily misconduct or ill treatment of such a character as might entitle her to a divorce from the bonds of matrimony, but such as could be made without turning on the same length of time, a foundation for a judicial separation under R. S., Chap. 66, *Sec.* 10.

Under the Workmen's Compensation Act, though the cause need not be utter and may become complete sooner than the divorce statute, yet desertion means wilful, wrongful, and continued separation with intent to desert, without consent.

A separation begun by a husband, his wife acquiescing or consenting, does not amount to desertion until some withdrawal of the acquiescence or consent or the occurrence of some act, or the making of a declaration indicative of a change in attitude.

In the case at bar the Commissioner found that the separation was begun with the wife's consent and continued with her will until the time of the accident. There was evidence to support his findings and the conclusion drawn by the trier of the facts did not constitute within the purview of the law, an indefensible inference from the proofs.

On appeal from a decree of a single Justice dismissing a petition and denying compensation under the Workmen's Compensation Act.

A petition by Hattie A. Albee as dependent widow of John Henry Albee, who was killed on November 15, 1927, while working for the Elias Hersey Roofing Company on a building at Thomaston, Maine. The sole question was whether Petitioner was entitled to compensation as a dependent under the provisions of Section 1, VIII (a) of the Workmen's Compensation Act, inasmuch as at the time of the accident she was not living with her husband nor actually dependent upon him.

Upon hearing, the Chairman of the Industrial Accident Commission denied compensation and dismissed the petition, and his findings and decree were affirmed. Appeal was taken. Appeal dismissed. Decree below affirmed.

The case fully appears in the opinion.

Tascus Atwood, for plaintiff.

Hinckley, Hinckley & Shesong, for defendant.

SITTING: WILSON, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PATTANGALL, J., non-concurring.

DUNN, J. On November 15, 1927, John Henry Albee, the workman of that name, sustained industrial injury at Thomaston. He was killed instantly. His widow claimed compensation. The in-

surance carrier filed an opposing answer. Upon hearing, the chairman of the Industrial Accident Commission denied compensation, and dismissed the claimant's petition. Such action was on the ground that, conceding all other points proved, claimant was not the statutory dependent of her husband at the time of his injury; her living apart from him having been without justifiable cause, and he not having deserted her. From the compensatory decree, this appeal is prosecuted. The appeal presents for decision whether, as a matter of law, the claimant was dependent on her husband for support.

In reference to the situation the Workmen's Compensation Act (Laws 1919, *c.* 238) provides:

> A wife (shall be conclusively presumed to be wholly dependent for support) upon a husband * * * from whom she was living apart for a justifiable cause, or because he had deserted her.

Sec. 1, VIII (a).

Conclusive presumptions are not really presumptions at all. They are merely rules of law declaring a particular fact to be true under particular circumstances. The Legislature establishes that in the case specified the nonexistence of the fact presumed is immaterial. *Rush* v. *London etc. Co.*, 166 N. W., 772 (Minn.).

There was testimony justifying the trier to find these material facts:

Beginning in 1896, husband and wife lived together over a period of 24 years, both at fault as to "words" with the condition mutually accepted, perhaps, as incidental to marriage.

In 1920 they were boarding at the wife's sister's house in Lewiston. The husband had employment elsewhere as a laborer; the wife was employed in a shoe factory.

The boarding mistress did not like the man's habit of getting up early mornings and talking in his naturally loud voice. She dismissed him. He went down town and hired a room; of this his wife learned. When he came back that same day for his bank book, his wife gave it to him from her custody, voluntarily and without hesitation or question. He took the book to and left it with his stepdaughter in Auburn. Later in the week he returned to the boarding house and removed his personal effects. The wife, though she saw

what her husband was doing, did not seek him or speak to him, nor did he go to or speak to her. That was his last time there.

On leaving the boarding house or afterwards Albee did not ask his wife to live with him. He did not from that time on contribute to her support. He made no effort to see her. On one day, five or six years afterward, husband and wife met on the street when he bowed and may have spoken to her; she was indifferent to his presence. Following this they unexpectedly found themselves in a public dining room on the fair grounds, but neither sought out the other.

Seven years passed. Meanwhile the woman, who throughout had been self-sustaining, and was informed as to her husband's whereabouts, had removed to the home of the daughter who had, or had had, the bank book.

The wife libeled for divorce. The cause alleged is not in the record. Before the case was called the libelee had died.

Claimant testified she might have been ready and willing, before the libeling, to live with her husband, had he requested her to do so, and made provision therefor, and said he was sorry for the names he had called her and indicated that he would do better than he had done, but, notwithstanding this testimony, she apparently made up her mind, recites the commissioner in the opinion he filed, that she no longer needed her husband and chose not to live with him further.

In the absence of fraud, findings of fact in a compensation proceeding, having competent evidence to support them, are conclusive on review. *Mailman's Case*, 118 Me., 172; *Gauthier's Case*, 120 Me., 73.

The separation, certainly, was not, in the first instance, wilful toward the wife; that the boarding house keeper ordered the man to leave negatives any intent to desert at the outset.

What of the conduct of the husband after he had had a reasonable time to establish himself in some other abiding place?

Justifiable cause which will excuse a wife for living apart from her husband ordinarily involves, on the part of the husband with respect to the wife and to her knowledge, conduct inconsistent with the marital relation; not necessarily misconduct or ill treatment of such a character as might entitle her to a divorce from the bonds of matrimony, but such, for instance, as could be made, without

turning on the same length of time, the foundation for a judicial separation. See R. S., Chap. 66, Sec. 10. A wife does not live apart from her husband for justifiable cause, if he is not recreant to marital duty. *Newman's Case*, 222 Mass., 563.

Desertion can not be inferred from the mere fact that the parties do not live together. *Freeman* v. *Freeman*, 82 N. J. Eq., 360. It may be that a wife may be passive and yet deserted. On the other hand, she may manifest consent avowedly, or even silently, to her husband's prolonged absence and neglect. Under the Workmen's Compensation Act, though the cause need not be utter, and may become complete sooner than under the divorce statute, yet desertion still means wilful, wrongful, and continued separation with intention to desert, without consent. *Scott's Case*, 117 Me., 436, 440. An absence assented to does not constitute desertion. *Moody* v. *Moody*, 118 Me., 454, 457. A married partner who concurs in the other's staying away, to change slightly Mr. Bishop's phrase, cannot complain of the staying. Bish. M. & D., 1609.

A separation begun by a husband, his wife acquiescing or consenting, does not amount to desertion until some withdrawal of the acquiescence or consent, or the occurrence of some act, or the making of a declaration indicative of a change in attitude. The sitting commissioner, who heard the witnesses, and who saw the witnesses, and, with reference to their credibility and the weight of their testimony, may have gathered that which is not gatherable from the printed record, found that this separation was begun with the wife's consent and continued with her will to the time of the accident.

The reviewing court may not try the facts. That is prohibited. It is for this court to decide if the conclusion drawn by the trier of facts and given efficacy by the decree is within the purview of the law an indefensible inference from the proofs. So to characterize the decision of the chairman of the commission would be inconsistent. It is unimportant that a determination different from that made by the chairman might have been sustainable.

Appeal dismissed.
Decree below affirmed.

FRANK R. DYER *vs.* EDWIN C. BARNES.

Lincoln. Opinion April 23, 1929.

DAMAGES. EVIDENCE.

Where there exists a fixed standard or scale by which damages may be calculated a jury will not be permitted to depart from it.

In the case at bar no such standard was applicable. Damages were not liquidated nor were they capable of being reduced to certainty by arithmetical calculation, so the criterion was how much the plaintiff deserved for drilling the well.

There was sufficient believable evidence to warrant the jury in finding liability on the part of the defendant, and in arriving at its estimate assessing the damages.

On general motion for new trial by defendant. An action of assumpsit brought by plaintiff to recover the sum of $825.00 for digging an artesian well 165 feet deep. At the trial the jury returned a verdict for the plaintiff in the sum of $666.60. The defendant thereupon filed a motion for a new trial. Motion overruled.

The case sufficiently appears in the opinion.

Ralph Dale, for plaintiff.

Weston M. Hilton, for defendant.

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

DUNN, J. This action concerned if the plaintiff was entitled to a compensatory verdict against the defendant for drilling a well on his Lincoln county premises. The plaintiff established a state of facts which entitled the case to go to the jury. He testified that in drilling the well he relied partly upon a special contract, which he had fully performed, and partly on an implied promise; the latter regulating the amount of recovery, which plaintiff attested should be $825.

The defense introduced testimony in denial of liability. Defendant witnessed that he gave plaintiff permission to drill this well, near

one plaintiff had drilled previously, which had ever been inadequate in supplying water; the defendant to be under no obligation to pay for the new well. No other issue was litigated.

Numerically the witnesses were on the side of the defendant, but the jury finding the testimony given by the plaintiff to outweigh that adduced by the defendant, awarded the plaintiff damages in the sum of $666.60.

The case is here on motion in usual form for a new trial.

While recognizing, generally, that a party can not complain that a verdict against him is too small, counsel finds fault with this verdict, not because the verdict is not large enough, but because, if the jury believed the plaintiff, the jury was bound to render a verdict for the amount he claimed, and that in deciding that plaintiff was not entitled to what he demanded, the triers of fact in effect refused to accept his version of the case.

It is argued that while perhaps the jury might well, upon the conflict of evidence, have found either way as to liability, yet they could not with consistency find both ways as to damages; wherefore, argument continues, it being the right of every litigant to have the verdict against him based upon the evidence, this verdict, which should have been either for the plaintiff in the amount sued for, or for the defendant, is manifestly wrong.

Where there exists a fixed standard or scale by which damages may be calculated, a jury will not be permitted to depart from it. *Miller* v. *Mariner's Church*, 7 Me., 51, 55. But no such standard is applicable to the case at bar. Damages were not liquidated, nor were they capable of being reduced to certainty by arithmetical calculation, so the criterion was how much the plaintiff deserved for drilling the well. He was allowed to express his opinion from personal knowledge of a transaction in the ordinary affairs of life. *Snow* v. *Boston & Maine Railroad*, 65 Me., 230. The jury in arriving at its own opinion, from the facts and circumstances and inferences and the opinion given in testimony, might accept the latter opinion at face value, or discredit it, wholly or in part. *Snow* v. *Boston & Maine Railroad*, supra.

Other points are advanced, but on close scrutiny of the record it is not to be said the jury rested its verdict on other than a reasonable basis in believable, believed, and fairly preponderating evi-

dence. Another jury, on the same evidence, might have decided differently. This, however, is not of consequence in testing the integrity of the present verdict.

Motion overruled.

JOHN L. DUFOUR ET AL *vs.* FRANK STEBBINS, EXECUTOR.

Androscoggin. Opinion April 23, 1929.

PLEADING AND PRACTICE. ACTIONS. CONTRACT.

In an action on a contract one can not recover by proving another and different contract from that set forth in the declaration.

Specifications under money counts, while not required to be exact in form, must truly state the ground of claim — the gist of the action — and recovery is limited to that claim. Plaintiffs can not avail themselves of evidence tending to prove another case than that stated in their claim to recovery in their specification.

In the case at bar an analysis of the pleadings discloses that the plaintiffs' right of recovery, if any there were, was based on an alleged express contract declared upon specially in the first count of their declaration, and the gist of their action as specified in the second or omnibus count.

The limitations upon the plaintiffs' recovery under the declaration are well settled. The averment was that the decedent "in consideration that the plaintiffs would join in the execution of a release" etc., made the promise relied upon. The proof was that the decedent stated she considered she owed the plaintiffs $2,000 and upon that consideration made the promise alleged. There was therefore a clear conflict between the allegation and the proof, and the decedent's undertaking as alleged in the first count of the declaration was for failure of proof, without consideration, and a verdict for the plaintiffs thereon could not stand.

Under the second or omnibus count the plaintiffs were limited in their proof and restricted in their right of recovery by their specifications thereunder. Failing to prove the special contract, the plaintiffs can not recover under the second count. Recovery could not be had under the pleadings in this case for labor, care, board and clothing, or money expended for the maintenance of the decedent and her husband.

Under the pleadings in the case at bar upon the proof offered, the verdict for the defendant was clearly right.

On exceptions and general motion for new trial by plaintiffs. An action on the case against the Executor of the last will and testament of Azilda Stebbins to recover moneys which plaintiffs claimed the decedent promised to pay them by making provision therefor in her will.

There were two counts to the declaration, the second an omnibus count.

At the trial of the cause the jury rendered a verdict for the defendant.

To certain instructions given by the presiding Judge plaintiffs seasonably excepted and after the verdict filed a general motion for new trial. Motion overruled. Exceptions overruled.

The case fully appears in the opinion.

L. A. Jack,

Frank H. Haskell, for plaintiffs.

Skelton & Skelton, for defendant.

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

STURGIS, J. In this action of assumpsit, brought to this court on a general motion and exceptions, a brief preliminary review of the important facts in evidence seems necessary.

The defendant's testatrix, Azilda Stebbins, was the mother of the plaintiff, Delia A. Dufour. Prior to November, 1921, Delia and John Dufour, her husband, had been living on the river road, so-called, with Mrs. Dufour's parents, Mrs. Stebbins, the deceased, and her husband, George W. Stebbins. November 5, 1921, the Dufours having acquired a home in Auburn, an arrangement was made whereby the Dufours, in consideration of the payment to them of $3,000 by Mr. and Mrs. Stebbins, agreed to support and maintain the latter for the rest of each of their natural lives, with provision for penalty in case the arrangement should not prove a happy one for either of the parents.

This agreement was evidenced by a writing mutually signed by all the parties, and went into effect. The $3,000 was paid by the parents, and the daughter and her husband supported them, so far as the record discloses, in accordance with the terms of the agree-

ment. The arrangement, however, was short lived. On December 1, 1922, it was rescinded. Mr. and Mrs. Dufour paid back the money which Mrs. Dufour's parents had advanced, and they in turn released all claims under the agreement and moved into a home of their own at Lisbon. This rescission agreement was also in writing and signed by all of the parties.

It is out of the incidents and conversations which the plaintiffs say took place when this rescission agreement was made that they here claim a liability on Mrs. Stebbins' part arose, and for which they seek here to charge her executor. George C. Webber, a practicing attorney at Auburn, called as a witness by the plaintiffs, testifies that while he was preparing the rescission agreement of December 1, 1922, the following took place:

"A. Well, Mrs. Stebbins said that she considered that she owed John L. Dufour and Delia Dufour, her daughter — called them by name, son-in-law and daughter — $2,000. And she wanted to know if she could put it in a bank book, payable to them, to her, or for her survivor. I am not sure about that though. She may have said both of them; and I told her no, that the only way she could do that was by a will. And when I read this agreement —

Q. I would like to enquire whether that was before or after the contract was executed?

A. Well, it was while it was being drawn. She said that she would draw a will right there, and she asked me when I read this paper to her if that clause could not be incorporated into this paper that they were to have $2,000 at her death in addition to the divisional share of the estate, as I understood it to be divided equally between the children and they to have $2,000 additional. I told her no, that the only way it could be done was to draw a will and when this contract was signed I supposed —

A. It was understood. She said —

A. That she would make this will right then and there, and when the contract was signed she got up, much to my surprise, and said, 'I have got some things to do at Lisbon Falls and I will be back this afternoon or tomorrow morning, and probably this afternoon, and draw that will.' And they went out. And she did not come back in the afternoon or the next morning. And it fixed itself on my memory because of that thing very strongly. I think I stated

that she said that she owed that money to those two people."

With admissions that Mrs. Stebbins did not pay the Dufours the $2,000 which Mr. Webber says she discussed with him, nor did her will when probated contain a provision therefor, the evidence was closed.

MOTION.

The plaintiffs by their general motion urge in the usual form that the verdict for the defendant is against evidence, and the weight of evidence, and is against law. As the case presents itself, these questions may well be determined first.

A careful analysis of the pleadings discloses that the plaintiffs' right of recovery, if there be such, is based on an alleged express contract declared upon specially in the first count of their declaration, and the gist of their action as specified in the second or omnibus count.

The first count sets out that Azilda Stebbins in her lifetime, etc., "in consideration that the plaintiffs would join in the execution of a release of the said Azilda Stebbins and her husband, George W. Stebbins, from the obligations of a certain agreement for support theretofore made and existing by and between the plaintiffs and the said Azilda Stebbins and her husband, George W. Stebbins, promised the plaintiffs that she, the said Azilda Stebbins, would pay to the plaintiffs in money or make her will and therein provide that the plaintiffs should receive the sum of two thousand dollars in addition to the share of the estate of the said deceased to which the said Delia A. Dufour would be entitled upon a division of the remaining property of said Azilda Stebbins," and concludes with averments that Mrs. Stebbins did not pay the money in her lifetime nor make her will providing for its payment, and the claim having been duly filed in the Probate Court the defendant as executor has not paid the same.

The limitations upon the plaintiffs' recovery under this declaration are well settled. The averment is that the decedent "in consideration that the plaintiffs would join in the execution of a release" etc., made the promise relied upon. The proof is that "Mrs. Stebbins said she considered that she owed John L. Dufour and Delia Dufour, her daughter — called them by name — son-in-law

and daughter — $2,000," and upon that consideration made the promise alleged. Clearly there is a conflict between allegation and proof.

Giving full credence to Mr. Webber's testimony, the contract thereby established is not the contract relied upon by the plaintiffs. They can not recover by proving another and different contract from that set forth in their declaration. *Kidder* v. *Flagg*, 28 Me., 477; *Porter* v. *Porter*, 31 Me., 169, 172; *Gilman* v. *Bradford*, 82 Me., 547, 550; *Gilbert* v. *Gerrity*, 108 Me., 258; 1 Chitty on Pleading, 298; 21 R. C. L., 608 et seq.; 13 C. J., 723, 753. The decedent's undertaking as alleged in the first count of the declaration is, for failure of proof, without consideration, and a verdict for the plaintiffs thereon could not stand.

Turning to the second count of the declaration which is an omnibus count, we find that the plaintiffs have restricted their claim of recovery by the specifications which read:

> "Under the foregoing money counts the plaintiffs will claim to recover, upon proof of the promises of said deceased to pay the plaintiffs the sum of two thousand dollars in money or to make her will providing for the payment to the plaintiffs of said sum, as heretofore alleged, in accordance with the agreement made with the plaintiffs on the fifth day of November, 1921, as hereinbefore set forth."

Their proof is thus limited and their right of recovery accordingly restricted. *Gooding* v. *Morgan*, 37 Me., 419, 423; *Carson* v. *Calhoun*, 101 Me., 456, 458. Their "claim to recover" is upon the alleged promise and agreement of the decedent "as heretofore alleged" and "as hereinbefore set forth" only in the first count. It is not, as stated in the bill of exceptions, "for labor, care, board, clothing, and money expended for the maintenance and support" of the decedent and her husband. By the limitations of their specifications their right of recovery depends on proof of the existence of the special contract. Had they done this, upon proof of full performance of the contract on their part, with nothing but the payment of money due from the decedent, they could recover in indebitatus assumpsit. *Poole* v. *Tuttle*, 11 Me., 468; *Holden Steam*

Mill v. *Westervelt*, 67 Me., 446, 450; *Elm City Club* v. *Howes*, 92 Me., 211; *Rogers* v. *Brown*, 103 Me., 478. This is the only "claim to recover" open to them upon these pleadings.

Failing to prove the special contract, the plaintiffs can not recover under the second count. If we assume without adoption the correctness of the rule accepted in many jurisdictions that a person may make a valid enforcible contract to dispose of his property by will in a particular way, 28 R. C. L., 64; 40 Cyc., 1063, and numerous cases cited, in the instant case the promise so to do lacks of record consideration and can not bind the decedent. No express contract is proven under which the plaintiffs can show full performance on their part or payment of money due from the decedent. Their "claim to recover" lacks proof.

It is urged, however, by counsel on the brief that the plaintiffs have a right of recovery under the second count for labor, care, board, clothing, and money expended for the maintenance and support of the decedent and her husband. That is not the claim to recover specified; and while specifications are not required to be exact in form, they must truly state the ground of claim, the gist of the action, and recovery is limited to that claim. *Goodwin* v. *Morgan*, supra. The plaintiffs can not avail themselves of evidence tending to prove another case. *Carson* v. *Calhoun*, supra. Having elected to restrict their specifications within the limits of the contract alleged in the first count, the plaintiffs must abide their election.

Upon the motion, for the foregoing reasons, we must hold that the verdict below was clearly right and must stand.

EXCEPTIONS.

The plaintiffs reserved numerous exceptions to the charge of the presiding Justice. In view of the conclusion of the court upon the motion it becomes immaterial whether the instructions given were right or wrong. Upon the law, the pleadings and the evidence, whatever the errors in the instructions of the Court as abstract principles of law may be, the result of the trial was right. If the Court erred, the jury did not. No one of the instructions given could affect the limitations upon the plaintiffs' recovery already pointed out in this opinion. As in *Gordon* v. *Conley*, 107 Me., 286,

292, the court is fully satisfied that the case has been rightly decided, and the result should not be disturbed because of abstract errors of law, if they exist, which could not and did not prejudice the plaintiffs. The exceptions must be overruled.

Motion overruled.
Exceptions overruled.

JAMES H. PINKHAM *vs.* COMMERCIAL ACCEPTANCE CORPORATION.

Cumberland. Opinion May 6, 1929.

CONSTRUCTION OF INSTRUMENTS. CONDITIONAL SALES. R. S., CHAP. 114, SEC. 8.

When an error exists in an instrument it must, until duly reformed, be interpreted according to its terms.

In the case at bar the buyer did not sign a writing that the title to the particular automobile, bargained and delivered to him, should, pending payment, remain in the seller. The agreement which the buyer signed related to the title to a very similar but none the less a very different automobile.

The imperative provision of Chap. 114, Sec. 8, R. S., being unmet, no conditional sale was effected but a sale was made on credit.

The seller undertook to sell the automobile No. 779690 again, this time to the plaintiff, but the undertaking was to no purpose.

On exceptions by plaintiff. An action of replevin for one Hudson automobile, maker's number, 779690. Defendant pleaded the general issue and title in itself, denying plaintiff's title, and praying for the return of the property. On trial without jury the presiding Judge made certain findings of fact and ruled that as a matter of law judgment should be for the defendant and for the return, and assessed damages for the taking in the sum of $125. Plaintiff excepted to the ruling of the Court.

It appeared that one Austin, an automobile dealer, sold a Hudson car carrying serial No. 779690 to one Vigue taking back a con-

ditional sale contract, with a Holmes note attached, listing the serial number of the auto, however, as "779610." Austin assigned this contract and note to the defendant. Vigue failed to make the payments as agreed and the defendant repossessed itself of the car. Later, Austin, becoming involved in financial difficulties, entered into arrangements with plaintiff for financial assistance. Plaintiff turned over to Austin an $800 note of Austin's, which he (plaintiff) held and received therefor a bill marked "Paid" for one Hudson Automobile, Serial No. 779690, which was the correct number of the car. Plaintiff made demand on defendant to deliver the car to him, and thereafterward replevied the car. Action was brought as above set forth. Exception overruled.

The case appears in the opinion.

Berman & Berman, for plaintiff.

Abraham Breitbard,

Max L. Pinansky, for defendant.

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

DUNN, J. An action of replevin, heard (jury waived) in the Superior Court for Cumberland county, with the right of exception reserved. Under the general issue, defendant pleaded title in itself and traversed title in plaintiff. The court ruled that, on the right to immediate possession, the plaintiff had not made his case. An exception saved the point.

In Maine, on February 6, 1928, a bargain was made concerning an automobile, the seller and the buyer intending to consummate a conditional-sale agreement, which would be incorporated by reference in a purchase-price note. The serial number of the automobile, distinguishing it from all other automobiles of the same make, was 779690. The seller delivered that automobile into the possession of the buyer. The buyer executed to the seller a conditional-sale agreement, sufficiently describing the automobile which had been delivered to him, except as to the serial number, this being given as 779610.

There is a statute that, to be valid, an agreement, that the property or title to a bargained and delivered chattel shall remain that

of the seller till paid for, must be in writing and signed by the person to be bound thereby. R. S., Chap. 114, Sec. 8.

The buyer did not sign a writing that the title to the particular automobile, bargained and delivered to him, should, pending payment, remain in the seller. The agreement which the buyer signed related to the title to a very similar, but none the less a very different, automobile.

It matters not that the error, for such the ruling judge apparently found it to be, might have resulted from mutual mistake on the part of the parties to the transaction. The instrument must, until duly reformed, be interpreted according to its terms. *Martin* v. *Smith*, 102 Me., 27.

The imperative provision of the statute being unmet, no conditional sale was effected, but a sale was made on credit. See, in strong analogy, *Holt* v. *Knowlton*, 86 Me., 456. See, too, less strongly, but nevertheless pertinently, in its sentence, "The note does not refer to the wagon." *Boynton* v. *Libby*, 62 Me., 253.

The seller undertook to sell the automobile 779690 again, this time to the plaintiff, but the undertaking was to no purpose.

Exceptions overruled.

STATE *vs.* JOHN J. FLAHERTY.

Cumberland. Opinion May 6, 1929.

CRIMINAL LAW. RAPE. EVIDENCE. EXCEPTIONS.

At common law rape is defined as the act of having unlawful carnal knowledge of a woman forcibly and against her will; later authorities have better defined it as having unlawful carnal knowledge of a woman, forcibly and without her consent.

The crime may be committed when the woman exhibits no will at all in the matter, as where she is drugged or non compos mentis; *but the words "against her will" and "without her consent" have been held to be synonymous expression.*

Three elements must be present to constitute rape, viz.: carnal knowledge,

force, and the commission of the act without the consent or against the will of the ravished woman.

It being well settled law that rape is a felony and that all persons who are present aiding, abetting, or assisting a man to commit the offense, whether men or women, are principals and may be indicted as such, it is immaterial that the aider and abettor is disqualified from being the principal actor by reason of age, sex, condition or class. A woman therefore may be convicted as principal in the crime of rape.

Unchastity of the female is no defense to the charge of rape.

Evidence to show a reputation for unchastity may be admissible to impeach the testimony of the prosecuting witness as to the want of consent, yet the overwhelming weight of authority is that specific acts of unchastity are not admissible to prove character.

When the presiding Justice excludes testimony de bene *with the statement that if the evidence warrants it, it may become admissible, and the objecting party does not make an attempt to introduce the testimony at a later stage of the evidence, his exception is of no avail.*

In the case at bar, the respondent furnished the necessary force while another performed the act of sexual intercourse, all being against the will and without the consent of the woman. Each was therefore guilty as principal.

While intoxication may be of such a degree as to involve a numbing of the faculties so as to affect the capacity to observe, recollect or communicate, and as such may tend to prove the witness unworthy of credit in stating facts which occurred when he was in such condition, yet no such condition of the complaining witness at bar was proved, and presumption can not stand in the place of proof.

On exceptions. The respondent was indicted and tried for rape. The jury returned a verdict of guilty. To rulings, and to the charge of the presiding Judge the respondent excepted.

Exceptions overruled. The case fully appears in the opinion.

Ralph M. Ingalls, County Attorney,

Walter M. Tapley, Assistant County Attorney, for State.

Joseph E. F. Connolly, for respondent.

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

PHILBROOK, A. R. J. The respondent, charged with committing the crime of rape, tried by jury and found guilty, brings his case before the Law Court by a bill of exceptions.

There are eight exceptions in the bill but in argument these are reduced to four, viz.:

A. Denial of respondent's motion for a directed verdict at the close of the opening to the jury by the attorney for the State;

B. Denial of respondent's motion for a directed verdict at the close of all the evidence;

C. Exceptions by the respondent to the charge of the presiding Justice;

D. Exceptions by the respondent to the exclusion and admission of evidence concerning the alleged intoxication of the complaining witness at and before the time of the occurrence laid in the indictment.

The first three exceptions involve essentially the same legal questions.

The indictment alleges that the respondent, on a certain day and at a certain place, upon a certain female person, more than fourteen years of age, feloniously did make an assault, and did then and there feloniously, unlawfully and wilfully, by force and against her will, rape, ravish, and carnally know and abuse the said person, against the peace of the State and contrary to the form of the statute in such case made and provided.

Our statute, R. S., Chap. 120, Sec. 16, provides that "Whoever ravishes, and carnally knows, any female of fourteen or more years of age, by force and against her will," shall suffer a punishment of such severity as to make the act a felony. Strictly speaking, this statute does not define rape but provides a punishment for the crime. At common law the earlier jurists and textbook writers defined rape as the having of unlawful carnal knowledge of a woman, forcibly and against her will. 4 Blackstone, 210; 1 Russell on Crimes, 3d Eng. ed., 675; 1 East P. C., 434; 1 Hawk. P. C., Curw. ed., 122; 1 Hale P. C., 628. Later authorities define it as the act of a man in having unlawful carnal knowledge of a woman, forcibly, and without her consent. This definition receives favorable comment in a note following *Smith* v. *State*, 80 Am. Dec. at page 361, since the crime may be committed when, strictly speak-

ing, the woman exhibits no will at all in the matter, as where she is drugged, or *non compos mentis*.

In *Com.* v. *Burke*, 105 Mass., 376, Mr. Justice Gray said that it is manifest upon the face of the Statutes of Westminster, and is recognized in the oldest commentaries and cases, that the words "without her consent" and "against her will" were used synonymously. That the words "against her will" mean exactly the same thing as "without her consent," and that the distinction between those phrases, as applied to the crime of rape, is unfounded, has been held in *Gore* v. *State*, 119 Ga., 418, 46 S. E., 671, 100 A. S. R., 182; *Com.* v. *Burke*, supra; *Whittaker* v. *State*, 50 Wis., 518, 7 N. W., 431, 36 Am. Rep., 856.

In any event there are three elements which must be present to constitute rape, viz.: carnal knowledge, force, and the commission of the act without the consent or against the will of the ravished woman. *People* v. *Griffin*, 117 Cal., 583, 49 Pac., 711, 59 A. S. R., 216; *Rice* v. *State*, 35 Fla., 236, 17 So., 286, 48 A. S. R., 245.

In the case at bar the state offered no testimony to prove that the respondent had actual carnal intercourse with the complaining witness, and frankly admitted in the opening address to the jury, made part of the record, that such was not the fact, but did offer testimony to prove that the respondent, being a person possessed of great strength in his arms, forcibly, and against the will of the woman, held her while two other men had carnal intercourse with her without her consent and against her will.

After the attorney for the State, in his opening address, had rehearsed the facts upon which he relied, and again after all the testimony relied upon by the State had been given, counsel for the respondent presented motions for a directed verdict of not guilty, upon the ground that the respondent had not been shown to have had any carnal intercourse with the complaining witness, and therefore was not guilty as charged in the indictment. Both motions were denied and exceptions taken and allowed.

In his charge to the jury, the presiding Justice remarked, "I should have said perhaps in my discussion of the elements of rape that usually you think of the act of rape as being confined to one man and one woman, but, if a person takes any part in the ravishing of the woman, all the elements of the rape being present which

I have given you, if he is present and takes a hand in it, assists, employs some force in the bringing about of this matter, this ravishing, he is equally guilty with the person whose body is used for the consummation of the sexual intercourse. It is not necessary that a person must use his own body for the consummation of the sexual intercourse in order to make him guilty of the offense. And if in this case the elements exist which I have given you, that is, there was sexual intercourse with this young woman against her will by force, and the respondent was using some force there and assisting in bringing that about, then he would be guilty of the offense." To this instruction the respondent seasonably took exceptions and the same were allowed.

The denial of the two motions above referred to, and that portion of the charge just quoted, relate to the same legal issues herein raised by the first three exceptions.

It is now a well settled rule of law that rape is a felony and that all persons who are present, aiding, abetting, and assisting a man to commit the offense, whether men or women, are principals and may be indicted as such. 1 Russ. on Crimes, 557; 1 Hale P. C., 628; 1 Hawk. P. C., Chap. 16, Sec. 10; *State* v. *Jones*, 83 N. C., 605, 35 Am. Rep., 586; *Strang* v. *People*, 24 Mich., 1. It is immaterial that the aider and abettor is disqualified from being the principal actor by reason of age, sex, condition or class. *State* v. *Sprague*, 4 R. I., 257; *Lord Audley's Case*, 3 Howard St., Tr. 401; *Rex* v. *Gray*, 7 Car. & P., 164; *Reg.* v. *Chrisham*, 1 Car. & M., 187.

It is generally held that a woman may be convicted as a principal in the crime of rape, although incapable herself of committing the deed, if she aids, abets and assists the actual perpetrator in the commission of the crime. Note to *Campbell* v. *State*, Ann. Cas., 1913 D. at p. 863, citing numerous authorities. Since this is true, it follows that in a joint act of two or more persons, committing rape, one may furnish one of the elements and the other another, whereby each is guilty as a principal. In the case at bar, the respondent used the necessary force, while another performed the act of sexual intercourse, all being against the will and without the consent of the woman.

The rulings and charge of the presiding Justice, involved in the

first three exceptions, are in harmony with well established law governing the case at bar.

The fourth exception relates to the exclusion of a certain affidavit, given in another proceeding, and signed by the complaining witness, together with other testimony, by which the defense endeavored to show that she was a person of unchaste character, and especially to show that she had been intoxicated during the two days previous to the act herein made the subject of complaint.

Upon the question of chastity, the presiding Justice correctly instructed the jury as follows: "We care not in this case what the relative merits of John Flaherty and Ardelle Kirby are. We care not whether Ardelle Kirby was a chaste woman or not, so far as the commission of the offense goes. . . . You heard the words of the statute — 'the ravishing of any female.' Whether she be chaste, whether she has been to some extent unchaste, or whether she has gone further, the offense is the ravishing of the female, according to the definition which I have given you." Unchastity of the female is no defense to the charge of rape. The crime may be committed upon an unchaste woman or a prostitute as well as upon any other woman. 1 Hawk. P. C., Curw. ed., 122, Sec. 7; *Rex* v. *Barker*, 3 Car. & P., 589; *Pleasant* v. *State*, 13 Ark., 360; *Higgins* v. *People*, 1 Hun., 307; *Pleasant* v. *State*, 15 Ark., 624; *Wright* v. *State*, 4 Humph., 194. It is true that evidence to show a reputation for unchastity may be admissible to impeach the testimony of the prosecuting witness as to the want of consent, *Wilson* v. *State*, 17 Tex App., 525, yet the overwhelming weight of authority is that specific acts of unchastity, as in the case at bar, are not admissible to prove character. 22 C. J., 481, Sec. 579.

The affidavit was also offered in an effort to prove that from the time described in the affidavit, up to and including the time of the alleged assault, viz.: for two days, the complaining witness was under the influence of liquor to a very marked degree. The respondent claims that it was admissible to show a continued debauch.

The respondent admits that the affidavit made no mention of liquor, yet he asks the court to presume that it showed a setting where liquor is usually found. We are not inclined to indulge in such a presumption. While intoxication may be of such a degree as to involve a numbing of the faculties, so as to affect the capacity to

observe, to recollect, or to communicate, *Com.* v. *Fitzgerald*, 2 Allen (Mass.), 297, and as such tending to prove the witness to be unworthy of credit in stating facts which occurred when he was in such condition, yet no such condition of the complaining witness was shown in the case at bar and presumption can not stand in the place of proof.

The respondent also claims that he should have been allowed to show the affidavit to the complaining witness for the purpose of refreshing her recollection. The affidavit having been excluded, the court properly refused to allow the witness to indirectly introduce the substance of the affidavit. Moreover, in excluding this testimony the court, with proper caution, said "so far as the question is for the purpose of showing intoxication, if the evidence warrants it, later it may be admissible. If it is a question of tying up the question of intoxication with the night in question, it might be that there was a continued debauch, a continued intoxication, and evidence of a condition a day or a week before might be pertinent to show what her condition was that night. So far as that part of the question goes I will rule on it *de bene*, excluding it." The defense was accorded the right to recall the witness but did not do so.

After a careful examination of the extensive and learned briefs of counsel, and the record of the case, somewhat peculiar as to form, we are of the opinion that the respondent had a fair and impartial trial and that no legal errors were committed.

Exceptions overruled.

GEORGE B. LOURIE, GUARDIAN OF BESSIE R. MELNICK, PETITIONER

vs.

JACOB MELNICK.

Cumberland. Opinion May 6, 1929.

DIVORCE. DESERTION. EVIDENCE. R. S., CHAP. 65, SEC. 11.

A petition for rehearing in divorce proceedings under the provisions of Sec. 11, Chap. 65, R. S., 1916, is in the nature of a petition for review.

When such a petition is based upon an allegation that final judgment was rendered against a libellee during a period of mental incapacity, evidence as to the mental condition of the libellee, both before and after the period directly in issue, is admissible.

It is error to exclude such evidence solely because a portion of it relates to a time prior to the date of the decree granting the divorce and was introduced at the original hearing, if the excluded evidence is connected with that concerning a later condition and the whole taken together constitutes a connected basis for the opinion of medical experts as to the sanity of the libellee during the intermediate period.

When a divorce is decreed for desertion and it is alleged in a petition for rehearing that the decree was obtained by the fraud of the libellant, evidence that the separation was by mutual arrangement between the libellant and libellee is entitled to consideration and may not be disregarded on the ground that such evidence might have been introduced at the original hearing.

On exceptions. A petition under Sec. 11, Chap. 65, R. S. The original proceeding was a libel for divorce in which the Petitioner was the libellee and in which a divorce was granted on the grounds of desertion. Exceptions were taken, but the case was dismissed for want of prosecution. These proceedings were next begun, petition then being dismissed by the Justice who heard the original case. Exceptions sustained.

The case fully appears in the opinion.

Charles F. King,

Clarence W. Peabody, for petitioner.

Arthur D. Welch, for respondent.

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

PATTANGALL, J. Petition under Sec. 11, Chap. 65, R. S. Dismissed below. Case comes forward on exceptions.

Jacob Melnick and Bessie R. Melnick were married June 15, 1915. They lived together for three years, during which time two children were born to them, and then separated by mutual agreement as evidenced by a document which they subscribed.

On August 17, 1925, the husband brought a libel for divorce, charging his wife with utter desertion for the statutory period of three years and with cruel and abusive treatment, also praying for the custody of the minor children. The libel, in the regular course of proceedings, came on for hearing in November, 1925, the wife being represented by counsel. The presiding Justice was then informed that the wife was insane. The case was continued, provision being made for the support of the wife and children.

On May 12, 1926, the husband filed a petition in the Probate Court for Cumberland County, in which he represented his wife as insane, praying that she be committed to the State Insane Hospital; and on the same day he, being a practising physician, filed a certificate to which he made oath that, after due inquiry and personal examination, it was his opinion that his wife was insane. Whether this certificate satisfied the requirements of Sec. 25, Chap. 145, or not is not the point; the certificate was filed. The certificate and the knowledge which it disclosed became of record. This petition was dismissed, the ground therefor not appearing.

No guardian *ad litem* was appointed. On July 8, 1926, and on February 12, 1927, the case was called up and in each instance after hearing evidence was continued, counsel for the wife appearing and urging the insanity of the libellee.

On April 20, 1927, the case was finally decided. Counsel still insisted upon the insanity of the wife, who all of this time had been resident of another state, is not shown by the record to have personally taken part in any of the proceedings and who was not even present in court at the time of the final hearing.

The presiding Justice found the libellee sane and that she had been sane during the entire period covering the three years immedi-

ately preceding the filing of the libel and a divorce was granted on the ground of desertion. Exceptions were taken, and the case was in order for argument before the full bench on June 30, 1927, at which time it was dismissed for want of prosecution.

December 27, 1927, in the Probate Court of Suffolk County, Massachusetts, a guardian was appointed for the wife, she having been adjudged a person of unsound mind, and on January 5, 1928, these proceedings were begun and hearing was had thereon before the same trial Judge who heard the original case. At the February term, 1928, the Justice dismissed this petition.

Such a petition is somewhat in the nature of a petition for review. *Simpson* v. *Simpson*, 119 Me., 17. Petitioner seeks to establish, in the words of the statute, that in the original proceedings justice failed by reason of "fraud, accident, mistake or misfortune." These words are a repetition of a like phrase in Paragraph vii, Sec. 1, Chap. 94, R. S., relating to petitions for review in civil cases.

The petition in the case at bar, so far as now relied upon, was based on the following allegations: (1) That Bessie R. Melnick was, at the time of the acts complained of in the libel for divorce and at the time of the trial thereof, of unsound mind. (2) That at the time she purported to answer and defend the libel, she was not legally competent to act without a guardian *ad litem* and one was not appointed. (3) That at the time of the final hearing on the libel, she was unable to be present by reason of physical illness and unable to instruct her counsel by reason of mental incapacity. (4) That her husband was aware of her condition but deceived the court concerning the same. (5) "That since the date of the hearing on said libel certain newly discovered evidence material to the issues involved in said trial has come to the attention of your petitioner which was not available or known to the libellee at the time of said trial, to wit: the testimony of certain attorneys-at-law, neighbors and other persons relating to the facts constituting the said alleged desertion and including certain material circumstances tending to prove that no such desertion took place or was contemplated by the said libellee."

The exceptions, so far as they need to be considered here, are (1) to the exclusion of the testimony of Dr. Henry M. Swift, an expert on mental diseases, as to an examination of the libellee made by him

on November 30, 1925, about the time of the first hearing on the divorce libel; (2) to the exclusion of evidence of the same character by Dr. Clement P. Wescott, an expert on mental diseases; (3) to the ruling of the presiding Justice, denying the petition for a new hearing.

The decree dismissing the petition states that "the issue of insanity was passed upon in the original hearing. Evidence was introduced, arguments made and after long and careful consideration I concluded that this petitioner, then the libellee, was sane; that a divorce should be granted and so decreed. And at this time, after hearing all testimony and consideration of same, I am of the same opinion.

"The allegation in the petition that a new trial should be granted because of newly discovered evidence (even if it be a cause) is not sustained. Petitioner is not within the rule. While it may be newly discovered by present attorneys, it must have been necessarily known by attorneys in the former proceedings but, if not known, is not sufficient to change the findings."

In considering the exceptions, it must be kept in mind that the fact that the petition was heard before the same Justice who heard the original case does not in any way affect the rules of evidence. The issue involved was whether or not the judgment adverse to the petitioner's ward had been rendered by reason of "fraud, accident, mistake or misfortune" and that, therefore, "justice had failed."

Petitioner's case rests on two propositions: (1) that because of her mental condition during the entire period covered by the divorce proceedings including the spring and summer of 1927 and because of her physical illness in April of that year, Mrs. Melnick was unable to properly present her defense; and (2) that the divorce was procured by the fraud of her husband in deceiving the court both as to her mental condition and as to the real facts with regard to their separation; facts which it is contended are inconsistent with a finding that she was guilty of desertion.

Her sanity for three years prior to August 17, 1925, the date of her husband's libel, was in issue in the court below as was her sanity during the progress of the case, from the date of the libel to the date of the *nisi prius* decree.

These questions having been determined were not open under

this petition. The judgment of the trial court in these respects must stand, assuming that the record discloses evidence in its support, and whether or not such basis for the judgment exists is a question to be raised by exceptions, not by such a petition as this.

In these proceedings it is incumbent on petitioner to show that justice has failed, not because petitioner regards the findings of the court below as erroneous, but because of fraud, accident, mistake or misfortune. Petitioner must establish this proposition in order to be entitled to a hearing on the merits of the original case.

Mrs. Melnick's sanity during the period between the date of the *nisi prius* decree and the final action of the appellate court in dismissing her exceptions for want of prosecution was in issue under the allegation in the petition that at that time she was unable to intelligently instruct her counsel and to take necessary measures to protect her rights.

On this point the court received the evidence of Dr. Solomon who examined her in October, 1927, found her insane, and testified that in his opinion the insanity was of long duration.

Dr. Swift testified that he had examined Mrs. Melnick in November, 1925, and again two years later. Evidence as to what he found in 1925 was excluded, both on the ground that the presiding Justice had already heard it in the divorce proceedings and that the question of her sanity at that time having been decided was not in issue. It was urged that the diagnosis of 1925 was confirmed by the examination in 1927 and that the opinion of the expert was based on both examinations. But the witness was confined to testimony as to what he observed in November, 1927.

Notwithstanding the fact that the court had decided that Mrs. Melnick was sane at the time of the filing of the libel in 1925, and had been sane during the three preceding years and had also, at some time between August, 1925, and April, 1927, decided that her mental condition was such that there was no occasion for the appointment of a guardian *ad litem*, the question of her sanity following the date in April, 1927, when the court below filed its final decree and between that date and the day in June, 1927, when her counsel abandoned the prosecution of her case in the law court, was in issue in these proceedings under the allegation that during that latter period, living in another state and physically ill, she

was in a mental state which prevented her directing or consulting her attorneys in Maine and that it was this unfortunate condition which prevented her from exhausting the remedy presented by her exceptions.

Her mental condition during that period had never been passed upon. On that issue, testimony as to her condition, both prior and subsequent to the date of the *nisi prius* decree, was pertinent. The fact that the presiding Justice had, in a former hearing, heard Dr. Swift's recital of what he had discovered in 1925 and had not been impressed by his statement of the diagnosis made at that time, affected in no way the admissibility of the testimony.

Dr. Wescott had also examined Mrs. Melnick in November, 1925, and in November, 1927. He was permitted to testify as to her condition in 1927, but his testimony as to the examination in 1925 was excluded.

The exclusion of the evidence of these two experts concerning Mrs. Melnick's sanity in 1925 was error. It bore directly upon her sanity in 1927 and upon her ability to properly protect her interests during the spring and summer of that year. Taken in connection with the evidence of the same experts concerning her condition in 1927, it is not subject to the criticism of being too remote, nor was it excluded on that ground. The ruling of the court in this respect was apparently based upon the premises already suggested, namely, that the evidence had been previously heard by the presiding Justice and that the issue raised by the evidence had already been finally decided. These reasons are not sufficient to warrant the exclusion of the evidence. The first is unimportant. The second indicates a misapprehension of the real bearing and probative force of the evidence.

There was testimony also that Dr. Melnick and Mrs. Melnick separated in 1918 by mutual agreement evidenced by a document drawn up by an attorney, under the terms of which the doctor paid a certain weekly sum in support of his wife. There was no evidence negativing the suggestion that they continued to live apart in accordance with this agreement up to the very time of the filing of the libel. The divorce was granted for the cause of desertion. Desertion could not be predicated on a separation by mutual consent.

When this evidence was offered in support of the petition, it was

referred to as "newly discovered." It was received but was given no weight, the decree stating as the reasons for disregarding this testimony, first that it did not come within the rule admitting evidence as "newly discovered," and second that it was not sufficient to change the findings in the former proceedings. There is no intimation that the facts thus testified to were in evidence at the hearing on the divorce libel. The inference is otherwise. If this evidence actually revealed to the court for the first time the facts concerning the separation, it was not only admissible but entitled to great weight because it was directly applicable to the proposition that the divorce was procured by fraud.

The testimony concerning the agreement to live apart included a letter under date of April, 1921, which plainly showed that up to that time there had been no desertion. The libel declared that the desertion occurred on February 27, 1919. A situation was indicated by this evidence which at least demanded careful investigation.

The presiding Justice apparently misunderstood the purpose and effect of this evidence. The decree shows that the matter was somewhat confused in his mind. The evidence concerning the separation came from an attorney who had transacted no business with Mrs. Melnick since 1921, in fact had not seen her or corresponded with her or acted for her in any way since that time. Yet the decree states as a reason for disregarding this testimony that this attorney represented her in the divorce proceedings between 1925 and 1927. It is difficult to understand just what caused the presiding Justice to fall into such a patent error.

This evidence was entitled to grave consideration; not because it was newly discovered but because it bore directly on the issue involved in the petition. It is true that it was admitted. But it apparently was not considered. Its bearing upon a direct issue raised by this petition, the issue of fraud practiced upon the court by the libellant, did not impress the mind of the trial Judge.

The exclusion of the evidence offered by Dr. Swift and Dr. Wescott and the failure to consider the evidence relating to the circumstances surrounding the separation may have resulted in injustice to Mrs. Melnick. She is entitled to an opportunity to make full presentation of her case and to thoughtful consideration of all competent evidence presented by her.

Exceptions sustained.

GAGNON'S CASE.

CAYER'S CASE.

MOORE'S CASE.

SYLVAIN'S CASE.

Aroostook. Opinion May 7, 1929.

WORKMEN'S COMPENSATION ACT. LIABILITIES OF GENERAL AND SPECIAL EMPLOYERS.

The fact that an employee is the general servant of an employer does not, as a matter of law, prevent him from becoming the particular servant of another.

But merely because the work in which the servant is engaged is superintended by the agent of someone other than the general employer does not relieve the latter from responsibility.

If servants are under the exclusive control of the special employer in the performance of work which is a part of his business, they are, for the time being, his employees, even though they may remain on the payroll of the general employer.

When an employee performs services for a third party by direction of his employer, such employer may be liable under the Workmen's Compensation Act for injuries sustained while performing the task, although the employee may be under the control of the third party as to the details of the work.

In the cases at bar from the evidence submitted the Commissioners were justified in finding that the workmen were on the payroll of the general employer; that it retained authority to order the men when to go to work, to regulate the hours of their labor, and to discharge them at its pleasure; that the special employer had mere direction of the details of the work and did not have such exclusive control of the laborers as to create the relation of master and servant.

On appeal from an affirming decree awarding compensation under the Workmen's Compensation Act. A petition by the widow of Felix B. Gagnon to recover compensation for his death, and by Adelard Cayer, John T. Moore, and Joseph Sylvain to recover compensation for injuries received March 10, 1928, at Madawaska, Maine. All four men were injured in one explosion.

It was admitted that four cases were compensable under the Act, the sole question being, who was the employer.

The Commission found that all four men were, at the time of the injury, employees of the Madawaska Construction Company and awarded them compensation.

Appeal was taken. Appeal dismissed. Decree below affirmed.

The cases fully appear in the opinion.

Mrs. Felix B. Gagnon,
Adelard Cayer,
John T. Moore,
Joseph Sylvain, pro se.
James C. Madigan, for respondents.

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

PATTANGALL, J. Cases arising under Workmen's Compensation Act. On appeal from decree of Industrial Accident Commission awarding compensation in each case. The sole issue before the Commission was whether or not at the time of receiving admittedly compensable injury, the injured men were employees of the Madawaska Construction Company.

Appellant claims that Gagnon, in favor of whose dependent widow award has been made, and Cayer were at that time employees of the Bailey Meter Company and that Moore and Sylvain were employees of the Combustion Engineering Corporation.

It is admitted that all of the injured men were in the general employ of the Madawaska Construction Company, but it is urged that at the time their injuries were sustained they were in the temporary employ of the Engineering Corporation and the Meter Company under an arrangement entered into between these companies and the Construction Company.

The Madawaska Construction Company, a subsidiary of the Fraser Paper Company, was engaged in the erection of a paper mill. In connection with the construction of the mill, the Fraser Company contracted with the Combustion Engineering Corporation for the purchase of a pulverized fuel system and furnace and with the Bailey Meter Company for certain meter equipment.

The case assumes that the Fraser Company and the Madawaska Construction Company were so related that these contracts have the same effect as though they had been entered into by the latter company.

The contract with the Combustion Engineering Corporation is in evidence. The record does not disclose the exact terms of the contract with the Bailey Meter Company; but it would appear from the oral evidence that the two contracts were alike in their essential features.

The Engineering Corporation made a written proposal to the Fraser Company to furnish, according to detailed specifications, F. O. B., Madawaska, the material for Lopulco Furnace Settings, applied to one Badenhausen Water Tube Boiler and to superintend the erection of the same.

The detailed specifications provided that the vendor should "furnish a competent man to superintend the erection of the settings described herein," also that vendor should "erect the Lopulco Water Screens, supplied on another contract." There was no mention in the proposal of labor or labor costs other than a provision that the purchaser should unload material from cars free of charge and that an adjustment should be made for overtime charges. This proposal was accepted.

The contract for the Lopulco Water Screens, referred to above, was evidenced by a proposal on the part of the Engineering Corporation, accepted by the Fraser Company. This proposal was to furnish Lopulco Pulverized Fuel System and Water Screens in accordance with specifications which contained the following provisions: Vendor to "furnish a competent man to superintend the erection and starting of its equipment. All labor, unless otherwise specified, for the installation and erection of the equipment shall be furnished by the purchaser."

The Engineering Corporation had, therefore, sold to the Fraser Company certain appliances, machinery and material which could only be properly assembled under expert supervision and had engaged to furnish such supervision. It did not undertake to install the appliances and machinery, but simply to furnish an engineer possessing sufficient technical skill to superintend the installation.

The testimony indicates a like situation with regard to the

Bailey Meter Company. It sold to the Fraser Company, for the mill which was being constructed by the Madawaska Construction Company, certain equipment to be installed under the direction of its representative.

The vendor companies delivered the equipment. Their engineers undertook to supervise its installation. The necessary labor was provided by the vendee, certain of its regular employees, in charge of foremen also in its regular employ, being assigned to the work.

Orders were given by the engineers to the foremen and by the foremen to the laborers. The selection of the individual workmen, the authority to employ and to discharge them, remained in the purchaser. There was no direct contract of employment between them and the vendor companies. The workmen continued on the regular payroll of the Construction Company.

An accident occurred. One workman was killed. Three were injured. Necessary steps were taken to bring the cases before the Industrial Accident Commission. It was agreed that compensation should be awarded. The only question was whether the awards should run against the Construction Company or the Engineering Corporation and the Meter Company. The former was admittedly the general employer. It was contended that the two latter companies were special employers of the injured men at the time of the accident, and that they and not the general employer were liable.

The Commission found against the Construction Company. The duty of this court is limited to ascertaining whether or not the Commission had before it legal evidence in support of its finding.

The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another. As a general proposition, when one lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the one to whom he is loaned, although he remains the general servant of his regular employer. *Wyman* v. *Berry*, 106 Me., 43; *Wilbur* v. *Construction Company*, 109 Me., 521; *Pease* v. *Gardiner*, 113 Me., 264.

But the mere fact that the work in which the servant is engaged is superintended by the agent of someone other than the master does not relieve the master of responsibility. "The test is whether

in the particular service which he is engaged to perform, he continues liable to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired." *Coughlin* v. *Cambridge*, 166 Mass., 268. "If the men are under the exclusive control of the special employer in the performance of work which is a part of his business, they are, for the time being, his employees." *Comerford's Case*, 224 Mass., 571. The fact that the servant thus loaned remains on the payroll of his general employer is not decisive on the question of employment, although it is a circumstance to be considered. *Chisholm's Case*, 238 Mass., 412.

In *Arnett* v. *Hayes Wheel Co.*, 166 N. W., 957 (Mich.), the court set aside an award against a general employer under circumstances not wholly unlike those which appear here, but certain important factors were there present which are not found in the instant case. "After the laborers were turned over to the Grand Rapids Company, nothing was left to be done by the Jackson Company (the general employer) but to pay them. After they were placed subject to the orders of the Grand Rapids Company, they worked with the servants of that company, used the tools of that company upon material owned by it, obeyed its orders, worked the particular hours designated by it and obtained its consent if they desired to absent themselves for a time."

Appellant relies upon *Chisholm's Case*, supra, in which the court sustained a finding that the town of Lexington and not one Bills was the employer of Chisholm, although Chisholm was on Bills' payroll and generally was his employee. But in that case it appeared affirmatively in evidence that the officer in charge of the work for the town not only had a right to exercise control over the work in which Chisholm was engaged, and did so exercise control, but had authority to discharge Chisholm whenever he desired to do so. Under these circumstances the court concluded that "the finding of the board was not wholly without support."

"Where an employee performs services for a third party by direction of his employer, if the relation of employer and employee continues to exist between them during the performance of such services, the employer is liable under the Compensation Act for injuries sustained by the employee while performing the task so assigned to him, although he may be under the control of the third party as to

the details of the work." *O'Rourke* v. *Percy Vittum Co. et al,* 166 Minn., 251.

From the evidence submitted in the instant case, the Commission were justified in finding that the workmen were on the payroll of the general employer; that it retained authority to order the men when to go to work, to regulate the hours of their labor, and to discharge them at its pleasure; that while the representatives of the Engineering Corporation and the Meter Company had general supervision of the installation of the equipment which the general employer had purchased from their respective companies and directed the performance of the necessary work, they did not have such exclusive control of the laborers as to create the relation of master and servant.

These conclusions reached by the Commission can not be said to lack support in competent and credible evidence, and on the basis of these facts the result reached by them finds warrant in law.

Appeal dismissed.
Decree below affirmed.

AUBURN SEWERAGE DISTRICT *vs.* GEORGE I. WHITEHOUSE.

Androscoggin. Opinion May 7, 1929.

MUNICIPAL CORPORATIONS. SEWERS. SURFACE WATERS. EXCEPTIONS.

Neither a municipality nor a sewerage district assuming the obligations of a municipality with relation to providing sewage facilities is obliged to provide means by which surface water may be enabled to enter into and pass through its sewers.

Contentions not raised at nisi prius *trial are not open on exceptions.*

On exceptions by defendant. Action of debt to recover sewer construction assessment. Case heard by presiding Justice without jury. Right of exceptions reserved. The presiding Justice ruled that the contention of the defendant did not constitute a valid de-

fense and rendered judgment for the plaintiff in the sum of $148.70, to which ruling the defendant seasonably excepted. Exceptions overruled.

The case fully appears in the opinion.

George C. Wing, Jr., for plaintiff.

Berman & Berman, for defendant.

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

PATTANGALL, J. On exceptions. Action of debt to recover sewer construction assessment. Plea general issue with brief statement setting forth that defendant is not liable because the estate upon which the assessment is levied, by reason of its grade and level and the contour of the surrounding land and highways, can not be drained into the sewer for which the tax is assessed.

The case was tried before a single Justice, without a jury, and judgment rendered for the plaintiff.

The plaintiff, a quasi municipal corporation, was created by Chap. 193 of the Private and Special Laws of 1917, amended by Chap. 82 of the Private and Special Laws of 1919. Sec. 2 of the Act provides that "all powers and duties which may be exercised with respect to the sewer system conferred upon the City of Auburn or upon the municipal officers of the City of Auburn by the general laws of the State, except as hereinafter excepted, shall be vested in the Auburn Sewerage District."

Sec. 3 provides for the transfer from the City of Auburn to the district of the entire sewerage system "except the street catch-basins and their connection with the sewer mains" and the City of Auburn has, since the taking over of the system by the district, continued to own and control the catch-basins and has built new catch-basins from time to time, connecting them with plaintiff's sewer system.

Defendant is the owner of a lot of land in Auburn on which are two houses. Plaintiff constructed a sewer along one of the streets bounding the property. Both houses connect with the sewer and it is admitted that defendant's needs so far as domestic or toilet sewage are concerned are satisfactorily served. But no catch-

basins have been constructed in connection with the sewer although it is of sufficient capacity to take care of surface drainage and defendant's refusal to pay the assessment rests upon the failure of the district to provide means to care for the flow of surface water which by reason of the contour of the land flows upon his lot from adjoining property.

Sec. 10 of the Act provides that "no assessment shall be made upon any estate which by reason of its grade or level, or for any other cause, can not be drained into such sewer, until such incapacity is removed."

Plaintiff asserts that it has nothing to do with the construction and maintenance of catch-basins and is under no obligation to provide drainage for surface water flowing upon and over defendant's land from the adjoining lots.

The issue, thus plainly drawn, is whether or not, as a condition precedent to its right to collect such an assessment, plaintiff must provide means to take care of surface drainage to the extent not only of constructing sewers of sufficient size and so located as to suffice for that purpose but to construct appropriate catch-basins and connect them with the sewer.

As has already been noted, the district assumed the powers and duties with respect to sewers which were conferred upon the City of Auburn, by the general laws of the state. No additional obligation was imposed upon it. Indeed, it was specifically relieved from the purchase of the catch-basins then existing, together with their connections with the mains and inferentially from the duty of maintaining them or of constructing additional catch-basins. Even if this were not so, it could not reasonably be claimed that its duty to the defendant embraced more than the duty with which the city was burdened when the district was formed and the city was under no obligation to provide means by which surface water might be enabled to enter into and pass through its sewers. *Dyer* v. *South Portland*, 111 Me., 119. Hence no such obligation rested upon the district.

Defendant raises the further point that the assessment is void because the manner of determining it as provided in Sec. 10 of the Act is contrary to law, in that there is no provision either for notice or hearing, but on the contrary a definite and positive li-

ability for such assessment upon each abutter is established by an arbitrary and general rule which does not take into account the benefit accruing to the land owner and cites authorities to sustain the proposition that "A statute or charter authorizing special assessments, which fails to provide for notice to property owners and an opportunity to be heard at some stage of the proceedings, is unconstitutional, as depriving persons of their property without due process of law."

This objection can not be considered here. It is not open to defendant in these proceedings. The point was not raised in the court below. It is not covered by the bill of exceptions. No reference to it appears in the record. The bill of exceptions recites that the contention of the defendant is set forth at length in the decision of the court. There is no mention of this contention in that decision. This court has decided many times that questions not raised at the original trial are not open on exceptions. *McKown* v. *Powers*, 86 Me., 291; *Lenfest* v. *Robbins*, 101 Me., 176; *State* v. *Chorosky*, 122 Me., 283.

Exceptions overruled.

BENJ. J. CHECKEWAY *vs.* PEJEPSCOT PAPER COMPANY.

Sagadahoc. Opinion May 11, 1929.

ATTACHMENT. ASSIGNMENT OF CLAIMS. BANKRUPTCY.

The defendant company contracted with a certain foundry company to construct a pulp grinder of a certain type under an order numbered 82728.

The foundry company purchased some material of the plaintiff to be used in its construction but failing to pay, the plaintiff sued and attached the material. Requiring the material and being in financial straits, the foundry company obtained a release of the attachment by giving an order on the defendant to pay the plaintiff a sum due him on delivery of the grinder in satisfactory operating condition and at the time the payment for the grinder was due, and charge the amount paid to the account of the foundry company against the order numbered 82728.

The foundry company within a few days after giving the order went into bankruptcy. Mortgagees took possession of its plant and leased it to a new company. The defendant notified the foundry company, on learning that the mortgagees had taken possession of the plant, that it cancelled its order 82728 *and gave a new order with the same specifications to the new company to construct a grinder of the same type, which the new company did, and delivered it, and received its pay.*

The plaintiff demanded payment on its order, which was refused, and this action was brought, held:

That the defendant under the circumstances proven was entitled to cancel the first order to construct the grinder.

That the order given the plaintiff on the defendant company, though accepted by it, was not an absolute order to pay at a time certain, but to pay out of a certain fund which fund never materialized.

On exceptions and motion for new trial by defendant. An action of assumpsit by the payee of a written order against an acceptor. At the trial of the cause the plaintiff recovered a verdict in the sum of $1,888.97, being the amount of the order with interest.

To rulings of the presiding Justice denying defendants motion for a directed verdict, and refusing to give certain instructions the defendant seasonably excepted, and after the verdict, filed a general motion for new trial.

Motion and exceptions sustained.

The case fully appears in the opinion.

George W. Heselton,
Edward W. Bridgham, for plaintiff.
Robinson & Richardson,
Harris W. Isaacson, for defendant.

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

WILSON, C. J. An action to recover on an order payable to the plaintiff and accepted by the defendant company.

On November 11, 1926, the defendant company contracted with Watson, Frye Company of Bath, Maine, for the manufacture of one four pocket grinder, so-called, for grinding pulpwood in the proc-

ess of manufacturing paper, under a written order containing specifications and numbered 82728.

Prior to the receipt of the order, the Watson, Frye Company had purchased of the plaintiff certain material suitable to be used in the manufacture of machines of this type. Without going into all the details of the negotiations between the plaintiff and a representative of the Watson, Frye Company, the purchase price of the material, or a note or check given in payment therefor, was not paid in due time and suit was brought, and some of the materials, at least, purchased of the plaintiff, and then in the possession of the Watson, Frye Company, were attached.

In order to have the materials released from the attachment, which were necessary for the completion of the grinder by the Watson, Frye Company, the Watson Frye Company gave the following order on the defendant company:

Dec. 2, 1926

Pejepscot Paper Co.
Brunswick, Me.

Gentlemen:

Kindly pay to the order of Benjamin J. Checkeway, Newburyport, Mass., one thousand eight hundred forty-two dollars ($1,842.00) and charge to the account of the Watson, Frye Company against your order 82728.

This assignment is payable upon delivery of grinder in satisfactory operating condition and at the time payment for the grinder is due.

Watson, Frye Company
by T. B. Oldham, *Treas.*

Accepted, Pejepscot Paper Co.
A. B. Johnson, Purchasing Agent
December 2, 1926

Within a few days after the acceptance of the above order, the Watson, Frye Co. was petitioned into bankruptcy by its creditors. Possession of its plant was taken by certain stockholders of the company as second mortgagees, and who either at that time were doing business as partners under the name and style of Corner Brook Foundry and Machine Co. or then formed a co-partnership under that name and took over the plant, and carried on the busi-

ness of a foundry and machine shop and continued to occupy the premises formerly occupied by the Watson, Frye Co. under some arrangement with the first mortgagee.

Upon learning on December 8, 1926, that the mortgagees had taken possession of the plant and had foreclosed, and probably of the bankruptcy of the Watson, Frye Co., and that the plant was being operated by the Corner Brook Foundry and Machine Co., which hereafter for brevity will be referred to as the Corner Brook Co., the defendant company on December 10, 1926, wrote the Watson, Frye Co. the following letter:

Watson, Frye Co.
Bath, Maine
Gentlemen: Re order 82728.

Please cancel the above order calling for one four pocket grinder for grinding two foot wood.

Pejepscot Paper Co.

and on the same or the following day sent to the Corner Brook Co. an order numbered 83224, of the same tenor as the order given the Watson, Frye Co. on November 11, 1926, for the manufacture of a four pocket grinder.

Prior to the bankruptcy of the Watson, Frye Co. it had completed certain minor parts of the grinder. By arrangement with the trustee in bankruptcy the Corner Brook Co. acquired these parts, paying to the trustee therefor approximately $285.00. If it affects the rights of the parties to this action, it does not appear from the evidence whether any of the materials released from the plaintiff's attachment in his action against the Watson, Frye Co. upon the acceptance of the order by the defendant entered into the grinder constructed by the Corner Brook Co.

The machine was completed by the Corner Brook Co. and delivered to the defendant company on February 2, 1926. The defendant company has paid to the Corner Brook Co. the agreed price for manufacturing the grinder of $3,450.00, except a balance of $200.00.

On May 21, 1927, the plaintiff made demand on the defendant for the payment of his order dated December 2, 1926, and on payment being refused brought this action based on the order.

At the close of the testimony, the defendant moved for a directed verdict, which was refused, and the case submitted to the jury, which returned a verdict for the plaintiff in the sum of $1,888.97, being, presumably, for the amount of the order and interest to date of the verdict.

The case comes before this court on exceptions to the refusal to direct a verdict for the defendant, and a general motion for a new trial.

The plaintiff contends that the Corner Brook Co. in manufacturing a grinder was merely carrying out the order and contract entered into between the defendant company and the Watson, Frye Co. on November 11, 1926; and further that the order to pay given December 2, 1926, when accepted was an absolute and independent agreement on the part of the defendant to pay "The amount named upon the happening of the conditions specified," viz.: the delivery of the grinder in satisfactory operating condition.

He bases this contention chiefly upon the evidence that one or more of the directors or stockholders of the Watson, Frye Co. were the mortgagees who took over the plant and were the co-partners constituting the Corner Brook Co. and on a letter from the treasurer of the Watson, Frye Co. following the bankruptcy and foreclosure proceedings to the defendant dated December 8, 1926, informing it that mortgagees had taken possession and were going to operate it under the name of the Corner Brook Foundry & Machine Co. and that "They stated that they were going ahead and finish the grinder," and that the order later given by the defendant to the Corner Brook Co. was, except as to its number, an exact duplicate of the one given the Watson, Frye Co. in November and merely authorized the Corner Brook Co. to complete the grinder.

These contentions, however, overlook the legal status of the parties and the proper construction of the order accepted by the defendant. The Watson, Frye Co. was a corporation. It became an involuntary bankrupt and a trustee was appointed, but the trustee never took possession of the plant. He, therefore, could not finish the grinder. He never attempted to do so, or claimed the right to, nor assigned the contract to construct the grinder to either the mortgagees of the plant or the Corner Brook Co. The

directors or stockholders, who were mortgagees, or those constituting the co-partnership Corner Brook Co. were, of course, not the same in law as the corporation.

Under these conditions, the defendant was warranted in cancelling its order to the Watson, Frye Co. If the trustee had retained possession of the plant and had indicated his readiness to complete the grinder, it may be doubtful whether the defendant could have cancelled it without the consent of the trustee until the time expired for its completion; but a bankrupt without a plant is held to have placed himself in a position where he can not perform his executory contracts to manufacture articles, and furnishes sufficient grounds for a recission or cancellation. *Kamps Sacksteder D. Co.* v. *United D. Co.*, 164 Wis., 412; *Central T. Co.* v. *Chicago A. Ass.*, 240 U. S., 581; 13 Cyc., 615; Williston Contracts, Secs. 880, 1987.

The defendant company was, therefore, warranted in cancelling its order of November 11, and placing its order with the co-partnership; and the grinder delivered, while of the same type and built according to the same specifications, was not the grinder ordered of the Watson, Frye Co. In constructing the grinder delivered, the Corner Brook Co. was acting in its own behalf and not instead of and for the benefit of the Watson, Frye Co. or its creditors.

Although the plaintiff was given a mortgage on the grinder by the Watson, Frye Co. when he released his attachment, and he was notified by the defendant ten days before its completion and delivery that the Watson, Frye Co. was not completing the grinder but it was being done by the Corner Brook Co., he made no effort to enforce his rights under his mortgage, as it appears he might have done if Watson, Frye Co. had built it or it was the same grinder described in his mortgage. *Morrill* v. *Noyes*, 56 Me., 458, 467-8; *Perry* v. *Pettingill*, 33 N. H., 433.

However, under a proper construction of the pay order on which this action is based, the defendant did not enter into an absolute and independent agreement to pay when a grinder was delivered in satisfactory operating condition, of the same type and built according to the same specifications contained in the order to Watson, Frye Co. though manufactured in the same plant, but to

pay out of funds to become due to the Watson, Frye Co. upon the fulfillment of the order 82728.

Counsel for the plaintiff relies on certain Massachusetts cases: *Cook* v. *Wolfendale*, 105 Mass., 401; *Russell* v. *Barry*, 115 Mass., 300; *Robbins* v. *Blodgett*, 124 Mass., 279.

These cases, however, are clearly distinguishable from the case at bar. In the *Cook* v. *Wolfendale* case, the order read: "pay Wm. M. Cook or order $1,200, payable when house is ready for occupancy"; but as that Court points out in *Somers* v. *Thayer*, 115 Mass., 163: "The terms of the order contained no reference to the building contract, but merely fixed the time of payment as the time when the building should be ready for occupancy."

In the *Somers-Thayer* case above cited, however, the order read: "Pay Wm. Somers & Co. or order the sum of $296.00 on completion of the house now building at Randolph by me for you," but it also contained the further important direction "and charge the same to me on account of contract."

There is no difference in legal effect between the order in the instant case and that in the *Somers-Thayer* case. The Somers order read to pay when house now being built "by me for you" is completed "and charge to my account." The order accepted by the defendant in the instant case was in effect to pay when the grinder, then being built by the Watson, Frye Co. for the defendant company under its order 82728 was delivered in satisfactory working condition and to charge the amount paid to the amount to become due the Watson, Frye Co. under the order for building the grinder 82728. Indeed, there is even stronger grounds, we think, in the language of the Watson, Frye Co. order for holding it payable for a designated fund when it became due than in the *Somers-Thayer* case.

In *Russell* v. *Barry*, 115 Mass., 300, the order read: "deliver Mr. John McDonald lumber for my house on Codman Street and I'll be responsible for the same when the house is completed." Here, the Court held that the order resembled that in *Cook* v. *Wolfendale*, supra, and that it was not made a condition that the house was to be completed by McDonald, and the Court further says: "The reference to the completion of the house has no effect except to fix the time when the order should be payable."

The order in *Robbins* v. *Blodgett*, supra, was of the same tenor and the Court held it was payable when the house was finished and was not conditioned upon its being finished by the drawer of the order.

In *O'Connell* v. *Mt. Holyoke College*, 174 Mass., 511, however, where the sum to be paid was to be paid from moneys to become due, and in *Morrison* v. *Lamson*, 176 Mass., 536, where the payment was to be from equities in hosiery consigned to the defendant and to be charged to consignor's account, it was held in each case that the payment was intended to be made from a designated fund to become due under a contract between the drawer and acceptor, and the fund failing to materialize there was no liability on the order.

The provision in the order in the case at bar that the payment is to be charged to the account of the Watson, Frye Co. and against the defendant's order 82728 must, therefore, be construed to mean that the payment was to be made only from funds to become due Watson, Frye Co. under the order specified. This pay order is, we think, susceptible of no other reasonable construction. It was in legal effect a partial assignment of funds to become due under a certain contract. It was evidently so understood by the parties. The order when originally presented to the defendant for acceptance read: "This *order* is payable when grinder is delivered, etc.," but to make clear the intention, it was, at the insistence of the defendant, changed to read: "This *assignment* is payable, etc."

Therefore, regardless of whether the original order was cancelled and a new order given to a new concern, or whether the Corner Brook Co. merely finished a grinder already begun by the Watson, Frye Co., since it is not claimed, and can not be upon the testimony, that it was done for the benefit of the Watson, Frye Co. or its creditors, or was done under any arrangements with it or the trustee in bankruptcy, and since nothing ever became due the Watson, Frye Co. or its trustee in bankruptcy from the defendant under its order 82728, the plaintiff can recover nothing of the defendant in this action.

Motion and exceptions sustained.

ISRAEL KETCH *vs.* B. S. SMITH.

Aroostook. Opinion May 24, 1929.

JUDGMENTS. RES ADJUDICATA.

The law is well settled in this State that, conceding jurisdiction, regularity in proceedings, and the absence of fraud, a judgment between the same parties is a final bar to any other suit for the same cause of action, and is conclusive not only as to all matters that were tried, but also as to all which might have been tried in the first action.

In the case at bar the doctrine of "res adjudicata" was conclusive as to the rights of the parties.

On exceptions by plaintiff. An action of replevin brought against a deputy sheriff who was in possession of an automobile which he held by virtue of seizure on execution as the property of one Schriver. The case at bar was the second action between the same parties. The cause was heard before the presiding Justice without jury. To certain of his rulings of law, the plaintiff seasonably excepted. Exceptions overruled.

The case fully appears in the opinion.

W. P. Hamilton, for plaintiff.

C. M. Fowler,

H. T. Powers, for defendant.

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

FARRINGTON, J. On exceptions. This was an action of replevin heard before the presiding Justice below without jury. The defendant pleaded the general issue and for brief statement said that the automobile described in plaintiff's writ was, at the time of the taking, in the possession of defendant as a duly qualified deputy sheriff by virtue of a seizure on an execution.

The only facts available from the bill of exceptions on which the ruling of the Court below must have been based are those contained

in the written decision of the Court in a previous case between the same parties in which the same issues were involved, which decision, it is assumed, was intended to be a part of the bill. Those facts are as follows:

Fred E. Peterson on November 4, 1926, sold to S. B. Schriver and Thelma Schriver an automobile, taking a Holmes note for security. The note was recorded November 5, 1926. On January 25, 1927, it was assigned by Peterson to the plaintiff, and on the same date the assignment was recorded and the plaintiff, having taken possession of the automobile, gave to the Schrivers a written notice of his intention to foreclose the note, and on the following day recorded a copy of the notice.

On March 24, 1927, the L. B. Bean Company brought an action against S. B. Schriver on a note of his held by the Company, and on March 25, 1927, the defendant attached the automobile on the premises of the plaintiff and in his absence. The defendant had taken possession of the automobile and had it in the highway, when the plaintiff returned and then the defendant informed the plaintiff that the Company had given him money to pay the amount due on the note and that he was prepared to and desired to pay such amount and took out of his pocket the money given him for that purpose. The plaintiff refused to talk with him and the defendant left with the automobile. The sixty days after recording notice of the foreclosure had not, on March 25, 1927, expired.

The plaintiff on March 29, 1927, on which date the sixty days' notice had expired, brought an action of replevin. The defendant pleaded *non cepit* with brief statement that the automobile was, on March 29, 1927, in his possession and held by him as an officer by virtue of an attachment made by him on March 25, 1927, as above stated.

Upon the above facts the presiding Justice in the former case held that the defendant had the right to attach the automobile on March 25, 1927, and that the conduct of defendant at the time of attachment amounted to a tender which was waived by the plaintiff; that the right to redeem from the foreclosure was not forfeited and that the plaintiff not having given the required statutory notice as claimant could not bring the action. Judgment was accordingly rendered for the defendant and one dollar damages and costs and

return of the property ordered. No appeal was taken and it is to be assumed that the property was returned. There is nothing in the record to show on the part of the plaintiff anything except acquiescence in the decision of the presiding Justice.

The foregoing are the only facts before this court and must be taken as those existing at the time of bringing the second replevin suit which was decided against the plaintiff and which comes up on his exceptions. No change in the status of the parties and no new facts appear since the decision in the previous case. The parties are the same, the automobile is the same, and the conditions under which the taking took place are the same, the issue is the same. The full sixty days' period on the foreclosure had expired at the time of the former taking and the same was true at the second taking; the automobile was still in the possession of the defendant under the same claim of right; nor is their any evidence in the present record to show the giving of the forty-eight hours statutory notice on the part of the plaintiff claimant. The present case therefore stands on all fours with the former case, removed only in point of time.

Upon the issue of tender the record clearly discloses an existing final judgment or decree rendered on the merits, without fraud or collusion, by a court of competent jurisdiction on a matter within its jurisdiction, regularity of proceedings and a matter between the same parties and covering the same issue.

It would be of no avail for the plaintiff to claim that the former decision may have been erroneous. No appeal was taken and judgment in that case was final.

The doctrine of "res adjudicata" was not referred to as far as the record discloses but appears conclusive as to the rights of parties in this case.

It is accepted law in this State, that, conceding jurisdiction, regularity in proceedings, and the absence of fraud, a judgment between the same parties is a final bar to any other suit for the same cause of action, and is conclusive not only as to all matters which were tried, but also as to all which might have been tried in the first action. *Blodgett* v. *Dow*, 81 Me., 197; *Blaisdell* v. *Inhabitants of York*, 117 Me., 379; *Merrill* v. *Regan*, 117 Me., 183; *Van Buren Light and Power Company* v. *Inhabitants of Van Buren*, 118 Me., 463; *Emerson* v. *Street Railway*, 116 Me., 61; *Arsenault*

v. *Brown Company*, 122 Me., 52; *Edwards* v. *Seal*, 125 Me., 39.

The plaintiff has had his day in Court and can not, under the facts which form the basis of the consideration of the case, prevail. Though for reason different from that on which the presiding Judge below based his finding, the decision below must stand.

Exceptions overruled.

FRANK L. AMES, ADMR. *vs.* SELDEN E. ADAMS.

Somerset. Opinion May 29, 1929.

ACTIONS. R. S., CHAP. 92, SECS. 9 AND 10 (LORD CAMPBELL'S ACT). R. S. 91, SEC. 1. TRUSTEE PROCESS.

The effect of R. S., Chap. 92, Secs. 9 and 10 (Lord Campbell's Act) was not to create a new remedy for an existing cause of action but to create the cause of action itself where none existed before. The two causes are inherently distinctive. The common law gave to the personal representative a right of action to recover for conscious suffering up to the time of death but nothing for the death itself.

The object of the Campbell act was not to give a new right of action where ample means of redress existed, but to supplement the existing law, and give a new right of action in a class of cases where no means of redress before existed.

In the case at bar the death was caused by assault and battery inflicted by the defendant upon the plaintiff's intestate, but that would not make the present action an action of assault and battery; hence the present action would not fall within the inhibition of R. S., Chap. 91, Sec. 1, and it was error to order a non-suit.

On exceptions by plaintiff. An action by administrator to recover for the death of his intestate, brought under the provisions of Sections 9 and 10, R. S., Chap. 92, known as Lord Campbell's Act. Action included a trustee process against a certain banking institution.

In the trial of the cause at the close of plaintiff's testimony, counsel for defendant moved for non-suit on the ground that the

evidence disclosed that this was an action for assault and battery and could not as provided in Sec. 1, Chap. 91, R. S., be commenced by trustee process. This motion was granted and exceptions taken. Plaintiff thereafterward presented a written motion that his writ be amended by removing all portions giving it the form, character and force of a trustee process. This motion was denied and exceptions seasonably taken.

First exception sustained. Second exception not considered.

The case fully appears in the opinion.

Ames & Ames, for plaintiff.

Merrill & Merrill, for defendant.

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

PHILBROOK, A. R. J. This action is brought under the provisions of Secs. 9 and 10 of R. S., Chap. 92, commonly known to the legal profession as Lord Campbell's Act, which by the former section provides that "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as shall amount to a felony;" and by the latter section that "Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of his widow, if no children, and of the children, if no widow, and if both, then of her and them equally, and if neither, of his heirs."

That the defendant shot and instantly killed the plaintiff's intestate is established by the verdict of a jury which heard the case upon a charge of murder. It is admitted that the plaintiff is the duly appointed administrator of the estate of the deceased, who left no widow nor children, and that the action is brought for the ex-

clusive benefit of Mary L. Gordon, mother and sole heir of the deceased.

The declaration is in terms appropriate to the action as described in the statute. It contains no allegation of assault and battery. After the declaration is a command to summon certain banking institutions as trustees of the defendant.

At the close of plaintiff's testimony, counsel moved for non-suit "on the ground that the evidence discloses that this is an action for assault and battery and is within the exception contained in Sec. 1, Chap. 91, of the Revised Statutes, the action being an action commenced by trustee process, therefore not maintainable." The motion was granted and exceptions taken to the ruling.

After the order of non-suit had been granted, and at the same term of court, the plaintiff presented a written motion that his writ be amended by removing therefrom all those portions thereof which gave it the form, character and force of a trustee process. This motion was denied and to this ruling also exceptions were taken.

Upon these two exceptions the plaintiff relies.

The effect of the Lord Campbell Act was not to create a new remedy for an existing cause of action but to create the cause of action itself where none existed before. It was therefor necessarily a new cause of action, a new right of action. The two causes are inherently distinct, both in their nature and in their results. The statutory cause of action begins where the common law leaves off. The common law gave to the personal representative a right of action to recover for conscious suffering up to the time of death, but nothing for the death itself. The statute does not apply in case of conscious suffering and therefore gives no damage for that, but for the death itself which must follow immediately. The former is brought for the benefit of the estate, the latter for the benefit of the next of kin and ignores the estate. The rule of damages in the two actions is entirely different. *Anderson* v. *Wetter*, 103 Me., 257. The object of the Lord Campbell Act was not to give a new right of action where ample means of redress already existed, but to supplement the existing law, and give a new right of action in a class of cases where no means of redress before existed. *Sawyer* v. *Perry*, 88 Me., 42. Similar statutes have received the same con-

struction in other jurisdictions, where they have been held to be not remedial in their nature but creative of a distinctly new and independent right. *Funk* v. *Garman*, 40 Pa., St., 95; *Matz* v. *Chicago & A. R. R. Co.*, 85 Fed., 180; *Union Pacific Railroad* v. *Wyler*, 158 U. S., 285. See also 17 C. J., 1184, Sec. 38 et seq.

Although the plaintiff's intestate, had he lived, might have brought an action of assault and battery against this defendant to recover such damages as were suffered, yet the present action is not brought to enforce that right but is one to recover damages for another and independent cause. The statute, R. S., Chap. 91, Sec. 1, would forbid bringing the former action by trustee process but it does not forbid such process in the present suit.

Since the first exception must be sustained, it is unnecessary to consider the second one.

First exception sustained.
Second exception not considered.

SHEEHAN'S CASE.

Penobscot. May 29, 1929.

WORKMEN'S COMPENSATION ACT. R. S., CHAP. 50, SECS. 17, 18, AND 19. P. L. 1919, CHAP. 238. ORAL NOTICE CONSTRUED.

While oral notice for an injury received by an employee does not take the place of the written notice required by Sections 17, 18, *and* 19, *Chap.* 50, *R. S.* 1916, *as amended by Chap.* 238, *P. L.* 1919, *the Workmen's Compensation Act, yet such oral notice may result in the acquirement of knowledge on the part of an employer or its agent so as to bring the case within the remedial provisions of Section* 20.

Such an agent need not be one of that narrow class upon whom written notice may properly be served. The term is used in a broader sense in Section 20 *than in Section* 19. *It includes foremen and superintendents; not, however, mere fellow servants.*

To constitute a person an agent in the sense in which the word is used in Section 20, *such person should, for the time being, stand in the place of the*

employer or such relationship should exist between him and the employer that his knowledge of an injury to an employee would, in the ordinary course of business, be communicated to the principal.

One who merely, at times, supervises a portion of the work of certain employees, does not fall within the rule.

In the case at bar while there was no evidence to sustain the finding that any person qualifying as an agent under the rule stated had knowledge of the injury and the finding of the Commission in that respect must be reversed and the appeal sustained, there was some evidence indicating possible liability on another phase of the case. Plaintiff's rights in that respect should be preserved.

On appeal from an affirming decree awarding compensation under the Workmen's Compensation Act. Appeal sustained. Case remanded for further hearing.

The case fully appears in the opinion.

Arthur L. Thayer, for petitioner.

Gillin & Gillin, for respondent.

SITTING: WILSON, C. J., STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

PATTANGALL, J. Appeal from award of Industrial Accident Commission.

Petitioner was employed as clerk in appellant's store and in September, 1926, sustained an injury to her knee by slipping on a newly oiled floor, while engaged in her usual and regular work. No written notice of the accident was given the employer within the following thirty days as required by the provisions of Secs. 17, 18 and 19 of Chap. 50, R. S. 1916, as amended by Chap. 238, P. L. 1919. Petitioner contended that failure to give notice was excused because of knowledge of the injury on the part of an agent of the employer, thus bringing the case within the remedial provisions of Sec. 20 of the act, and the Commission so found, the decree stating that the petitioner, immediately after receiving the injury, "notified the lady in the employer's force who had supervision over this employee's services," evidently intending a finding that the employer by its agent had knowledge of the injury at or near the time of its occurrence.

There were many other matters in controversy at the hearing below and lengthy arguments are presented here in support of appellant's position concerning them, but the only issue which this court may properly consider is that involved in the above mentioned finding. In all other respects the decree is unassailable when it is borne in mind that the decision of the Commission on matters of fact is only subject to review if entirely without support of legal evidence.

Upon the one remaining issue the dispute lies within a very narrow compass. It is admitted that the required written notice was not given. It is undisputed that the injury was known to the person referred to in the decree as "the lady in the employer's force who had supervision of this employee's services" and that such knowledge was acquired shortly after the injury occurred. It is also agreed that no such knowledge was communicated to the employer, its manager, its superintendent, or any officer thereof, until several months had elapsed.

The sole issue is, therefore, whether or not there was evidence before the Commission that the person who had knowledge of the injury was an agent of the employing corporation within the meaning of Sec. 20.

Oral notice is not the statutory notice and of itself may not take the place of written notice. Nevertheless an oral notice may lead to the acquirement of such knowledge on the part of the employer or its agent as to obviate the necessity of written notice. *Simmons' Case*, 117 Me., 176; *Lachance's Case*, 121 Me., 509.

The agent need not be one of that narrow class upon whom written notice might properly be served. The term is used in a broader sense in Sec. 20 than in Sec. 19. It includes superintendents and foremen. *Simmons' Case*, supra; *Lachance's Case*, supra; *Marchavitch's Case*, 123 Me., 498. It does not, however, include mere fellow servants. *Armstrong* v. *Oakland Vinegar and Pickle Co. et al*, 163 N. W., 897 (Mich.).

In the instant case, the evidence is that the business of the employer was directed by a manager; that under him was a superintendent who "had charge of the employees"; that in the department in which petitioner worked as saleswoman, a woman was employed as buyer; that between her monthly buying trips, this

woman had, as she expressed it, "charge of two floors"; that at such times the saleswomen in this department, including petitioner, were to some extent under her direction. This buyer is the person referred to in the decree as "the lady in the employer's force who had supervision over this employee's services."

To constitute a person an agent, in the sense in which the word is used in Sec. 20, such person should, for the time being, stand in the place of the employer (*Lachance's Case*, supra); or such relationship should exist between him and the employer that the agent's knowledge of injury to an employee would in the ordinary course of business conduct be communicated to the principal. A superintendent or foreman is such an agent. But one who merely, at times, supervises a portion of the work of certain employees does not fall within the rule. Giving the broadest possible construction to the provisions of the act, we can not find warrant in this evidence for the conclusion that the relation of this buyer to the corporation was such that she may be considered such an agent. An award of compensation based on this proposition can not be sustained.

But Sec. 20 contains a further clause. Want of notice may be excused when failure to give it is due to accident, mistake or unforeseen cause. There is some evidence tending to show that the injury was latent and that the employer or its agent had knowledge of it within the time which, under such circumstances, might be allowed for giving notice. *Brackett's Case*, 126 Me., 365.

The case has never been considered from this point of view and in order that no possible injustice may be done petitioner, it may properly be re-examined with that situation in mind.

Appeal sustained.
Case remanded for further hearing.

JOHN FRANKLIN *vs.* AUGUST ERICKSON AND ANOTHER.

Aroostook. Opinion June 1, 1929.

CONSPIRACY DEFINED. PLEADING AND PRACTICE. LIMITATION OF ACTIONS.

A conspiracy at common law may be defined as an agreement or combination formed by two or more persons to do an unlawful act or to do a lawful act by unlawful means.

Conspiracy is a convenient form of declaration against two or more joint tort-feasors. Its averment adds nothing to the nature or gravity of the offense charged. The choice of tort in the nature of conspiracy may affect the applicability of evidence, but the gist of the action, its ground and foundation is the tort alleged.

In the case at bar the jury found no conspiracy, but found defendant Erickson guilty of slander.

An action of slander must be commenced within two years after the cause of action accrues. Inasmuch as the slander was uttered in 1922, or repeated in 1924, the two year limitation prevails and the verdict arrived at was not within the law.

On general motion for a new trial by defendant. An action for conspiracy to injure the reputation and to prevent the ordination of a candidate for the ministry. Verdict was for the plaintiff.

Motion sustained; new trial granted; for reasons fully expressed in the opinion.

W. P. Hamilton,
A. S. Crawford, Jr.,
John S. Cummings, for plaintiff.
Joseph E. Hall,
Ransford W. Shaw, for defendant.

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

BARNES, J. This case comes before the court on defendant's motion to set aside a verdict, upon the usual grounds.

The action as tried was for conspiracy to injure the plaintiff in his reputation and profession by the utterance of slanderous words.

When sued out, the writ charged conspiracy of three but, at the trial term discontinuance as to the third was allowed and trial proceeded against defendant Erickson and his sister, Mrs. Elofson. The jury found the latter not guilty and assessed damages against Mr. Erickson, hereinafter called, the defendant.

In January, 1922, plaintiff was "Student Pastor" of the Swedish Lutheran Church, in New Sweden, Maine, the church of the defendant.

The allegation is that then and there defendant, more or less publicly, accused plaintiff of criminal intercourse with a woman then living in that town.

In 1924 plaintiff presented himself for ordination before the supreme body of his church and his petition was denied, as he testified, because knowledge of the alleged slanderous utterances of defendant was brought to the attention of the ordaining authorities.

The writ is dated October 12, 1927.

A conspiracy at common law may be defined, in short, as an agreement or combination formed by two or more persons to do an unlawful act or to do a lawful act by unlawful means.

An executed conspiracy is actionable, if it cause damage to person or property of the plaintiff. There is no recovery in a civil action for conspiracy without damage.

This action is on the case for tort. The tort complained of here is slander. As drawn the writ alleged a joint tort of three persons; as tried, the action was for a joint tort of two.

Conspiracy is a convenient form of declaration against two or more joint tort-feasors.

The averment of conspiracy adds nothing to the nature or gravity of the offense charged.

It is but a convenient mode of declaring for a joint tort against two or more persons.

True the choice of tort in the nature of conspiracy affects the expense of litigation and the applicability of evidence, but the gist of the action, its ground and foundation is the tort alleged, in this case slander.

It is for the tort proven that a defendant or defendants must respond in damages. *Parker* v. *Huntington et al*, 2 Gray, 124; *Hayward* v. *Draper*, 3 Allen, 551; *Carew* v. *Rutherford*, 106 Mass., 1; *Rice* v. *Coolidge*, 121 Mass., 393; *Boston* v. *Simmons*, 150 Mass., 463; *Page* v. *Parker*, 43 N. H., 363; *Stevens* v. *Rowe*, 59 N. H., 578; *National Fireproofing Co.* v. *Mason Builders Ass'n*, 169 Fed., 259, 26 L. R. A. (N. S.), 148; *Brown & Allen* v. *Jacobs Pharmacy Co.*, 115 Ga., 429, 57 L. R. A., 547; *Kimball* v. *Harmon*, 34 Md., 407, 6 Am. Rep., 340; *Jones* v. *Monson*, 137 Wis., 478, 119 N. W., 179; *Garing* v. *Fraser*, 76 Me., 37; *Strout* v. *Packard*, 76 Me., 148.

As the gist of an action on the case in the nature of a conspiracy is the damage done to the plaintiff, the authorities sustain the proposition that a verdict, in a proper case, may be rendered against all the defendants, if the damage and the conspiracy are proven, or against one of the defendants if the damage is found due to tort on his part, even though no conspiracy is proved. 19 Am. and Eng. Ann. Cases, 1254 Note.

In the case at bar the jury found no conspiracy, but found defendant Erickson guilty. They, therefore, found him guilty of slander, uttered in 1922, five years and more before the date of the writ.

But in this state an action for slander must be commenced within two years after the cause of action accrues. R. S., Chap. 86, Sec. 87.

Since the date of this writ no action can be tried for slander uttered in 1922, as alleged in the writ, or repeated in 1924.

And by indirection a result impossible of accomplishment by direct act can not be effected.

The verdict was not arrived at within the law. Hence, upon the first ground claimed defendant prevails.

Motion sustained.
New trial granted.

WILLIAM A. BRENNAN

vs.

EASTERN CASUALTY INSURANCE COMPANY.

Androscoggin. Opinion June 4, 1929.

HEALTH AND ACCIDENT INSURANCE. EVIDENCE. WAIVER.

In an action to recover sick benefits under an accident and health policy which contained a "lapse" clause if the premium were not paid when due on the first day of each month and a reinstatement clause if paid after a lapse, held:

That there was no evidence warranting a finding of a waiver of the provision requiring payment of the premiums on the first day of each month.

That application of a premium unless accompanied by a stipulation that it be applied on a certain month is left to the insurer to apply, and having been once applied and repeated notice given to the insured by receipts of later premiums without objection on his part binds him.

That a provision for ten days of grace for the payment of premiums when the policy has been in force for three consecutive months is held to mean continuously in force.

That the plaintiff's policy, by failure to pay the premium due October 1, 1927, *until October* 4, *had elapsed and did not cover illness beginning October* 3, *the insurer not having knowledge of the illness of the insured when it accepted the premium.*

That the acceptance of a premium when due in the month following a lapse had no effect on the past, but merely extended the policy into the future.

On report. An action of assumpsit upon a health and accident indemnity policy. Plaintiff sued for one month's total disability and confinement in hospital from October 3 to November 3, 1927, amounting to $225, and for continuing full indemnity for confinement in his own home from November 3 to November 17, one-half month, a total of $300. The case was tried before a jury and at the close of the evidence was taken from the jury and reported

to the Law Court by the presiding Justice. Judgment for defendant.

The case fully appears in the opinion.

Herbert E. Holmes, for plaintiff.

Frank P. Preti, for defendant.

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

WILSON, C. J. An action to recover sick benefits under an insurance policy issued by the defendant company. The evidence was taken out before the jury, but at the close of the evidence it was reported to this court by the Justice presiding.

The defense is that the policy was not in force at the inception of the plaintiff's illness. The policy was issued on March 31, 1924, and by its terms insured the plaintiff from 12 o'clock noon on said March 31 to 12 o'clock noon on the following day, and for such further time as the premiums paid by the insured as therein agreed should maintain it in force.

By the terms of the policy the premiums were made payable monthly in advance on the first day of each month in the amount of $3.85. If the premium was not paid as provided, the policy lapsed, but could be reinstated by the payment of the overdue premium, if accepted by the company. When reinstated, however, it covered only accidental injuries thereafter sustained, and such illness as occurred more than ten days after the date of acceptance. If the next premium became due within the ten days and was not paid, the policy again lapsed, and no liability on the part of the company accrued until again reinstated.

During a period of eight years, while the plaintiff had carried similar policies with the defendant company, he had permitted his policy to lapse more or less frequently and often for several months, and then was permitted by the company to reinstate it by merely paying a monthly premium. The evidence, therefore, does not present a case of all premiums in arrears having been paid from the inception of the policy.

In the fall of 1926 and spring of 1927, the plaintiff permitted the policy on which this action is brought to lapse for a period of eight months or from September, 1926, to May, 1927. On May

20, 1927, the plaintiff sent the company a check for the monthly premium of $3.85, which was accepted on May 23, and according to the receipt given was applied by the company in payment of the premium for the month of May.

On May 26, 1927, the plaintiff testified that he mailed a letter to the company, a copy of which was received in evidence, and in which he says that his receipt stated the premium forwarded was accepted for the month of May, and that premiums were due the first of the month. If this was the case, he requested that his payment of May 20 be applied on the June premium; or if not so applied that protection begin when his check was received. The company denied receiving this letter. At least no reply was made.

Payments of the monthly premium were afterward made by the plaintiff as follows: June 3, July 5, August 3, September 22, October 4 and November 1. The plaintiff was taken ill on October 3, 1927, and his period of disability lasted until November 17. It is for the benefits accruing during this period, if the policy was in force on October 3, that this action is brought.

Three questions are raised for the consideration of this court. First, the plaintiff claims that the defendant had by custom waived the provision of the policy requiring the premiums to be paid in advance on the first day of the month. The evidence does not sustain this claim. The policy expressly provides that the company may accept the premium, if not paid on the first day, with certain conditions as to non-liability for illness occurring within ten days of the acceptance of the payment. There is nothing to indicate that overdue premiums on this policy had ever been accepted by this company other than upon the conditions contained in the policy. The evidence does not disclose that the defendant ever paid benefits accruing during one of the periods while the policy had lapsed, except for illness originating while it was actually in force, or held out any inducement to the plaintiff that the payment of an overdue premium reinstated the policy from the first of the month in which it was paid. When the plaintiff paid one month's premium on May 20, 1927, it is clear from his testimony and the letter written May 26, 1927, to the company that he understood he was reinstating the policy from the date of payment, unless the company accepted it for the premium due on June 1.

Secondly, the plaintiff contends that by reason of the failure of the company to reply to the plaintiff's letter the defendant should be held to have applied the premium paid on May 20 to the payment due June 1, and, therefore, the payments made in June, July, August, September, and October paid in advance the premiums due on the first day of the month following the payment, so that the policy was in force at the inception of the plaintiff's illness on October 3.

This contention can not be sustained. The plaintiff gave no direction for the application of the premium when he sent it on May 20. Even if the company received the letter of May 26, and the evidence lacks the probative force to warrant such a finding against the direct denial of the defendant, the evidence clearly indicates that the company did not apply it on the June premium; and that the plaintiff must have known it was not so applied, and acquiesced in the defendant's application of this and the later payments to the month in which they were paid.

The plaintiff's receipts show that the payment made on May 20 was applied in payment of the May premium; the June payment, on the June premium; the July payment, on the July premium; the August payment, on the August premium; the September payment, on the September premium; and the October payment on the October premium. No objection to this application was made by the plaintiff during all this time. The plaintiff must be held to have assented to the application of the payments made by the company.

In fact the plaintiff in his letter indicated his acceptance of whatever action the company might take by requesting that, if not applied on the June premium, protection start from day check was received, or May 20.

His policy, therefore, lapsed July 1, August 1 and on September 1, 1927, and was not reinstated in September until the 22nd day. The payment made on September 22, however, extended the policy only to October 1, when the next payment became due, and would not cover illness occurring after October 1, unless the October premium was paid when due.

The policy lapsed again on October 1, and was not reinstated again until October 4, unless the plaintiff's third contention can be upheld, viz.: that the policy having been in force for a period of

three consecutive months, the plaintiff under Part 14 of the policy had ten days of grace within which to pay the premiums due on the first day of October, and during which ten days the policy remained in force. If this contention is sustained, the payment on October 4 being within the ten-day period, the policy did not lapse on October 1, but by the payments on October 4, and November 1, continued in force during all the period of the plaintiff's disability.

Neither can this contention be sustained. The three consecutive months that result in the ten days of grace must be three months in which the policy is continuously in force. If allowed to lapse during any one of the three months next prior to the month in which the ten days of grace is claimed, no period of grace results.

This follows from a reasonable intendment of such a provision. It is not reasonable that the parties intended that payments made long after they were due would give equal privileges with a strict compliance with the terms of the policy in making payments. Such a provision obviously was made to encourage prompt payments and not to promote laxity. That this is the true construction is also apparent when Part 14 is considered in connection with other provisions of the policy.

Part 3 of the policy provides:

"For each consecutive month immediately preceding the date of the accident that this Policy shall have been maintained in continuous force, ONE PER CENT shall be added to the original amount provided for any loss under Part 2 sustained by the Insured, but all such additions shall never exceed FIFTY PER CENT of such original amount."

Bearing in mind that the benefits under Part 3 are conditioned upon the policy being "maintained in continuous force" it is clear from the terms of Part 14 of the policy, in which appears the provision for the ten days of grace for the payment of premiums after the policy has been in force for three consecutive months, that the ten days of grace is also conditioned upon the policy being in force continuously for the period named. Under Part 14, if the condition is complied with, the policy continues in force during the ten days of grace, "except as to the benefits granted under Part 3." If the three consecutive months of life in Part 14 as a condition for the

period of grace does not mean continuous life without a lapse, then the exception in Part 14 of the benefits under Part 3 is meaningless; since under Part 3 the benefits do not accrue unless the policy has been continuously in force for consecutive months, which obviously means without a lapse, unless the lapse has been waived, as, of course, it may be, and the policy treated as in force during all the period.

This policy, however, can not be held to have been continuously in force during the three months prior to October 1. The entire history of the transactions between the plaintiff and the company in relation thereto is contrary to such an understanding between them. The plaintiff had been accustomed to allow the policy to lapse for months and then by the payment of a single premium reinstate it without paying any of the premiums in arrears. The defendant company could not tell, if a payment was not made when due, whether the policy would be reinstated during that month or six months later. The policy by its express terms in case of reinstatement applies only to future accidents and illness occurring more than ten days after the acceptance of the payment. *Greenwaldt* v. *U. S. H. & A. Ins. Co.*, 102 N. Y. S., 157. The plaintiff knew what the provisions were as to the effect of the payment of overdue premiums. A payment after the first day of the month, therefore, under this policy, if accepted by the company, can not be held *ipso facto* to reinstate the policy in continuous force from the first day of the month in which it was paid.

The plaintiff in the case at bar, therefore, was not entitled to ten days grace for making the October payment, since for no month during the twelve last past had it been continuously in force.

It may be urged, however, that the insurance company gave no adequate benefits in return when it accepted an overdue premium on the 20th or 22nd of the month, unless it thereby is held to have waived the lapse and the policy is held to be in force from the first of the month; neither did the insured lose anything by its being reinstated as of the date of payment, unless he was then ill or suffering from an injury, except the possible right to have the period of grace under Part 14 and the increased benefits under Part 3. In every instance under this policy the plaintiff in case an overdue payment was accepted received protection against future acci-

dents or illness occurring after ten days and until the next payment became due.

We think this case must be distinguished from the Bruzas case, 111 Me., 308. In that case, the insured had paid up all premiums in arrears, and his premium for the month during which he fell ill, was paid in advance. His policy was, therefore, in force at the inception of his illness. In the case at bar, the insured never paid his back premiums and his policy was not in force at the inception of his illness. In the cited case, it is true, the premium of the month following the inception of his illness, while due on the first day, was not paid until the 24th; the insurance company, however, as the court held, knew of his prior illness when it accepted the premium and also accepted and retained overdue premiums for succeeding months. The court held under these circumstances that having accepted and retained the premiums with full knowledge of the facts as to the illness of the insured, it should not be freed from liability, and that the acceptance of the overdue premiums was a waiver of the lapse and the policy must be held to have been continuously in force as to that illness from the first day of the month in which he was taken ill. To have held otherwise in that case would result in the retaining of premiums with no benefits accruing for sickness, as the policy provided that no benefits accrued for illness originating before the expiration of thirty days after the acceptance of an overdue premium. Under the policy in the case at bar, illness originating after ten days from the acceptance of the overdue premium is covered. The waiver in the Bruzas case, we think, could not have been extended to illness occurring during a period of lapse, of which illness the company had no knowledge when it accepted the overdue premiums. In other words, the policy was in continuous force only as to the particular illness of which the company had notice.

It is clear that when the defendant company in the case at bar accepted the October premium, it had no knowledge that the plaintiff was ill and so was not apprised of the consequences in case it waived the lapse. An insurer can not be held to waive a breach on the part of the insured when it does not have full knowledge of the facts and the consequences of such waiver. *Chasson* v. *Camp of Woodmen*, 127 Me., 151; *Handley* v. *Ins. Co.*, 127 Me., 361.

There being no facts shown that entitled the plaintiff in this case to claim that by making payments after they were due a lapse was waived and the policy should be treated as in continuous force, the parties must be held to be bound by the express terms of the policy of which the plaintiff admitted he had full knowledge. *Conway* v. *P. L. Ins. Co.*, 140 N. Y., 79, 83; *Gagne* v. *Mass. Bonding & Ins. Co.*, 78 N. H., 439, and an overdue premium accepted merely reinstated the policy as to future accidents and illness occurring after ten days.

Though by the terms of the policy the acceptance of a renewal premium on the first day of the month was optional with the company, its acceptance only extended the policy into the future. It had no effect on the past, except under the circumstances creating an estoppel or constituting a waiver of the provisions of the contract, which do not exist in this case.

The policy not being in force when his illness began, no benefits, therefore, accrued to the plaintiff under it by reason of such illness by the payment made November 1. *Greenwaldt* v. *U. S. H. & A. Ins. Co.*, supra; *Gagne* v. *Mass. Bonding & Ins. Co.*, supra.

Judgment for the defendant.

LIZZIE E. HILT, APPELLANT FROM DECREE OF JUDGE OF PROBATE

vs.

ANDREW D. WARD.

Kennebec. Opinion June 5, 1929.

WIDOW'S ALLOWANCE. SUPREME COURT OF PROBATE. EXCEPTIONS. R. S., CHAP. 70, SEC. 14. SPECIFIC LEGACY DEFINED.

A widow's or widower's allowance under Sec. 14, Chap. 70, R. S., is based on her or his necessities.

While the degree of need such as to warrant an allowance is within discretion of the Court and when any evidence of need exists the conclusion of the Court

below is not subject to exception; where the conclusion of the Court below is clearly based on other grounds and no evidence of need exists, such conclusion is subject to exception.

In the instant case the decree of the Court below granting an allowance to the widower was clearly based on other grounds than his necessities. Error was committed.

On exceptions. An appeal from the decree of the Judge of Probate granting a widower's allowance, taken to the Supreme Court of Probate. To the refusal of the presiding Justice to make certain rulings appellant seasonably excepted, and also excepted generally to the final judgment and decree made by the presiding Justice. Exceptions sustained.

The case fully appears in the opinion.

E. M. Thompson, for appellant.

Robert A. Cony, for appellee.

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

WILSON, C. J. Cora Luce Ward died testate on February 19, 1928. Her husband within the statutory period waived the provisions of the will and petitioned the Probate Court that an allowance be made to him out of the personal estate under Sec. 14, Chap. 70, R. S.

The estate consisted of real estate appraised at $12,000, and personal estate of approximately $28,000. Among the articles of personal property in her estate were certain jewelry and clothing of the deceased, and also certain articles of household furniture, which the husband contended were owned by him and the deceased in common in equal shares.

The Probate Court after hearing, granted him an allowance to the amount of $462.53, with the right to take articles of personal property to that amount at the appraised value.

From this decree, the appellant, a niece of the testatrix and interested under the will and affected by the decree of the Probate Court, appealed and as reasons of appeal set forth in her appeal: (1) that no evidence was adduced as to the petitioner's need, or by and through which it could be judicially determined in accordance

with the spirit of the statute that it was necessary to grant an allowance to the petitioner as prayed for; (2) that the petitioner was a man of considerable means, with no family dependent upon him, and that his own property with his distributive share of the estate of the testatrix was more than ample to provide for all his needs; (3) that the petitioner at the hearing in the Probate Court requested that certain jewelry and clothing specifically enumerated be given him, that the articles of clothing and jewelry asked for by the petitioner were specifically bequeathed under the will of the testatrix.

It should be noted, however, that while the petitioner apparently requested at the hearing in the Probate Court that he be allowed the clothing and jewelry enumerated and certain articles of household furniture and the case apparently was heard in the Supreme Court of Probate on the basis that the decree authorized him to select the articles he desired, the decree of the Probate Court did not in terms go that far; but merely granted him an allowance of a definite sum, with the right generally to take personal property at its appraised value without specifying any particular articles.

Under proper circumstances, the authority to grant an allowance, though it diminish property specifically bequeathed, may be vested in the Probate Court, but the policy of this court has been to preserve the specific bequests in a will in so far as possible. *Brown* v. *Hodgdon*, 31 Me., 67; *Gilman* v. *Gilman*, 53 Me., 192; *Fox* v. *Rumery*, 68 Me., 129. Such a decree as made by the Probate Court in this case, however, would not authorize the taking of personal property specifically bequeathed if there was sufficient personal property not specifically disposed of by will equal in value to the allowance.

Upon a hearing before the Supreme Court of Probate, the decree of the Probate Court was affirmed, and the case is presented to this court on exceptions to the ruling of the Supreme Court of Probate affirming the decree below and also to a ruling that the bequests of "all the clothing" and "all the jewelry" of the testatrix was a general and not a specific legacy.

That the clauses of the will disposing of the clothing and jewelry created a specific and not a general legacy we think is clear.

The first clause reads: "I give and bequeath all the clothing and wearing apparel which I may own at my decease";

The second reads: "I give and bequeath all the jewelry . . . which I may own at my decease."

Such language is generally held by all the authorities to create a specific bequest. In *Tomlinson* v. *Bury*, 145 Mass., 346, 348, the Court said: "A bequest is not the less specific because it includes numerous articles. A bequest of all the horses which the testator may own, of all his plate, of all the books in his library or of all his horses, cattle, and farming tools on a particular farm or farms is specific."

"A specific legacy is a bequest of a particular article or a particular part of the testator's estate so described and distinguished from all other articles and parts as to be identifiable." *Kelly* v. *Richardson*, 100 Ala., 584. Also see *Wallace* v. *Wallace*, 23 N. H., 149; *Loring* v. *Woodward*, 41 N. H., 391; *Crawford* v. *McCarthy*, 159 N. Y., 514; *Kearns* v. *Kearns*, 76 Atl., 1042; *In re Stilphen*, 100 Me., 146.

The rule applied in *Palmer* v. *Palmer*, 106 Me., 25, and *Perry* v. *Leslie*, 124 Me., 93, does not apply to the language used by this testatrix. The rule applied in those cases related to bequests of a stated number of shares of stock without any reference to the particular shares intended to be bequeathed, and it was held to be a general and not a specific bequest, because it could be complied with by the delivery of any shares of the corporation named; but the court in *Palmer* v. *Palmer* laid down the rule which applies to the language of the will in the instant case: "A specific legacy is a bequest of a specific thing or fund that can be separated out of all the rest of the testator's estate of the same kind so as to individualize it and enable it to be delivered to the legatee as the particular thing or fund bequeathed."

When the testatrix in the case at bar gave "all of her clothing" and "all of her jewelry," she designated the particular clothing and the particular jewelry which she desired to go to the legatees named, and the bequest could not be met by any of the other property in the estate. It was clearly the intent of the testatrix to give the legatees named certain definite articles. There were no other articles in the estate that could satisfy this bequest. It included all

the articles of that character which she possessed as clearly as though she had enumerated each one.

While the authority to grant an allowance to a widow or a widower under Sec. 14, Chap. 70, R. S., is vested in the discretion of the Probate Court to be exercised in view of the needs and circumstances of the petitioner and the degree and estate of the deceased, and in so far as the Court acts within that authority, his conclusions will not be disturbed, *Costello* v. *Tighe*, 103 Me., 324; *Palmer Appl't*, 110 Me., 441; *Gower Appl't*, 113 Me., 158; yet "if he exercises discretion without authority, his doing so may be challenged by exceptions." *Palmer Appl't*, supra, p. 443.

It clearly appears in the decree and in the rulings of the Supreme Court of Probate that the presiding Justice assumed that the decree of the Probate Court authorized the taking of certain articles of clothing and jewelry and household effects and approved the decree below, not on the ground of the necessities of the petitioner, but because of the sentiment associated with the articles enumerated.

Evidence of any financial need on the part of the petitioner in this case, temporary or otherwise, is entirely lacking. While he is a man past eighty years of age, he is possessed of considerable means, approximately $30,000, in his own right in addition to the amount he will receive from his wife's estate. Again, the amount of the allowance is so small, $462.53, as to conclusively indicate that it could not have been granted on the ground of any financial necessity. This is also confirmed by the fact that the sum allowed is approximately the appraised value of the specific articles requested by the petitioner.

While the original intention of the statute giving the power to grant an allowance to a widow out of her husband's estate in addition to the amount she would receive as dower was to meet her temporary needs until she could realize something from her dower, *Hallenbeck* v. *Pixley Ex'r*, 3 Gray, 521, 525; *Foster* v. *Foster*, 36 N. H., 437, this court has always construed the statute liberally, *Kersey* v. *Bailey*, 52 Me., 198, 201; *Smith* v. *Howard*, 86 Me., 203, 209; and has not always limited the grounds to a petitioner's immediate needs; but the necessities of the petitioner are expressly made by the statute the underlying basis on which judicial discretion when exercised must rest for its authority.

It certainly was not the purpose of this statute to aid a widower or widow, without regard to his or her necessities, to obtain certain specific articles belonging to the estate of the other through an allowance by the Probate Court, merely because of the sentiment associated therewith.

A sound judicial discretion is not an unlimited power. It does not include arbitrary, unreasoning or even well intentioned action, without regard to the nature and purpose of the power vested in the court or to the provisions of the statute granting the authority.

If the Supreme Court of Probate had merely dismissed the appeal and affirmed the decree of the Probate Court, we might have hesitated to interfere, even though we think judicial discretion would then, under the circumstances of this case, have been strained to the limit. But by giving consideration to the element of sentiment connected with the petitioner's entirely laudable desire in this instance to possess the wedding ring and certain other articles of jewelry and clothing and household goods which had only a peculiar and sentimental value to him, without any evidence of financial necessity as a basis for the exercise of the power, we think the Supreme Court of Probate went outside the realm of the judicial discretion vested in it under the statutes. Schouler on Wills (5th Ed.), Vol. 2, Sec. 1449; *Hollenbeck* v. *Pixley Ex'r*, supra.

It may be urged that since the decree as affirmed does not permit the taking of the property specifically bequeathed, it is not apparent that the appellant is aggrieved. The appellant, as one of the residuary legatees, however, was entitled to have the court in granting the allowance exercise a sound judicial discretion within the limits authorized by the statute, and not upon any sentimental appeal due to the fact that certain of articles requested, viz.: the household goods, had been a part of the "environment" in which a happy married life had been spent and to the not unreasonable wish on the part of the petitioner to have certain articles of clothing and jewelry formerly belonging to the testatrix, which it now appears had been specifically bequeathed to other parties.

If there was any evidence on which the court below could have found that an allowance in this case was "necessary" in view of petitioner's own "degree and estate" and that of the testatrix, we should consider a finding on this point as binding on this court and

overrule the exceptions, since the degree of necessity on which to base an allowance is wholly within the discretion of the court below, but we find no such evidence, nor, indeed, any such finding by the Supreme Court of Probate. Having based its decree, without any need being shown, upon entirely irrelevant considerations, we think error was committed by the Supreme Court of Probate, and the mandate must be

Exceptions sustained.

HARWOOD GOUDY *vs.* IDA LITTLEJOHN.

EUGENE CLARK *vs.* IDA LITTLEJOHN.

Lincoln. Opinion June 10, 1929.

REAL ACTIONS. PLEADING AND PRACTICE. JURY FINDINGS.

In a real action where the pleadings are so framed that the issue is the location of the dividing line between property of plaintiff and defendant and the case is fully tried on that issue, defendant raising no question as to plaintiff's ownership of land north of the line and disclaiming any title thereto, motion for new trial will not be sustained on the ground that plaintiff's deeds, admissible for descriptive purposes and of value from that point of view, failed to furnish complete proof of title to the land north of the dividing line.

That technical proof is lacking of that which the litigants assumed to be true, after a long trial during which that assumption was acted upon by all concerned, is no ground upon which to set aside a verdict, on general motion.

A jury finding based upon sufficient evidence, on the issues submitted to them, under proper instructions of law, is conclusive upon this court.

On general motion by defendant for new trial in each case. Real actions. Two cases tried together for the recovery of adjoining parcels of land situated on the southerly side of Church Street in Damariscotta. The jury found for the plaintiff in each case. A general motion for new trial in each case was thereupon filed by the defendant. Motions overruled.

The cases are sufficiently stated in the opinion.

George A. Cowan, for plaintiffs.

Ellis B. Aldrich,
Joseph E. F. Connolly,
Clinton C. Palmer, for defendant.

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

PATTANGALL, J. On motion. Real actions. Cases tried together. Verdict for plaintiff in each case.

Plaintiff Goudy demanded of defendant possession of certain land described in his amended declaration as follows:

"Beginning on the south side of Church Street, at the northwest corner of land of Harrison Puffer; thence south two and three-fourths degrees east by last named land, along a fence 201.5 feet to the north line of land of Kendall M. Dunbar and a board fence; thence westerly by said Dunbar fence to an angle in said fence; thence south eighty-six and one-fourth degrees west along said Dunbar fence to said Dunbar's northwest corner, a distance in all along said board fence of 125.2 feet; thence continuing on same course 25 feet to the southeast corner of land of Eugene Clark; thence north eight and one-fourth degrees west, by said Clark land, 160 feet to the south side of Church Street; thence by said Church Street, north 71 degrees east, 145 feet and north seventy and one-half degrees east, 48.2 feet, to the point of beginning."

Plaintiff Clark demanded of the defendant possession of certain land described in his amended declaration as follows:

"Beginning on the south side of Church Street at the northwest corner of land of Harwood Goudy; thence by said Goudy land south eight and one-fourth degrees east 160 feet; thence south eighty-six and one-fourth degrees west to the southeast corner of land of heirs of Warren Hatch; thence by said Hatch land, north, sixteen and one-half degrees west, along a fence 130 feet to the south side of said Church Street; thence by said Church Street 148.2 feet to the point of beginning."

In each case, defendant filed a plea of nul disseizin and a disclaimer. In the Goudy case, the land disclaimed is described as follows,

"Land described in plaintiff's writ situated northerly of the southerly line of land formerly of Knowlton or Hitchcock, which line runs north 88° east through a point 8 feet northerly of the northwest corner of the fence of Kendall M. Dunbar, said distance of 8 feet being the continuation northerly of the westerly line of said Dunbar's land beyond said northwest corner and the point at which the westerly line of said Dunbar's land ended at the line of land formerly of Martha Hitchcock or Jacob Knowlton; nor of any part of said premises of the said Goudy line lying easterly of the westerly line of said Dunbar herein described."

In the Clark case, the land disclaimed is described as follows,

"Land described in plaintiff's writ situated northerly of the southerly line of land formerly of Knowlton or Hitchcock, which line runs north 88° east through a point 8 feet northerly of the northwest corner of the fence of Kendall M. Dunbar, said distance of 8 feet being the continuation northerly of the westerly line of said Dunbar's land beyond said northwest corner and the point at which the westerly line of said Dunbar's land ended at the line of land formerly of Martha Hitchcock or Jacob Knowlton (said Dunbar land lying easterly of that of the said Ida Littlejohn); nor of any part of the said premises of the said Clark lying westerly of the westerly line of the premises of the said Littlejohn, which westerly line of said Littlejohn's premises ends at the southerly line of land formerly of Knowlton or Hitchcock, which southerly line has the course above indicated."

There was no controversy between the parties as to the western or eastern bounds of land of defendant or either of plaintiffs. There was no controversy as to the northern bound of either plaintiff's land or the southern bound of defendant's land. The dispute was as to the location of defendant's north line which was also the south line of both plaintiffs. And there was no question but that the "southerly line of land formerly of Knowlton or Hitchcock" was the dividing line between land of defendant and land of both plaintiffs.

The issue then was to locate this line on the face of the earth and to that issue and that alone the attention of the trial court was

directed. Defendant claimed nothing north of that line. Plaintiffs claimed nothing south of it. Without any formal stipulation to that effect being entered on the record, the parties by their pleadings, by the evidence introduced, by their entire course of conduct, admitted the title of the one to the land south and of the others to the land north of the division line which was in dispute and the location of which was submitted to the jury.

Defendant now urges, in support of his motion, that both plaintiffs failed to prove title to the demanded premises. No such issue was raised below. True, the deeds submitted did not, taken by themselves, furnish technically adequate proof of title. They were supplemented by evidence of occupation, perhaps not in itself wholly sufficient to establish title by adverse possession. More complete evidence of record title and additional testimony regarding occupation might well have been introduced had title been in controversy. There was no controversy on that point. Title to the land north of the Knowlton or Hitchcock line was admittedly in plaintiffs, just as title to land south of that line was admittedly in defendant.

Excepting that the deeds were of some value for descriptive purposes, the case, on the issues framed by the pleadings and on which it was fully and fairly tried, could have been decided without the introduction of a single deed.

That technical proof is lacking of that which the litigants assumed to be true, after a long trial during which that assumption was acted upon by all concerned, is no ground on which to set aside a verdict on general motion.

The evidence concerning the location of the division line was voluminous and conflicting. The jury found for the plaintiffs. We can not disturb its findings. There is ample evidence to support them.

Motion overruled.

CHARLES W. ALLEN *vs.* FRANK ROSSI.

Androscoggin. Opinion June 13, 1929.

HUSBAND AND WIFE. ALIENATION OF AFFECTIONS. PUNITIVE DAMAGES.

The gist of distinct actionable torts of criminal conversation and alienation of affections is the loss of the property right of consortium.

Damages are recoverable for the loss of conjugal fellowship of the wife, her company, coöperation, and help in every connubial relation, as also are damages for mental suffering.

Indifferent or repugnant attitude of mind on the part of the wife toward her husband may mitigate compensatory damages in proportion to circumstances in evidence. Value of performance of duty to support, clothe, and care for wife, whose affections have been alienated from husband, may lessen amount of compensable injury in action for criminal conversation and alienation.

Where tort is malicious, wanton, or willful, damages called interchanageably exemplary, punitive, or vindictive damages, which would be beyond compensation or satisfaction for injury, may be superadded to compensatory damages by way of punishment and example.

Criminal conversation furnishes the necessary foundation for awarding punitive damages to aggrieved spouse.

Punitive damages are distinguishable from a fine. A fine is imposed on a person for a past violation of law, while punitive damages have reference rather to the future than to the past conduct of the offender as an admonition to him to not to repeat the offense, and deter others from the commission of like offenses.

The discretion of the jury in imposing punitive damages is not limitless. Ordinarily, and under the same circumstances as in a case of compensatory damages, courts exercising revisory power may grant a new trial for excessiveness of vindictive damages.

In the case at bar the jury must have been swayed by prejudice, over-aroused sympathy or emotion, which prevented their dispassionate discharge of duty.

The award of $6,474.17 damages was excessive.

On motion for new trial by defendant. An action on the case for alienation of affections. The jury found for the plaintiff assessing damages in the sum of $6,474.17. A general motion for new trial

was thereupon filed by the defendant. Motion sustained. New trial granted as to damages. The case fully appears in the opinion.

Tascus Atwood, for plaintiff.

Oakes & Farnum, for defendant.

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

DUNN, J. There are two counts. One, for criminal conversation aggravated by the wrongful alienation of the plaintiff's wife's affections, which, by implication, the defendant carried to himself; the other, for the alienation only.

Plaintiff prevailed with the jury. No special finding was made. The award of damages is general in the sum of $6,474.17. On the grounds that the verdict is against evidence, contrary to law, and that the damages are excessive, defendant moves for a new trial.

Speaking on the subject of the first count, there is warrant for the verdict to the utmost allegation, in rational connection between the fact proved and that which the jury ultimately inferred.

To press onward in inquiry, the sole question remaining is about the damages. Are they clearly excessive?

Married in 1905, plaintiff and his wife, the age of neither being stated, lived in the marital relation until one day in August of 1928, when separation ensued. The wife left her husband. It seems fair inference that she then left their twelve year old daughter too.

"Things, perhaps, might not have been as smooth as they should have been, . . . she had found fault about my actions at the house" (meaning his habit of tracking dirt from the barn), testified the plaintiff, (but) "I have no fault to find up to early last spring (1928) . . . I have nothing to complain. She made a nice home for me."

Plaintiff and defendant were thrown into acquaintance in 1923 when the former had employment for himself and team under the oversight of the latter. In the fall defendant came to plaintiff's to board and stayed a few weeks. He boarded there three months the next year. Afterwards, throughout four years, though living elsewhere, defendant was often at plaintiff's house.

In 1927, in plaintiff's absence, a neighbor unexpectedly knocked

at his door. Defendant, his clothing in disorder, hastened to the shed. Plaintiff's wife, excited in manner and her countenance flushed, came from the room defendant had left.

At midnight plaintiff's wife's automobile stood, unoccupied, on a side road, a mile from her house. Near her automobile was the defendant's automobile, stopped, only he and she in it, a robe covering her head.

The two were riding at three o'clock in the morning on a city street.

They were frequently at public dances in the nighttime until small hours. They met, from time to time, at the home of the wife's sister, and together went away in daylight.

Six weeks before the instant action was begun, plaintiff learned of the house and automobile incidents. Before this point of time he had no suspicion of assignation, nor was he apprehensive of alienation.

He interviewed the defendant, who denied attachment for the wife. Later, defendant admitted he had said to the wife that which was to the wrong of the plaintiff.

Without alluding to other testimony, such were features of importance at the trial, on the side of the plaintiff.

Defendant swore to facts of tendency to show that his conduct had not given plaintiff a cause of action. Relations with the wife had been friendly, nothing more, with plaintiff's approbation, is, in epitome, what the defendant testified.

The wife flatly contradicted her husband's contentions. She bore witness that his unkind treatment, borne for their child's sake, coupled with her husband's slovenliness, and intensified by his unsavory behavior with other women, destroyed domestic happiness, weaned her affection for him, and drove her to quit her husband and his house.

Testimony corroborative, in part, of that by the wife, was introduced.

Apparently the testimony for the defense was not given credit by the jury.

What, in a case such as this, is the measure of relief which the law affords?

The gist of the distinct actionable torts of criminal conversa-

tion and alienation of affections is the loss of the property right of consortium. *Valentine* v. *Pollak*, 95 Conn., 556; *Bigaouette* v. *Paulet*, 134 Mass., 123; *Evans* v. *O'Connor*, 174 Mass., 287. The literature of the law emphasizes the society, comfort, and assistance which the wife, having affection for her husband, would have afforded him, had he not been deprived thereof, intentionally and unlawfully, by art and contrivance. So, damages are recoverable for the loss of the conjugal fellowship of the wife, her company, coöperation, and help in ever connubial relation; damages also for mental suffering.

These are the elements by way of compensation. From the nature of things they are difficult to be estimated. There might be every variety of cases. They vary very much. For instance, a hideous case which takes affection from the household. And there might be a case where the degree of affection which could be supposed to have existed would be so slight or small that the loss would be regarded as of little moment, comparatively speaking. Between these extremes there might be a medium ground, according to the picture of the home life.

Social rank and influence, which the reputation for wealth goes to make up, may make compensable injury from a wrongful act the greater. *Humphries* v. *Parker*, 52 Me., 502. Indifferent or repugnant attitude of mind on the part of the wife toward her husband may mitigate compensatory damages, in proportion to the circumstances in evidence. *Cutter* v. *Cooper*, 234 Mass., 307, 316. The value of the performance of the duty to support, clothe, and care for her may lessen the amount of compensable injury. *Prettyman* v. *Williamson*, 39 Atl., 731 (Del.).

Where a tort is malicious, wanton, or willful, damages, called interchangeably exemplary, punitive, or vindictive damages, which would be beyond a compensation or satisfaction for the injury, may be superadded to compensatory damages by way of punishment and example. *Goddard* v. *Grand Trunk Railway*, 57 Me., 202.

Criminal conversation furnishes the necessary foundation for punitive damages. *Hargraves* v. *Ballou*, 131 Atl., 643 (R. I.).

When imposed, punitive damages are not in the sense of, or as a substitute for, criminal punishment. *State* v. *Shevlin-Carpenter Co.*, 108 N. W., 935 (Minn.). Punitive damages are distinguishable

from a fine. A fine is imposed on a person for a past violation of law, while punitive damages have reference rather to the future than to the past conduct of the offender, as an admonition to him not to repeat the offense, and to deter others from the commission of like offenses. 8 R. C. L., 594. Touching such damages, it is not the reputation for pecuniary ability, but pecuniary ability itself, which is of consequence. The reason is that may be excessive punishment to one man which is slight or no punishment at all to another. *Audibert* v. *Michaud*, 119 Me., 295; *Rea* v. *Harrington*, 58 Vt., 181; Southerland on Damages, Sec. 406.

The discretion of the jury in imposing punitive damages is not limitless. Ordinarily, and under the same circumstances as in a case of compensatory damages, courts exercising revisory power may grant a new trial for excessiveness of vindicative damages. 8 R. C. L., 680. Our own decisions recognize this. *Jowett* v. *Wallace*, 112 Me., 389; *Audibert* v. *Michaud*, supra; *Wentworth* v. *Gerrish*, 121 Me., 583. In other jurisdictions, punitory awards, in actions like the present one, have been set aside (*Peek* v. *Traylor* [Ky.], 34 S. W., 705), or reduced (*Decker* v. *Fair* [Mich.], 193 N. W., 288). On the other hand, conduct which strikes at the sanctity of the home, and breaks up the home, that most sacred institution to civilization, judicial opinions universally censure. But not every roof is a home.

It may be that plaintiff's trust in his wife misled him; what he saw and heard may have made him indignant, more readily than suspicious. His visual imagination may not have been bold. But eventually resentment kindled.

Over the period of two months, preceding the commencement of this suit by a period of somewhat shorter duration, plaintiff's wife was out of their house four to six nights a week to the hour of one and even to dawn. At times plaintiff knew where his wife had been; at other times he did not and she refused to tell him. He had seen his wife and the defendant at dances, had seen them leave the hall and return, had seen them near the theatre, had heard her statement to the effect that, to be free to wed, she and the defendant would divorce their respective spouses. Plaintiff had another conversation with the defendant, who "never done anything to straighten this out."

A defendant, while guilty, would not be so guilty, in respect to actual or compensatory damages, if remissness on the part of the husband united with the defendant's wrong in producing the result. An English case holds that the husband's negligence of his wife's conduct may be shown, not in bar, as consent or connivance might be (*Murrell* v. *Culver* [Md.], 118 Atl., 803); (*Kohlhoss* v. *Mobley* [Md.], 62 Atl., 236), but in partial defense; in other words, in reduction of damages. *Calcraft* v. *Harborough*, 4 C. & P., 499, 19 E. C. L., 494. A husband, being a reasonable man, had not causlessly alarmed, though his alarm was from probable and rational conjecture only, would, it is reasonable to assume, speak words of caution, would admonish his helpmate against temptation. He would interfere, on occasion, to protect his wife. *Calcraft* v. *Harborough*, supra.

When plaintiff had learned that there were two available men to give evidence of facts tending to show the debauchery of his wife, he not only sued the defendant but he libeled his wife for divorcement.

For their mutual comfort and support, for the good of society, the policy of the law encourages husband and wife, if living apart, to come together again. Reconciliation should be followed by purity in their marriage relations, and happiness in their home. *Prettyman* v. *Williamson*, supra. The filing of a libel for divorce, though in legal right, is not usually conducive to the reunion of husband and wife.

The question recurs: Are the damages unwarranted? After all, this is but another way of inquiring: Considering the case in every phase relevant to damages which the jury was authorized to adopt, is the whole assessment palpably too great?

Defendant is superintendent of a concern engaging in the business of improving highways. Of his salary, there is no evidence, nor is there of his age. Evidence of his repute for wealth, his actual wealth, or of his poverty, there is none. *Johnson* v. *Smith*, 64 Me., 553; *Rea* v. *Harrington*, supra. Nothing indicates his prospects in life, aside from the employment he has, and has had, inferentially, for ten years.

It is always a delicate undertaking to draw the distinctive line separating a permissible from an inordinate award. This is es-

pecially so where the underlying measure is vague. But when, as now, conclusion is that the award transcends reasonable basis in the evidence, it remains but to declare that wrong violating the integrity of the verdict has been done.

Prejudice unduly inflamed, contempt excessively awakened, sympathy overaroused, disgust, bias in the one direction, or emotion, must have swayed the jury, till there was brought to bear upon the situation a state of feeling unappropriate to the dispassionate discharge of duty.

The motion is sustained, and a new trial granted. On the new trial no other question than that of damages need be litigated.

Motion sustained.
New trial granted
as to damages.

NELLIE EDWARDS ET AL

vs.

CUMBERLAND COUNTY POWER & LIGHT CO.

NELLIE EDWARDS ET AL

vs.

CUMBERLAND COUNTY POWER & LIGHT CO.

York. Opinion June 14, 1929.

ELECTRICITY. NEGLIGENCE. RES IPSA LOQUITUR DEFINED. NEW TRIAL.

A vendor of electricity, engaged in the distribution of current over its lines to consumers, is bound to exercise due care and diligence in the construction, maintenance, inspection and operation of its lines and in selection, installation and inspection of its appliances, so as to afford to the consumers assurance of a reasonable degree of safety.

The degree of care required of one whose breach of duty is very likely to

result in serious harm is greater than when the effect of such breach is not near so threatening.

No liability to respond in damages will attach in the absence of negligence on the part of the company or its employees proximately causing the injury complained of.

It is the duty of a company conducting electric current of great intensity by means of wires not only to make the wires safe, but to use due care, commensurate with the danger inherent in their business, to keep them safe by inspection and repair.

The doctrine of res ipsa loquitur *does not affect the burden of proof. It merely shifts the burden of evidence and requires the defendant to go forward with evidence tending to exonerate it. It does not affect the general rule, when the evidence is so clear and convincing that reasonable minds would not differ in their conclusions therefrom, the question of the defendant's negligence is for the court, and not for the jury.*

An electric company is not an insurer. It can be held liable for damage to property only when negligence is shown.

While it is the duty of an electric light company to make reasonable and proper inspection of its appliances, this duty does not contemplate inspection which would absolutely forestall injuries.

In the case at bar the defendant, a public service corporation, was at the time of the fire engaged in the business of transmitting over its wires, upon poles exclusively used by it, electric current for light and power.

There was no contention that the poles, cross-arms, insulators, wires and necessary transformers were not of proper material and design at the time of installation; but it was claimed that at the time of the fire the interval between the poles in front of the house was too great, and that the high voltage wires sagged excessively, coming in contact thereby with the service wire running into the house and through it discharging a current of such voltage as to ignite the house and thus destroy it.

It was not contradicted that defendant's line of poles and wires was rebuilt less than four years before the fire, and that in all respects they were in accordance with the standards recommended by the Bureau of Standards of the United States Government.

It further appears that an employee whose duty it was to inspect this part of the line made a trip over the route within a month of the breaking. No charge was made that he was an incompetent man, and it could not be reasonably argued that a trained eye would not have detected an excessive sag of the wires.

Negligence on the part of the defendant was not proven.

On exceptions and motion for new trial by defendant. Two cases tried together with verdicts for plaintiffs. The defendant, a public service corporation engaged in the business of supplying electric current for power and light, was alleged to be responsible for the destruction of a house and its contents by fire. Allegations of negligence not proven. Motion sustained in each case. New trials granted.

The cases are fully stated in the opinion.

William H. Gulliver, for plaintiffs.

Verrill, Hale, Booth & Ives,

Emery & Waterhouse, for defendant.

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

BARNES, J. Two actions were tried together and resulted in verdicts for the plaintiffs for loss of a house and its contents, by fire, and defendant brings the case up on motion and exceptions.

The defendant is a public service corporation, at the time of the fire engaged in the business of transmitting over its wires, upon poles exclusively used by it, electric current for light and power.

The poles in the vicinity of the house that was burned were maintained on the easterly side of the highway leading from Biddeford to Biddeford Pool. The house stood some seventy-five feet back from the highway and on the easterly side thereof. The pole of defendant nearest the house was on the margin of the highway a little north of the northerly corner of the house and about seventy-five feet therefrom. The next pole stood one hundred thirty-nine feet southerly, and the street was straight.

The fire occurred after the parting of two wires, that were carried on the easterly portion of the highest of three cross-arms.

These two wires of uninsulated, No. 6 hard-drawn copper, and a third wire of the same type and material, on the other portion of the same cross-arm, were high-voltage wires, carrying an 11,000 volt current. Beneath this cross-arm was a second, supporting four insulated wires, the middle wires carrying 2,300 volts, the other two being a part of the street lighting circuit.

The lowest cross-arm supported two 115 volt wires, and from a

buck-arm, on the pole nearest the house and below the three cross-arms, service wires led to the house, to which they were attached near the northerly front corner at a point near the eaves.

From this point, through an iron pipe, the service wires were conducted to cellar wall and thence into a meter within the cellar, to furnish current for the lighting system in the house.

There is no contention that the poles, cross-arms, insulators, wires and necessary transformers were not of proper material and design at the time of installation; but it is claimed that at the time of the fire the interval between the poles in front of the house was too great; that the two high voltage wires sagged excessively between the poles, and that, due to such sag, or to some defects in the two wires, while charged with 11,000 volts they parted, came in contact with the service wire running into the house and through it discharged a current of such voltage to the house as to ignite the house and thus destroy it, with its contents.

The fire was discovered by a neighbor who, looking from his home, about eight hundred feet distant "saw fire," on the afternoon of Monday, April 7, 1924, between the hours of four and five, who hurried to the scene, and found the main house "pretty well burned then."

He broke a window, entered the kitchen, came out almost at once, and testified that then "the upstairs was all afire, and we didn't dare to go back again."

Thus the first knowledge of fire in the house was in the late afternoon.

At 9.45 A. M. on this day the Biddeford Pool circuit automatically registered a short circuit or other serious defect in the lines.

Workmen found the two wires parted, and repaired them by splicing, so that the current was turned into the circuit about 10.57.

At 11.23 the current was again shut off for a few minutes while a transformer was being repaired.

Plaintiffs' complaint is that for a few minutes, after the break in the circuit, a current of too high voltage for the service wire was communicated to the house over the service wire, and that it started ignition, which after an interval of about seven hours burst into flames visible to a neighbor.

While the house was unoccupied from the November before, the service switch was left "on" and two men had occupied the house from Monday to Friday afternoon of the week before the Monday on which it was burned. These men were working on the property and maintained a fire in the kitchen stove and after work used a kerosene lamp as their needs required.

On the morning of April 7 there was a rainstorm; it was raining when a traveller on the road saw the wires down in the road and evidently still charged with electricity. The wind was from the east, strong enough to blow the wires "Sometimes straight down the road and sometimes about straight across the road," as reported by the traveller.

Another witness for the plaintiffs testified it was rainy and the wind was blowing very hard.

Two of the three workmen who made the repairs testified as to the service wires leading to the house, one that they were still in position, and the other that they were not down.

When the neighbor, the first man at the fire, entered the yard he saw the conduit pipe on the ground, together with the service wires, and noticed that the latter were smoking.

Two employees of defendant who arrived at the scene of the fire at about 6 o'clock, saw the service wires, extending from the pole to the ground; one climbed the pole, cutting them there and also at the end of the conduit pipe: the other took them away and placed them in the waste.

It is a law of the world of physics that when two bare wires carrying current of high voltage approach nearly to contact the current will leap across the gap, and an arc is formed, accompanied by intense heat; the higher the potential of the current the wider the gap that an arc will bridge.

So when a high voltage wire comes in contact with one of less intensity the current will flow over the latter.

On the theory that the high voltage current escaped into the house the plaintiffs declare against the defendant, that it negligently so maintained its wires and other equipment that its wires became crossed so that electrical current of high potential voltage entered plaintiffs' building and caused the same together with the contents thereof to become ignited and to be burned.

By their declaration plaintiffs acknowledge the rule to require reasonable care, and the adoption of reasonable precautions only of defendant.

In reference to the duties incumbent on the vendor of electricity, by reason of the danger it presents to those who come in contact with it, and as to the methods and appliances for its proper delivery to customers these are to be determined under the general principles of the law of negligence. *Turner* v. *Southern Power Co.*, 154 N. C., 131, 32 L. R. A. (N. S.), 848, 17 Ann. Cas., Note P. 1046.

A vendor of electricity, engaged in the distribution of current over its lines to consumers, is bound to exercise due care and diligence in the construction, maintenance, inspection and operation of its lines, and in selection, installation and inspection of its appliances, so as to afford to the consumer assurance of a reasonable degree of safety.

"The degree of care required of one whose breach of duty is very likely to result in serious harm is greater than when the effect of such breach is not near so threatening." *Turner* v. *S. Power Co.*, supra. No liability to respond in damages will attach in the absence of negligence on the part of the company or its employees proximately causing the injury complained of. 9 R. C. L., 1197; *Nelson* v. *Narragansett Electric Lighting Co.*, 26 R. I., 258, 67, L. R. A., 116.

"The standard of care required of the defendant was such care as an ordinarily reasonable and prudent person would have exercised under like circumstances." *O'Brien* v. *White & Co.*, 105 Me., 308.

"The amount of care necessary, of course, varies with the danger which is incurred by negligence." *Boyd* v. *Portland Gen. Elec. Co.*, 37 Or., 567, 52 L. R. A., 509.

If the circumstances are found to be dangerous the degree of care to be exercised is correspondingly high.

"The danger is great, and the care and watchfulness must be commensurate with it." *Haynes* v. *Raleigh Gas Co.*, 114 N. C., 203, 26 L. R. A., 810; *Perham* v. *Portland Gen. Elec. Co.*, 33 Or., 451, 40 L. R. A., 799.

"In undertaking, for hire, to deliver so dangerous an element

as electricity into the houses of people for every day use great care and caution should be observed — such a degree of care and caution as is commensurate with the danger — which danger is enhanced by the lack of knowledge and of the means of knowledge, by the consumer, of the safety of the means and appliances employed to deliver it." *Alton Illuminating Co.* v. *Foulds*, 190 Ill., 367, 60 N. E., 537. As the danger to property from permitting wires carrying electric currents of great intensity or high voltage to come in contact with those designed for the carriage of currents of less intensity, and fitted with appliances designed for the conduct of such currents of less intensity, is very great, the courts are unanimous in holding that the care required to avoid such contact must be commensurate with the danger. 16 Ann. Cases, 1195.

So it is the duty of a company conducting electric currents of great intensity by means of wires not only to make the wires safe, but to use due care, commensurate with the danger inherent in their business, to keep them safe by inspection and repair.

It is not contradicted that defendant's line of poles and wires was rebuilt less than four years before the fire, and that in all respects the construction of the lines was in accordance with the best engineering practice and equalled or exceeded, as to margin of safety, the standards recommended by the Bureau of Standards of the United States Government.

It is true that the parting of the wires is sufficient evidence to put upon the defendant the burden of proving that it had exercised due care in construction, maintenance and inspection.

Plaintiffs claim to recover under the doctrine of *res ipsa loquitur*, but, "This maxim of the law extends no further in its application to cases of negligence than to require the case to be submitted to the jury upon the facts in issue." *Ridge* v. *R. R. Co.*, 167 N. C., 518.

"The applicability of the maxim does not affect the burden of proof. It merely shifts the burden of evidence, and requires the defendant to go forward with evidence tending to exonerate him.

"Nor does the application of the maxim affect the general rule, when the evidence is so clear and convincing that reasonable minds would not differ in their conclusions therefrom, the question of the defendant's negligence is for the court, and not for the jury.

"It was said in (66 Vt., 331, 347) that the maxim does not *apply* to such a case. Perhaps it would be more accurate to say that the maxim does not *avail* in such a case. The thing that defeats the plaintiff is, not that the maxim does not apply, but that its force and effect are rebutted by the proof. A defendant is not required to overcome the *prima facie* case which the maxim makes of evidence showing the fact of the accident happening in circumstances making the maxim applicable. All he is called upon to do is to produce exculpating evidence of equal weight. In such cases, the plaintiff fails, if the force of the maxim is counterbalanced by the facts disclosed." *Humphreys* v. *Twin State Gas & Elec. Co.*, 100 Vt., 414, 139 Atl., 440.

There should be no confusion of terms. The doctrine, *res ipsa loquitur*, justifies on the part of the jury an inference of negligence (we are not now discussing the burden of evidence); it does not raise a presumption of negligence.

"Owing to the fact and circumstances of the defendant having the management and control of the wires and poles, the same being charged with a dangerous current of electricity, and the wire being found broken and lying in the highway, and the cause of plaintiff's injuries, the jury would be warranted in inferring negligence on the part of the defendant.

"Such an inference of negligence, if drawn by the jury, would become a conclusion founded upon common experience.

"To say that a presumption of negligence arises from the foregoing facts and circumstances is to say that those facts and circumstances create a rule of law, which would necessarily cast upon the defendant the burden of overcoming the same by a preponderance of evidence and not merely meeting them by evidence of equal weight." *Glowacki* v. *Railway & Power Co.*, 116 Ohio St., 451.

In the case at bar plaintiffs received full advantage from the doctrine *res ipsa loquitur* when the case was submitted to the jury.

As to construction, negligence is predicated upon an excessive sag, or slack, of the wires that parted, between the two poles.

In the record we find no evidence of the depth of sag.

But we do find it uncontradicted that on a line of the type of construction maintained by defendant in front of the house that was burned, a span of one hundred seventy-five feet is permissible,

the clearance between wires should be not less than 11.18 inches (clearance here was 14.5 inches) and the sag should not exceed 30.4 inches.

A degree of sag is necessary. In the nature of suspended wires, a horizontal could not be maintained. To provide for the contraction of the metal, lines erected in summer must have an allowance of sag to compensate the contraction present in colder seasons.

The only evidence in the matter of sag is that three similar wires were suspended on the topmost cross-arm. Such inspection as had been made did not reveal sag of the two that parted, more than of the third which outrode the storm before the fire.

And the workmen who spliced the parted wires at the cross-arm testified that the sag of the wire that had not parted, as he sighted across the span, from insulator to insulator was not more than fourteen (14) inches.

It is in the testimony that the dropping of a twig of a tree upon two such wires as these will cause a short circuit, and the wires will be instantly burned. It is in the testimony that a poplar tree stood in the house yard, easterly from the wires and about twenty (20) feet southerly of the pole nearest the house.

Two wires parted at the same distance from the pole. The point of severance in each was opposite such point in the other.

The argument of defect in the material is not stressed, but the jury should give full effect to the probability that some foreign substance, like a twig, may have fallen across the two wires at this point.

In argument that the high-voltage current ignited the house, plaintiffs' counsel present decided cases and urge that they are authorities that the jury was justified in considering it proven in the case at bar that because defendant's high power wire may have caused the fire it must necessarily have done so.

But examination of the cases cited reveals that in each there was substantial evidence in addition to the mere probability.

In *Newman* v. *Electric Co.*, 28 Idaho, 764, where a barn constructed of corrugated iron (a good conductor of electricity), and filled with hay which protruded outward through cracks, and where the wires hung along the sides of the barn, the court says, "There was substantial evidence tending to show that respondent's loss was due to appellant's negligence."

St. George Pulp & Paper Co. v. *Southern N. E. Telephone Co.*, 91 Conn., 563, is a suit to recover for the loss of a building burned.

In this case the defendant, with a street railroad company, and the city, furnishing current for power and light, attached their wires to a pole on one side of the building.

Several of the wires carried current of high potential, some 2,300 and others 5,000 volts or more, and such wires ran through the branches of trees. Defendant carried its cable over the roof to a pole on the side of the building opposite from the tree, and allowed it to rest on the ridge pole of the building.

At the time of the fire arcing was observed among the branches of the trees. The court held the defendant chargeable with knowledge that such arcing might occur and that its cable might become charged with a high potential current, and that this, together with evidence of the cable's contact with the building, and other evidence inadequate grounding should be submitted to the jury.

An electric company is not an insurer. It can be held liable for damage to property only when negligence is shown.

Plaintiffs urge that no sufficient inspection was made to determine whether or not there was excessive sag, and claim negligence in this phase of defendant's duty.

The testimony shows that the employee whose duty it was to inspect this part of the line made a trip over the route within a month of the breaking.

No charge is made that he was an incompetent man, and it can not reasonably be argued that a trained eye would not have detected an excessive sag here of one or two wires when the third was so nearly taut as it was found to be on that day.

The requirement of inspection has been stated by other courts.

"It is (also) the duty of such (Electric Lighting) Company to make reasonable and proper inspection of its appliances.

"This duty does not contemplate such inspection as would absolutely forestall injuries." *Alabama City Etc. R. Co.* v. *Appleton*, 171 Ala., 324, 26 Ann. Cas., 1181.

"The owner or operator of an electric plant is bound to exercise reasonable care in maintaining a system of inspection by which any change in the physical condition of any part of the plant, which would tend to increase the danger to persons lawfully in the pursuit

of their business or pleasure, may be reasonably discovered." *Foley* v. *Northern Cal. Power Co.*, 14 Cal., A. 401, 112 P., 467.

"The exercise of the highest degree of care would not require appellants to search the remotest parts of their lines and wires every day to discover their condition." *Richey* v. *Jerseyville Illum. Co.*, 176 Ill., A. 495.

"The nature of the hazard is an element in determining the question.

"The frequency and nature of the inspections required depend in a measure upon this." *Warren* v. *City E. Ry. Co.*, 141 Mich., 298.

"An electric light company must use a high degree of care in inspecting the conditions of its wires," but "would not have been obliged to inspect these wires so frequently as to be at all times aware of their condition." *Jackiewicz* v. *United Illuminating Co.*, 106 Conn., 302, 138 A., 147.

The inference of negligence that makes out a *prima facie* case is of no avail to a plaintiff and will not maintain a verdict in his behalf, when defendant has shown that its appliances were of standard pattern and approved design for construction of its type. *Cosgrove* v. *K. Light & Heat Co.*, 98 Me., 473; when the appliance was properly equipped, operated and protected, *Rocap* v. *Bell Tel. Co.*, 230 Pa., 597, 36 L. R. A. (N. S.), 279; when the evidence shows the use of customary and approved appliances, *Martinek* v. *Swift & Co.*, 122 Iowa, 611; when the method of construction was proper, *Dierks L. & C. Co.* v. *Brown*, 19 Fed. (2nd), 732; when the appliance was of approved pattern and of the best material, *Owen* v. *Appalachian Pr. Co.*, 78 W. Va., 597; and when, as in this case, evidence as to proper construction was uncontradicted, it must be given its full probative force. *Brown* v. *Worumbo Mfg. Co.*, 105 Me., 31; *Loon* v. *Jones*, 113 Me., 563.

A vast volume of testimony was adduced to the effect that the electric current set the house on fire. Evidence of experts to the occurrence of arcing within the conduit pipe, its effect on the service wires, and on the meter within the cellar, affixed to a board fastened to a floor timber was given. To the jury this testimony may have seemed conclusive, despite the fact that two witnesses testified to the unbroken condition of the service wires, after the current was shut off, and that insulated wire of the type of the service wire pre-

sented practically the same residue and condition, when burned in the open air, over kindling of excelsior.

Passing this phase of the contention and the question of excessive damages, without deciding them, we hold that negligence of defendant was not proven.

Since this is so, it is unnecessary to consider the exceptions. A verdict in an action sounding in tort is against the law, if brought against a defendant on whose part negligence is not proved.

Verdicts set aside.
New trial granted.

AMERICAN THREAD COMPANY *vs.* MILO WATER COMPANY.

Piscataquis. Opinion June 14, 1929.

SALES. PLEADING AND PRACTICE. PUBLIC UTILITIES.

Where a sale is of specific, identified chattels or articles appropriated by the seller, to the fulfillment of the contract, the question as to when the title passes is primarily one of intent of the parties, to be derived from the terms of the contract and the circumstances of the case. It passes only when the parties intend it to pass.

On report, technical questions of pleading may be treated as waived.

In the case at bar the contract between the parties was based upon an agreement for a conditional sale of property for a fixed sum to be paid by the utility, in service, which service the plaintiff agreed to accept until the property was paid for at rates fixed in the contract, the property to be conveyed only when the rates for the service totaled the sale price agreed upon. Such contract must be held to have been entered into with the understanding that the rates fixed by the parties were subject to change by the rate making power of the State. A change in the rate, therefore, even though made on complaint of the utility, can not be held to constitute such a breach of its contract as would warrant the plaintiff in rescinding with the right to recover the value of the property.

There was therefore, no transfer of title to the pipe line, or breach of contract by the water company.

On report. An action of assumpsit in two counts; one on an account annexed for $7,186.20, and the second alleging the same

amount as being the unpaid balance due under a contract. After the evidence was taken out, the case was, by agreement, reported to the Law Court. Judgment for defendant.

The case fully appears in the opinion.

C. W. & H. M. Hayes, for plaintiff.

McLean, Fogg & Southard, for defendant.

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

PHILBROOK, J. Case on report. The plaintiff, herein designated as the Thread Company, is a manufacturing corporation having an established place of business at Milo, Maine. The defendant, herein designated as the Water Company, is a public utility furnishing a general water service, including fire protection service, in said town.

In addition to, and apart from its manufacturing plant, the Thread Company owned a certain parcel of real estate, with buildings thereon, situated in said Milo and locally called the Gubtill Farm. This farm property was on a street known as Park street and was approximately three thousand feet northerly from the northerly terminus of the Water Company's six inch service main on that street. The Thread Company desired the Water Company service at its farm and requested extension of the Park street main so as to furnish such service. This the Water Company declined to do on account of the heavy initial cost involved and lack of funds to defray such expense.

Thereupon, under date of June 17, 1920, the Thread Company wrote the Public Utilities Commission, briefly describing the situation, its desire for water service, the willingness of the Water Company to furnish the same, provided it could borrow the necessary capital to make the extension, and asking suggestion as to the manner in which the financial factor in the problem might be met. On June 28 the Commission wrote the Water Company to ascertain what the latter intended to do. To this letter, under date of June 30, the Water Company replied that their estimate of the cost of the extension of the Park street main, as requested by the Thread Company, would be approximately six thousand dollars,

which sum it would be impossible for the Water Company to borrow under existing conditions, and that it could do nothing definitely until the Commission should send an engineer to make an estimate of the value of the water plant and whether the Water Company would be entitled to an increase of rate. Under date of July 1, the Commission wrote the Thread Company that they had instructed their chief engineer to go to Milo and confer with the two interested companies, and suggested that the Thread Company take under consideration the proposition "of assisting in the proposed extension to the extent of taking bonds with a view of being reimbursed by the company under some form of contract to be approved by the Commission. This is only a suggestion and we would like to have you consider it. Undoubtedly a public hearing will be ordered in this case at which all interested parties will have opportunity to express their views to the Commission."

In accordance with the suggestions contained in this letter from the Commission, the parties, on July 24, submitted a tentative draft of a contract to the Commission for its examination. Replying the Commission stated that it had no objection to the contract but made some suggestions as to size of the proposed service pipe and modification of rates agreed upon by the parties to the end that those rates would comply with regulations against discrimination.

Up to this time the Commission had done no official act and these details are briefly sketched in as a background to the picture and to show, among other things, that the first suggestion of a contract came from the Commission and not from either of the parties.

On September 13 three copies of the contract, redrafted and duly executed by the parties, were sent to the Commission for approval, and on November 10, under the hand and seal of that Commission the contract was officially approved, the decree containing the following: "The approval of the contract is subject to all conditions in the matters of rates, services and practices, and the Commission retains full regulatory powers and jurisdiction under the contract as now made or as it may be modified or renewed."

The instrument thus executed and approved bears date of August 31, 1920, and is the contract involved in this case. The outstanding provisions of the agreement are: (a) that the Thread

Company would at once enter upon the work of installing the necessary service main on Park street, with service tees as requested by the Water Company, and a hydrant at the terminal point of the extension; (b) that the Thread Company would keep an accurate record of the cost of this extension and render to the Water Company an itemized statement thereof; (c) that when the Thread Company was ready to receive water service it would make, execute and deliver to the Water Company a lease of the extension at an annual rental of $402.50; (d) that the Water Company should furnish service to the Thread Company at the following rates, viz., for hydrant service $37.50 per year, and for all other service used by the Thread Company $1.00 per day; (e) that the amounts paid by the Water Company as rental should be credited on the total cost of the extension with interest on said cost; (f) that when the principal sum representing the expense of making said extension, with interest, should be fully paid by such rental, or otherwise, the Thread Company would make, execute and deliver to the Water Company a good and sufficient bill of sale of the extension, and thereafter the Thread Company would pay for its water service the regular published tariff rate applicable to the service received by it; (g) that during the term of the lease the Water Company should keep the extension main in repair and might furnish service to other persons through said extension; (h) that subject only to the hydrant service being assumed and paid by the Town of Milo, the Thread Company agreed to accept and pay for service at its Park street property at the rates named in the contract until the initial cost, and interest hereon, were fully paid; (i) that readiness on the part of the Water Company to furnish service should be sufficient to charge the Thread Company at the rates specified in the contract.

The service main having been installed, the Thread Company, under date of November 1, 1920, executed the lease called for by the contract, the terms thereof being in harmony with the contract.

It should be here observed that on November 8, 1920, with consent of the Public Utilities Commission, the Water Company filed a schedule of rates made in harmony with the contract and the same were approved by the Commission. Rate schedules for service rendered to the Town of Milo, to business corporations, and to in-

dividual users of water, had been duly established before the contract with the Thread Company and lease of the extension by the same.

Under date of February 13, 1926, the Water Company filed with the Public Utilities Commission a complaint against itself, alleging that its then rates were unreasonable, insufficient and unjustly discriminatory, and asking for certain changes and increases therein. Public hearing on this complaint was held at Milo on October 20 and 21, 1926. At that hearing the Thread Company, the Water Company, and other patrons of the service rendered by the Water Company appeared and were represented by counsel. The decree of the Commission bears date of September 30, 1927. Only so much of the decree as affected the relations between the Water Company and the Thread Company are to be here discussed.

In its historical statement the Commission refers to the contract between the parties bearing date of August 31, 1920, under which the extension was made at a cost of $8,222.39, and, says the Commission, "was leased to the Water Company with the agreement that the title should pass to it when the Thread Company should have been reimbursed for its full cost. Since the time of such lease the Water Company has been furnishing its service to the American Thread Company at Gubtill farm at rates fixed in the contract."

The Commission found that additional revenue by the Water Company was needed, and with reference to contracts for service, including the one made by these parties on August 31, 1920, said that "The additional revenue requirements, and the increases in rates occasioned thereby, result in modifications of the several contracts herein referred to. The authority of the State through the agency of the Public Utilities Commission in Maine, to make such modifications is well settled," citing *In re Guilford Water Company*, 118 Me., 367; *In re Searsport Water Company* and *In re Lincoln Water Company*, 118 Me., 382.

The Commission found that "The status of the Park street extension, so-called, is described in the contract and fixed by its terms. This extension was made primarily for a particular customer who must pay such rates as, taken with the other revenue derived from the line, will be sufficient to support it without placing any addi-

tional burden upon the rest of the system." The minimum yearly charged for water furnished through the Park street extension, exclusive of the payment for two public hydrants, was fixed at $575.

On or about November 16, 1927, the Thread Company formally notified the Water Company that the former would not continue the use of water from the system of the latter, at the Gubtill farm, and requested that it be shut off. This was accordingly done about November 16 or 17.

In declining to accept further service from the Water Company, the Thread Company, through its attorney, wrote the Water Company stating, among other things, "The Milo Water Company is indebted to the American Thread Company, under the contract, approximately $7,300, which we are instructed to demand of you." Correspondence followed between attorneys for the two companies and in a letter dated November 30, 1927, the attorney for the Thread Company said "Among other things we claim that the contract and lease constitutes a loan of money on the part of our client, and a promise to pay in a certain way on the part of the Milo Water Company. We claim that the increase of rates of Water service to our client, being an amount largely in excess of what we can afford to pay, justifies us in declining to take the water and we believe that we can be made whole in no other way than to demand and receive the balance due on the money advanced by the American Thread Company."

Upon failure to pay, suit followed, the writ bearing date of January 17, 1928. The declaration contains two counts, one being indebtitatus assumpsit for materials and labor expended in the Park street extension; the other containing an extended recital as to the contract, the lease, the complaint addressed to the Public Utilities Commission, the decree of that body, and especially averring that "the said defendant has itself, by its said complaint against itself, and the prosecution thereof, made it impossible to pay its said debt to plaintiff in accordance with the terms of said contract; whereby and by reason whereof, the said defendant, on the first day of October, A. D., 1927, at said Milo, to wit at said Dover-Foxcroft, became liable, and promised the plaintiff to pay it said sum of $7,186.20, and interest thereon on demand."

The plaintiff concedes that in order to recover in this action it

must establish two propositions: (a) that the contract of August 31, 1920, and the lease of November 1, 1920, taken together, constitute a sale; (b) that the change of rates, made by the Public Utilities Commission on complaint of the defendant against itself, resulted in a change of the contract between the parties in such an important part as to render the contract voidable.

The rights and liabilities of the parties depend upon a special contract, the provisions of which having been already stated do not need repetition. The contract contains no taint of illegality. Since one of the parties is a public service corporation, it not only must have been known to and understood by both companies that the State, through proper statutory provisions, retained control as to certain elements of the contract, but that control was also plainly provided for in the approving decree of the Public Utilities Commission.

The Thread Company, acting under the obligations placed upon it by the contract, installed the extension, rendered a true account of the cost of so doing to the Water Company, and executed the lease called for by the contract. From the date of the lease to a date sometime in the month of November, 1927, a period of about seven years, water service was rendered by the Water Company and accepted by the Thread Company at the annual service rate fixed by the contract and lease, both parties being apparently mindful of and governed by the outstanding provisions of the contract above referred to as (h) and (i). The record does not disclose that during those seven years there was any suggestion by either party that the transactions of contract and lease constituted a sale, in any legal aspect, nor that title to the extension was transferred, or ever to be transferred, until the cost of extension, and interest had been fully paid, at which time the Thread Company was to execute the bill of sale called for by the contract.

On June 30, 1927, and on September 30, 1927, two events occurred which have important bearing upon the attitude of the parties toward each other, and are highly suggestive as to the reasons for their present controversy.

The Thread Company came into possession of the Gubtill farm some time in 1920. At that time it proposed to stock the farm and did so. It desired the water service for the purpose of providing

water for a large herd of cattle and hogs, and for protection of the property against fire. This farm was originally purchased and stocked for the benefit of another property owned by the Thread Company, known as the Lake View Mill. In August, 1925, this mill was closed, and the necessity or occasion for the existence of the farm practically ceased. The number of the herd was slowly diminished until June 30, 1927, when all the stock was disposed of by auction sale. The farm was closed, and with this closing and sale of stock the substantial reason for need of water simultaneously ceased. The event of September 30, 1927, refers to the fact and date of the decree of the Public Utilities Commission increasing the water rates to be paid by the Thread Company.

Prior to September 30, 1927, the record shows no claim by either party that the transaction of contract and lease constituted a sale of the extension, nor transferred title thereof to the Water Company.

Where a sale is of specific, identified chattels or articles appropriated by the seller to the fulfillment of the contract, the question as to when the title passes is primarily one of the intention of the parties, to be derived from the terms of the contract and the circumstances of the case. The parties may, by the express terms of the contract, fix the time at which the title shall pass, and ordinarily full effect will be given to such provisions as between the parties. But as the parties do not always stipulate in this respect, the courts, when called upon to determine when the title passes, must necessarily seek to arrive at the intention of the parties as evidenced by the circumstances and the otherwise indefinite expressions of intention. 24 R. C. L., 15, and cases there cited.

Title to personal property passes only when the parties intend it to pass. Whatever the language or conduct of the parties, the question remains — did they intend the title to pass. *Thomas* v. *Parsons*, 87 Me., 203. Passing of title is always a question of intention between parties, *Russell* v. *Clark*, 112 Me., 166; it is largely a question of intention gathered from circumstances, *Silver* v. *Moore*, 109 Me., 505; it always involves intention, *Bethel Steam Mill Co.* v. *Brown*, 57 Me., 17.

As bearing upon the intention of the parties, regarding transfer of title, it is important to note that when the cost of the extension,

with interest, was "fully paid in the manner aforesaid, or otherwise," the Thread Company agreed to "make, execute and deliver to said Water Company a good and sufficient bill of sale of said six-inch extension." Light is thrown on the words "or otherwise" by a later provision in the contract, that after January 1, 1921, the Water Company might make payment to the Thread Company for the extension "in cash." It seems quite clear that the intention of the parties, as to the completion of the sale or transfer of title to the extension awaited full payment of the cost of the same with interest thereon. This has not been done.

But in order to support its contention that the contract and lease constituted a sale, the plaintiff invokes *Gross* v. *Jordan*, 83 Me., 380; *Reynolds* v. *Waterville*, 92 Me., 292; *Richmond* v. *Miss. Mills*, 4 L. R. A., 413; and *Jinnings* v. *Amend et al*, 101 Kansas, 130; 165 Pacific, 845; L. R. A., 1917, F. 626.

In argument it says that the acts of the parties are important as tending to show the purpose and understanding of the parties at the time of entering into the agreement, and claims that the real purpose of the parties was to create the relation of debtor and creditor between the plaintiff and the defendant, to have the plaintiff construct the extension for the defendant, and take its pay in installments. To support its argument it quotes from the opinion in *Reynolds* v. *Waterville*, supra, but makes no reference to the three other cases cited. Courteous consideration of the brief of the learned counsel for the plaintiff, however, demands examination of each of his citations upon this point.

Gross v. *Jordan*, supra, was a replevin suit brought against a deputy sheriff to recover possession of a butcher wagon which the officer had attached as the property of A who purchased the wagon from parties in Massachusetts, under an agreement made in that state, and termed a "lease of personal property." The so-called lease provided that the wagon was to be held by A, as the property of the lessor; that A was to pay a stipulated monthly sum for the use of the same, which payments were to be endorsed on the lease, and when the sums so paid aggregated a fixed sum the lessor would sell and deliver the wagon to A, and that until the aggregate sum was fully paid no title to the wagon was to be claimed or acquired by A. The right and title of the lessor had been transferred to

Gross and Briggs, residents of Maine, who were plaintiffs in the action.

By way of dictum our court remarked that if the contract had been made in this state, the paper called a lease would be a conditional sale of property, but upon authority of *Morris* v. *Lynde*, 73 Me., 88, the title to a chattel which is the subject of conditional sale can pass to the vendee, *in praesenti*, or *in futuro*, only by consent of the vendor unless a statute controlled the contract and changed the relations of the parties.

The legal issue upon which the decision rested in *Gross* v. *Jordan*, supra, was the effect of the statute of the state in which the contract was made. That Massachusetts statute provides that in conditional sales of personal property the vendee shall have a right of redemption by paying the amount due and unpaid with interest and charges, virtually the same right of redemption as exists in Maine in mortgages of personal property. In the Gross case, involving a purchase price of $150.00, only $15.00 remained unpaid. The plaintiffs became owners of the vendor's right in the wagon, and the defendant officer attached it as property of the vendee. The case was decided on the legal point that the officer was entitled to notice of the amount due on the quasi-mortgage claim, before the plaintiffs could maintain replevin against him, since the statute requiring notice of the amount of a mortgage claim before maintaining a suit against an officer who has attached the property, applies to an irregular mortgage such as the one there under discussion.

Reynolds v. *Waterville*, supra, involved fundamental elements so widely differing from the case at bar that the two cases are easily and necessarily differentiated. In that case, the defendant desired to erect a city building at a cost which would cause the liabilities of the municipality to far exceed its constitutional debt limit. By special act of the legislature, Chap. 523, P. and S. Laws of 1897, a so-called City Hall Commission was created. The act provided that the City of Waterville, when its city council so voted, might convey to this Commission, in trust, "its present city hall building in said Waterville, together with all buildings, additions and improvements existing on said city hall lot at the time of said conveyance, for the sole purpose of securing the payment of the

bonds issued under the provisions of section three of this act, and for no other purpose." The Commission was to hold the property "in trust for said purpose" until all bonds and coupons so issued were paid and the trust discharged. The bonds so issued were to be known as "Waterville City Hall bonds," the proceeds of the sale of such bonds to be exclusively used for the purpose of erecting a city building in the city of Waterville. The city was required to annually raise, by taxation, sufficient money to pay all expense of repairs, insurance and management of the building, together with an annual rental in a sum equal to the annual interest on the bonds issued and outstanding, and in consideration of such rental "the city of Waterville shall become the tenant of said building" with power to sublease or sublet any part of the same. The plans of the building provided for an amusement hall, or opera house, and was not to be used wholly and exclusively for strictly municipal purposes. The treasurer of the city was to be the treasurer, *ex officio*, of the Commission. The court held that the Commission was very little more than a passive trustee; that it was naked of all authority except in one respect and that was a formal medium through which the city could secure its debt to the bondholders; that the Commission was to be entirely under the control of the city; that there could be no tenancy in any true sense of the word since the city was both landlord and tenant; and that instead of leasing the property the city undertook to pay for it on the installment plan. Hence, in that case, the court properly held that no element of a lease existed, but the wide difference between the principles involved clearly shows that the decision in that case is by no means determinative of the case at bar.

To avoid prolonged discussion of the cases cited by the plaintiff, as above stated, it is only necessary to say that in *Richmond* v. *Mississippi Mills*, supra, the point applicable to the instant case is the following language of Mr. Justice Sandels: "The true meaning and effect of an instrument determine its character; . . . the meaning of the instrument is ordinarily gathered from the language in which it is couched because that is usually the best evidence of the intention of the parties to it."

This ruling is entirely in harmony with what we have already said with respect to intention to transfer title.

In *Jinnings* v. *Amend*, supra, the issue involved was the right to terminate a lease under certain circumstances, and again the intention of the parties, under the instrument, was an outstanding issue.

While technically the form of the second count may not be sufficient to permit a recovery for a breach of the contract, the case was fully heard and evidence of the entire transactions between the parties introduced upon which the plaintiff's claim of a breach of the contract by the defendant is now based. On report, technical questions of pleading may be treated as waived. *Whitman* v. *Allen*, 123 Me., 1. Upon any view of the case no breach of the contract by the defendant is shown.

This is not a case of a conveyance of property upon a continuing consideration later held to be invalid under the regulatory or police powers of the state, or a grant of right or privileges, not for a definite sum, but in consideration of the furnishing of a service by a utility permanently or for a definite period at existing rates which were later changed by the rate-making power of the state, so that the grantor may be held to have been deprived of property without just compensation and due process of law as in *Low* v. *Railroad Com.*, 14 A. L. R., 249; *N. Y. Cent. R. R.* v. *Gray*, 239 U. S., 583; *Louisville & N. R. R. Co.* v. *Crowe*, 156 Ky., 27; but an agreement for a conditional sale of property for a fixed sum to be paid for by the utility in service which the grantor agreed to take until the property was paid for, at rates fixed in the contract, the property to be conveyed when the rates for the service totaled the sale price agreed upon. Such a contract must be held to have been entered into with the understanding that the rates fixed by the parties were subject to change by the rate-making power of the state. *Guilford, Searsport and Lincoln Water Co. Cases*, 118 Me., 367, 382. A change in the rates, therefore, even though made on complaint of the defendant, can not be held to constitute a breach of its contract which would warrant the plaintiff in rescinding with the right to recover the value of the property as contended in this action. *Northern Pac. Ry. Co.* v. *St. Paul & Tacoma Lumber Co.*, 4 Fed. (2nd Series), 359; *Union Dry Goods Co.* v. *Geo. Pub. Utilities Corp.*, 248 U. S., 372. The effect of the increase in rates, even if the plaintiff is required under its contract to con-

tinue to take the service, is not to compel the plaintiff to accept a less amount for its property than that fixed by the contract. It agreed to accept a service in payment, which the Public Utilities Commission found by reason of changed conditions was worth more than at the inception of the contract.

There having been no transfer of the title to the pipe line or breach of the contract by the defendant, the mandate in this case must be

Judgment for the defendant.

FRANK S. SAWYER *vs.* LEONARD R. HILLGROVE.

Penobscot. Opinion June 26, 1929.

PLEADING AND PRACTICE. EXCEPTIONS. EVIDENCE.
R. S., CHAP. 87, SEC. 127. P. L. 1925, CHAP. 96.

Exceptions do not lie to the exclusion of evidence which if admitted could not affect the result.

Unless the excepting party sets forth sufficient in his bill to enable the court to determine that the point raised is material and the ruling complained of is prejudicial, he takes nothing by his exceptions.

In order to sustain an exception to a ruling excluding a document or a conversation, the bill must disclose the substance of the document or the conversation sought to be proved.

The statute permitting a plaintiff to prove an itemized account, prima facie, *by affidavit (Sec. 127, Chap. 87, R. S., amended by Chap. 96, P. L.,* 1925) *being in derogation of common law, must be strictly construed.*

Whether a plaintiff shall or shall not be compelled to elect which of several counts in his writ he relies upon, is a matter within the discretion of the trial judge.

Where the evidence discloses that but one verdict could be arrived at by an intelligent and conscientious jury, it is the duty of the presiding Justice to order a verdict.

On exceptions by plaintiff. An action of assumpsit brought on two counts, one on an account annexed, and the other a claim for

damages for breach of contract. To the exclusion of certain evidence offered by the plaintiff, and to rulings of the court, and the direction of a verdict against him, plaintiff seasonably excepted. Exceptions overruled.

The case fully appears in the opinion.

Clinton C. Stevens, for plaintiff.

Ryder & Simpson,

Daniel Hurley, for defendant.

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

PATTANGALL, J. Exceptions. Assumpsit on two counts; account annexed and claim for damages for breach of contract. Writ dated April 20, 1928. Plea general issue and statute of limitations. Directed verdict for defendant. Exceptions relate to the exclusion of certain evidence, both documentary and oral; to the exclusion of plaintiff's affidavit under the provisions of Sec. 127 of Chap. 87, R. S., 1916, as amended by Chap. 96, P. L. of 1925; to the ruling of the court compelling plaintiff, at the close of his evidence, to elect upon which count he relied; and to the direction of a verdict against him.

In September, 1919, defendant contracted in writing to sell and deliver to plaintiff one thousand cords of pulp wood, final delivery to be completed in the spring of 1920. Plaintiff agreed to purchase the same and to pay therefor fifteen dollars per cord for peeled wood and twelve dollars per cord for rough wood. There was delivered, under this contract, wood of the value of $6,979.66, the last delivery being on October 20, 1920, and plaintiff paid therefor $7,200, the last payment being made on April 28, 1920, in addition to which, in the fall of 1919, he paid out $7.75 in expenses properly chargeable to defendant. Notwithstanding that defendant had been overpaid for the wood delivered by him, he failed to make further deliveries. These facts were properly set forth in the second count of the plaintiff's writ and were substantiated in evidence.

The original agreement between the parties had been lost or destroyed and plaintiff sought to supply its place by offering another document which he claimed was jointly dictated by the

defendant and himself to an attorney acting for both of them, on October 1, 1920, and which purported to recite the terms of the original contract. This latter agreement was never signed by either party. The sole purpose which it could have served would have been to prove the terms of the earlier agreement. It was excluded and the first exception is as to its exclusion.

Assuming that it may have been admissible as proof of an admission on defendant's part of the existence and terms of the original contract, plaintiff was not aggrieved by its exclusion. He was permitted to refresh his memory by examining it and testified to its contents, in so far as they were related to the matters in issue. He proved the original contract by his uncontradicted testimony and proved it in accordance with his declaration. True, he had the right to support his testimony with any competent corroborating evidence but his statement not having been attacked, he suffered no loss by the ruling.

Further than that, the breach of contract of which he complained occurred in 1920. Recovery of damages therefor was obviously barred by the statute of limitations. There is nothing in the evidence to indicate that the excluded document affected this situation. "Plaintiff is not aggrieved by the exclusion of evidence, which, even if admissible, would not affect the result of the case." *Look* v. *Norton*, 94 Me., 547; *Freeman* v. *Dodge*, 98 Me., 531; *Merrill* v. *Milliken*, 101 Me., 50.

In addition to the above reasons which seem sufficient warrant for overruling this exception, the question sought to be raised is not properly before us. The document in question is not made a part of the bill of exceptions by direct quotation, nor is it incorporated therein by reference. It did not become a part of the evidence. It is not, therefore, included in the blanket clause which made the evidence in the case a part of the bill. It is the well settled rule in this state, too well settled to be now shaken, that the excepting party in his bill of exceptions must set forth enough to enable the court to determine that the point raised is material and that the ruling excepted to is both erroneous and prejudicial, or he can take nothing by his exceptions. *Doylestown Agricultural Company* v. *Brackett, Shaw & Lunt Company*, 109 Me., 301; *Copeland* v. *Hewett*, 96 Me., 525; *Lenfest* v. *Robbins*, 101 Me., 176. Plaintiff

should have incorporated the excluded exhibit in his bill if he desired this court to pass on its admissibility.

The second, third and fourth exceptions relate to the exclusion of certain conversations alleged to have occurred between plaintiff and defendant relative to the purchase by defendant of a certain automobile. The last debit item in plaintiff's account annexed, with the exception of charges for interest and a charge of "Amount due on contract, $8,360.08," and the only item which did not show on its face that it was barred by the statute of limitations, was a charge for "an automobile, sold and delivered, $1,920," under date of May 3, 1922.

The last credit item, and the only one within the statute, was "wood delivered on auto 125 cords, $1,500" under the date,"1922."

Defendant, in cross examination of plaintiff, brought out the fact that, on May 3, 1922, Frank S. Sawyer Co., a corporation of which plaintiff was president, by written bill of sale signed by plaintiff as president of the corporation, conveyed to defendant an automobile, admitted to be the same automobile charged for in this account, for $1,920 and that on the same day defendant contracted in writing to deliver to the Frank S. Sawyer Co. 150 cords of rough pulp wood at $12 per cord and eight cords of peeled pulp wood at $15 per cord. The automobile was delivered to the defendant and a part, if not all, of the wood was delivered to the corporation. After the documentary evidence relative to the automobile had been introduced, plaintiff offered evidence of a conversation on May 3, 1922, between himself and defendant, regarding the automobile. This was excluded. He was then asked whether or not defendant made a proposition to purchase the automobile in question from plaintiff. This also was excluded. He was then asked if he, plaintiff, owned the automobile in question. This was excluded. Exceptions were taken to these various rulings.

In plaintiff's brief it is urged that the testimony sought to be introduced would have sustained the proposition that plaintiff and defendant agreed that the automobile and pulp wood which was to be received in pay therefor were to be entered upon both sides of the account then existing between them.

There is nothing in the record to warrant the assumption that any such evidence as that suggested in the brief would have been forthcoming.

In order to sustain an exception to a ruling excluding a conversation, the exceptions must disclose what the conversation was. *Johnson* v. *Day*, 78 Me., 224; *Doylestown Agricultural Company* v. *Brackett, Shaw & Lunt Company*, supra.

But these exceptions fail on broader grounds. The bill of sale from the corporation to defendant, supplemented by the agreement on defendant's part to furnish sufficient pulp wood to the corporation to pay it for the automobile, constitute, taken together, a complete contract, in writing, under seal, between the parties thereto.

To permit oral evidence which would entirely destroy the effect of these written instruments and substitute therefor an oral contract of sale of an automobile by this plaintiff to defendant and an oral agreement on defendant's part to pay plaintiff for the automobile by delivering to him the pulp wood which defendant had agreed to deliver the corporation would be so patent a violation of primary rules of evidence that it is difficult to believe that the proposition is seriously argued. Had the written evidence of the actual contract not existed, the oral evidence suggested might have had the desired effect of avoiding the bar of the statute of limitations as to the remainder of the account. At any rate it would have been an ingenious, if not ingenuous, attempt to accomplish that purpose. But in view of the documentary evidence, plaintiff's position would be patently fallacious even if his bill of exceptions had been so framed as to bring the question before us.

The fifth exception relates to the exclusion of the affidavit authorized by Sec. 127, Chap. 87, R. S., amended by Chap. 96, P. L., 1925.

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

The purpose of the statute which enables a plaintiff to make

out a *prima facie* case without submitting himself to cross examination has been said to be "to facilitate procedure in collection of accounts in actions of assumpsit. It applies only to actions brought on an itemized account. It is in derogation of common law and should be strictly construed. There should be no attempt to extend its terms or plain intent by judicial interpretation." *Hamilton Brown Shoe Co.* v. *McCurdy*, 124 Me., 111.

In the instant case, the affidavit was offered after the plaintiff had testified fully and after cross examination had revealed the fact that certain charges contained in his account could not be sustained.

The account annexed was made up as follows:

1919		
Sept. 8	To Cash	$2,000.00
Oct. 23	To Expense	1.75
Nov. 26	To Cash	500.00
Nov. 29	To Demurrage	4.00
Dec. 2	To Checks	500.00
Dec. 30	To Cash	1,000.00
1920		
Jan. 3	To Cash	1,000.00
Jan. 23	To Cash	1,000.00
Feb. 12	To Cash	1,000.00
Mar. 10	To Cash	300.00
Apr. 28	To Cash	400.00
1922		
May 3	To Automobile (sold and delivered)	1,920.00
	To Interest on $3,104.46, 2 years, 5 months	527.75
	Interest since due and demanded on $4,052.21, 5 years, 9 months	1,539.83
	Amount due on contract	8,360.08
		20,055.41
	Less credits	8,479.66
	Balance due	$11,575.75

Then followed the details of the credits aggregating, as stated above, $8,479.66, and consisting of pulp wood delivered at various dates beginning with September 26, 1919, and ending with October 20, 1920, excepting that the last item, "Wood delivered on auto, $1500," is dated 1922.

The automobile and the wood delivered on account of it were plainly out of the case previous to the filing of the affidavit. In addition to that, plaintiff had utterly failed to prove the payment of $500 on November 26, 1919, the evidence being that this charge was error and was taken care of by the charge of "Checks, $500" under date of December 2; the computation of interest was necessarily incorrect, the principal sum upon which it was computed having been shown to be incorrect; the last charge "Amount due on contract $8,360.08" could in no sense be deemed a part of an "itemized account," and to complete the summary, each remaining item in the account was, on its face, barred by the statute of limitations..

Under these circumstances, the trial judge excluded the affidavit.

The affidavit was offered to the entire account. It was in regular form. It was offered, in the language of the statute, as "*prima facie* evidence of the truth of the statement" contained in it and "entitled plaintiff to judgment unless rebutted by competent and sufficient evidence." Such an affidavit is only applicable to "actions brought on an itemized account." Is such an affidavit applicable to an account annexed which is in part itemized and in part not? Must it be received as *prima facie* evidence of its truth and as entitling plaintiff to judgment unless rebutted, when a portion of the account to which it is sought to be applied is obviously barred by the statute of limitations?

The statute which makes such an affidavit admissible defines the weight which shall be given it. It is "*prima facie* evidence of the truth of the statements contained therein." It "entitles plaintiff to judgment unless rebutted by competent and sufficient evidence." It puts the burden of proceeding with the evidence on the defendant.

It is urged, by the defendant, that when offered in support of an entire account, such an affidavit should be susceptible of application to the entire account; that if plaintiff desires to apply it to a portion of his account only, he should limit its scope by appro-

priate selection of that part of his account which he desires to prove by it; that if the court receives it at all, it must receive it at face value and give it the weight to which the statute says it is entitled and that to so receive it in the instant case and give it that weight would be an enlargement of any intended or legitimate use.

It can not be denied that there is merit in these suggestions. But the various propositions outlined, together with others which suggest themselves in the consideration of the matter, require no decision here. Whether the ruling complained of was error or not is not, in this case, of the slightest importance. If the affidavit had been admitted and had been accorded all of the weight possible to give such an affidavit, the situation, so far as the plaintiff's right to recover is concerned, would have remained unchanged. It could only entitle him to judgment in the event that it was not "rebutted by competent and sufficient evidence." The evidence already in the case furnished a complete rebuttal to the *prima facie* case made out by the affidavit, assuming that such a case was so made out. Plaintiff was not aggrieved by the ruling. The result was not changed by it. He takes nothing by this exception.

The sixth exception is to the order of the Court, at the close of plaintiff's case, compelling him to elect upon which count in his writ he intended to rely. The one count was for damages for breach of contract, the other, the account annexed, which, excepting for the item relating to the automobile, was made up entirely of charges of payments made on account of the contract set forth in the second count and interest thereon and a blanket item for amount due on the pulp wood contract.

From the evidence which had been introduced prior to this ruling, it was apparent that plaintiff could not recover for the alleged sale of the automobile. Certainly he could not recover both for damages for breach of the contract and also the amount of money paid by him on account of the contract.

The counts were inconsistent. Under the circumstances, the propriety of the ruling is apparent. It was a matter wholly within the discretion of the trial judge. *Brady* v. *Ludlow Mfg. Co.*, 154 Mass., 468; *Golding* v. *Brennan*, 183 Mass., 286. The discretionary power of the court was not transcended here; on the contrary, it was wisely exercised.

The seventh exception is to the direction of a verdict for defendant. There is no merit in this exception. There was nothing to submit to the jury. No evidence had been adduced upon which twelve reasonable and intelligent men could have based a verdict for plaintiff. Had the action of the court been otherwise and for any reason a jury had found for the plaintiff, it would have been the plain duty of the presiding Justice to have set the verdict aside.

Exceptions overruled.

MRS. R. L. BEAN *vs.* MARK W. INGRAHAM AND J. W. INGRAHAM.

Knox. Opinion July 13, 1929.

PLEADING AND PRACTICE. TRUSTEE PROCESS. SCIRE FACIAS. R. S., CHAP. 91, SECS. 67, 73 AND 74.

Actions of Scire facias *to enforce judgments in trustee suits are governed by the provisions of Secs.* 67, 73 *and* 74, *Chap.* 91, *R. S.*, 1916.

If no demand is made by the plaintiff in a trustee suit within thirty days after judgment, the attachment by the original process, as against the trustee, is dissolved, and, if no second attachment has intervened, the principal defendant may recover his goods, effects and credits in the hands of his trustee as if they had not been attached.

If demand is not made by the officer holding the execution issued in a trustee suit, within thirty days after final judgment in the original action, an action of scire facias *can not be maintained to enforce the original judgment.*

In the case at bar both demands being made more than thirty days after judgment the ruling below charging defendant, Mark W. Ingraham, as trustee, was error.

On exceptions by defendant. An action of *scire facias* against defendants as trustees in trustee process, heard on sufficiency of process, and defendants' disclosures. To the refusal of the presiding Justice to give certain rulings defendants seasonably excepted. Exceptions sustained.

The case sufficiently appears in the opinion.

Frank Tirrell, for plaintiff.

J. H. Montgomery, for defendants.

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

STURGIS, J. At *Nisi Prius*, the presiding Justice charged the defendant, Mark W. Ingraham, as trustee in a *scire facias* action brought to enforce a judgment in trustee process against the defendants as trustees and the Camden Lumber & Fuel Co. as principal defendant. The defendant, J. W. Ingraham, was discharged. Rulings sustaining the validity of the proceedings and charging the trustee were challenged by exceptions.

The Bill of Exceptions states that "Judgment in the original action was rendered on the 2d Tuesday of September, 1927, which was the 13th day." This, of judicial knowledge, was the 13th day of the month. Demand upon the execution was first made October 15, 1927. It was again made on an alias execution July 16, 1928.

Trustee process in this State is created by statute and regulated by the statutory requirements. *Hibbard* v. *Newman*, 101 Me., 410; *Hanson* v. *Butler*, 48 Me., 81. *Scire facias* actions to enforce judgments rendered in trustee suits are governed by the same statute and are authorized only upon compliance with its requirements. The provisions of Chap. 91 of the current Revised Statutes determine the validity of this proceeding.

By Sec. 67, the plaintiff in a trustee suit may sue out a writ of *scire facias* to enforce his judgment against a trustee only when the trustee does not, on demand of the officer holding the execution, pay over and deliver to him the goods, effects and credits of the principal defendant in his hands, and the execution is returned unsatisfied.

But by Secs. 73 and 74, the demand must be made within thirty days after final judgment in the trustee suit. At the expiration of that period, the attachment by the original process, as against the trustee, is dissolved, and, if no second attachment has intervened, the principal defendant may recover his goods, effects and credits in the hands of his trustee "as if they had not been attached." *McAllister* v. *Furlong*, 36 Me., 307; *Bachelder* v. *Merriman*, 34 Me., 69.

In the Massachusetts statute governing trustee process, in its early form incorporated in substantial part into the original statute of this state (P. L., 1821, Chap. 61), with a continuing similarity of form and substance since that time, a provision appears, attaching liability to the trustee to pay on demand after the ex-

piration of thirty days, if there has been no second attachment and no action has been brought to recover by the principal defendant. Mass. Revised Statutes, Chap. 109, Sec. 45; *Burnap* v. *Campbell*, 6 Gray (Mass), 241.

This provision of the Massachusetts Statutes has not been adopted in this state. The statute as here written casts the penalty of delay in demand upon the plaintiff in the trustee suit, remitting the principal defendant to his original right in his goods, effects and credits in the hands of the trustee, with a right of action for their recovery. Failure to make demand within thirty days, absolves the trustee, we think, from further liability under the trustee process, and bars the maintenance of an action of *scire facias* to enforce the original judgment.

Upon the facts stated in the Bill of Exceptions it appears that the demands here made were both more than thirty days after judgment. The mandate must be

Exceptions sustained.

INHABITANTS OF THE CITY OF BIDDEFORD *vs.* JOSEPH A. BENOIT.

York. Opinion July 15, 1929.

PLEADING AND PRACTICE. MUNICIPAL CORPORATIONS. "MONEY PAID." *Livermore* v. *Peru*, 55 ME., 469, OVERRULED.

By usage in this state, a town may as a party to an action be properly described "the inhabitants of the town of (name)," as it customarily is, or "town of (name)"; and a city may as a party to an action be properly described by its exact corporate name only or with the additional words "inhabitants of the."

In an action by the Inhabitants of the City of Biddeford, the exact corporate name of which municipality is City of Biddeford, to recover money alleged to have been paid under a contract made with it, a written contract between the City of Biddeford and the defendant, offered in proof of the allegation, is not a variance therefrom.

The action for money paid is founded on equitable principles and no privity of contract between the parties is required except that resulting from circumstances showing an equitable obligation.

The obligation is not contractual, nor when said to be "implied" is it an implied contract. It is an implication of law. It is quasi contractual.

A quasi contractual obligation may arise against one in consequence of the payment of his obligation by another. Mere voluntary payment of the obligation gives no right of action at law or equity to recover from the debtor the money so paid. That one is benefited by the payment by another is not alone sufficient to raise such obligations against him.

The payor must not have made the payment officiously. If the payment made, though made without request, is not regarded in law as made officiously, the party so paying is entitled to be reimbursed to the extent that the debt as between the debtor and himself should in equity and good conscience have been paid by the debtor.

Payment must have been made by the debtor with the expectation of being recompensed therefor.

While in the case of individuals recovery may be had for money paid under a mistake of fact but not under a mistake of law, payments of public money made by officials under a mistake of law may be recovered. Inhabitants of Livermore *v.* Inhabitants of Peru, 55 *Me.*, 469, *overruled.*

Where the money of a municipal corporation has been paid to discharge the debt of an individual under circumstances under which an individual making payment could not recover, yet if such payment be made under a mistake of law or under such circumstances that the debtor should, as between him and the corporation, in equity and good conscience repay the corporation, the latter may recover it from the debtor in an action for money paid.

In the case at bar the payment by the city officials of the premium on the bond was without consideration and legal authority and could be recovered from the defendant whose obligation to pay was discharged.

On exceptions and motion for new trial by defendant. An action of assumpsit brought by the City of Biddeford to recover from the defendant the amount of a premium of an indemnity bond, paid by it, which bond was given by the defendant for the faithful performance of a contract entered into by the defendant to build an addition to a schoolhouse building for the said city. To the refusal of the presiding Justice to give certain requested instructions, the defendant seasonably excepted and after a verdict had been rendered for the plaintiff, filed a general motion for new trial. Exceptions and motion overruled.

The case fully appears in the opinion.

Willard & Ford, for plaintiffs.

Leroy Haley, for defendant.

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

BASSETT, J. An action of assumpsit for money paid to recover $1,913.33, the amount of the premium of a bond given by the defendant for the faithful performance of a contract made by the defendant with the plaintiff to build an addition to its high school and paid, as alleged, by the plaintiff to the bonding company for the benefit of the defendant. Plea the general issue. Verdict for the plaintiff.

The case comes up on exception and general motion.

EXCEPTION.

The plaintiff named in the writ was the Inhabitants of the City of Biddeford. The contract upon which the bond was given was alleged to be and was in fact between the defendant and the City of Biddeford. The defendant requested the presiding Justice to instruct the jury that the plaintiff named in the writ was not the corporation with which the contract was made and that, there having been a failure to produce evidence of a contract with or by the plaintiff, the verdict should be for the defendant. To the refusal so to instruct, the defendant excepted.

The City of Biddeford was incorporated by Chap. 408 of the Private and Special Laws of 1855, the first section of which act provided, "The inhabitants of the town of Biddeford, in the County of York, shall continue to be a body politic and corporate by the name of the city of Biddeford; and as such shall have, exercise and enjoy all the rights, immunities, powers, privileges and franchises and be subject to all the duties and obligations now appertaining to or incumbent upon the inhabitants or selectmen thereof."

The City of Biddeford had, under the act, the power to sue and be sued which the inhabitants of the town of Biddeford then had under the general statutes, R. S., 1840, Chap. 5, Sec. 23, and which towns now have, R. S., 1916, Chap. 4, Sec. 1.

The Supreme Court of Massachusetts in *City of Lowell* v. *Morse*, 1 Met., 473, held that in actions brought by or against a town, the town may by immemorial usage be described as "the inhabitants of" (name of town); that in an action brought by a city, the city may

be properly described by its true corporate name "city of Lowell"; and that the city is not obliged to use also the words "the inhabitants of the" before such name. The decision appears to imply that the action would have been properly brought even if these words had also been used.

That court has also held, *Commonwealth* v. *Dedham*, 16 Mass., 141, that a town may, as a party, be correctly described as "the town of Dedham" without the further words "the inhabitants of."

We think that under our usage, which we derived from Massachusetts and have since used, a town may as a party to an action be properly described "the inhabitants of the town of" (name) as it customarily is, or as "the town of" (name), and that a city may as a party to an action be properly described by its exact corporate name only or preceded by the words "inhabitants of the."

The plaintiff, therefore, was correctly described Inhabitants of the City of Biddeford as by its exact corporate name.

The promisee of the contract, under which it was alleged that the payment was made by the plaintiff, was the plaintiff described by its exact corporate name. No question, therefore, of the promise being made to a person or corporation by a wrong name arises in this case. In such cases of wrong name, the principle stated in *City of Lowell* v. *Morse*, supra, may apply; see also 37 Cent. Dig., Sec. 109, page 2507. Since the promise was made to the plaintiff described by its exact corporate name and the name of the plaintiff as a party was legally the same, there was no variance between allegation and proof. The exception was not well taken.

MOTION.

At a joint convention of the city government of Biddeford on October 13, 1924, it was voted that the Board of Aldermen, the Board of Education, the Principal of the High School and the Superintendent of Schools "form a committee for a new annex to the Biddeford High School." The committee was called "Joint Building Committee." On December 8, it was voted that the mayor and fourteen others named be members of this Committee, that the plans presented by a firm of architects be accepted, and that a loan be made to build the annex.

The Committee decided to make contracts for the work under five separate items, one of which was "General Work," and chose two of their number a subcommittee to be called "Finance Committee" and, among its other duties, to execute the contract.

The Joint Building Committee published in the local paper on February 9, 1925, a call for separate proposals for the five items, bidders "giving bond of a surety company satisfactory to the Finance Committee in the sum of 45 per cent of the entire contract price of each item." The proposals were to be opened on March 12.

The defendant, a general contractor, submitted a proposal — there were twelve others — for the General Work "according to plans and specifications made by" the architects for $127,568. He was familiar with giving contract bonds, had read the published notice, and before the proposals were opened applied to the local agent of a surety company for a bond if he was a successful bidder.

On March 12, after the bids were opened, the Joint Building Committee voted to award the contract for the General Work to the defendant for the amount of his bid.

Execution of the written contract had to await the return of the bond from the company's home office. It was delivered by the agent to the defendant on March 17. The defendant did not give then or at any time later to the agent any instruction as to who was to pay for the premium. The agent, without anything being said, charged it to the defendant who took the bond directly to the Committee, and the contract was then executed by the defendant and for the City of Biddeford by the two members of the Finance Committee.

The agent, after he delivered the bond and charged the premium to the defendant, was notified by telephone — he was unable to state definitely the time or circumstances — from the City Clerk's office to send the bill to that office. He therefore made out a bill for the premium against the city, dated March 17, the date the bond was delivered. On April 9, he received a city check for the amount of the premium, dated April 9 and signed by the mayor, and the bill which was enclosed in a regular official jacket or cover dated April 8 and endorsed on the back "High School Annex"; "Schools;" "Correct, C. A. Weed, Supt.:" "Approved, J. W. Robinson, Board of Education;" "A legal and valid claim in proper

form, Henry A. Pratt, Auditor." The agent immediately receipted the bill and returned it to the City Clerk's office.

The records of the Building Committee contain no record of any action of the Committee authorizing the payment of the premium by the city or relieving the defendant from paying it. There was no record of any action of the city government authorizing payment by the city or relieving the defendant of payment. In short, the only record reference to the bond was the entry in the records of the Building Committee that on March 17 the five contracts for the construction of the annex "which were awarded last Thursday were drawn up and signed by the respective contractors and by the Finance Committee. Satisfactory bonds were presented." The only evidence of the course, formal or otherwise, taken for payment of the bill was the cover of the bill and the indorsements thereon and the check signed by the mayor.

The foregoing facts are not controverted. But the defendant claimed that on March 17, before he signed the contract, he said to the Committee that the premium of the bond was not to be paid by him but by the city, that he did not include the amount in his bid, which would have been that much larger if he was to pay the premium, that the architect who was present confirmed what he said, and that the Building Committee so understood and the payment was made by the city because of this understanding.

Whether or not the contract was signed with this understanding was the issue submitted to the jury, and the jury found it was not.

The plaintiff contended that this action for "money paid" was maintainable because the city paid an obligation which the defendant "under the terms of his bond and contract with the city was bound to satisfy"; and that the benefit conferred thereby upon him was sufficient to create an equitable obligation upon which such an action can be based.

That the payment of the premium was in the first instance an obligation of the defendant seems clear.

The bidders were obliged to furnish a satisfactory bond. The defendant obtained one and was in regular course charged with the premium by the agent.

The defendant claimed that the contract not only contained no recital, reference or implication that he undertook to pay the pre-

mium but contained an implication that he was not to pay because a reference to such payment in the specifications was deleted and the deletion appeared in the blue print copies made for the bidders, one of which the defendant had with each of its pages initialed with his initials. The contract expressly provided that all the specifications annexed to the contract and the plans noted therein "are hereby made a part of this contract and the following is an exact enumeration of the same." Then followed "Schedule of Specifications" by sections, the first of which, "Section A," included among other things the "Advertisement" which was a copy of the published notice of February 9 and the "Notice to Bidders." This Notice had items from (1) to (7) inclusive, of which (6) contained the "Form of the Bond." About three lines immediately preceding, between (4) and (6), was an item which had obviously been numbered (5) and was completely blotted out. But the record is silent as to what it was and there is no way to determine whether it referred to the bond or premium or to what not. That it referred to payment of premium is stated in brief of counsel but does not appear from the record.

The advertisement required each bidder to give a bond. The contract incorporated the advertisement. While neither contained any express statement that the defendant was to pay the premium, there was no statement he was not to pay. The ordinary and necessary implication would be that he was to pay for what he must and did furnish.

The payment of the premium was not an obligation which the defendant was bound to satisfy "under the terms of his bond and contract." His obligation to the city under the contract was to furnish a bond. His obligation was satisfied when he delivered such a bond. The bond was of the kind which must be purchased. His indebtedness for the premium or purchase price arose from the purchase and he had been charged with it. The city was not liable for the purchase price. The bond had taken effect and could not be cancelled for nonpayment of the premium. The indebtedness was no more "under the contract" with the city than an indebtedness for gasoline obtained on credit for the purpose of running an automobile to carry a passenger to a certain destination, which the owner had agreed to do, would be under the contract of carriage.

The indebtedness is a consequence of the contract in either case but is not under it.

We have here therefore the case of A paying to B an obligation of C to B for which A is not liable and is under no compulsion to pay.

Upon the evidence, the payment by the city was voluntary. There was no express request of the defendant for payment by the city. Neither was there any evidence to imply such a request. Unless the defendant on the day the contract was signed or at some time between then and April 8, the date of the voucher of the bill, stated he had not and would not pay the premium, the city had no knowledge that he would not and, if he also said that he would not pay because he understood the city would, it was no evidence from which a request could be implied. It might imply a demand but not a request. Payment thereafter by the city would be a voluntary matter.

Until this action was brought October 19, 1926, no demand for repayment by the defendant was made and there is no evidence prior thereto that the city expected to be reimbursed.

It is elemental that the action for money paid is founded on equitable principles and no privity of contract between the parties is required except that resulting from circumstances showing an equitable obligation. 41 C. J., 20, Sec. 17.

The obligation is not contractual, nor, when said to be "implied," is it an implied contract. It is an implication of law. It is quasi contractual. Williston on Contracts, Vol. I, Sec. 3; Keener on Quasi Contracts, page 5.

"In equity and good conscience" are words used descriptive of the obligation upon which the law constructs a promise to make payment in satisfaction. *Dresser* v. *Kronberg*, 108 Me., 424; *Bither* v. *Packard*, 115 Me., 312; *Kelley* v. *Merrill*, 14 Me., 228.

Under what circumstances will this obligation in equity and good conscience arise?

A quasi contractual right may arise against one in consequence of the payment of his obligation by another. Mere voluntary payment of the obligation of another gives no right of action either in law or equity to recover from the debtor the money so paid. 2 R. C. L., 776, Sec. 33; 23 L. R. A., 123, note. That one is benefited

by the payment by another is not alone sufficient to raise an assumpsit against him. *Turner* v. *Egerton*, 19 Am. Dec., 235 (Md.). If the consideration is beneficial to the party sought to be charged and is actually adopted, taken advantage of, or ratified so that it is equivalent to a subsequent promise to repay, assumpsit for money paid lies. 2 R. C. L., Sec. 33, supra; 23 L. R. A., 122, note; 1 Parsons on Contracts, 9th Ed., *472, page 508. The payor must not have made the payment officiously. Keener on Quasi Contracts, 388; *Dunbar* v. *Williams*, 10 Johns. (N. Y.), 249. If the payment made, though made without request, is not regarded in law as having been officiously made, the party so paying is entitled to be reimbursed to the extent that the debt as between the debtor and himself should in equity and good conscience have been paid by the debtor. Keener on Quasi Contracts, page 388. That the defendant did not request the payment to be made should be no objection, as the basis of the recovery, whether at law or in equity, is the unjust enrichment that would result if the defendant were not compelled to reimburse the plaintiff. Keener on Quasi Contracts, page 396. One does not of course act officiously when he acts from some legal compulsion, which is often found to exist in the cases; *Davis* v. *Smith*, 79 Me., 361; *Marsh* v. *Hayford*, 80 Me., 97; *Ticonic Bank* v. *Smiley*, 27 Me., 229; nor when he acts from necessity to preserve his property or discharge his debt; *Edmunds* v. *Wallingford*, 14 Q. B. D., 811; *Johnson* v. *Royal Mail Steam Packet Co.*, 1 L. R., 3 C. P., 38; *Hunt* v. *Amidon*, 40 Am. Dec., 283 (N. Y.); nor when he fulfills a strong moral duty such as supporting those in need or rendering funeral services; *Gilley* v. *Gilley*, 79 Me., 292; *Patterson* v. *Patterson*, 59 N. Y., 574. *Contra*, *Matheny* v. *Chester*, 133 S. W., 754 (Ky.), which decision did not consider whether there was evidence of expectation of recompense but denied recovery upon the ground that the plaintiff was in no way affected by the defendant's contract. One, however, not a party to the defendant's contract to support may be allowed recovery in quasi contract. *Forsyth* v. *Ganson*, 5 Wend., 558; *Rundell* v. *Bentley*, 53 Hun., 272.

The question of recovery for payment of a debt paid without request and under no compulsion arose in equity in *McGhee* v. *Ellis*, 14 Am. Dec., 124 (Ky.), in the case of a purchaser under an exe-

cution sale of property to which the judgment debtor had no title. The purchaser was in equity allowed to recover from the debtor the money so paid in discharge of the execution debt. This conclusion has been followed in other jurisdictions, *Muir* v. *Craig*, 25 Am. Dec., 111 (Ind.); *Dunn* v. *Frazier*, 8 Blackf., 432; Note, 14 Am. Dec., 131, although it was doubted in *McGhee* v. *Ellis* and in *Hawkins* v. *Miller*, 26 Ind., 173, that the purchaser could recover in any action at law; but there would seem to be no objection to allowing an action at law as readily as in equity. Keener on Quasi Contracts, page 396.

Payments must have been made by the payor with the expectation of being recompensed therefor. Keener on Quasi Contracts, page 350.

While in the case of individuals, recovery may be had for money paid under a mistake of fact but not when paid under a mistake of law, payments of public money made by officials under a mistake of law may be recovered. Williston on Contracts, Vol. III, Sec. 1590 and cases cited. As a general rule, and on grounds of public policy, the government can not be bound by the action of its officers who must be held to the performance of their duties within the strict limits of their legal authority, where by misconstruction of the law, under which they have presumed to act, unauthorized payments are made. *Wisconsin R. R.* v. *United States*, 164 U. S., 190, 210. In many of the cases the recipient was himself a public official. But it is the authority of the one or of those who pay, not the capacity, official or otherwise, of the one who is paid, that determines. The capacity of the latter should not make, as it has not in the decisions made, any difference. In *Wisconsin R. R.* v. *United States*, supra, the recipient was a corporation; in *Heath* v. *Albrook*, 98 N. W., 619 (Ia.), it was an individual.

In *Inhabitants of Livermore* v. *Inhabitants of Peru*, 55 Me., 469, this court applied the same rule to a town as to an individual and decided that money voluntarily paid under a mistake of law by the agents of one town to another town could not be recovered. The case has since been cited as an authority in *Coburn* v. *Neal*, 94 Me., 541, which was, however, a case of payment by an individual. Any distinction between public and private money and between the acts of an individual and of agents of the government was not considered.

There are cases in other jurisdictions holding that a voluntary payment by a public official is the same as voluntary payment by an individual.

But the weight of authority and, as it seems to us, sounder principle support the right of recovery of payments of public money, though voluntarily made under a mistake of law; and *Inhabitants of Livermore* v. *Inhabitants of Peru*, supra, so far as it is a decision to the contrary, is overruled.

Numerous cases are collected in *State* v. *Young*, 110 N. W., 296, (Ia.).

In the cases cited, recovery was sought from the payee and not as in the instant case from a debtor whose debt to the payee had by the payment been paid. If the payment here was unauthorized, the agent of the surety company had no right to the money paid and the city would have maintained an action for it; but that would result in circuity of action because the agent could then recover his debt from the defendant. The defendant can not contend that it is inequitable that the direct road to him be taken.

While therefore in the light of the authorities, although upon the evidence in this case the payment of the premium was voluntary and apparently without expectation of reimbursement and the only basis to raise a quasi contractual obligation was the benefit to the defendant from the payment and therefore it is doubtful if this action for money paid, had the plaintiff been an individual, could be maintained, we hold that where the money of a municipal corporation has been paid to discharge the debt of an individual under a mistake of law or under such circumstances that the debtor should, as between him and the corporation, in equity and good conscience repay the corporation, the latter may recover it in an action of money paid.

If in fact the defendant at the time he delivered the bond and signed the contract made the statements about the payment of the premium he said he did and the Building Committee so understood and impliedly assented, the payment by the city would have been proper and the defendant would have had an equitable defense in this equitable action. That was a question of fact. While it would appear from the evidence that the question, whether the defendant or the city should pay the premium, was considered by some of the

Building Committee and one at least of the Finance Committee and the architect was of the opinion that the city should pay, it was debatable whether the matter had its beginning on the day the bond was delivered and the contract signed or at a later date after the execution of the contract was completed. There was evidence to warrant the conclusion of the jury that it was not at the former time.

The architect had under the contract no authority to determine who should pay the premium. His statements were opinion only.

If the matter of payment first arose after the delivery of the bond and execution of the contract, the Building Committee or Finance Committee or the city government had no right to modify the contract or to relieve the defendant of his obligation to pay for the premium without consideration any more than to modify the contract price of the work. There is no evidence of any consideration. The defendant said he heard nothing more about the matter after it came up until suit was brought. There was no subsequent dispute concerning liability or any allowance on account of the premium.

The defendant became entitled to several thousand dollars for extras. Final payment was not made until March, 1926, when the certificate for final payment was prepared by the architect. The certificate itself was not in evidence. Its terms did not appear. Nor was it in evidence whether, in reckoning the amount finally due, the payment of the premium was taken into consideration. It was not taken up with the defendant. There were none of the elements necessary for a compromise or for an accord and satisfaction. While nothing was shown for which to criticize the motives on the part of the city officials, the payment of the premium was without consideration and legal authority and can be recovered from the defendant whose obligation to pay was discharged.

The mandate must therefore be

Exception and motion overruled.

HERBERT L. YORK *vs.* ULYSSES G. GOLDER.

Kennebec. Opinion July 18, 1929.

EASEMENTS. IMPLIED RESERVATIONS AND GRANTS.

The law is well settled that there may be implied reservations of easements as well as implied grants where the easement is one of strict necessity.

An implied reservation of an easement of necessity may exist even against the grantee even though the land may have been conveyed with covenants of warranty where the easement is open and apparent and in use at the time of the conveyance.

In the case at bar the title to the land of the plaintiff and defendant was derived from a common grantor. There was evidence sufficient to go to a jury tending to show that the drain across the defendant's land was open, that its use must have been apparent to the defendant at the time of the purchase of his lot, that the use of the drain was one of strict necessity to the enjoyment of the land now owned by the plaintiff.

On exceptions by plaintiff. An action on the case to recover damages occasioned by alleged wrongful closing and stopping-up by defendant of a drain in water-course running from plaintiff's land across defendant's. At the trial of the cause after the evidence for the plaintiff had been taken, a non-suit was granted by the presiding Justice on defendant's motion. To this ruling plaintiff seasonably excepted. Exceptions sustained.

The case sufficiently appears in the opinion.

Ames & Ames, for plaintiff.

George M. Chapman, for defendant.

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

WILSON, C. J. In 1890, and for some time prior thereto, one Baker owned both parcels of land located in the town of Oakland, now owned respectively by the plaintiff and defendant, as well as adjoining land on the west. The entire tract was low and swampy

and the natural flow of the surface water therefrom was toward the southeast where its natural flow was obstructed by a public way, now known as High Street.

At the southeasterly corner of the land now owned by the defendant the town at some time constructed a culvert to discharge the water collected on the north side of High Street to the south side where it was carried off in a ditch or by the natural slope of the land to the south.

About 1890, Baker, having built the house now occupied by the plaintiff and having sold other lots to the west on which one or more houses were built, to provide drainage of the land and for the kitchen waste, constructed a drain in the rear of the York house which was also extended in the rear of the other houses located on the northery side of High Street and westerly of the York house, and extended the drain southeasterly to the southeasterly corner of the lot now owned by the plaintiff and across the land now owned by the defendant to the culvert under High Street.

He also connected the cellar under the house now owned by York by a tile pipe with the above-described drain. The drain in the rear of the York house was filled in with rocks and covered, but where it crossed the land now owned by the defendant was open and from three to four feet deep. At the time of the construction of the drain and for more than thirty years there was no building on the lot now owned by the defendant.

The land now owned by the plaintiff and the defendant was occupied by Baker for several years after the construction of the drain. He sold the house and land now owned by York to one party and later the land owned by the defendant to another. The York land passed through several hands until in 1918, it, together with the defendant's lot came into the hands of one Morang who conveyed it to Della Briggs in 1918, who in turn in 1918 conveyed it to a Mrs. LaRock, who in 1922 on September 5 conveyed to the defendant the lot now owned by him, and five days later conveyed to the plaintiff the house and lot now occupied and owned by him.

During all this time from 1890, when the artificial drain was dug by Mr. Baker across the defendant's lot, it was used to carry away the surface water accumulating on the plaintiff's land and the land to the west and to discharge the kitchen waste from the York house

and the houses on the west and, so far as the evidence discloses, without protest from any owner of the Golder lot whenever during that period the York and Golder lots were owned by different parties.

In 1925, the defendant built a house on his lot and filled up the drain, the result of which was to cause the surface water and house waste to back up and accumulate on the York land and the land to the west, filling the cellar of the York house with stagnant, filthy water from August until November, 1925, when the town lowered the sewer in High Street and the plaintiff was able to connect his cellar drain with the sewer, which he previously had not been able to do because of the elevation of the public sewer.

The plaintiff in his writ claimed a right to the use of the drain so constructed across the Golder lot as it had been used by his predecessors in title, and claims that right by virtue of an implied reservation at the time of the conveyance by Mrs. LaRock to Golder and an implied grant in connection with Mrs. LaRock's deed to him, as neither deed mentioned the drain in terms. After the evidence was in, the presiding Justice granted a non-suit to which the plaintiff excepted, and the case is before this court on the plaintiff's exceptions.

The law appears to be well settled that there may be implied reservations of easements as well as implied grants where the easement is one of strict necessity. While there is some conflict of authority, the doctrine laid down in *Pyer* v. *Carter*, 26 L. J. Exch., N. S., 258, somewhat modified by later decisions as to the necessity which must exist, is now quite generally followed not only in England; *Morland* v. *Cook*, L. R., 6 Eq., 252; *Watts* v. *Kelson*, L. R., 6 Ch., 171; but in the majority of the states. Farnham on Water & Water Rights, Vol. III, Secs. 832, 832a, 832b; 26 L. R. A. (N. S.), 321 Note, 9 R. C. L., p. 765, Sec. 28; *Carbrey* v. *Willis*, 7 Allen, 364; *Willey* v. *Thwing*, 68 Vt., 128; *Kelly* v. *Dunning*, 43 N. J., Eq. 62; *Dunklee* v. *Wilton R. Co.*, 24 N. H., 489.

That an implied reservation of an easement of necessity, though the servient estate is conveyed with covenants of warranty, may exist is recognized in this state in *Warren* v. *Blake*, 54 Me., 276; *Dolliff* v. *B. & M. R. R.*, 68 Me., 173; *Watson* v. *French*, 112 Me., 371, 375. The true rule being that where an easement exists over

land that is open and apparent and in use at the time of the conveyance and strictly necessary to the enjoyment of another part and the owner of both the dominant and servient part conveys the servient part, even with covenants of warranty, there is an implied reservation of the easement for the benefit of the dominant estate.

The controlling elements in determining whether an implied reservation exists is the openness of the use of the easement at the time of the transfer, and the necessity of its existence for the reasonable enjoyment of the part retained by the owner. In determining the necessity it must be shown to be one of "strict necessity," that is, that a substitute can not be provided by the owner over his own land at any reasonable outlay of money, *Carbrey* v. *Willis*, supra; *Randell* v. *McLaughlin*, 10 Allen, 366.

In the instant case there was evidence tending to show that the drain across the defendant's lot was open and that its use must have been apparent to the defendant at the time of the purchase of his land, and also evidence tending to show that its continued existence was strictly necessary to the enjoyment of the plaintiff's premises and that no substitute therefor could be provided by the plaintiff at any reasonable expense until the town lowered its sewer, thus furnishing an application of the rules of law above laid down, if the jury found the necessity existed. We think there was evidence sufficient to go to the jury on the question of whether the drain was open and its purpose apparent and an easement of a drain across the defendant's land was necessary to the reasonable enjoyment to the plaintiff's premises and that no substitute could be provided by the plaintiff at any reasonable expense.

Exceptions sustained.

KENNEBUNK, KENNEBUNKPORT AND WELLS WATER DISTRICT

vs.

INHABITANTS OF THE TOWN OF WELLS.

York. Opinion July 18, 1929.

MUNICIPAL CORPORATIONS. WATER DISTRICTS. WATER RATES. PUBLIC UTILITIES. R. S., CHAP. 55, SECS. 16 AND 33.

The Act creating the Water District in the case at bar must be construed in the light of the settled policy of the state as expressed in Chap. 55, R. S., 1916.

Every such district is a quasi-municipal corporation in its nature and a public utility and as such is subject to the control of the Public Utilities Commission. There is nothing in the Act creating this district indicating that the legislature intended to exempt this district from the control of the Utilities Commission.

When the legislature declared that the rates established by the trustees of the district shall be uniform throughout, it required no more than is required under Secs. 16 and 33 of Chap. 55, R. S., viz.: that all rates shall be reasonable and just and without discrimination.

Absolute uniformity in utility rates, like uniformity in taxation, is the unattainable. It can only be approximated. Uniformity as required by the Act creating the district, must be held to mean that the rates established by the trustees must be reasonable and just and without unjust discrimination between takers of the same class, having reference to the nature of the service and the cost of supplying it.

Whenever the regulatory body created by the State, acting within the scope of its authority, has approved certain rates as reasonable and just and not unjustly discriminatory, no grievance having been claimed by those affected, the Court will assume the rates are uniform between all takers of the same class. The establishing of classes is vested finally in the Utilities Commission.

When the District took over the property of the Water Company, it found rates in force which had received the approval of the Commission after a hearing. It had a right to assume they were not discriminatory.

After the property was taken over, the Act contemplated that the old rates established by the Water Company should remain in force until the trustees of

the district were in possession and control and that some time must elapse after taking possession before the trustees under the new conditions could fairly weigh the elements entering into new, reasonable, and just rates. To divide the total hydrant rental in the three towns by the total number of hydrants might produce the same rate for all hydrants but not a reasonable and just rate. Rate making is not so simple a problem.

In the case at bar it could not be determined from the report whether the trustees formally adopted the old rates of the Water Company and filed them as the rates established by the District with the Utilities Commission as required by Chap. 55, R. S. The rates of the Water Company, if adopted by the trustees, became then the rates of the District and must be filed as a public record. Until this is done the courts will not enforce their recovery.

The report being lacking in so many respects for the determination of the rights of these parties, lest injustice be done, the report must be discharged in order that the parties, if they so desire may supplement it.

On report. An action by the plaintiff Water District to recover the sum of $2,211.18, claimed by it to be due from the defendant as hydrant rentals. The case was referred to a Commissioner before whom the evidence was taken out. At the conclusion of the hearing the cause was by agreement of the parties reported to the Law Court. Report discharged that the parties may take out additional evidence.

The case fully appears in the opinion.

Harold H. Bourne, for plaintiff.

Ray P. Hanscom, for defendant.

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

WILSON, C. J. An action by the Kennebunk, Kennebunkport and Wells Water District to recover sums alleged to be due the District as hydrant rentals from the town of Wells. It comes to this court on report.

Prior to 1922, the inhabitants of the towns of Kennebunk, Kennebunkport, and Wells and a part of the town of York and the city of Biddeford were supplied with water for domestic and municipal purposes by the York County Water Company. On application to the Legislature of 1921 by citizens of these towns, an act was

passed, Chap. 159, Private and Special Laws, 1921, creating a Water District composed of the towns of Kennebunk, Kennebunkport and a part of the town of Wells to become effective when accepted as provided in the Act. The Act contained the usual provisions for taking over the property and franchises of the Water Company.

The Act having been duly accepted, but the trustees of the District and the Water Company being unable to agree as to the price to be paid, a petition was filed in the court by the trustees of the District with a view to acquiring the property by condemnation. Before these proceedings reached a hearing, however, the parties agreed to terms of purchase. The agreement was reached about April 1, 1922, the District on May 8, 1922, taking over the property, including by the terms of the Act the net proceeds of all receipts after January 1, 1922.

Prior to the formation of the District, the Water Company with the approval of the Public Utilities Commission had fixed rates to the consumers, including hydrant rentals for the three towns, and according to the established rates the town of Wells was required to pay annually a sum averaging approximately sixty-eight dollars per hydrant, and the town of Kennebunk approximately thirty dollars per hydrant per year. It does not appear in the report what the exact annual rental per hydrant for the town of Kennebunkport was, but the inference from the record is that it was considerably more than that paid by the town of Kennebunk, and that the average for the three towns was between forty-five and fifty dollars per hydrant per year.

During the period from January 1 to May 8, 1922, on which latter date the District actually took over the property, the Water Company, of course, collected or billed to the several towns the hydrant rentals at the old rates and following the taking over of the property, the trustees of the Water District continued to bill the hydrant rentals at the rates fixed by the Water Company until April 1, 1923, when a flat rate of thirty-five dollars per hydrant per year was fixed by the trustees for each town.

The total rental for hydrants in the town of Wells at the old rate of the Water Company to April 1, 1923, and at the new rates fixed by the Trustees of the Water District from April 1 until

December 31, 1923, totals $6,595.37, and the total amounts paid by the town of Wells up to January 1, 1924, was $4,717.53, leaving a balance due as the Water District claims of $1,877.84.

The town of Wells, however, contends that the old rates for hydrants became illegal from January 1, 1922, the date when the District was entitled to receive the rates, and according to the rates finally fixed by the Water District a much less amount is due. It bases this claim on a provision in the Act creating the District which provides that: "All individuals, firms and corporations, whether public, private or municipal, shall pay to the treasurer of said district the rates established by said board of trustees for the water used by them, and said rates shall be uniform within the district."

This contention, we think, can not be sustained. The act creating the district must be construed in the light of the general policy of the state as expressed in Chap. 55, R. S. Every such district is quasi-municipal in its nature, and this district is so termed in the act creating it.

Every quasi-municipal corporation serving the public as a "Water company" is a "public utility" and as such is subject to the control of the Public Utilities Commission. There is nothing in the act creating this district to indicate that the legislature intended to exempt it from the control of the Utilities Commission.

By the act of 1913, the legislature vested in the Public Utilities Commission exclusive control over the rates of all public utilities and provided the method by which all unjust and unreasonable or discriminatory rates should be remedied, subject only to appeal to this court on questions of law by bill of exceptions.

When the legislature declared that the rates established by the trustees of the district shall be uniform throughout, it required no more than is required under Secs. 16 and 33 of Chap. 55, R. S., viz.: that all rates shall be reasonable and just and without unjust discrimination. This provision in the act creating the district should not be construed to require every householder in the district to pay the same rate regardless of the amount of water used or that no one could use meters unless all did, or that rates for all kinds of service, domestic or municipal, regardless of the amount of water used or the expense of supplying it must be the same.

Absolute uniformity in public service rates like uniformity in taxation is the unattainable. It can only be approximated.

Uniformity as required by the Act creating the district, therefore, must be held to mean that the rates established by the trustees must be reasonable and just and without discrimination between takers of the same class having reference to the nature of the service and also the cost of supplying it. 40 Cyc., 802, 27 R. C. L., 1448-51. *Souther* v. *Gloucester*, 187 Mass., 552.

Whenever the regulatory body created by the state acting within the scope of its authority have approved certain rates as reasonable and just and not unjustly discriminatory and no grievance is claimed in due course by those affected, the courts will assume that the rates are uniform as between users of the same class. The establishing of classes of users is a matter of judgment, and is vested finally in the Utilities Commission, Sec. 31, Chap. 55, R. S., and a finding by the Commission on such questions will not be disturbed by this court unless clearly without any basis on which to rest, or results in confiscation or the taking of property without due process.

When the district in this instance took over the property of the Water Company, it found in force rates, including those for hydrant rentals, which had been approved after hearing by the Utilities Commission. We think it had a right to assume they were not unjustly discriminatory as between the takers of this municipal service. The adjustment of a schedule of rates is not a matter to be done offhand. Many elements enter into reasonable rates, and the classification of users.

The dividing of the total hydrant rentals in the three towns by the total number of hydrants as suggested by the counsel would, of course, have produced the same rates for each town, but it might not have produced reasonable and just rates. Rate making is not so simple a problem.

It is clear that, until the District and the Water Company arrived at an agreement to take over the property the Act contemplated that the rates established by the Water Company should remain in force; nor could new rates be put into effect until the trustees were in possession and control. The legislature must also have contemplated that some time would elapse after taking over

the property before the trustees of the District under the new conditions could fairly weigh the elements entering into changes in the schedule of rates which had been in force under the Water Company.

It can not be determined, however, from the report whether the trustees of the District immediately after taking over the property formally adopted the rates of the Water Company, and, if so, whether they filed them as the rates established by the district with the Public Utilities Commission. The rates of the Water Company, if adopted by the trustees, were no longer those of the Water Company, but became on adoption those established by the District, and according to the plain intent of Chap. 55, R. S., must be filed with the Utilities Commission in order that they may be of public record and be complained against by any person aggrieved thereby. Until this is done, the courts will not enforce the recovery of them in a suit at law. A utility has no right to furnish service to the public until it has complied with the provisions of Chap. 55. Failure to do so subjects it to a penalty.

None of the facts for the determination of these questions appear in the report. The report is lacking in so many respects for a determination of the rights of these parties, lest injustice be done, the report is discharged in order that the parties, if they so desire, may take out additional evidence.

Report discharged.

CHRISTIAN O. PETERSEN *vs.* PATRICK FLAHERTY.

Cumberland. Opinion July 18, 1929.

MOTOR VEHICLES. NEGLIGENCE. P. L., 1923, CHAP. 9.

The rule laid down in Chap. 9, P. L., 1923, regulating the right of travelers at intersecting streets is not an absolute rule which frees a driver of a motor vehicle at intersecting streets from observing the ordinary rules of due care with respect to a motor vehicle approaching on his left.

A driver of a motor vehicle must always have his car under control when approaching the intersection of streets.

If a driver approaching on the left through negligence enters the intersection of two streets, the driver approaching on the right must still use due care and all reasonable means to avoid a collision.

In the case at bar, the evidence is clear that the defendant's truck had entered the intersection of the streets before the plaintiff's car had reached it and that the plaintiff in the exercise of due care should have seen the defendant's truck in time to have avoided the collision.

On report. An action on the case to recover damages sustained in collision between automobiles of the parties, at the intersection of Federal and Exchange Streets, Portland. The evidence was taken out before the presiding Judge of the Superior Court for the County of Cumberland, and at its conclusion, by agreement of the parties, the cause was reported to the Law Court for determination. Judgment for defendant.

The case fully appears in the opinion.

Israel Bernstein, for plaintiff.

Joseph E. F. Connolly, for defendant.

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

WILSON, C. J. An action to recover damages for injuries to the plaintiff's automobile, resulting from a collision with a truck driven by a servant of the defendant.

The collision occurred at the intersection of Exchange and Federal Streets in Portland, the defendant's truck entering the intersection of the two streets on the plaintiff's left. The plaintiff relies on Chap. 9, P. L., 1923, as establishing the defendant's negligence. The case is before this court on report.

We think the preponderance of the evidence warrants the finding of the following facts: The plaintiff was driving southerly along Exchange Street from Congress Street at from twelve to fifteen miles per hour, and as he approached the intersection of Exchange Street with Federal Street — the two streets intersecting at approximately right angles — he blew his horn when about twenty feet from the northerly line of Federal Street. As he approached the intersection of these streets, a Ford coupe passed him, going in the same direction, and turned easterly into Federal Street, which

may have in some degree obscured his vision of Federal Street on his left, but not sufficiently, if he had been observing the traffic on his left, to shut off his view of the defendant's truck.

Before the plaintiff's car entered the travelled part of Federal Street at all, according to the testimony of the plaintiff's own witness who was riding with him at the time, the defendant's truck, proceeding at the rate of eight to ten miles per hour, had entered Exchange Street, and had nearly reached the center line of the intersection of the two streets. The plaintiff, however, continued on, and, it at once becoming apparent that a collision was inevitable, turned to the right, but too late to avoid the collision, the front end of plaintiff's car striking the defendant's truck just back of or near the door of the cab. The collision occurred near the southwesterly corner of the square formed by the intersection of the side lines of the two streets.

The somewhat greater rate of speed at which the plaintiff's car was going and the fact that it struck the defendant's truck just back of the door of the cab, or even if opposite the door of the cab as the plaintiff admitted, presents incontrovertible evidence that the defendant's truck had entered the intersection and was, as the witness riding with the plaintiff testified, nearing the center of the intersection before the plaintiff's car entered the travelled part of Federal Street.

Upon these facts it is clear, we think, that both drivers were negligent and the plaintiff can not recover. The rule of the road laid down in Chap. 9 of P. L., 1923, is not an absolute rule which frees a driver of a motor vehicle at intersecting streets from observing the ordinary rules of due care with respect to a motor vehicle approaching on his left. *Fitz* v. *Marquis*, 127 Me., 75. It does not compel a driver at intersecting streets to stop whenever a motor vehicle is approaching on his right, but too far away to reach the intersection until he has crossed. Only when the motor vehicle approaching on the right, traveling at a lawful rate of speed, will enter the intersection before he can cross and a collision might follow, if he did not stop or slow down, does the rule apply. Occasions will obviously arise when quick decision must be exercised by the driver approaching on the left. If doubt exists in his mind, reasonable care requires him to stop; but if, through failure to exercise

good judgment or reasonable care, he enters the intersection, the driver approaching on the right must still use due care and all reasonable means within his power to avoid a collision.

A driver of a motor vehicle must have his car under control at the intersections of streets. Especially is this so if the street is slippery from rain or if his vision of approaching cars from either direction is obscured.

According to the testimony of the witness riding with the plaintiff, the plaintiff either must have seen the defendant's truck enter the intersection of these streets before he reached the intersection, or by the exercise of reasonable care should have seen it in time to have avoided the collision. While the defendant's servant was, no doubt, guilty of negligence in attempting to cross Exchange Street, with a car approaching so near on his right, yet the exercise of reasonable care on the part of the plaintiff after the defendant's truck had entered the intersection would have enabled him to stop before the collision occurred or to turn into Federal Street westerly in time to avoid it as he attempted to do when it was too late.

Judgment for the defendant.

BERTRAND G. BIRMINGHAM, ADM'R

vs.

THE BANGOR & AROOSTOOK R. R. CO.

Penobscot. Opinion July 31, 1929.

FEDERAL EMPLOYER'S LIABILITY ACT. NEGLIGENCE.

Actionable negligence is predicated upon some duty owed by the defendant to the plaintiff and a breach of such duty.

When the only negligence claimed on the part of a railroad company is the placing of a semaphore in a position alleged to be too near the track and an employee is injured or killed by coming in contact with such semaphore while he is

using the side ladder of a frieght car in violation of the company's rule and warning, not to use such side ladder while switching in yards, no breach of the defendant's duty appears and no liability is proved.

In the case at bar the defendant owed to its employee no duty to so locate its semaphore that he would not come in contact with it while using a side ladder in violation of the defendant's express warning.

On exceptions and motion for new trial by defendant. An action under the Federal Employer's Liability Act brought by the plaintiff in his capacity as administrator of the estate of George L. Birmingham for damages resulting in the death of the intestate while in the employ of defendant company. To the admission of certain testimony and to certain rulings of the presiding Justice defendant seasonably excepted, and after the jury had returned a verdict for the plaintiff in the sum of $2,291.67, filed a general motion for new trial. Motion sustained. Verdict set aside.

The case sufficiently appears in the opinion.

Clinton C. Stevens, for plaintiff.

George E. Thompson,

Henry J. Hart,

Frank P. Ayer, for defendant.

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

DEASY, J. Action under the Federal Employer's Liability Law. The plaintiff is the father and the administrator of the estate of George L. Birmingham, deceased. The latter, while employed by the defendant as brakeman, was on March 15, 1927, in the defendant's yard at Oakfield, Maine, accidently and suddenly killed. No witness saw the occurrence. It is evident, however, that young Birmingham in using the ladder on the side of a moving refrigerator car, while attempting to reach the top of the car, lost his hold, fell and was crushed and killed.

The plaintiff's theory, which was apparently accepted by the jury, is that while on the ladder young Birmingham came in contact with a semaphore erected and maintained by the defendant. This is disputed, but we think that the jury was justified in so finding. The plaintiff claims that the semaphore was negligently located and maintained too near the track. The record shows that

the semaphore was sixty inches from the track and owing to the overhang was twenty-nine inches from the side ladder. No other negligence on the defendant's part is claimed or pleaded or indicated by the evidence.

Actionable negligence is predicated upon some duty owed by the defendant to the plaintiff and a breach of such duty. The plaintiff contends that the defendant owed to the plaintiff's intestate the duty of exercising due care to have its semaphore placed so far from the track that in using the side ladder of the car he would not come in contact with it.

The evidence showed that Birmingham's post of duty at the time of the accident was on top of the refrigerator car, called in railroad parlance a "reefer," next to the caboose.

The train came to a stand-still in the yard for information as to the track upon which it was to be switched. Birmingham had no responsibility or duty in reference to the obtaining of such information, or acting upon it. For some reason not connected with his occupation or duty he came down to the ground and in seeking to return after the train had started he lost his life.

The evidence further shows that the defendant had warned its employees against using the side ladder on freight cars while switching in yards. This warning was printed upon the employee's time cards. The undisputed evidence shows that the plaintiff's intestate had in his possession such a card with its warning, which is as follows:

> "Employees are warned not to use the side ladders of cars when passing through bridges or on the sides of cars next to buildings or cars when switching in yards."

The plaintiff in effect claims that one of the duties which the defendant owed to the plaintiff's intestate was to so locate its semaphore that he would not come in contact with it while using a side ladder, even in violation of the defendant's express warning to him not to so use it.

The mere statement of such a proposition shows its unsoundness. In erecting the semaphore the defendant was not bound to anticipate that any employee would use a side ladder while switching in a yard in violation of an express rule and warning.

Contributory negligence on the part of the plaintiff is not set up

in this case, and under the Federal Liability Law it is not a complete defense. Contributory negligence implies negligence on the part of the defendant. 18 R. C. L., 129. In this case no negligence of the defendant is shown because in locating its semaphore it was not bound to foresee and guard against a violation of its rule and warning.

The language of the Supreme Court of the United States in the recent case of *Railroad Company* v. *Driggers* (opinion announced June 23, 1929), is applicable to this case. "The contention that his death was caused by the negligence of the railroad company in any respect in which it owed a duty to him is without any substantial support and the jury should have been instructed to find for the railroad company." The motion in this case must be sustained. It is unnecessary to pass upon the exceptions.

Motion sustained;
Verdict set aside.

STATE *vs.* PETRO DEPALMA.

Cumberland. Opinion August 8, 1929.

CRIMINAL LAW. EVIDENCE. INFERENCES.

An inference founded upon hearsay is not more admissible in evidence than a fact obtained in a like manner.

In the case at bar the excluded evidence was offered presumably as preliminary to and a foundation for an assertion, by the respondent, of Vacca's conviction, that an inference might be drawn therefrom that Vacca, and not the respondent, was responsible for the presence on the premises of a hide in which the liquors found were concealed.

With no effort on the part of the respondent to procure the better evidence of Vacca's conviction appearing, his statement of the conviction or his knowledge of it can be regarded only as hearsay evidence, furnishing no proper foundation for an inference, and inadmissible.

On exceptions. Respondent convicted of illegal possession of intoxicating liquors in violation of the laws of Maine, reserved an exceptions to the exclusion of evidence. Exceptions overruled. Judgment for the State.

The case sufficiently appears in the opinion.

Ralph M. Ingalls, County Attorney,

Walter M. Tapley, Asst. County Attorney, for State.

Joseph E. F. Connolly, for respondent.

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

STURGIS, J. During the trial of the respondent for illegal possession of intoxicating liquors in violation of the laws of Maine, he was asked:

Q. "Now a man, you say, lived there, Vacca — do you know whether or not he had been convicted of handling liquor?" . . . "While he lived at this place?"

Counsel for the respondent said his purpose in asking the question was "to show people had lived there who had been in the business, which would explain with other things, the presence of the hide. That is all it is for." Upon a general objection by the State, the answer was excluded, and exception reserved. A second exception, reserved to a refusal to direct a verdict for the respondent, is here abandoned.

The ruling below was correct. The responsive answer to the inquiry made could only be "yes" or "no" or an equivalent, a statement which in itself could neither add to or detract from the respondent's cause. No prejudice resulted from its exclusion.

Nor was the evidence admissible. It was offered presumably as preliminary to and a foundation for an assertion, by the respondent, of Vacca's conviction, that an inference might be drawn therefrom that Vacca, and not the respondent, was responsible for the presence on the premises of a hide in which the liquors found were concealed.

An inference founded upon hearsay is not more admissible in evidence than a fact obtained in a like manner. *Mason* v. *Tallman*, 34 Me., 472. Convictions are matters of court record, permanent and accessible. With no effort on the part of this respondent to

procure the better evidence of Vacca's conviction appearing, his statement of the conviction or his knowledge of it can be regarded only as hearsay evidence, furnishing no proper foundation for an inference of Vacca's responsibility for the hide, and inadmissible. *State* v. *Butler*, 113 Me., 1.

Exceptions overruled.
Judgment for the State.

PAULINE S. SARGENT *vs.* WALTER E. REED.

Cumberland. Opinion August 8, 1929.

LANDLORD AND TENANT. LEASE. TENANCY AT WILL.

Where a lease for five years, with a privilege of renewal for the same term, contains a proviso that the lessee shall give to the lessor at least sixty days' written notice of his desire for such renewal and such written notice is not given, the fact that the lessee, after the expiration of the lease, with knowledge of the lessor, allowed some of his personal property to remain on the leased premises, to aid in the effecting of a new renting, does not constitute a holding over on the part of the defendant which might be considered an election to extend the lease for a further period of five years, in view of the evidence in the case which shows that the arrangements for allowing the property to remain were made on the basis of a rental to be paid as long as the property was kept there.

While a holding over may constitute strong evidence of an intent to renew or extend a lease, yet where there is, as in this case, no intention shown to renew or extend, and where there is a new arrangement made for rental, the occupancy is merely a tenancy at will.

On report. An action of assumpsit to recover an amount alleged to be due for rent. Hearing was had in the Superior Court for the County of Cumberland, and after the evidence had been taken out, by agreement of the parties, the cause was reported to the Law Court for determination. Judgment for the plaintiff in the sum of $40.00 with costs.

The case fully appears in the opinion.
Berman & Berman, for plaintiff.
Woodman, Whitehouse, Skelton & Thompson,
L. M. Sanborn, for defendant.

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

FARRINGTON, J. This case came up on report. By stipulation of the parties, all references in the record to a former action by the plaintiff against the defendant, and also that portion of the plaintiff's argument relating to *res adjudicata*, are to be disregarded.

On June 14, 1922, the plaintiff leased to the defendant for a period of five years certain premises on the easterly side of Commercial Wharf in Portland, Maine. The lease, which was to take effect June 1, 1922, provided that "The lessee shall have the right and privilege of renewing this lease for a further period of five years, provided he shall give to the lessor at least sixty days before the first day of June, 1927, a written notice that he desires such five years extension."

No such written notice was given by the defendant, and on June 1, 1927, the five-year term expired. Under the terms of the lease, rent was payable at six months' periods in advance. On February 21, 1928, suit on an account annexed was brought by the plaintiff, lessor in the original lease, against the defendant, lessee in said lease, to recover for rental of the premises described in the lease covering a period of six months from December 1, 1927, to June 1, 1928, at $40.00 per month, one count being for use and occupation of the premises described in the lease and another count for the rent of the same premises at the same rate for the "semi-annual installment due December 1, 1927, under the lease dated June 14, 1922." There were also money counts with no specifications. There was also a further count declaring on the original June 14, 1922, lease, in which it was alleged, after reciting the lease and making an annexed copy part of the declaration, that after the expiration of the five-year original period, the defendant remained in possession of the premises, although he did not give any sixty-day notice as required in the lease. The declaration alleges a waiver on the part of the plaintiff lessor of this written notice of election of the

privilege of extension on the part of the defendant and that the defendant from June 1, 1927, was in possession of the premises by virtue of conduct which was tantamount to an election to avail himself of an extension. The usual general issue was joined.

The real claim of the plaintiff is under the count declaring on the lease and the real question is whether the defendant under the evidentiary facts disclosed by the report made an election to extend the lease for a further period of five years beyond the five years covered by the original lease.

It appears undisputed that the defendant did, after June 1, 1927, leave on the premises certain articles of personal property which were removed some time in December, 1927. It is also undisputed that the defendant did not give any sixty-day written notice of his desire to extend the term.

The plaintiff's claim that she is entitled to judgment for the advance rental from December 1, 1927, to June 1, 1928, is based on two points. First, that there was an extension or renewal of the lease, as a matter of law, for a further period of five years from June 1, 1927, as a result of what is claimed as a holding over on the part of the defendant, as evidenced by his keeping on the premises the personal property admittedly there, and second, that the sixty-day written notice was waived by her.

Taking all the evidence contained in the record and properly admissible, and weighing in the scales the contradictory testimony of the plaintiff and Mr. Jordan, through whom the negotiations relating to the lease were carried on, the preponderating weight of evidence inclines one to the belief that the defendant had no intention of renewing the lease or extending it, and so informed Jordan, who in turn informed the plaintiff of that fact some time prior to June 1, 1927, and that Jordan, as he stated, suggested to the plaintiff prior to June 1, 1927, that he would try to secure another tenant, and as an aid to that he would try to arrange with the defendant to have certain personal property left on the premises, which arrangement was made on the basis of a rental to be paid by the defendant while the property remained there. The placing of the "to let" sign on the premises and its removal after the plaintiff had talked with Jordan tends strongly to corroborate Jordan's testimony.

It would seem immaterial as to whether or not Jordan was the agent of the plaintiff, as the evidence is preponderatingly convincing that knowledge was brought home to the plaintiff as to the defendant's intentions regarding the premises and as to the arrangement made in regard to the personal property to be left there.

While the Maine cases are clear on the point that a holding over is strong evidence of an intent to renew or extend a lease, the great weight of evidence in this case shows that the defendant did not intend to renew or extend the lease and that his holding over was under a tenancy at will understood by the plaintiff and by him.

This tenancy was terminated on January 1, 1928, after due and seasonable notice to the plaintiff in writing in compliance with statutory provisions, so that the defendant is liable only for rent for the month of December, 1927, to the amount of forty dollars ($40.00).

Judgment for plaintiff for the sum of forty dollars ($40.00), with costs.

OLIVE KELLEY *vs.* CARRIE E. FORBES, EXECUTRIX.

Aroostook. Opinion August 9, 1929.

ESTATES. EXECUTORS AND ADMINISTRATORS. PLEADING AND PRACTICE. CHAP. 92, R. S., SEC. 14. P. L. 1917, CHAP. 33. P. L. 1919, CHAP. 177.

One making claim against an estate is required by the provisions of Sec. 14, *Chap.* 92, *R. S., as amended by P. L.,* 1917, *Chap.* 33 *and P. L.,* 1919, *Chap.* 177, *as a condition precedent to the maintenance of his action, to present his claim in writing to the administrator or executor or file it in the registry of probate supported by his affidavit, or that of some other person cognizant thereof, either before or within twelve months after the qualification of the administrator or executor.*

While, before the claim is barred by the statute of limitations, presentment or filing may be waived by the personal representative, under a plea of the general issue, want of filing or presentment is in issue and failure to prove performance or waiver thereof bars an action by the claimant.

In the case at bar the record showed no record of presentment or filing of the plaintiff's claim nor of waiver of that requirement by defendant. The verdict was therefore in error.

On motion for new trial by defendant. Action of assumpsit to recover for board and services furnished to defendant's testator. Trial was had before the Supreme Judicial Court for the County of Aroostook, February Term, 1929. The jury rendered a verdict for plaintiff assessing damages in the sum of $545.52. A general motion for new trial was filed by the defendant. Motion for new trial granted.

The case sufficiently appears in the opinion.

W. P. Hamilton, for plaintiff.

Francis W. Walsh,

Ransford W. Shaw, for defendant.

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

STURGIS, J. The plaintiff seeks in this action of assumpsit to recover for board and services furnished and rendered to the defendant's testator. The defendant pleaded the general issue, and to an adverse verdict files a general motion.

By Revised Statutes, Chap. 92, Sec. 14, as amended by P. L., 1917, Chap. 133, and by P. L., 1919, Chap. 177, as a condition precedent to the maintenance of her action, the plaintiff is required to present her claim in writing to the defendant or file it in the registry of probate supported by her affidavit or that of some other person cognizant thereof either before or within twelve months after the defendant's qualification as executrix, *Holbrook* v. *Libby*, 113 Me., 390; *Rawson* v. *Knight*, 71 Me., 99; *Eaton* v. *Buswell*, 69 Me., 552.

And while, before the claim is barred by the statute of limitations, presentment or filing may be waived by the personal representative, *Littlefield* v. *Cook*, 112 Me., 551; *Marshall* v. *Perkins*, 72 Me., 343; *Rawson* v. *Knight*, supra, under a plea of the general issue, want of filing or presentment is in issue and failure to prove performance or waiver thereof bars an action by the claimant, *Holbrook* v. *Libby*, supra; *Boothby* v. *Boothby*, 76 Me., 17; *Maine Central Inst.* v. *Haskell*, 71 Me., 490.

The instant action falls within these rules. The case sent forward records no evidence of presentment or filing of the plaintiff's claim nor of waiver of this requirement by the defendant. For this failure of proof, the verdict is set aside.

Motion for new trial granted.

KATHERINE CLANCEY

vs.

CUMBERLAND COUNTY POWER & LIGHT COMPANY.

Cumberland. Opinion August 12, 1929.

STREET RAILWAYS. NEGLIGENCE. RIGHTS AND DUTIES OF PEDESTRIANS. "LAST CLEAR CHANCE" RULE.

A pedestrian is not guilty of negligence as a matter of law in attempting to cross a city street at a place where there is no crossing.

A pedestrian is not bound as a matter of law to look or listen before crossing electric car tracks or, being about to cross a public street, to look or listen for approaching vehicles.

A pedestrian about to cross a street must use the care and prudence of a prudent man under like circumstances having in mind his own safety. The law does not undertake to define the standard or to say how often he must look or precisely how far or when or where.

Failure of a pedestrian about to cross a street or electric car tracks to look or listen for approaching vehicles or electric cars may be strong evidence of negligence.

Electric railroad tracks in a city street are places the crossing of which has elements of danger so that no one should come toward them without senses alert and used or attempt to pass over them without reasonable regard for his own safety. Pedestrians in crossing streets should carefully observe the movements of electric cars.

Conditions as to other traffic may require additional vigilance concerning electric cars.

Mere looking by a pedestrian about to cross a public street or car track is not sufficient. One is bound to see what is obviously to be seen.

The "last clear chance" rule does not apply where the plaintiff's negligence is progressive and actively continues up to the point of collision.

Where a pedestrian approaches an electric car track and looks up at an approaching car and stops, an intent to wait for the car to pass is indicated and the motorman may assume, at all events until the contrary appears, that the pedestrian will continue standing at the side of the track and not attempt to cross in front of the car. The motorman is not bound to anticipate negligence on the part of the pedestrian.

If the pedestrian then steps forward suddenly as the motorman applies the power and is struck by the car, the proximate cause of the collision is the pedestrian's own negligence and not negligence of the motorman.

In the case at bar the only reasonable conclusion the jury could have drawn from the evidence was that the collision between the plaintiff and the car was due, not to any negligence of the motorman but to the negligence of the plaintiff herself; that her own negligence was the proximate cause, and a verdict otherwise could not have been maintained.

On exception by plaintiff. An action of tort for negligence. Hearing was had at the October Term, 1927, of the Supreme Judicial Court. At the conclusion of the evidence the defendant moved the Court that a verdict be directed in its behalf, which motion with certain stipulations was granted by the Court. To this ruling plaintiff seasonably excepted. Exception overruled.

The case fully appears in the opinion.

William B. Mahoney,

Eugene F. Martin, for plaintiff.

Verrill, Hale, Booth & Ives, for defendant.

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

BASSETT, J. An action to recover for personal injuries resulting from the plaintiff's being struck, while crossing the street, by an electric express car of the defendant. At the close of the evidence, the presiding Justice on motion directed a verdict for the defendant with the stipulation that, if the Law Court sustains the exception taken by the plaintiff to the granting of the motion, judgment should be entered for the plaintiff and the case remanded

to the court below for hearing on damages. The case comes up on the exceptions.

The plaintiff, a woman sixty-five years old, at about quarter after four in the afternoon of July 16, a fair day, was crossing Washington Avenue from east to west in the city of Portland between Cumberland Avenue and Oxford Street, which intersect Washington Avenue. Washington Avenue is one of the main thoroughfares leading from Portland to the so-called Gray Road and Atlantic Highway, which are two main routes for traffic in and out of Portland. The avenue is approximately forty-two feet wide and has two lines of trolley tracks in the middle and level with the street. The distance from the easterly curb to the nearest or easterly rail of the easterly and outbound track is fourteen feet. The width of each track is 4.71 feet. The distance between the westerly rail of the outbound and the easterly rail of the inbound track is 4.3 feet. The total distance therefore from the easterly curb to the easterly or nearest rail of the inbound track is approximately twenty-three feet. Washington Avenue from Cumberland Avenue northerly for three-eights of a mile is straight.

The plaintiff, who had lived in the vicinity for years and crossed the street many times, had been making a call at a house on the easterly side of Washington Avenue and two houses northerly from Cumberland Avenue. She walked down the steps, across the sidewalk to the curb, and started straight across the street. There was no crosswalk.

The electric car of the defendant was an express or freight car carrying express for the Atlantic Express Company. It weighed about twenty tons empty, was partially loaded and inbound. It was about twelve feet high and painted a dark color. It had an air-brake and a whistle but no bell. It was being operated by a motorman sixty-five years old with between twenty-nine and thirty years' experience as a motorman. Standing beside him in the front vestibule and on his left, the side nearest the plaintiff, was the messenger of the Express Company.

The plaintiff's eyesight and hearing were, as she testified, as good as ever. She looked both ways as she left the curb, but did not see the electric car then or until it hit her. She saw automobiles coming from her right, the same direction as the car, and passing

on the other or westerly side of the street. She did not see the automobile approaching from her left. Seeing only automobiles on the other side of the street and that they were passing, she started straight across without thereafter stopping or looking in either direction or to see if anything was coming on the car tracks. She was hit by the front of the car on its left side.

The eyewitnesses of the accident were the motorman; the express messenger; the driver of an automobile, which approached the plaintiff from her left, which she did not see and which was stopped a short distance from her to let her pass in front by the driver, who saw her leaving the curb; a man riding in the rear seat of the automobile; and a bystander at the corner of Washington and Cumberland Avenues about thirty-five feet away.

From their testimony, it appeared that the motorman saw the plaintiff who was in plain sight of him, some seventy-five or one hundred feet away, as she was crossing the sidewalk and about to leave the curb. He blew the whistle, applied the brake and slowed the car, which had been traveling about ten miles an hour, so that just before it struck the plaintiff, it was moving very slowly, "barely moving." While the express messenger used the word "stopped," it was clear from his testimony, and the jury could not have properly understood otherwise, that he meant the car was moving very slowly and not that motion had ceased. The plaintiff, as she reached a point either between the rails of the easterly track or between the two tracks, looked up toward the car and stopped. The motorman thereupon loosed the brake and began to build up the power. The plaintiff suddenly started forward. The motorman reversed the power and stopped the car within four feet.

If the jury believed that the plaintiff, as she said, looked both ways before she left the curb and then without further looking or listening kept straight on across the street until struck by the car, they must have concluded that she would not have been struck had she been using due care under the circumstances.

She was not guilty of negligence as a matter of law in attempting to cross the street at the point where she did. *Page* v. *Moulton*, 127 Me., 80. She was not bound as a matter of law to look or listen before she crossed the car tracks, *Marden* v. *Street Railway*, 100 Me., 41; or, being about to cross a public street, to look or

listen for approaching vehicles, *Shaw* v. *Bolton*, 122 Me., 234. But she was bound to exercise a degree of vigilance and caution commensurate with the situation. *Philbrick* v. *A. S. L. Railway*, 107 Me., 429. A pedestrian about to cross a street must use the care and prudence of a prudent man under like circumstances, having in mind his own safety. The law does not undertake further to define the standard. It does not undertake to say "how often he must look or precisely how far or when or from where." *Shaw* v. *Bolton*, supra; *Sturtevant* v. *Ouellette*, 126 Me., 558. Failure to look or listen may be strong evidence of negligence. *Shaw* v. *Bolton*, supra; *Sturtevant* v. *Ouellette*, supra. Electric railroad tracks in a city street are places the crossing of which has elements of danger so that no one should come toward them without senses alert and used, or should attempt to pass over them without reasonable regard for his own safety. *Philbrook* v. *Atlantic Shore Line Railway*, supra; *Blanchette* v. *Railway*, 126 Me., 40, 42. Foot passengers in crossing streets should carefully observe the movements of street cars. *Welch* v. *Street Railway*, 116 Me., 191, 194. The plaintiff was familiar with the place, knew the car tracks were there, and had seen cars passing. Conditions as to other traffic may require additional vigilance concerning electric cars.

Mere looking is not sufficient. One is bound to see what is obviously to be seen. *Blanchette* v. *Railway*, supra. There was no evidence that the car was going at a high rate of speed. All the witnesses except the plaintiff, who knew nothing of the movements of the car, agree that the car was slowing from the time she left the curb until at the contact it was moving very slowly, so that, since within that time the plaintiff walked not more than twenty-three feet, the car must have been near at hand. The two men in the automobile and the bystander, all of whom were looking toward the plaintiff, saw the car. The day was bright. There was nothing to interfere with her vision of the car.

The car itself with its heavy rumble must have made some noise. The driver of the automobile, who was a little farther away from the car than the plaintiff, heard, as did the express messenger, the whistle sounded.

That the plaintiff on her own story, without looking after she left the curb, walked straight on to the car tracks neither seeing

nor hearing the car, shows such want of attention and care under the circumstances that the only reasonable conclusion which the jury could have drawn was that, had she been using the care and prudence of a prudent person under like circumstances, having in mind her own safety, her collision with the car would not have occurred. If negligence of the motorman be assumed, she must have been contributorily negligent.

Nor would the "last clear chance" rule apply, because the plaintiff's negligence would have been progressive and actively continuing up to the point of collision. *Bechard* v. *Railway Company*, 122 Me., 236, 238.

If, on the other hand, the testimony of all the other witnesses but the plaintiff had been accepted by the jury, and it does not seem that they could reasonably have come to any other conclusion, the plaintiff stopped at a point either between the rails of the nearest or outbound track or between the two tracks, in either event not over eight feet in distance from the car, and looked toward it. Up to her so doing, there was no evidence that the motorman had failed to use due care. She had been on the sidewalk in plain sight. The motorman saw her and that she intended to cross the street. He at once applied the brakes, cut off the power so that the car was "coasting," and slowed the car until it barely moved.

The place was not a stopping place for cars or a regular street crossing or a street junction. The car was not a passenger but a freight car. That the plaintiff was approaching the track in front of the car did not of itself oblige the motorman to stop the car; nor, on the other hand, did the car have the right of way. The track in front of the car was a place of danger. The plaintiff's stopping where she did was an indication of her intent to wait for the car to pass. The motorman therefore might assume, at all events until the contrary appeared, that she would continue standing at the side of the track and not attempt to cross in front of the car. He was not bound to anticipate negligence on her part. *Dill* v. *Railway Co.*, 126 Me., 3.

The motorman, not being bound under the circumstances to stop the car, let on the power in order to proceed. Just as he did so, the plaintiff, putting her head down, made a quick running step forward. The motorman reversed the power, the most effective method

to stop the car quickly, and did stop it within four feet.

We think that the only reasonable conclusion which the jury could have drawn from the evidence was that the collision between the plaintiff and the car was due, not to any negligence of the motorman, but to the negligence of the plaintiff herself; that her own negligence was the proximate cause, *Welch* v. *Street Railway*, supra; and that a verdict otherwise could not have been maintained.

When upon the evidence presented a verdict for the plaintiff can not be sustained, it is the duty of the presiding Justice to direct a verdict for the defendant. *Brown* v. *Railroad Company*, 127 Me., 387, 393.

Exception overruled.

HYMAN SIMANSKY *vs.* ETHEL CLARK.

Cumberland. Opinion August 13, 1929.

BILLS AND NOTES. RIGHTS OF PLEDGOR AND PLEDGEE. ACTIONS.

An indorsee of a promissory note, who has pledged the note to a bank as collateral security for another and smaller note given by him, can recover in his own name in a suit on the pledged note, brought with the knowledge and consent of the pledgee, against an indorser of that note, even though the suit is brought while the note itself is in the physical possession of the pledgee bank, when it is shown that the note on which suit was brought was delivered to the plaintiff indorsee at or before the time of the trial.

The mere pledging of a promissory note or other evidence of indebtedness as collateral security for the payment of a debt does not divest the pledgor of title and vest title in the pledgee. The general property and the title still remains in the pledgor.

In the case at bar whatever special rights as holder of the collateral the bank may have had was waived by it by reason of its consent to the suit.

On exceptions by defendant. An action of assumpsit brought by indorsee of a negotiable note against an indorser thereof. Trial was had in the Superior Court for the County of Cumberland before the presiding Judge without jury. Right to exceptions in matters of law was reserved by both parties. To the refusal of the

presiding Judge to make certain rulings, and to the rulings made, the defendant seasonably excepted. Verdict was for the plaintiff. Exceptions overruled. Judgment affirmed. Interest to be added from date of judgment.

The case sufficiently appears in the opinion.

Harry S. Judelshon, for plaintiff.

Samuel L. Bates,

John J. Devine, for defendant.

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

FARRINGTON, J. The case comes up on exceptions to certain rulings of the presiding Justice which appear later.

This was a suit brought in his own name by the plaintiff as indorsee against the defendant, an indorser before delivery of a three year promissory note for twenty-nine hundred dollars ($2,900.00) (on which there was due twenty-five hundred dollars [$2,500.00] at time of suit), given by Jennie Weinstein, September 16, 1925, to Joseph Brenner and secured by a mortgage of real estate duly recorded. After its delivery the payee, Brenner, for a valuable consideration sold and delivered the note to the plaintiff together with an assignment of the mortgage given as security which assignment was duly recorded.

Before bringing this suit, the plaintiff, waiving demand, notice and protest, on August 20, 1928, indorsed the note and made an assignment of the mortgage to the Chapman National Bank and delivered them as collateral security for a five hundred dollar ($500.00) loan to him, the assignment to the bank being duly recorded.

At the maturity of the note, at the request of the attorney for the plaintiff, an attorney for the Bank took with him the note and mortgage, a re-assignment of the mortgage from the Bank to the plaintiff and a discharge by the plaintiff of the mortgage and made a demand upon the maker of the note and also upon the defendant for payment. The note was not paid, upon presentation, and the discharge of the mortgage was not delivered to the defendant and the re-assignment of the mortgage from the Bank to the plaintiff

was not delivered to the plaintiff at that time and not until some time after this suit was brought and after the plaintiff had obtained a release of the collateral of the twenty-five hundred dollar ($2,500.00) note by giving other security in its stead to cover his five hundred dollar ($500.00) loan at the Bank. The note and reassignment were delivered to the plaintiff, however, before this suit in question came to trial and were offered and admitted as evidence in the case.

After the presentment and demand for payment was made on the maker and on defendant and after their failure to pay, suit was brought by the plaintiff on the twenty-five hundred dollar ($2,500.00) note to recover of the defendant the amount due thereon. The suit was brought September 18, 1928. At this time the note with the mortgage securing it were admittedly not in the physical possession of the plaintiff but in the possession of the Bank.

The case was tried at the January Term, 1929, of the Cumberland County Superior Court before the Justice presiding at that court and without a jury, with reservation of the right to exception in matters of law.

When the evidence was closed the attorney for the defendant submitted to the presiding Justice in writing certain points of law and requested the following rulings:

"(1) In whom was the legal title to the note at the time this suit was instituted?"

"(2) Had the plaintiff any legal right to begin this suit while the Bank still had the legal title and full interest in said note, and said interest was fortified by the Bank's possession of said note, backed up by a written assignment of said note from the plaintiff, said assignment being under seal and recorded?"

The findings and rulings of the Justice thereon were:

1. "The court finds that the legal title to the note at the time this suit was instituted was in the plaintiff."

2. "The court finds, as stated in answer to request number one, that the legal title to the note was not in the Bank at the time of beginning suit, and also finds that upon the facts found the plaintiff had sufficient interest in the note to bring suit upon the same."

Judgment was accordingly rendered for the plaintiff for twenty-

five hundred dollars ($2,500.00) and interest at seven per cent from March 16, 1928, to date.

To these rulings the defendant seasonably took exceptions which were allowed.

The contention of the defendant is that at the time the suit was begun title to the note was in the Chapman National Bank and not in the plaintiff and that the plaintiff had no legal right to bring this suit in his own name. No other issues are raised in the case.

The plaintiff claims he had a right to bring suit in his own name, because he had legal title to the note, and that he also had authority of the Bank to bring suit, and that he had a right to bring suit as general owner of the note provided he produced the note at the trial, which he did.

City Electric Street Ry. Co. v. *First National Bank of Little Rock*, 65 Ark., 543 (47 S. W., 855), was a case in which a receiver was allowed to sue and recover on certain notes which were, at the commencement of suit, in the hands of a certain bank as collateral security for a debt due to the bank. After suit was begun but before the decree was rendered the notes were returned to the receiver, the plaintiff in the case, and were filed in court. The Court said, "This court held in the case of *Key* v. *Fielding*, 32 Ark., 56, that where commercial paper is assigned as collateral, the assignee takes it as trustee of an express trust. Such a trustee may sue in his own name, but the assignor still has an interest in the paper assigned, and he is not an improper party plaintiff in a suit on the paper."

Hewett v. *Williams* (La.), 17 S., 269, was a case where recovery was allowed in his own name by a pledgor on notes pledged to and in the hands of the pledgee when suit was instituted. The Court said, "If the notes are produced at the time of the trial and tendered to defendant, he has certainly no cause to complain, as his payment to the holder could be a valid extinguishment of the note. The general rule is that the pledgee is the *prima facie* owner of the pledged note, but this does not prevent him from authorizing the pledgor, *the real owner of the note*, to institute suit on it."

The case of *Fisher* v. *Bradford*, 7 Me., 28, is in point. On March 5, 1828, defendant gave a note to one Rice who induced the plaintiff to guarantee its payment. In September following Rice placed the

note in a bank as collateral to a loan to him. About January 1, 1829, plaintiff asked Rice if he would consider the note as his and look to him for it. Rice consented and agreed to help in collecting the note. On January 10, 1829, plaintiff, by authority of Rice, sued defendant, who contended that the bank having possession of the note when it was sued could alone bring or authorize the suit. On March 7, 1829, the note was withdrawn from the bank by Rice and was paid and taken up by the plaintiff, Rice at that time writing the words "without recourse to" over his own name which was on the note when it was turned over to the bank. The jury found for the plaintiff. In the Law Court in pronouncing judgment on the verdict, Weston, J., said, "But it is contended that the Globe Bank, being possessed of the note when sued, as collateral security, could alone bring or authorize the suit. They had a special property, which, accompanied as it was by possession of the instrument, would have justified and enabled them to sue and recover thereon. But the general owner might sue, although liable to be defeated in his suit, if the bank, not being otherwise satisfied, thought proper to retain the note to their own use. And so might any other person, authorized to sue by the general owner, be subject to the same contingency. The arrangement between the bank and the payee, affords no defence to the maker. The pledge, having been given up, is, as to him, as if it had never existed. He is not liable to the bank; and when he has paid and satisfied the plaintiff, he is completely discharged and exonerated from the note; and no one, who is or ever was interested in it, can have any cause of complaint."

In *Ticonic National Bank* v. *Bagley*, 68 Me., 249, at page 250, the Court says: "It has long been settled in this state that the promisor upon negotiable paper can not avoid judgment against him in a suit upon his broken contract merely upon the ground that the person or party in whose name the suit is brought or prosecuted has no interest in the enforcement of the promise." And again, on page 250, "Our decisions fully authorize the maintenance of a suit for the benefit of the owner and by his order in the name of any person competent to give the debtor a discharge who consents to the use of his name as plaintiff in the action; and this even in cases where the owner or his agent has instituted the suit in

the name of a nominal plaintiff without first getting his consent, provided the party whose name is thus used ratifies the act."

This being so, it would be contrary to the reasoning of the settled law of this state to hold that an indorsee who has delivered to a bank, as collateral security only, a note five times greater in amount than the debt so secured could not sue the note in his own name and recover from the maker, or an indorser, when such suit is brought *with* the knowledge and consent of the bank holding the note, and where the note in question is delivered to the plaintiff before trial, as in the instant case. The Chapman National Bank undoubtedly could have maintained an action on the note in its own name, had there been need to protect itself or had it seen fit so to do, but it waived any rights that it had and evidence is convincing that consent to sue the note was given by it to the plaintiff, and that it had full knowledge of every step leading up to the suit.

The case of *Rosenberg* v. *Cohen*, 127 Me., 260, was a real action against a defendant in possession holding record title, subject to a mortgage to the plaintiffs in the case. Prior to bringing action the plaintiffs assigned their mortgage to a bank as collateral security for a loan. At the time of the action the assignment still stood of record and the loan was unpaid. The plaintiffs foreclosed the mortgage by publication and sought to take possession. The defendants contended that the plaintiffs were not the proper parties to maintain the action; that it must be brought by the bank or in the name of the Bank, with the record remaining as it did.

The case did not disclose whether the mortgage was of greater or less value than the note for which the collateral security was given and there was nothing to show whether the bank "objected to, consented to or knew of the foreclosure by the plaintiffs." The Court in the case of *Rosenberg* v. *Cohen*, supra, said, "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 entitles him to bring an action for foreclosure of the mortgage." (See cases cited in following paragraphs to same effect.) The Court goes on to say on page 263, "It would appear, then, that a mortgagee who has assigned his mortgage and the note secured thereby to a third party as collateral, may main-

tain 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, . . ." On page 263, the Court states, "The agreed facts in this case do not place the plaintiffs in either of these positions. We can not assume that consent of the bank, nor that the amount of the collateral note was less than the amount of the original mortgage." Under these circumstances judgment was rendered for the defendant.

The reasoning of the court in the above case applies equally well to the present case where the rights of a pledgor are to be determined instead of those of the assignor of a mortgage, to all intents and purposes the payee of a note on the one hand and the original mortgagee on the other. The present case, however, shows the presence of facts which were lacking in the case of *Rosenberg* v. *Cohen*, supra. In the present case the loan for which the twenty-five hundred dollar ($2,500.00) note was pledged as collateral was only five hundred dollars ($500.00), and, as indicated by the findings of fact and rulings and decision of the Justice below, there is abundant evidence in the case to show that the Chapman National Bank had knowledge of and gave consent to the bringing of the suit by the plaintiff in his own name.

It is well recognized law that the general property in the thing pledged remains in the pledgor, and only a special property vests in the pledgee. While he has the right to retain the property pledged until the debt for which it was pledged is fully satisfied or has been otherwise discharged the pledgee acquires no interest in the property, except as security for his debt . . ." 21 R. C. L., Sec. 15.

By the endorsement of the note in this case and its delivery to the Chapman National Bank for the five hundred dollar ($500.00) loan to the plaintiff, the Bank thereby acquired no interest in the note except as security for the plaintiff's debt to it.

"The question seems to have been well settled that the mere pledging of a promissory note or other evidence of indebtedness as collateral security for the payment of a debt does not divest the pledgor of title and vest title in the pledgee." *Miller* v. *Horton*

(Oklahoma), 170 Pac., 509; *Averill Machinery Co.* v. *Bain*, 50 Mont., 512, 148 Pac., 334; *Garlick* v. *James*, 12 John (N. Y.), 146, 7 Am. Dec., 294; *Trust Co.* v. *Rigdon*, 93 Ill., 458; *Halliday* v. *Bank*, 112 Ga., 461, 37 S. E., 721; Note 49, Am. Dec., 731.

The general property and title still remained in the plaintiff and whatever special rights as holder of the collateral the Bank may have had were waived by it by reason of its consent to the suit.

The defendant is in no way injured by a recovery on the part of the plaintiff. The Bank, having voluntarily surrendered the note to the plaintiff before judgment, would be estopped from bringing suit itself. *St. Paul National Bank* v. *Cannon*, 48 N. W., 526.

The findings of the Justice below disclose no error.

Exceptions overruled. Judgment affirmed. Interest to be added from date of said judgment.

DANIEL WEBB *vs.* PHILIP BRANNEN.

Aroostook. Opinion August 13, 1929.

BILLS AND NOTES. ACTIONS. MONEY HAD AND RECEIVED.

An endorser who pays a judgment against himself by reason of his endorsement of certain notes, secured with other notes by a mortgage of real estate, the payment of which mortgage and all notes is assumed by a subsequent grantee of the real estate, can, in an action for money had and received, recover from the purchaser of said real estate from said subsequent grantee, to the extent of the amount still due from said purchaser on the purchase price, together with interest from the time the amount became due.

The action for money had and received is a liberal action and may be as comprehensive as a bill in equity. The action may be supported without privity between the parties other than created by law. The law may create both the privity and the promise. When one person has in his possession money which in equity and in good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs and in such a case an action for money had and received may be maintained.

In the case at bar the question as to what was the agreed purchase price was one of fact for the jury. The jury found that price to be $2,600, which left the

sum of $600 still due from the purchaser to his grantor, referred to in this case as the subsequent grantee, and for which the purchaser, the defendant in this action, was accountable to the plaintiff, who as endorser, paid the judgment of $786.83, recovered against himself on the notes which he had signed, which notes were included among those which the subsequent grantee agreed to pay.

The defendant was accountable for that which in equity and good conscience belongs to the plaintiff but not to more. This sum amounted to $672.00.

On motion for new trial by defendant. An action for money had and received, brought by plaintiff endorser, to recover money paid by him on a judgment against him had by reason of his endorsement of certain notes secured by a mortgage of real estate, which mortgage and notes were assumed by defendant a subsequent grantee of the real estate. After the jury had rendered a verdict for the plaintiff in the sum of $786.63, a general motion for new trial was filed by defendant. Motion overruled if plaintiff within thirty days from the filing of the mandate remits all of the verdict in excess of $672.20.

The case fully appears in the opinion.

Ransford W. Shaw, for plaintiff.

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

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

FARRINGTON, J. This case comes up on general motion for a new trial, after verdict for the plaintiff.

On January 28, 1920, one Wilbur C. Hersey, as security for a loan, gave the Houlton Savings Bank a mortgage for sixteen hundred dollars ($1,600.00) on a farm purchased by him. Seven notes were given. On the four notes first to become due, aggregating six hundred dollars ($600.00), Hersey procured as security, additional to the mortgage, the signatures of William Gerrish, Elmer Hersey, and Daniel Webb, the plaintiff.

Some time in 1921, Hersey gave other mortgages to parties by the name of Tarbell amounting to six hundred seventy-five dollars ($675.00).

On May 1, 1922, Hersey sold the farm for twenty-eight hundred dollars ($2,800.00) to one George Sanders, his father-in-law, who,

as part of the purchase price, was to pay the outstanding mortgages.

Later Sanders had talk with Phillip Brannen, the defendant, which finally resulted in a sale of the farm to the defendant. The deed which was dated April 20, 1927, executed April 21, 1927, and recorded April 22, 1927, was taken in the name of the defendant's son, Alfred P. Brannen.

The printed evidence in the case discloses a sharp conflict between the testimony of Sanders and that of the defendant in regard to the purchase price of the farm.

Sanders testified that the price finally agreed upon was twenty-six hundred dollars ($2,600.00), which was sufficient to take care of the face of the Houlton Savings Bank mortgage (sixteen hundred dollars [$1,600.00]), (which Sanders testified was the amount he understood was due on the principal), the Tarbell notes amounting to six hundred seventy-five dollars ($675.00), and the balance of three hundred twenty-five dollars ($325.00) to be paid to Sanders. "The interest, whatever it was" at the bank was to be paid by the defendant. Sanders testified that when the deed was delivered he had no knowledge that any of the Houlton Savings Bank notes had been paid in reduction of the sixteen hundred dollar ($1,600.00) mortgage.

The defendant testified that Sanders first talked with him about the farm in 1926 and asked twenty-eight hundred dollars ($2,800.00), and that in January, 1927, there was further talk and that Sanders still asked twenty-eight hundred dollars ($2,800.00); that in March, 1927, Sanders talked twenty-six hundred dollars ($2,600.00); that Sanders said the Tarbells had a mortgage and that the Houlton Savings Bank had one; that Sanders asked him if he was in Houlton to go to the Bank and to ask about it; that he reported to Sanders that the bank mortgage was one thousand dollars ($1,000.00) and interest; that Sanders wanted him to make an offer and that he said to Sanders, "I'll give you two thousand dollars" and "I'll take a chance on the interest" (meaning bank interest); that on April 19, 1927, Sanders said to him, "I am going to take you up on your offer," and that he asked if he meant defendant was to pay the bank one thousand dollars ($1,000.00) and interest and pay him (Sanders) one thousand

dollars ($1,000.00), and that Sanders replied, "Yes"; that on April 20, 1927, defendant said he would take the farm if the title was all right and that he had an examination of the records made but only as far as they related to any possible attachment by Webb, the plaintiff; that the deed was prepared under his direction and executed and delivered on April 21, 1927.

From the evidence it appears that the Tarbell notes of six hundred seventy-five dollars ($675.00) were paid and three hundred twenty-five dollars ($325.00) paid to Sanders, and apparently payment of the mortgage to the bank was assumed by the defendant.

Prior to this transaction between Sanders and defendant, the Houlton Savings Bank had sued Webb, the plaintiff, as indorser of the first four notes, amounting to six hundred dollars ($600.00), given by Hersey and hereinbefore referred to, as forming part of the original sixteen hundred dollar ($1,600.00) loan, the other two indorsers having died, and judgment for seven hundred eighty-six dollars and eighty-three cents ($786.83) was recovered against Webb on the third Tuesday of November, 1926, and was paid by him January 13, 1928. Webb testified that he did not before the sale of the farm to defendant tell either Hersey or Sanders that he had paid the four notes represented in the judgment which he settled.

The plaintiff learned from Wilbur Hersey of the sale by Sanders to defendant and went to defendant's house and found him away and left a message for defendant to come and see him. The defendant came April 22, 1927, and plaintiff told him about paying the notes. The defendant told him he owed him nothing, that he did not promise to pay him anything.

On November 24, 1928, the plaintiff sued the defendant, the account annexed being,

"1927

Apr. 20	Philip Brannen to Daniel Webb, Dr.	
	To cash paid to you by George C. Sanders for me at the time of the sale of the farm	$718.57
	To interest on same to date	68.26
		$786.83"

There was a money count with specifications claiming to show that defendant received from Sanders in April, 1927, money which

in equity and good conscience belonged to the plaintiff, and a count for money had and received founded on the same specifications. At the April Term, 1929, of the Aroostook County Supreme Judicial Court the jury returned a verdict for the plaintiff for seven hundred eighty-six dollars and eighty-three cents ($786.83), and defendant filed a general motion for new trial on the usual grounds.

The jury heard the case, saw the witnesses on the stand and heard their testimony, heard the testimony of Sanders and his witnesses as to the purchase price of the farm and the testimony of the defendant, uncorroborated by any other witnesses, as to the price.

Their verdict could have resulted only on the basis of their conviction, under the instructions of the court, that the price agreed upon was twenty-six hundred dollars ($2,600.00), as testified by Sanders and the other witnesses for the plaintiff, the interest "whatever it was" to be paid by the defendant as incidental. A careful examination of the evidence in the case fails to disclose anything that would warrant disturbing that finding of fact. The question as to what was the agreed price was one upon which fair minded and reasonable men might differ, and was, for that reason, a question of fact for the jury. The plaintiff, under the decisions and well settled law of this and other states, is entitled to recover and the jury has so found.

"An action for money had and received is a most liberal action, and may be as comprehensive as a bill in equity. It was held in the case cited (referring to 17 Mass., 575) that the action may be supported without privity between the parties, other than created by law, and that the law may create both the privity and the promise. The broad ground is there taken that whenever one man has in his hands money which he ought to pay over to another, he is liable, although he has never seen or heard of the party who has the right to it. This doctrine applies to all cases when no rule of policy or strict law intervenes to prevent it." *Keene* v. *Sage*, 75 Me., 138; *Lewis* v. *Sawyer*, 44 Me., 332.

"It should be observed at the outset that the action of assumpsit for money had and received is comprehensive in its reach and scope. Though the form of the procedure is in law it is equitable in spirit and purpose and the substantial justice which it promotes renders

it favored of the courts. 'It is a familiar principle,' says the Court in *Pease* v. *Bamford*, 96 Me., 23, 'that when one person has in his possession money which in equity and good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs, and in such a case an action for money had and received may be maintained.'" *Dresser* v. *Kronberg*, 108 Me., 423.

To the same effect are *Bither* v. *Packard*, 115 Me., 306; *Mayo* v. *Purington*, 113 Me., 452; *Carey* v. *Penney*, 127 Me., 304.

So numerous and varied have been the instances in which the courts have applied this doctrine that a further citation of authorities seems unnecessary.

The amount of the verdict, seven hundred eighty-six dollars and eighty-three cents ($786.83) was made up of seven hundred eighteen dollars and fifty-seven cents ($718.57), the amount of the execution which the plaintiff, Webb, paid to the Houlton Savings Bank on the four notes which he indorsed, with an interest item of sixty-eight dollars and twenty-six cents ($68.26).

While the defendant in this action is accountable for that which in equity and good conscience belongs to the plaintiff, the plaintiff is not entitled to more. The jury clearly found the agreed price of the farm was twenty-six hundred dollars ($2,600.00), whatever accrued interest there was to be paid by defendant. There is therefore still due from the defendant the sum of six hundred dollars ($600.00) which belongs in equity and good conscience to the plaintiff, together with seventy-two dollars and twenty cents ($72.20), interest to date of verdict on said six hundred dollars ($600.00) from April 21, 1927, the day on which the deed was delivered by Sanders to defendant and on which the balance of six hundred dollars ($600.00) should have been paid by defendant, that being the first time the money may be regarded in contemplation of law as in defendant's hands. *Fletcher* v. *Belfast*, 77 Me., 334.

The entry will therefore be,

Motion overruled, if plaintiff within thirty days from the filing of this mandate remits all of the verdict in excess of six hundred seventy-two dollars and twenty cents ($672.20); *otherwise motion sustained and new trial granted.*

FRED C. PEASE, PETITIONER FOR HABEAS CORPUS

vs.

THOMAS L. FOULKES, SHERIFF OF PISCATAQUIS COUNTY.

Piscataquis. Opinion August 13, 1929.

INTOXICATING LIQUORS. CONSTRUCTION OF STATUTES. HABEAS CORPUS. P. L., 1858, CHAP. 33. P. L., 1867, CHAP. 130. P. L., 1921, CHAP. 62. P. L., 1923, CHAP. 162. P. L., 1923, CHAP. 51. R. S., 1916, CHAP. 127, SEC. 40.

In interpreting and construing statutes the first consideration is to ascertain and give effect to the intention of the Legislature, but when the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction, and the statute must be given its plain and obvious meaning.

The natural and most obvious import of the language, without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation should govern in the construction of statutes.

In the case at bar the petitioner was charged, not with manufacturing liquors in violation of law, nor with keeping drinking-houses and tippling-shops, nor being a common seller of intoxicating liquors, in which cases prosecution must, under the plain meaning of the statute, be by indictment, but simply with the unlawful possession of mash fit for distillation, prosecution for which is not confined to indictment. The Municipal Court, therefore, had original jurisdiction on the complaint, and the sentence and commitment was with full authority of law, and the writ of habeas corpus should be denied.

On report. A petition for *habeas corpus.* The petitioner was arrested on a complaint and warrant issued by the Piscataquis Municipal Court, charging him with unlawful possession of ten gallons of mash fit for distillation. He was found guilty and sentenced and on appeal pleaded guilty and was sentenced and committed. The petition was on the ground that the proceedings under the statute should have been by indictment and not by complaint Writ denied.

The case fully appears in the opinion.

J. S. Williams, for petitioner.

Jerome B. Clark, County Attorney, for State.

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

FARRINGTON, J. On February 12, 1929, the petitioner, Fred C. Pease, was arrested on a complaint and warrant issued against him by the Piscataquis Municipal Court, charging him with unlawful possession of ten gallons of mash fit for distillation, and on the same date he was found guilty and was sentenced by the Judge of that Court to a term of six months in jail, and to payment of a fine of five hundred dollars and costs, and in default of payment to serve an additional six months' imprisonment. From this sentence the petitioner appealed and at the March Term of the Supreme Judicial Court for Piscataquis County he pleaded guilty to the offense as set forth in the complaint, and was sentenced by the Presiding Justice on March 21, 1929, to a term of four months in jail and to the payment of the same fine, with the same additional sentence in case of default as in the Municipal Court, and on March 23, 1929, he was committed to the county jail.

On May 1, 1929, he brought his petition for *habeas corpus*, and on May 28, 1929, the Justice before whom the petition was brought, at the request of parties, reserved the case for the Law Court to determine whether upon the foregoing statement of facts, the writ of *habeas corpus* should issue or be denied.

The contention of the petitioner for the writ of *habeas corpus* is that proceedings should have been by indictment and that without an indictment there could be no legal conviction or sentence.

In 1858 (Public Laws, Chap. 33), the Legislature of Maine passed "An Act for the Suppression of drinking houses and tippling shops" which repealed "An Act to restrain and regulate the sale of intoxicating liquors and to prohibit and suppress drinking houses and tippling shops, approved April 7, 1856," and all other inconsistent acts and parts of acts. The Act approved April 7, 1856 (Sec. 26), provided, "Justices of the Peace, and Justices of Municipal and police courts shall have jurisdiction by complaint, of all prosecutions under this act where the penalty provided for the offense can not exceed twenty-dollars, and may try the same and pass sentence thereon. But when the punishment may be by fine exceeding twenty dollars, or by imprisonment, the prosecution

shall be by indictment, and the magistrate aforesaid shall have power upon complaint, in such cases, to examine and bind over, as in other cases of offenses which are subject to indictment."

Sec. 23 of this 1858 repealing law is as follows:

"In matters not otherwise provided for, except prosecutions against common sellers and those for offenses described in the third and tenth sections of this act, Judges of Municipal Courts and police courts, and Justices of the Peace, having jurisdiction in other criminal matters in the places where they reside, shall have jurisdiction by complaint, original and concurrent with the Supreme Judicial Court, of all prosecutions under this Act."

The "third" section referred to in the preceding paragraph provided, on failure to give certain bonds, certain penalties against a person selling within the state any intoxicating liquors manufactured by him within the state, and need not be considered in this case.

The "tenth" section referred to in said paragraph covered drinking houses and tippling shops.

Sec. 2 of the 1858 repealing law provided that "no person shall manufacture any intoxicating liquor, for unlawful sale," and also "Any manufacturer of intoxicating liquors shall be allowed to sell intoxicating liquors manufactured by him within this state, to municipal officers authorized by the act to purchase the same;". There were provisions as to bond.

Under these conditions the Legislature of 1867 (Public Laws, Chap. 130), amended Chap. 33 of the Public Laws of 1858 and among other things provided that the second section of the 1858 Act "shall not authorize the manufacture for sale, of any intoxicating liquors except pure rum and alcohol. The manufacture for sale, of all other kinds of intoxicating liquors, except cider, is hereby prohibited." With knowledge of this change in regard to manufacture, and with the keepers of drinking houses and tippling shops, and the common sellers also in mind, and with knowledge that the 1858 repealing act had greatly enlarged the jurisdiction of municipal and police court judges, the same Legislature (Public Laws, Chap. 130, Sec. 6) provided as follows:

"All prosecutions against persons for manufacturing liquors in violation of law, for keeping drinking houses and tippling shops,

and for being common sellers of intoxicating liquors, shall be by indictment; and in all other prosecutions under this Act, and the Act aforesaid to which this is additional, Judges of the municipal and police courts, Justices of the Peace, and Trial Justices in their respective counties, shall have jurisdiction, by complaint, original and concurrent with the Supreme Judicial Court. All prosecutions in the Supreme Judicial Court shall be by indictment.**"

From 1867, including the Revision of 1916 and to date, there has been no change in the essential language of these statutory provisions as to prosecutions which shall be by indictment, now found in Chap. 127, Revised Statutes, Sec. 40, as amended.

The Legislature of 1921 (Chap. 62), amended Sec. 17 of Chap. 127, Revised Statutes, which formerly read, "Whoever manufactures for sale any intoxicating liquor, except cider, and whoever sells any intoxicating liquor manufactured by him in this state, except cider, shall be imprisoned for two months and fined one thousand dollars." to provide that "whoever manufactures or attempts to manufacture any intoxicating liquors except cider, and whoever has in his possession any wort or mash fit for distillation or for the production of distilled spirits, or has in his possession any worm, still or other device for the purpose of manufacturing intoxicating liquors, shall be imprisoned for two months and fined one thousand dollars; and said wort, mash, worm, still or other device shall be seized by any officer having authority to seize intoxicating liquors and shall be declared forfeited by the Court *or magistrate having cognizance of the case,* and ordered destroyed."

The language of this amendment suggests that it was clearly in the minds of its framers that, as to the new offenses included, all prosecutions under that section were not to be by indictment, as is evidenced by the reference as to "magistrates having cognizance of the case."

The Legislature of 1923 (Chap. 162) added another amendment to Sec. 17 but made no changes except as to fine and term of imprisonment and in adding certain provisions as to use of alcohol in manufacture of flavoring extracts.

Sec. 40 of Chap. 127, Revised Statutes, was amended in 1923 (Chap. 51) to make provision in regard to the penal sum of a recognizance, but no change was made in the language relating to

what prosecutions should be by indictment, and the essential provisions are as follows:

"Prosecutions for manufacturing liquors in violation of law, for keeping drinking-houses and tippling-shops, and for being common sellers of intoxicating liquors, shall be by indictment; but in all other prosecutions under this chapter, except when otherwise expressly provided, judges of municipal and police courts and trial justices have by complaint, jurisdiction, original and concurrent with the supreme judicial and superior courts. All prosecutions in the supreme judicial and superior courts shall be by indictment."

Thus the same Legislature of 1923, which passed the last amendment to Sec. 17, also made the last amendment to Sec. 40, both of which amendments are noted above. If it had been in the Legislative mind that prosecutions for the new offenses created by the amendment to Sec. 17 should be by indictment, it is reasonable to suppose that Sec. 40 would have been amended accordingly. The fact that no such amendment was made, coupled with the language already referred to in the amendment of Sec. 17, "*or magistrate* having cognizance of the case" compels the conclusion that while the new offenses were included in the section relating to the manufacture of intoxicating liquors, and while they may be regarded as related to and connected with the manufacture of intoxicating liquors, they nevertheless constitute separate and distinct offenses, just as the manufacturing or attempting to manufacture are two separate and distinct offenses. Sec. 40 refers to "Prosecutions *for manufacturing* liquors" and to no other offense under the amended Sec. 17.

The petitioner was not charged with manufacturing liquors in violation of law, nor with keeping drinking houses and tippling shops, nor with being a common seller of intoxicating liquors, in all of which cases prosecutions must, under the plain meaning of the Statute, be by indictment.

The offense with which he was charged was that he "unlawfully did have in his possession a certain quantity of mash fit for distillation**."

In interpreting and construing statutes the first consideration is to ascertain and give effect to the intention of the Legislature, but when the language of a Statute is plain and unambiguous and

conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction, and the statute must be given its plain and obvious meaning. *State* v. *Frederickson*, 101 Me., 37; In re Bergeron, 220 Mass., 472.

The current of authority at the present day is in favor of reading Statutes according to the natural and most obvious import of the language without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation. (21 R. C. L., Sec. 217 at page 962.)

The natural and reasonable construction of Sec. 40 of Chap. 127, Revised Statutes, as amended, leads to but one conclusion, that it was the clear intent that prosecution by indictment should be required only in the cases clearly and specifically set out, and that, except when otherwise expressly provided, Judges of Municipal and Police Courts and trial justices should by complaint have jurisdiction, original and concurrent with the Supreme Judicial and Superior Courts.

The plain and obvious meaning of Sec. 40 leads to the same conclusion. As the problems of the prohibitory law increased amendments were passed which added new crimes and new penalties but at no time does there appear any purpose or intent or any language which could be fairly construed to add to the list of those in which prosecution should be by indictment.

There being no express provision otherwise, the Piscataquis Municipal Court had original jurisdiction on the complaint in this case over the offense with which the petitioner was charged, and his sentence and commitment was with full authority of law. The writ of *Habeas Corpus* should be denied.

Writ denied.

ELDORE DEMERITT'S CASE.

Penobscot. Opinion August 15, 1929.

WORKMEN'S COMPENSATION ACT. DEPENDENCY UNDER SEC. 12 DEFINED.

In cases under the Workmen's Compensation Act in the absence of an answer disputing material facts alleged in or disclosed by the petition, such facts may be treated as admitted.

The dependency necessary to entitle one to compensation under the provisions of Sec. 12 *of the Workmen's Compensation Act does not require that the claimant shall be a member of the employee's family or next of kin fully or partially dependent upon the employee for support at the time of the injury as provided in paragraph eight of Sec.* 1 *of the Act, but does require that the petitioner be a child of the employee physically and mentally incapacitated from earning and dependent upon the widow at the time of her death.*

In the case at bar there was sufficient competent evidence to support the finding of the Commissioner that the petitioner was physically incapacitated from earning and dependent upon the widow at the time of her death and hence entitled to compensation under the provisions of Sec. 12 of the Act.

On appeal from an affirming decree awarding compensation under the Workmen's Compensation Act. A petition by the daughter as sole dependent of the deceased dependent widow of Ernest L. DeMeritt. The sole question was whether petitioner was a dependent within the meaning of the statute. Appeal dismissed with costs. Decree below affirmed.

The case fully appears in the opinion.

Gordon F. Gallert, for petitioner.

Franklin Fisher, for respondent.

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

BASSETT, J. Appeal from the decree of a single justice rendered in accordance with the decision of the Associate Legal Member of the Industrial Accident Commission granting compensation to the

daughter, as sole dependent, of the deceased dependent widow of Ernest L. DeMeritt.

DeMeritt, while working as a foreman in the employ of the State Highway Commission, was killed on October 29, 1925. An agreement was made with his widow as a dependent for the payment of weekly compensation of $15.38 under Sec. 12 of the Workmen's Compensation Act. (Public Laws, 1919, Chap. 238, as amended by Public Laws, 1921, Chap. 222). Compensation was paid to her until her death, August 22, 1927.

The petitioner, daughter of DeMeritt and twenty-seven years of age at the mother's death, on December 24, 1927, brought this petition alleging the employment, accident and death of the employee and that she was his daughter and praying for an award of compensation as his dependent.

On February 2, 1928, an answer was filed, admitting the employment, accident and death and that compensation was paid to the widow as a dependent within the meaning of the act, but denying that the petitioner was a dependent of DeMeritt.

A hearing was held before the Associate Legal Member on November 14, 1928, at the beginning of which, before evidence was introduced, by agreement the allegation of the relationship of the petitioner to DeMeritt was stricken out and replaced by an allegation that compensation had been paid to the widow as dependent until her death and a new allegation added that the petitioner was daughter of the widow and was dependent upon her on August 22, 1927, the date of her death.

Section 12 of the Act provides:

> "Sec. 12. Employers Liability for Death. If death results from the injury, the employer shall pay the dependents of the employee, wholly dependent upon his earnings for support at the time of his injury, a weekly payment equal to two-thirds his average weekly wages . . . for a period of three hundred weeks from the date of the injury, and in no case to exceed four thousand dollars; provided, however, that if the dependent of the employee to whom the compensation shall be payable upon his death is the widow of employee, upon her death or remarriage the compensation thereafter payable under this act shall be paid to the child or children of the de-

ceased employee, including adopted and step-children, under the age of eighteen years, or over said age, but physically or mentally incapacitated from earning, who are dependent upon the widow at the time of her death or remarriage."

The appellant contends that the petitioner must prove that she was a dependent of her father at the time of his injury. Paragraph VIII of Sec. 1 of the Act, which defines words and phrases used, provides "VIII. 'Dependents' shall mean members of the employee's family or next of kin, who are wholly or partly dependent upon the earnings of the employee for support at the time of the injury." It is contended that the petitioner must comply with this paragraph as well as with Sec. 12.

Not so. The paragraph defines "dependents" when used alone or with the further words "of the employee." But the petitioner would be entitled to compensation not as a dependent of the employee but as his child, physically or mentally incapacitated from earning and dependent at the death of his widow upon his widow. At the time of his injury, the widow was the dependent entitled to compensation. The act provides expressly and clearly for a contingency of her death or remarriage. The petitioner must comply with such express provision. There is no basis to imply any further provision of dependency on the employee at the time of his injury.

The appellant further contends that the petitioner under Sec. 12 must prove she was "physically or mentally incapacitated from earning" and was "dependent upon the widow at the time of her death," and that the Commissioner must so find.

This is so. His decree states that the petitioner was apparently never very well and in January, 1927, had to quit teaching because of bronchitis and lived at home with her mother; that the petitioner was ordered to refrain from work and to rest and take care of herself and had not worked since. "The sole question is whether or not on August 22, 1927, this claimant was physically or mentally incapacitated. The undenied testimony of the claimant is to the effect she was not able to work. . . . We believe claimant has sustained her petition. It is therefore ordered that the State Highway Commission, employer, pay Eldore DeMeritt, compensation, as sole dependent of Mrs. Ernest L. DeMeritt, deceased dependent widow of Ernest L. DeMeritt, at rate of $15.38 per week from

August 22, 1927, for balance of 300 weeks from October 29, 1925 . . . in accordance with the provisions of Sec. 12 of the Workmen's Compensation Act."

The appellant, admitting that this may be construed as a finding that the petitioner was physically incapacitated from earning, and we so construe it, contends that it can not be construed as a finding that she was dependent on the mother and that the Commissioner did not therefore find sufficient facts to support his decision.

The answer admitted the allegations of the petition. It also admitted that compensation was paid to the widow as a dependent of the employee, and denied that the petitioner was a dependent of the employee, neither of which facts was alleged. The amendment supplied an allegation of the former fact, payment to the widow, and added an allegation of dependency upon her at the date of her death. The answer was not amended. It therefore denied dependency on the father, which was not alleged, and did not deny dependency of the widow, which was alleged.

In the absence of an answer disputing material facts alleged in or disclosed by the petition, such facts may be treated as admitted. *McCollor's Case*, 122 Me., 136; *Ross' Case*, 124 Me., 108; *Brodin's Case*, 124 Me., 162; *Clark's Case*, 125 Me., 408; *Ripley's Case*, 126 Me., 173.

The petition did not allege and the answer did not deny that the petitioner was physically or mentally incapacitated from earning. The petitioner must prove this to be entitled to compensation. The Commissioner therefore proceeded without amending the petition to receive evidence on this point and to decide it. The most of the evidence concerned it. There was some evidence as to dependency on the widow.

We construe the decision of the Commissioner to mean that he held the one controverted fact before him was the petitioner's incapacity under Sec. 12 and that incapacity was the sole question for him to determine. Dependency on the widow being admitted because not denied in the answer and the petitioner being found unable to work and incapacitated under Sec. 12, the Commissioner concluded "We believe claimant has sustained her petition."

We think there was some competent evidence to support this finding of the Commissioner. *Butt's Case*, 125 Me., 245, 246.

The decree was for weekly payment after August 22, 1927, for the balance of the three hundred weeks from October 29, 1925, "in accordance with the provisions of Sec. 12 of the Workmen's Compensation Act." The section provides that the payment is "in no case to exceed four thousand dollars." This limitation, though not expressed in the decree was obviously meant to be included and the appeal is dismissed with that understanding and subject to that limitation.

Appeal dismissed with costs.
Decree below affirmed.

FARWELL'S CASE.

Kennebec. Opinion August 19, 1929.

WORKMEN'S COMPENSATION ACT. PROVINCE OF COMMISSIONER AND COURT.

Under the Workmen's Compensation Act, in the absence of fraud, the decision of the Commissioner upon all questions of fact is final, subject, however, to the condition that such decision must be based on facts proven by evidence and on natural inferences logically drawn therefrom.

Where there is direct testimony standing alone and uncontradicted which would justify the decree there is some evidence, notwithstanding its contradiction by other evidence of much greater weight.

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

The veracity of witnesses is for the Commissioner, but if he rejects none of the testimony the determination whether or not the service rendered is such as is within the contract as the same is proven by the testimony is a question of law.

In the case at bar there appears no evidence to support the Commission's decree and none which would justify an inference that the service rendered at the time of the accident did not arise out of and within the course of petitioner's employment. The decree was therefore error.

Appeal by petitioner from decree of a single Justice affirming the decree of the Associate Legal Member of the Industrial Accident Commission denying compensation. A second appeal to the Law Court. Petitioner was injured August 5, 1927, at about eleven P. M. while performing a service for the manager and proprietor of Belgrade Hotel Company. Her first petition was dismissed by the Industrial Accident Commission and appealed to the Law Court, in *Farwell's Case*, 127 Me., 249, in which the court reversed the decree below and remitted the case again to the Industrial Accident Commission. Petition again dismissed and again appealed to the Law Court. Appeal sustained. Decree below reversed, case remanded to Industrial Accident Commission.

The case sufficiently appears in the opinion.

Andrew, Nelson & Gardiner, for petitioner.

Arthur J. Cratty and Robinson & Richardson, for respondents.

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

BARNES, J. The case is a second appeal, through the regular channel, from a decision of the Legal Associate Member of the Industrial Accident Commission dismissing the petition of an employee of the Belgrade Hotel Company.

It was first heard in October, 1927, the truth of allegations of accident being admitted, as well as the fact that the employer had due notice or knowledge of the happening of the accident, within the statute period. The petition was then dismissed, on the finding that the accident did not arise out of and in the course of petitioner's employment.

Upon appeal this court held that the Commissioner "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." *Farwell's Case*, 127 Me., 249.

Rehearing was had, and on December 12, 1928, a second decision of the Commissioner ordered the petition dismissed.

At the second hearing the case was submitted upon the record of the former hearing, without more except the addition of two affidavits of petitioner, one on disability and the other on expense in-

curred, and neither having evidentiary weight upon the issue here, the construction of the contract of employment.

No testimony was presented at either hearing on behalf of employer or insurance carrier. The contract of employment was oral and the evidence on this is the same as when reviewed before, and is stated with such fulness in our former opinion that it would serve no useful purpose to set it out here. And it is to be remembered that both parties to the contract testified.

As the legislature has prescribed, in the absence of fraud, the decision of the Commissioner upon all questions of fact shall be final. R. S., Chap. 50., Sec. 34.

His decision, however, must be based on facts proven by evidence and on natural inferences logically drawn therefrom.

"There must be some competent evidence. It may be slender. It must be evidence, however, and not speculation, surmise and conjecture."

While no general rule can be established applicable to all cases, certain principles are clear.

"If there is direct testimony which, standing alone and uncontradicted, would justify the decree there is some evidence, notwithstanding its contradiction by other evidence of much greater weight." *Mailman's Case*, 118 Me., 172; *Taylor's Case*, 142 Atl., 730.

"Whether the finding of fact is supported by legal evidence is the limit of passing in review." *Noe Gagnon's Case*, 125 Me., 16.

From known facts and from all the circumstances the Commissioner may draw "rational and natural inferences." *Mailman's Case*, supra; "such inference as a reasonable man would draw." *Sanderson's Case*, 224 Mass., 558.

"When the facts are assembled and stated, inference, as distinguished from mere conjecture, surmise or probability may be drawn by the Commissioner; but a finding by him can not stand unless the facts thus found are such as to entitle him reasonably to infer his conclusions from them." *Paulauski's Case*, 126 Me., 32.

Petitioner suffered a grievous injury, by accident, in the late evening, while bearing a message to the night watchman, as ordered by the manager of the corporation.

It was incumbent on her to prove that the accident befell her while serving within the scope of her employment.

She testified, the manager testified, and the steward testified that she was employed to wait on tables, and to do any other work that might be required of her by the manager or the head waiter when not engaged in table work.

There can be found in the record no evidence that she could not be required to serve after the dining room was closed at night, or that the field of her employment was less extensive than as stated by her.

The veracity of witnesses is for the Commissioner, but if he rejects none of the testimony the determination whether or not the service rendered is such as is within the contract as the same is proved by the testimony is a question of law.

If the Commissioner's conclusion was of law from the facts stated in the testimony, assuming it to be true, there is error. *Kelley's Case*, 123 Me., 261; *Paulauski's Case*, supra; *Shaw's Case*, 126 Me., 572.

The Commissioner recites testimony in the decree under inspection, but he does not state that he rejects any.

If the Commissioner's conclusion is one of fact, it must be of facts deduced by him, for the only ground on which the decree can rest is that on the evidence the Commissioner drew the deduction that the errand on which the petitioner was busied was a gratuitous accommodation, an act to which she was urged by feelings of humanity, and not a service which she had contracted to perform.

If logical inferences from the testimony could be drawn to substantiate such a conclusion, the decree should stand.

But the case affords no evidence to support the decree and none from which a rational mind, functioning logically, may infer that the service rendered at the time of the accident did not arise out of and within the course of petitioner's employment.

After reciting much of the manager's testimony the Commissioner does not state that he discards any testimony, but recites, — "From all of which, plus all the other evidence in the case, we do not believe that the errand being run at eleven o'clock at night for Mr. Charles A. Hill, was any part of this employee's duties, etc."

If a conclusion of fact it is without statement or inference upon which it may stand,

Appeal sustained.
Decree below reversed.
Case remanded to the Industrial Accident Commission.

FRANK H. INGRAHAM *vs.* ISAAC BERLIAWSKY.

Knox. Opinion September 6, 1929.

PLEADING AND PRACTICE. SET-OFF AND COUNTER-CLAIMS. COURTS. REFERENCE. R. S., CHAP. 87, SEC. 74.

The doctrine of set-off did not exist at common law and the right in this state to set-off one demand against another is wholly regulated by the provisions of Sec. 74, Chap. 87, Revised Statutes.

The time of commencement of a term of court is fixed by statute, and the end of a term is fixed by the final adjournment of the court for that term.

A hearing before referees is not a continuation of a term of court at which the reference is made.

Failure to file a brief statement of his demands in set-off during the term to which the writ is returnable, as required by Sec. 74, Chap. 87, Revised Statutes, precludes a defendant, where the rule of reference does not provide for adjustment of claims in set-off, from presenting such demands at the hearing before the referees, and the referees have no authority to receive such brief statement or to consider set-offs claimed under it.

In the case at bar the referees therefore properly refused to receive the brief statement and to consider the set-off claimed under it, and their finding that the assignment of the judgment to the plaintiff was for a valuable consideration and was not colorable was a finding of fact not subject to review by the Law Court.

On report on an agreed statement. An action on a judgment heard by referees and after their findings, by them and by counsel

reported to the Law Court on an agreed statement. Report sustained. Judgment for plaintiff in the sum of $1,876.89 with interest from April 20, 1926, the date of the original judgment.

The case fully appears in the opinion.

Frank H. Ingraham,
Adelbert L. Miles, for plaintiff.
Rodney I. Thompson,
F. A. Tirrell, Jr., for defendant.

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

FARRINGTON, J. The case comes up on an agreed statement. On April 20, 1926, Marcia A. Burch recovered a judgment for eighteen hundred seventy-six dollars and eighty-nine cents ($1,876.89) against Isaac Berliawsky the defendant. This judgment was on October 22, 1926, assigned by Marcia A. Burch to Frank H. Ingraham, the plaintiff. Suit was brought on the judgment and the action was entered at the January Term, 1927, of the Supreme Judicial Court for Knox County.

At that Term this case, No. 4304, was, together with two other cases, referred to as No. 4163 and No. 4345, and a bill in equity, the nature of none of which last three cases nor the parties thereto are disclosed by the record, referred to referees, to whom the Commission was issued January 27, 1927. A hearing on No. 4304 was held on March 11, 1927, after final adjournment of the January Term. At the hearing the defendant asked leave to file a brief statement alleging certain set-offs, as to which there is nothing before the court to show the other parties concerned, and also set-off of a judgment in No. 4345, and also a judgment in No. 4163.

The referees in their report found that "said brief statement alleging set-offs aforesaid was not filed during the term to which the writ in this case was returnable and that said referees can not now receive it, and set-off can not be allowed."

The referees also found that the assignment of the judgment above mentioned by Marcia A. Burch to Frank H. Ingraham, the plaintiff, was for a valuable consideration and was not colorable.

The report of the referees on the instant case, received and filed

on the fourth day of the April Term, 1927, awarded judgment for the plaintiff in the sum of eighteen hundred and seventy-six dollars and eighty-nine cents ($1,876.89), together with interest from April 20, 1926, the date of judgment, to the amount of one hundred three dollars and fifty-four cents ($103.54).

The presiding Justice on the tenth day of the April Term, 1927, re-committed the report to the referees "for the purpose of modifying report in such manner as they deem necessary to present any questions of law that they desire for consideration of the Court."

Pursuant to this re-commitment the referees again met and reported that they desired to have the Court determine (1) whether or not the hearing before the referees was a continuation of the January, 1927, Term of entry of the writ; (2) whether the brief statement, not having been filed in Court during said January Term before final adjournment, could be received and considered by the referees, and (3) whether the assignment from Marcia A. Burch to the plaintiff was for a valuable consideration or was colorable.

If the Court should decide that the assignment was for a valuable consideration and not colorable and if the various items of set-off were not legally before them, judgment was to be awarded for the plaintiff in the sum of eighteen hundred seventy-six dollars and eighty-nine cents ($1,876.89) with interest from April 20, 1926, the date of judgment.

The doctrine of set-off did not exist at common law. At common law if a defendant had accounts or claims against the plaintiff, he could enforce them only by an independent action commenced by him against the plaintiff. 24 R. C. L., p. 801, Sec. 10, and cases cited.

The right in this state, therefore, to set off one demand against another is wholly regulated and determined by statute and the rights of parties must depend upon the provisions of law by which it is regulated. *Houghton* v. *Houghton*, 37 Me., 72; *Robinson* v. *Safford*, 57 Me., 163; *Call* v. *Chapman*, 25 Me., 128; *Smith* v. *Ellis*, 29 Me., 422.

Sec. 74, Chap. 87, Revised Statutes, provides as follows: "Demands between plaintiffs and defendants may be set off against each other as follows:

The defendant during the term to which the writ is returnable, *must* file a brief statement of his demand, in substance as certain as in a declaration, which by leave of court may be amended. The clerk shall enter on it and on the docket the date, and on the docket, under the action, notice of the filing."

It is undisputed and in the record that the defendant did not, prior to the final adjournment of the January Term, 1927, file any brief statement of any demand in set-off.

The time of the commencement of a term of court is fixed by statute, and the end of a term is fixed by the final adjournment of the court for that term. *Bronson* v. *Schulten*, 104 U. S., 410; *Parsons* v. *Hathaway*, 40 Me., 132; *Moreland* v. *Vomilas*, 127 Me., at p. 499.

The hearing before the referees was, therefore, not a continuation of the January Term, 1927.

If the instant case had not been referred at the January Term of entry and had been tried at that Term, or if it had been continued to the April Term following and at that Term, or at a subsequent Term, it had come to trial before a jury or before the presiding Justice, without jury, the failure on his part to have filed the brief statement required by the provisions of the foregoing Sec. 74, of Chap. 87, would have prevented the defendant in that suit from receiving any advantage from demands he may have had against the plaintiff.

It is well settled that a defendant can not avail himself of any demand he may have against the plaintiff, unless it has been filed in set-off pursuant to the provisions of the statute. *Wood* v. *Warren*, 19 Me., 23; *School District* v. *Deshon*, 51 Me., 454.

And where there is not a strict compliance with the provisions of the statute, the Court is not authorized by it to allow a set-off to be made. *Pond* v. *Niles*, 31 Me., 131.

Does the fact that this case was by agreement of parties referred to referees, instead of being tried before a jury or heard by the Court, relieve the defendant, if he wishes to claim set-off, from the necessity of filing, during the term to which the writ was returnable, a brief statement of his demand in set-off as required by the statute?

We believe that the defendant is not relieved from the necessity

under the statute of filing his brief statement of set-off during the return Term of the writ. There was ample time, after the reference, and before final adjournment of court, for the defendant to have filed his brief statement so that in any event he would have been protected. He failed to do so.

If a cause be referred before any plea in set-off has been filed, and the rule of reference does not provide for the adjustment of claims in set-off, the referee has no authority to consider any such claim. *Fulton* v. *Wiley*, 32 Vt., 762.

In *Fulton* v. *Wiley*, Pierpont, C. J., says, "If this case had been tried in the County Court, it is very clear that the defendant could have availed himself of the note only by a plea in set-off. But it is said that upon the trial before the referee, the same rule does not apply," and further on he continues, "An off-set can not be said to be an answer to the plaintiff's claim or to his right of action; it is conceding the claim of the plaintiff, and his right to recover thereon, and then setting up a counter claim in his favor against the plaintiff and asking the court to make the application. It is introducing an entirely new and distinct subject matter of litigation, one that is separate from, and independent of, the one declared upon, one that is in no sense embraced in the subject matter referred. To allow it would be to introduce a controversy as foreign from the matter referred, as would be any claim of the plaintiff separate and distinct from the one declared upon. And there would be no more propriety in allowing the introduction of the one than the other. If the defendant would avail himself of an off-set to the plaintiff's claim, he can do it only by a plea for that purpose, and if he neglects to avail himself of such plea by filing it before the case is referred, he can not avail himself of such defense before the referee.

If the defendant files a plea in set-off, the plaintiff may then, by his replication thereto, bring in any other cause of action he may have against the defendant, proper to be presented as an off-set to the defendant's claim.

If all this is done before the suit is referred, the reference carries the whole matter before the referee, and an examination of the pleadings show precisely what is referred and what the parties are to meet. But to allow the reference to have that effect before the

pleas in off-set are filed, would turn every reference of a suit in court into a general reference of all matters in controversy between the parties."

Counsel for defendant cites the cases of *Collins* v. *Campbell*, and *Campbell et al* v. *Collins*, 97 Me., 23, as authority for the proposition that "courts of common law have an equitable jurisdiction in cases of set-off independent of the Statute" and that "by the exercise of this equitable jurisdiction the courts are enabled to do justice between the parties in cases not strictly within the Statute," but these cases do not hold that a defendant can dispense with the provisions of the statute relating to the filing of brief statements in set-off during the term of entry. That point was not involved in the cases. They came up under another statute relating to right of set-off of judgments in cross actions, Chap. 81, Revised Statutes, Sec. 77 (now Chap. 86, Sec. 80), a statute which did not authorize the set-off of a judgment to be recovered in an action of a firm against the judgment which a non-resident plaintiff may recover in his action against one of the partners. They decided only what might equitably be set-off in spite of the statute and are not to be regarded as in any way changing or attempting to change the plain and unmistakable provisions of Chap. 87, Sec. 74, which says "The defendant, during the term to which the writ is returnable, *must* file a brief statement of his demand, etc." The *Collins* v. *Campbell* cases were cross actions on foreign judgments, and both cases were defaulted and went to judgment separately. They involved a matter of set-off of judgments, and had nothing to do with the statute requiring the filing of brief statements by defendants claiming set-off.

According to the agreed statement, entries showing reference of No. 4163 and No. 4345 were made on the third day of the January Term, 1927, and the reference of the bill in equity was made on the fourth day of the Term. The date of the reference in the instant case, No. 4304, is not shown by docket entry. The agreed statement shows complete docket entries in No. 4304, but no docket entries are shown in the other cases above referred to.

A certain claim for waste, taxes, and insurance, No. 4467, it is agreed was not included among the actions referred, action having been brought subsequent to the references.

Nothing appears in the agreed statement to show that there was any understanding or agreement or intention that these several cases should be considered jointly, and no provision was made in the rule of reference for adjustment of claims in set-off. As far as the record discloses, each case was referred separately and was to be heard separately. A separate report was made on the instant case and it may be fairly assumed that each case was heard separately and that a separate report was made in each case. There is nothing before us to show what the reports in the other cases were or what was done with them. The other reports, one or all, may have been accepted and continued for judgment, as far as the record in this case discloses.

The only questions with which we are concerned are, as has been stated, (1) whether or not the hearing before the referees was a continuation of the January Term, 1927; (2) whether the brief statement, not having been filed in Court during said January Term before final adjournment, could be received and considered by the referees, and (3) whether or not the assignment to the plaintiff was for a valuable consideration or was colorable, and all these questions relate to No. 4304, the case which comes up on the agreed statement, and, as far as our consideration is concerned, they relate to no other case.

We therefore find that, on account of defendant's failure to file it during the time required by statute, the referees properly refused to receive the brief statement and to consider the set-offs claimed under it.

The referees in their first report, and in the second report after re-commitment, found that the assignment of the judgment to the plaintiff was for a valuable consideration and was not colorable. As far as this phase of the case is concerned, inasmuch as it involves a question of fact and not a question of law, it is for the referees to decide and they have made their finding and have found the fact, and that having been done, the question is not before this court.

On the authority of the stipulations of the report, judgment should be entered for the plaintiff for the sum of eighteen hundred seventy-six dollars and eighty-nine cents ($1,876.89), with interest from April 20, 1926, the date of the original judgment.

So ordered.

LINNEOUS M. MILLETT *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion September 12, 1929.

NEGLIGENCE. MASTER AND SERVANT.

An employer is bound to exercise ordinary care to provide reasonably safe and reasonably suitable methods, and such only, to enable the employee to do his work as safely as the hazards incident to employment will permit. But the employer is not an insurer.

Ordinary care is that care which ordinarily prudent persons take commensurate with the necessity for care and the dangers of the situation.

In the case at bar the plaintiff had the burden to present reasonable evidence which would tend to show a breach of duty owed to him in the method of doing his work. Negligence could not be found from the mere happening of the accident. No evidence was presented that the method employed was not common and usual in the occupation.

The plaintiff did not prove a prima facie case and the granting of a nonsuit was not error.

On exceptions. An action on the case in which plaintiff, an employee of defendant, claimed that he received an injury to his right eye and lost the sight thereof through the negligence of the defendant. At the conclusion of the plaintiff's evidence the presiding Justice, on motion of the defendant, granted a nonsuit. To this ruling plaintiff seasonably excepted. Exceptions overruled.

The case sufficiently appears in the opinion.

Frank I. Cowan, for plaintiff.

Perkins & Weeks, for defendant.

SITTING: WILSON, C. J., DUNN, STURGIS, BASSETT, FARRINGTON, JJ.

DUNN, J. Action by an employee to recover damages for personal injuries. Compulsory nonsuit imposed. Exception taken.

One count is at common law. Two others declare somewhat differently against an employer nonassenting to the Workman's

Compensation Act, R. S., Chap. 50, as amended by 1919 Laws, Chap. 238.

Each count alleges that the method of keeping the right of way, or location, of the defendant railroad free from grass, by burning it, was actionably negligent as to the plaintiff, to the injury of one of his eyes from the lodgment of a spark.

Plea, general issue. Brief statement sets up interstate commerce employment. The stipulation in this connection has not been argued, is considered to have been waived, and will not be discussed.

About one ton of grass, it appears in evidence, lay where it had been mown, on a stretch approximately sixty feet wide and a mile long.

The day, April 9, 1928, was suitable for burning grass.

Plaintiff was forty-five years old; this the second season of his employment; the method of burning the same.

His work required that he walk along the edge of the location, a pail of water and broom in hand, to prevent the escape of fire to contiguous land. While so doing, and when nothing unusual was being done, the accident occurred.

The law permits recovery, under any of the counts, only on the basis of negligence. Negligence is nothing more or less than a failure of duty. *Boardman* v. *Creighton*, 95 Me., 154, 159.

An employer is bound to exercise ordinary care to provide reasonably safe and reasonably suitable methods, and such only, to enable the employee to do his work as safely as the hazards incident to employment will permit.

Ordinary care is that kind of care most common and usual in the business. *Mad River & L. R. R. Company* v. *Barber*, 5 Ohio St., 541. What is ordinary care, that is, what an ordinarily prudent man would do, depends upon the particular and peculiar circumstances surrounding the case. Because, what might be due care under one condition of things might be the grossest negligence under another. In other words, the care which ordinarily prudent persons take is commensurate with the necessity for care and the dangers of the situation.

But the employer is not an insurer.

Plaintiff had the burden to adduce reasonable evidence which

would tend to show, primarily, a breach of duty owed to him in respect to the method of doing the work. Negligence may not be found from the mere happening of accident. *Wormell* v. *Railroad Company*, 79 Me., 397, 403.

There is no evidence that the method employed was not common and usual in the occupation.

To concede to argument, that negligence is attributable for failure to provide goggles, the impress such argument has made, goggles, if worn, might have prevented injury. However, this must remain conjectural. Certainly it is not a basis on which to predicate liability. Goggles, like the gauntlets of the employee in the plate-glass factory, would have been no more than the shoes or other apparel of the plaintiff; no more than the apron of the blacksmith. *Myers* v. *De Pauw Co.*, 38 N. E., 37 (Ind.).

The plaintiff did not prove a prima facie case. The trial judge did not err in granting the nonsuit. *Elwell v. Hacker*, 86 Me., 416; *Preble* v. *Preble*, 115 Me., 26; *Blacker* v. *Oxford Paper Company*, 127 Me., 228.

Exception overruled.

JOHN D. RICHARDSON, PRO AMI *vs.* CHARLES DUNN, JR.

Cumberland. Opinion September 12, 1929.

CRIMINAL LAW. NOTICE. R. S., CHAP. 137, SEC. 17.

Where a minor was convicted of a common law crime and sentenced to the State School for Boys without notice to parents of his arrest and the time of his trial under Sec. 17, Chap. 137, R. S., held upon exception to refusal to grant a writ of habeas corpus;

That the notice required under Sec. 17, Chap. 137, R. S., is not a jurisdictional fact;

That at common law no notice was required to parent or guardian of the arrest and trial of a minor even of tender years;

That the facts as stated in the record and as found by the Judge upon hearing did not require such a notice to be given.

On exceptions. A writ of *habeas corpus* issued upon petition of Charles P. Richardson for the discharge from imprisonment at the State School for Boys of his minor son, John D. Richardson. Hearing was had on the writ at the January Term of the Supreme Judicial Court for the County of Cumberland. The presiding Justice ruled as a matter of law that the minor John D. Richardson was not entitled to be discharged and denied the writ. To this ruling petitioner excepted. Exceptions overruled.

The case sufficiently appears in the opinion.

E. W. Pike, for petitioner.

Leonard L. Campbell, County Attorney, for defendant.

SITTING: WILSON, C. J., DUNN, DEASY, BASSETT, FARRINGTON, JJ.

WILSON, C. J. A petition for writ of *habea corpus* to obtain the release of John D. Richardson, a minor under sixteen years of age, from the custody of the State School for Boys, to which he was committed under the statutes of this state by the judge of the Municipal Court for the City of Rockland upon conviction of the crime of larceny.

The ground upon which it is claimed that the minor was unlawfully committed is that no notice of the fact of his arrest and of the time and place of his trial was given to his parents, guardian, or legal custodian under Sec. 3 of Chap. 263, P. L., 1909, now Sec. 17 of Chap. 137, R. S., 1916.

On the hearing below, the writ was denied. The Justice hearing the petition found as a fact that the minor was not confined in jail or in any police station prior to his trial. The case is before this court on exceptions to the ruling denying the petition. The exceptions must be overruled.

If the notice required under Sec. 17, Chap. 137, R. S., were a jurisdictional fact and the facts existed requiring such notice, *habeas corpus* would be a proper remedy to procure the release of this minor, but neither did the facts exist requiring such notice nor is the giving of the notice required under the section referred to a

jurisdictional prerequisite to a trial of a minor for having violated the criminal laws of this state.

At common law, the procedure in criminal cases against a minor, *doli capax*, were the same as in case of an adult. No guardian need be appointed. He could appear and plead by an attorney, and no notice to his parents or guardian was necessary before trial or conviction of an offense against the laws of his state or country. *Word's Case*, 3 Leigh (Va.), 805, 810, 4 Blackstone Com., 22; 1 Chitty Crim. Law, 411; 31 C. J., 1096.

In some states it has been held error to permit him to plead by guardian. *Word's Case*, supra. In re Rousos, 119 N. Y. S., 34; *People* v. *Wunsch*, 198 Ill., App., 437, 440; also see *Winslow* v. *Anderson*, 4 Mass., 376.

It is true that it is frequently provided in the statutes creating private institutions for the care of neglected children that, before committing a minor to such an institution, notice shall be given to the parents or one of them, not because a parent is entitled to such notice in case a minor is charged with an offense which may result in his being committed to jail or a reformatory established by the state for the detention and training of youthful offenders, — though the parents be, during his detention, in effect deprived of custody; but under such special statutes enacted for the protection and training of children, and under which the minor may be committed to a private institution, it is generally expressly provided that notice shall be given parents or a guardian upon the theory that the proceedings have the effect of taking the custody of children away from parents or their legal guardian, and is regarded as a jurisdictional prerequisite. Where, however, the proceeding is before a common law court or a court vested with common law jurisdiction over crimes and where the commitment is to a public institution controlled by the state, no such notice is necessary, unless expressly required by a statute.

This distinction is recognized in the case cited by petitioner's counsel. *People* v. *N. Y. Cath. Protectory*, 101 N. Y., 195, 202; also see 31 C. J., 1104-1107, Secs. 229, 231, 235.

Such provisions are to be found in this state in Chap. 64, R. S., 1916, providing for the welfare of neglected children, Sec. 53.

The statute invoked by the petitioner in the case at bar is a part

of the statute enacted in 1909, Chap. 263, P. L., creating a probation officer. The provisions of Sec. 3 of the Act were obviously enacted with a view of preventing children of tender years from being thrown into associations with adults confined in jail before convicted of any offense, and relate more particularly to his release on the personal recognizance of a parent or by being placed in the charge of a probation officer pending his trial.

When a minor is arrested, the personal recognizance of a parent may be taken by the officer making the arrest. In case he is detained "in a jail or police station," the officer is required to notify the parents and the probation officer of the time and place of trial; and prior to the trial, on application to the Court, the minor may be placed in charge of the probation officer.

Failure to notify the parents under such condition by the officer making the arrest may be sufficient ground for a continuance by a magistrate acting according to the procedure at common law until notice to the parent, if it is deemed necessary, can be given. Failure on the part of the officer, however, to so notify parents or the probation officer does not deprive a court proceeding according to the common law of jurisdiction of a criminal offense.

In the case at bar, the facts found by the court below did not require such notice. Notice to parents in case of arrest for an offense is only required under Sec. 17, Chap. 137, R. S., when the minor is confined in jail or detained in a police station. The minor in this instance was not detained at either place. The record before this court does not disclose when the arrest was made or the conditions under which he was brought before the court.

Whether the legislature should have gone farther and required notice to parents in all cases of arrest of minors for any offense before trial by any court, we are not concerned. The law-making body has not yet done so. The court can only enforce the law as it finds it. The common law did not require such a notice, and upon the facts found by the court below neither did the statute in this instance.

Exceptions overruled.

RUMFORD FALLS POWER COMPANY

vs.

LEWIS WAISHWELL AND AMELIA WAISHWELL.

Oxford. Opinion September 19, 1929.

DEEDS. CONDITIONS SUBSEQUENT. FORFEITURE. WAIVER. REAL ACTIONS.

A waiver on the part of a grantor of past breaches of a condition subsequent is not to be construed into a waiver of all right to future observance and performance of it.

A grantee claiming waiver by his grantor of a condition subsequent contained in his deed can not prove it merely by showing waiver of similar conditions contained in other deeds from his grantor to other grantees.

Ambiguous language will not ordinarily be construed as creating a condition subsequent justifying a forfeiture. Forfeitures are not favored even by Courts of Common Law.

Conditions subsequent are to be construed with great strictness and are not to be extended by construction or inference.

In the case at bar the condition subsequent was plainly stated and defendant accepted the deed containing it. The evidence shows the condition was broken. The estate was therefore forfeited but only the estate conveyed, namely: the land, not including the buildings which were erected by the grantees.

On report on an agreed statement. A writ of entry brought by plaintiff to enforce a forfeiture for breach of conditions contained in a deed given by it conveying to the defendants lot 229 Franklin Street, Rumford Falls, and to recover the said lot.

Judgment for plaintiff for land, excepting buildings.

The case fully appears in the opinion.

Ralph T. Parker, for plaintiff.

Matthew McCarthy, for defendant.

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

DEASY, J. This case is brought forward by Agreed Statement.

In 1924 the plaintiff corporation conveyed to the defendants Lot 229 on Franklin St., Rumford Falls.

The deed contained an express condition subsequent as follows:

> "this conveyance is also upon the express condition that the said grantees, their heirs, executors, administrators, or assigns, shall not erect or maintain any building or structure within twenty-five years from the day of the date of this deed on any lot hereby sold, excepting a dwelling house suitable for not more than two families, and a stable or garage, or other necessary building, for the exclusive use and occupancy of the occupants of said dwelling house, and as an appurtenance thereto; and if this condition be broken, the estate hereby conveyed shall be forfeited and shall revert to the grantor, its successors or assigns."

Later in the same year the defendants erected upon the lot "a three tenement dwelling house suitable for three families without the consent and without the objection of the Rumford Falls Power Company." (The quotation is from the agreed statement.)

On May 6, 1929, the plaintiff learned that the defendants were preparing to remove to and upon the lot another dwelling, thus further aggravating the congestion which the condition was designed to prevent.

Oral objection was promptly made by the plaintiff's representative. On May 13 the defendants moved such dwelling to and upon the lot. Two days later the plaintiff protested against such removal by a letter as follows:

> "On May 6, Mr. Frederick O. Eaton, representative of the Rumford Falls Power Company called your attention to the fact that the erection of another dwelling house on said lot would be a violation of a condition in the deed of the Rumford Falls Power Company to you. This condition is as follows: (Condition as above quoted).
>
> "You were notified on May 6 by Mr. Eaton that the Rumford Falls Power Company objected to the erection or maintenance of another dwelling house on said lot on the ground

that such erection or maintenance of another dwelling house would be a violation of this condition.

"Notwithstanding this, you have proceeded to place another dwelling house on this lot. The Rumford Falls Power Company would regret exceedingly to be obliged to forfeit your rights in said lot for breach of this condition, but unless you take immediate steps to remove this dwelling house or convert it into a building that will conform to the above described condition in your deed, the Rumford Falls Power Company will be obliged to commence an action for the forfeiture of your rights in this lot by reason of this breach of the above named conditions in your deed."

The defendants refused to comply with the plaintiffs request. Thereupon the plaintiff entered upon the property for the purpose of forfeiting the title of the defendants in the same on account of the alleged breach of condition in the deed.

On May 23, 1929, this writ of entry was sued out to recover the lot.

The defense is based upon the theory that the plaintiff has waived or abandoned the condition. The agreed statement, however, does not show such waiver or abandonment.

It is true that the breach by the defendants in 1924 was not objected to by the plaintiff. The agreed statement does not show that the plaintiff had knowledge of the 1924 breach prior to the beginning of the present suit. If, however, we should assume such knowledge, neither waiver nor abandonment is proved by such circumstance alone. *Howe* v. *Lowell*, 171 Mass., 584.

"A waiver on the part of the plaintiffs of past breaches of the condition can not be construed into a waiver of all right to future observance and performance of it." *Ritchie* v. *Railway Co.* (Kan.), 39 Pac., 724.

The defendants also rely upon the fact that similar conditions contained in other deeds from the plaintiff, have been breached without forfeiture claimed, and without apparent objection made.

But this alone does not prove waiver or abandonment even of the conditions in such other deeds. *Howe* v. *Lowell*, supra. *Ritchie* v. *Railway Co.*, supra. A fortiori it does not show waiver or aban-

donment of the condition in the defendants conveyance.

Forfeitures are not favored, even by Courts of Common Law.

Ambiguous language will not ordinarily be construed as creating a condition subsequent justifying a forfeiture.

But in this case the condition subsequent is plainly stated. The defendants accepted the deed containing it. The plaintiff is entitled to judgment. But conditions subsequent are to be construed with great strictness. R. C. L., Sup., Vol. 2, Pg. 721. *Bray* v. *Hussey*, 83 Me., 329; *Frenchville* v. *Gagnon*, 112 Me., 245.

They are not to be extended by inference.

"It is the universal rule that the instrument creating the forfeiture will be strictly construed, and that its terms will never be extended by construction." *Ritchie* v. *Railway Co.*, supra.

In this case the forfeiture provided for by the deed is of "the estate hereby conveyed." The buildings were not conveyed. Never having been owned by the plaintiff, they can not "revert" to it. It is true that buildings are ordinarily a part of the land and pass by a deed of the land without special mention. This gives effect to presumed intent.

But presumed intent can not be resorted to for the purpose of extending a forfeiture. The plaintiff is entitled to judgment for the land that it conveyed to the defendants, not however including the buildings thereon.

The defendants are entitled to a reasonable time to remove buildings.

The ordinary form of writ of possession must be varied accordingly.

Judgment for plaintiff for land, excepting buildings.

BLANCHE C. THIBEAU ET AL *vs.* HOWARD W. THIBEAU.

Aroostook. Opinion September 25, 1929.

EQUITY. TRUSTS.

One occupying a quasi fiduciary relation to another with reference to mortgaged real estate, causing the other to rely on him to save the property from the result of foreclosure proceedings, and thereafterward obtaining title to the property himself and claiming to own the same, stands chargeable with constructive if not intentional fraud by reason of which the injured party is entitled to relief in equity.

In such a situation a bill in equity to enforce a trust is maintainable.

In the case at bar the relation between the plaintiff and the defendant was quasi fiduciary in character. Defendant caused the plaintiff to rely upon him to try to save the farm. His taking of title to himself and denying her rights after foreclosure was not proper.

Plaintiff is entitled as against defendant to legal title to an undivided one-half of the property upon payment of her proportionate part of the mortgage debt and interest.

On appeal by defendant. A bill in equity brought to establish and enforce a trust. After hearing before a single Justice a special Master was appointed to render an account setting forth the amount due between the parties. The Master's report was accepted by the sitting Justice, who filed a final decree from which the defendant appealed. Bill sustained. Decree in accordance with the opinion.

The case is fully stated in the opinion.

Hinckley, Hinckley & Shesong, for plaintiffs.

H. T. Powers, for defendant.

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

DEASY, J. The property involved in this suit in equity is one undivided half of the Bayliss Farm, so called, situated in Fort Fairfield.

The plaintiff is Blanche C. Thibeau, widow of John W. Thibeau, deceased. She brings the suit in her own right and also as guardian of her three minor children who are the only children and heirs of said John W. Thibeau.

The defendants are Howard W. Thibeau, brother of John, and also his administrator, and also (joined as defendants) Abbie Thibeau, mother of John and Howard, and also the Federal Land Bank of Springfield and the Fort Fairfield National Bank.

The defendant, Howard W. Thibeau, has the record title to the property in question. The plaintiff claims that Howard holds the property as mortgagee or trustee under a constructive trust and that upon making certain payments she and her children are entitled in equity to a conveyance of it.

The following is an abbreviated statement of the facts and circumstances which form the basis of the plaintiff's claim: The Bayliss Farm was formerly owned by John W. Thibeau and his mother Abbie. In 1917 they gave a mortgage of the entire property to the defendant, Howard Thibeau, securing the sum of eight thousand dollars ($8,000). In 1919 Howard assigned the mortgage to the Fort Fairfield National Bank. In 1922, after John's death which occurred in 1920, the Bank foreclosed the mortgage.

In 1924 after the expiration of the period of redemption the Bank conveyed the property by deed to Howard.

Thus the defendant Howard became the record title holder of the entire property. Thereupon he gave a mortgage to the Federal Land Bank and a second mortgage to the Fort Fairfield National Bank. Until the completion of the foreclosure Howard and the plaintiff occupied the place together, the former operating it as a farm.

In her bill the plaintiff alleges "that the said Howard W. Thibeau repeatedly informed the said Blanche C. Thibeau that it was necessary for said mortgage — to be foreclosed by said Fort Fairfield National Bank, and he constantly assured her that he would protect the rights of the (plaintiffs) after foreclosure of said mortgage."

This allegation is not fully supported by evidence but the plaintiff testifies that "he (Howard) said he would help me keep the

place — see that I did keep it — as long as it was possible for him to do so." Again she testified "He would tell me not to worry, that he would see about it, and it always went that way." Howard testifies—"I think I told her that we would try and save the farm."

Howard did not "help (the plaintiff) keep the place," but acquired it himself.

Without further rehearsing the testimony it is sufficient to say that in view of the quasi fiduciary relation in which Howard stood to the plaintiff, it is apparent that he stands chargeable with constructive if not intentional fraud by reason of which the plaintiff is entitled to relief in equity.

If the bill were to be sustained as a bill to redeem the property from mortgage the amount to be paid would be $8,000, plus interest, less net profits. Equity will not (except under conditions not present in this case) decree redemption of a part of mortgaged property upon payment of a part of a mortgage debt. *Wood* v. *Goodwin*, 49 Me., 260; 19 R. C. L., Pg. 647.

The bill is sustainable as a bill to enforce a trust. The plaintiff and her children have an equitable estate in one-half the Bayliss Farm, which property stands in the name of the defendant, Howard Thibeau.

The plaintiff and her children are entitled, as against Howard Thibeau, to have the legal title to their property upon payment of such part of the debt as should be allocated to their part of the farm.

A single Justice upon hearing and receiving the report of a special master found the amount to be paid to be $3,065.58, with interest at five per cent per annum from April 28, 1928.

This determination is based upon findings of fact.

Every presumption is in favor of the correctness of such findings.

The Law Court perceives no reason for modifying the decree of the single Justice in respect to the amount.

The appeal must, however, be sustained so that a modified decree may be ordered making more certain the plaintiff's remedy.

Decree to be signed by a single Justice sustaining the bill with costs against Howard Thibeau only, and providing that within three months from date of decree the plaintiff shall pay to Howard

Thibeau the sum of $3,065.58 with interest as aforesaid and thereupon he shall deliver to her a deed of one undivided half of the Bayliss Farm conveying title thereto free from the liens of the mortgages from Howard Thibeau to the defendant Banks. Said Howard to pay or satisfy such mortgages in whole or in part so as to obtain such releases as will enable him to convey one undivided half of the premises free from such liens.

If in three months said defendant Howard has not obtained such releases a single Justice upon further hearing shall determine the market value of a clear title to one-half of said Bayliss Farm as of April 28, 1928, and thereupon shall order judgment and execution to issue in favor of the plaintiff against said Howard for the difference between $3,065.58 and said value so found, with interest on such balance at five per cent per annum from April 28, 1928.

The plaintiff by her bill prays that the mortgages given by Howard Thibeau to the defendant Banks may be decreed null and void and of no effect. No evidence in the case justified such decree.

The defendant Howard raises a further point in defense. He says that as his brother's administrator he has paid debts of the deceased largely in excess of the value of the personal estate that came into his hands as administrator, and asks allowance of such amount in this case.

But this court in equity can not adjust the accounts between a decedent's estate and its administrator. Such adjustment belongs to the jurisdiction of the Court of Probate.

Bill sustained.
Decree in accordance with this opinion.

INHABITANTS OF THOMASTON *vs.* EMMA R. STARRETT, EXCX.

Knox. Opinion September 30, 1929.

PLEADING AND PRACTICE. REVIEW. R. S., 1821, CHAP. 57, SEC. 1; R. S., 1840, CHAP. 115, SEC. 7; R. S., 1840, CHAP. 123, SEC. 1; R. S., 1857, CHAP. 77, SEC. 27; R. S., 1857, CHAP. 89, SEC. 1; R. S., 1916, CHAP. 24, SEC. 84; R. S., 1916, CHAP. 94, SEC. 1; P. L., 1852, CHAP. 246, SEC. 13; P. L., 1858, CHAP. 40; P. L., 1859, CHAP. 94; P. L., 1862, CHAP. 107-133; P. L., 1863, CHAP. 200; P. L., 1868, CHAP. 164.

A petition for review is addressed to the discretion of the Court and its decision can be revised upon exception only for erroneous rulings in matter of law.

A petitioner for review under R. S., Chap. 94, Sec. 1, Par. VII, providing "A review may be granted in any case where it appears that through fraud, accident, mistake or misfortune, justice has not been done, and a further hearing would be just and equitable" is not entitled to a review unless he proves to the satisfaction of the Court at nisi prius *three propositions:* (1) *that justice has not been done;* (2) *that the consequent injustice was through fraud, accident, mistake or misfortune; and* (3) *that a further hearing would be just and equitable.*

If the presiding Justice is satisfied of all these and grants the petition or is not satisfied of some one or more of them and denies the petition, his decision is final and not subject to review upon exceptions.

The mere order of dismissal by itself is in legal effect a determination by the sitting Justice that at least one of the three requisite propositions of the foregoing rule as a matter of fact or of law so far as either fact or law or both are involved has not been proved to his satisfaction.

Exceptions to such an order of dismissal can not be sustained where it does not appear that the sitting Justice expressed any opinion or gave any direction or judgment on any matter of law or gave any specific ruling in relation to any matter of fact or law, or that upon the record the order raised only a question or questions of law.

On exceptions. A petition by the Inhabitants of the Town of Thomaston for review of a judgment recovered against the Town by George H. Starrett in April, 1927, and reported in 126 Me., 205. At the hearing on the petition the defendant in review pre-

sented a motion to dismiss, which motion was granted by the presiding Justice. To this ruling the defendant excepted. Exceptions overruled.

The case fully appears in the opinion.

Ensign Otis,

Rodney I. Thompson, for plaintiff.

Charles T. Smalley, for defendant.

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

BASSETT, J. Petition to the Supreme Judicial Court of Knox County for a review of a complaint brought under R. S., Chap. 24, Sec. 84, in which the present defendant's testate was complainant and the petitioner was defendant, for the assessment of damages to his property in Thomaston caused by raising the grade of a street in front of it in the construction of a bridge. The case was reported to the Law Court and judgment given for the complainant by the Court in its decision reported in *Starrett* v. *Thomaston*, 126 Me., 205.

The petition is brought under R. S., Chap. 94, Sec. 1, Par VII, providing, "A review may be granted in any case where it appears that through fraud, accident, mistake or misfortune, justice has not been done, and a further hearing would be just and equitable."

The petitioner alleges two grounds of relief; first a "mistake" of the Law Court in its above decision in inferring from the proceedings of the State Highway Commission that the way upon which the bridge was constructed and the grade of which was raised was a town way, when it was in fact a state highway and consequently the defendant was not legally liable for any damage caused by the change of grade; and second, that "due to accident or mistake" the three commissioners, appointed by agreement of the parties by the Court to determine the amount of damage, based their finding upon a computation outside the scope of their authority and found an excessive amount of damage.

The sitting Justice, upon motion of the respondent, dismissed the petition and the case comes up on exceptions to that ruling.

In *Donnell* v. *Hodsdon*, 102 Me., 420, upon a petition for review brought under Par. VII, the presiding Justice after hearing the evidence found as a matter of fact that the default of the petitioner in the action sought to be reviewed occurred through the negligence of her attorney and ruled that it was such accident, mistake or misfortune on her part as would entitle her to a review. Upon exceptions, this court held the ruling was wrong because it ignored other statutory requisites to the granting of a review. "Under clause VII upon which this petition is based, the petitioner is not entitled to a review unless he proves to the satisfaction of the court at *nisi prius* three propositions (1) that justice has not been done; (2) that the consequent injustice was through fraud, accident, mistake or misfortune; and (3) that a further hearing would be just and equitable. If the presiding Justice is satisfied of all those and grants the petition or is not satisfied of some of them and denies the petition, his decision is final and not subject to review upon exceptions. Where however as here the presiding Justice rules in effect that it is enough to show the negligent omission of the attorney to notify the client of the day set for trial and that he, the presiding Justice, need not be satisfied of anything else, such ruling is subject to exception and for the reasons above stated is erroneous. It grants a review although there may not be a defense to the action and although a further hearing would not be just or equitable."

In *Grant* v. *Spear*, 105 Me., 508, also a petition for review under the same clause, the presiding Justice found on hearing that the negligence of the petitioner's attorney was such "accident, mistake or misfortune" as would entitle to a review, and also that "justice had not been done" and that "a further hearing would be just and equitable." Exceptions to the decision of the presiding Justice were overruled. The Court said the rule in *Donnell* v. *Hodsdon*, supra, was decisive of the case. While in that case only one of the three elements had been found by the presiding Justice, here he had found all the elements in favor of the petitioner and his decision concluded the matter.

In *McDonough* v. *Blossom*, 109 Me., 141, the Court quoted with approval the rule of *Donnell* v. *Hodsdon*, and decided, the case

coming up on report, that the three propositions which must be proved had been proved by the evidence and ordered writ of review to issue.

At the hearing on the petition in the instant case, no evidence was presented. Before the presiding Justice were the petition, motion, the original printed case, which were printed together, *Starrett* v. *Inhabitants of the Town of Thomaston* and *Starrett* v. *State Highway Commission*, and which were made part of the bill of exceptions, and the above cited decision of this court.

The motion to dismiss was based on three grounds: first, *res adjudicata*; second, that Starrett died in November, 1927, following the above decision of this court in April, 1927, and it would be inequitable to require a rehearing on the case without his assistance and the petitioner could have filed the petition in his lifetime; third, because it does not appear in the petition that a review if granted would result in any material alteration of the decree of this court.

Upon the foregoing record, the presiding Justice ordered "Motion granted. Petition dismissed," to which ruling exceptions were taken.

In *Donnell* v. *Hodsdon*, supra, it is held that the decision of the presiding Justice "is final and not subject to review upon exceptions."

In *York & Cumberland Railroad Company* v. *Clark*, 45 Me., 151 (1858), the sitting Justice ordered a petition for review to be dismissed and the petitioner filed exceptions. The opinion states, "This case comes before us upon exceptions taken to the ruling of the Judge at *nisi prius*, in ordering the dismissal of a petition for review upon the whole case as presented before him. His adjudication, therefore, must have involved the determination of all such questions of law and fact as arose at the hearing. That both questions of law and fact were embraced in that adjudication is apparent, from the statement of the case, as contained in the exceptions. There is, however, no specific ruling in relation to any matter of fact or law, other than what relates to the admissibility of certain evidence, which was objected to by the petitioner, and admitted. Upon the merits, the only ruling consists in the order of

dismissal." The opinion goes on to state that under the statutes for review then in force, as under the earlier statutes, "all matters of fact or of discretion were left wholly to the determination of the presiding Judge and his decision in relation thereto was final. . . . In view of the numerous decisions, and the statutes we think it clear that prior to the R. S. of 1857, Chap. 77, Sec. 27, exceptions were not allowed in cases like the present, unless some question of law was therein distinctly presented." The Court held that the statute referred to did not apply and said, "As the same power which was vested in the Law Court (the whole court) at the time of this decision (*Leighton* v. *Manson*, 14 Me., 213 [1837]) is now vested in a single Justice, no reason is apparent why such Justice, in a hearing upon a petition for review, is not clothed with the same discretion as the Law Court formerly was. In both cases, the discretion to be exercised must be the discretion of the particular tribunal in which the law has placed it. An exception to the refusal of a judge to take off a default stands on the same ground. As there is no substantial difference in the effect of an adjudication upon a petition for review, and upon a motion to take off a nonsuit or default, all alike being matters of discretion, there is no reason why the same rule in regard to the right of exception should not be applied to each, and to all other cases where a like discretionary power is exercised. Perceiving no error in regard to any specific question of law raised upon the exceptions, the conclusion to which the Court have arrived in view of the whole subject — is that the exceptions must be dismissed."

In *Scruton* v. *Moulton*, 45 Me., 417 (1858), a petition for review was denied and exceptions taken, a report of the evidence adduced at the hearing being made a part of the bill. The exceptions were dismissed. The Court said, "In other cases referred to, upon petitions for review, the Judge has decided as matter of law, certain questions, and exceptions have been regarded as properly taken to such decisions and have been entertained and heard by the law Court. In the case presented, all the evidence adduced upon the hearing of the petition has been reported; and it does not appear that the Judge expressed any opinion, or gave any direction or judgment on matter of law; but he denied the review, in

the exercise of his discretion, upon the facts adduced in evidence."

These were decisions in cases which arose under the review statutes prior to the present review statute.

By the first statutes (1821, Chap. 57, Sec. 1), the Supreme Court, as a court, was empowered to grant review of causes "if they saw fit" and "on such terms and conditions as to them seem reasonable."

By the Revision of 1840, Chap. 123, Sec. 1, the Court was empowered to grant review in all civil suits "whenever they shall judge it reasonable and for the advancement of justice." By Sec. 2 of the same chapter, any Justice of the District Court had concurrent power to grant reviews.

In 1852 (P. L., Chap. 246, Sec. 13), the presiding Justice was empowered to hear and determine petitions for review "subject to exceptions to any matter of law by him so decided and determined." This provision says the Court, in *York & Cumberland R. R.* v. *Clark*, supra, "seems to have been inserted to confer a right which under the then existing statutes did not exist. . . . Without such provision the adjudication of a single Justice upon a petition for review, would, undoubtedly, have fallen within the general current of authorities wherein it is decided that exceptions will not lie to matters of discretion."

This provision was omitted by the Revision of 1857, Chap. 89, Sec. 1.

In 1858, Chap. 40, what is now the first clause or paragraph of the present review statute was enacted; in 1859, Chap. 94, the second and third; in 1862, Chaps. 107 and 133, the fourth and fifth; in 1863, Chap. 200, the sixth; and in 1868, Chap. 164, the seventh.

By the revision of 1840, Chap. 115, Sec. 7, provision was made for a writ of review "of right" in case of the default of an absent defendant. This provision in its present form is R. S., Chap. 87, Sec. 5.

In *Jones* v. *Eaton*, 51 Me., 386 (1863), where a review was granted only in case the defendant should fail to comply with certain terms, exceptions were overruled. The Court said, "When a review is not 'of right' its allowance or refusal rests wholly

upon judicial discretion. . . . And in such cases it may be done upon such terms and conditions as the Court may deem reasonable."

The rule was confirmed in *Austin* v. *Dunham*, 65 Me., 533 (1876).

In *Sherman* v. *Ward*, 73 Me., 30 (1881), exceptions to the granting of a review on a default without appearance were overruled. The Court said, "A review may be granted of right in certain cases where there is a default without appearance . . . or it may be granted as matter of discretion. Here the presiding Justice granted a review as a matter of discretion. . . . To the exercise of the discretionary power of the Court, exception will not lie. A petition for review is like a motion for a new trial. It is addressed to the discretion of the Court."

In *Berry* v. *Titus*, 76 Me., 285 (1884), where a review was granted because, as found by the Justice, by reason of accident or mistake injustice had not been done in two actions of replevin, the opinion held that his finding was conclusive and exceptions did not lie. "The ground for review in these cases appealed to the discretion of the Court. It could not be had of right but solely because the Court in the exercise of its judicial discretion saw fit to grant it. A court in the exercise of that discretion may impose terms and conditions upon which the rights or privileges granted shall be exercised or enjoyed."

In *Sawyer* v. *Chase*, 92 Me., 252 (1898), in a petition for leave to enter an appeal from a decree of a Judge of Probate, the opinion, upon the authority of *York & Cumberland Railroad Company* v. *Clark*, supra, and *Scruton* v. *Moulton*, supra, states, "So exceptions do not lie to a refusal to grant a review."

A petition for review is addressed to the discretion of the Court and its decision thereon can be revised upon exceptions only for erroneous rulings in matter of law.

The same rule is held in the decisions of the Massachusetts Supreme Court under the statutes of review of that Commonwealth, by which the Supreme Court was empowered to "grant a review on such terms as they shall think reasonable" (R. S., 1836, Chap. 99, Sec. 19); "on such terms as it deems reasonable" (Gen.

Stats., 1860, Chap. 146, Sec. 21); "may, upon petition, grant a writ of review" (Rev. Law., 1902, Chap. 193, Sec. 22; Gen. Laws, 1921, Chap. 250, Sec. 22). *Dearborn* v. *Mathes*, 128 Mass., 194; *Sylvester* v. *Hubley*, 157 Mass., 306; *Stillman* v. *Whittemore*, 165 Mass., 234; *Browne* v. *Fairhall*, 218 Mass., 495; *Burt* v. *Hodsdon*, 242 Mass., 302.

The legal effect of the order of dismissal in the instant case was a determination by the sitting Justice that at least one of the three requisite propositions of the rule of *Donnell* v. *Hodsdon*, supra, as a matter of fact or of law, so far as either fact or law or both were involved, had not been proved to his satisfaction, with regard to both alleged mistakes. Which does not appear. Nor does it appear that he expressed any opinion or gave any direction or judgment on any matter of law or gave any specific ruling in relation to any matter of fact or law. Nor can it be said that his order upon the record necessarily raises only a question or questions of law.

The mandate must therefore be

Exceptions overruled.

BERT W. BEMIS *vs.* DIAMOND MATCH CO.

Oxford. Opinion October 2, 1929.

REAL ACTIONS. TRESPASS. TROVER. DAMAGES. R. S., 1841, CHAP. 145, SECS. 14 AND 15. R. S., 1916, CHAP. 109, SECS. 11 AND 15.

In an action of trover to recover the value of certain logs cut by a disseizee and sold to the defendant and where the demandant has recovered possession after the cutting, but made no claim in his writ of entry for rents and profits or waste, held:

That while the demandant in a real action can not recover of the tenant in another action for rents, and profits or for waste committed during the period when the tenant was in possession and prior to the date of the writ of entry, he may recover in trover of a third person who has purchased the fruits of the trespass;

That since a demandant at common law before the enactment of Secs. 14 *and* 18, *Chap.* 145, *R. S.* (1841), *had the option of proceeding in trespass, once his title was established, against the disseizee for waste in the form of cutting and removing timber, or in trover against the purchaser of the disseizee, or against the purchaser in trover without first establishing his title in a real action. Secs.* 11 *and* 15, *Chap.* 109, *R. S.*, 1916, *are not to be construed as depriving the demandant of his right of action against the purchaser where no claim for waste was included in the real action;*

That while the purchaser of the disseizee may be a privy, no judgment obtained in a real action will estop the demandant from proceeding against a privy, who was not a party to the real action, and when the issue between them could not have been litigated in the real action and was not;

That the statutory prohibition against a demandant in a real action proceeding in trespass against a tenant for waste committed prior to the date of his writ of entry can not be extended to have the effect of a judgment shielding the purchaser of the fruits of the trespass from an action by the demandant for conversion, when no claim for such waste is made in the real action and, therefore, none could have been recovered against the tenant.

On report on an agreed statement. An action of trover to recover damages for an alleged wrongful conversion of timber by defendant. At the time of hearing the cause was, with the consent of the parties, and on an agreed statement, reported by the presiding Justice to the Law Court for determination. Judgment for plaintiff. Case remanded for assessment of damages.

The case is fully stated in the opinion.

Elias Smith,

Albert J. Stearns, for plaintiff.

Hastings & Son, for defendant.

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

WILSON, C. J. An action of trover to recover the value of certain logs alleged to have been wrongfully converted by the defendant company.

Sometime prior to the winter of 1924-25 one Bradley went upon the land of the plaintiff, claiming title thereto, and against the protests of the plaintiff, cut timber standing thereon and sold the logs in question to the defendant company. The plaintiff first

brought trespass against Bradley, but, failing to show possession, was nonsuited. He then brought a writ of entry to recover possession, but without claiming damages for rents and profits or for destruction or waste, and, under the law of this state, recovered judgment only for possession. *Bemis* v. *Bradley*, 126 Me., 462.

Following his judgment for possession, the plaintiff brought this action against the defendant for conversion of the logs which it purchased of Bradley while he was wrongfully in possession of the premises.

The case is reported to this court on the above statement of facts.

The defendant contends that inasmuch as the plaintiff is now prohibited under Secs. 11 and 15 of Chap. 109, R. S. (1916), as construed by this court, from bringing an action against Bradley, the tenant in the real action, for either rents and profits or waste accruing prior to the date of the writ of entry, the same prohibition applies to a privy of the tenant such as the purchaser of any fruits of waste committed by the tenant while in wrongful possession.

We think this contention can not prevail. At common law, the demandant could not recover for rents and profits or waste in his real action, but, after obtaining judgment under a writ of entry, he could bring an action to recover for rents and profits during the entire occupancy by the wrongdoer or for any destruction or waste committed during his wrongful possession. *Larrabee* v. *Lumbert*, 36 Me., 440.

It was held in the case just cited, however, that the common law was radically changed by Secs. 14 and 18 of Chap. 145, R. S. (1841), which are the same as now found in Secs. 11 and 15 of Chap. 109, R. S. (1916), in that the demandant not only may now recover under his writ of entry for any rents and profits accruing, or for waste committed, prior to the date of his writ, but that for such damages his remedy under his writ of entry is exclusive. In other words, he must either recover under his writ of entry for all damages for rents and profits or waste accruing prior to the date of his writ or be barred from ever recovering for that period. It was further held, contrary to the rule laid down in Massachusetts in

Raymond et al v. *Andrews*, 6 Cush., 265, that he must specifically include in his declaration a claim for such damages or he could not recover. In this respect, the Court followed a previous decision found in *Pierce* v. *Strickland*, 25 Me., 440.

The statute, therefore, gave the demandant no new rights but merely enabled him to accomplish in one action what had previously required two. *Purrington* v. *Pierce*, 41 Me., 532. The prohibition, however, against bringing a separate action in case no claim was made in the real action for rents and profits or waste is not express, but, as construed by the Court, a necessary implication and being in derogation of his common law rights should not be extended farther. Such appears to have been the intent of the legislature, as it expressly preserved the demandant's right of action against any other trespasser or person causing damage to the premises.

The Court has construed this statute strictly. In *Rollins* v. *Blackden*, 112 Me., 464, it held, that the demandant was not prohibited by the statute from bringing an action even against the tenant for any form of trespass that did not amount to destruction or waste, even though committed prior to the date of his writ of entry.

Since a demandant at common law before the enactment of this statute had an option of proceeding in trespass, once his title was established, against the disseizee for waste in the form of cutting and removing timber, or in trover against a purchaser, or even against the purchaser without establishing his title under a real action, *Moody* v. *Whitney et als*, 34 Me., 563, 564, we see no reason why the statute should be construed to deprive him of the right to recover damages in trover against a third person for the conversion of the fruits of the waste committed by the tenant when the demandant has not included in his real action any clause for damages by reason of the waste, nor do we think the language or the purpose of the statute requires such a construction.

The doctrine of *res adjudicata* has no application. Even though the purchaser of personal property of a trespasser may be a privy, no judgment obtained in a real action will estop the demandant as against a privy who was not a party, when the issue between them

could not have been litigated in the real action, and was not. *Smith* v. *Brunswick*, 80 Me., 189; *Young* v. *Pritchard*, 75 Me., 518; *Hill* v. *Morse*, 61 Me., 542. The statutory inhibition against a demandant in a real action proceeding in trespass against the tenant for waste accruing prior to the date of his writ of entry can not be extended to have the effect of a judgment shielding the purchaser of the fruits of the trespass from any action by the demandant for conversion, when no claim for such waste is made in the real action and none could be recovered against the tenant.

Judgment for the plaintiff.
Case remanded in accordance with stipulation of parties for assessment of damages below.

LOUIS B. CARON ET AL *vs.* HYMAN MARGOLIN ET AL.

Androscoggin. Opinion October 2, 1929.

DEEDS. EASEMENTS. BUILDING RESTRICTIONS. PLEADING AND PRACTICE. DAMAGES.

In an action to recover damages for interference with an easement in the nature of a building restriction common to all abutters on a public street, held:

That a restriction prohibiting building within a certain distance of the street line being imposed for the benefit of the principal estate runs with the land for the benefit of the grantee and his successors whether mentioned in succeeding deeds or not;

That there was not in the case at bar sufficient evidence of abandonment or of such a change in the character of the neighborhood as to render enforcement of the restriction inequitable to render a jury's verdict to the contrary clearly wrong;

That the record also fails to disclose that the jury was clearly wrong in finding that the plaintiffs were not estopped because of knowledge of the work of construction of the building which interfered with the easement;

That while the defendants may have an action against the plaintiff Caron, who was a grantor in their chain of title and who warranted the title without excepting the easement, a defense to an action by Caron can not avail the defendants in a joint action by Caron and another;

That the verdict is excessive, being evidently assessed on the basis that the injury was permanent. When an interference with an easement has been established in a suit at law, equity will abate the nuisance; and damages for a nuisance, which may be abated, are only recoverable to the date of the writ.

On general motion for new trial by defendants. An action on the case to recover damage to property of plaintiffs alleged to have been caused by defendants' interference with an easement relating to building restrictions. At the trial in the Superior Court for the County of Androscoggin, April Term, 1929, the jury found for the plaintiffs and assessed damages in the sum of $1,000. A general motion for new trial was thereupon filed by defendants. Verdict set aside and the case remanded to the court for a new trial only upon the question of damages.

The case fully appears in the opinion.

Belleau & Belleau, for plaintiffs.

Clifford & Clifford, for defendants.

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

WILSON, C. J. An action on the case to recover damages for interference with an easement common to lot owners abutting on Ash Street in the city of Lewiston, the easement consisting of a building restriction within twelve feet of the street line.

In 1872 the Franklin Company, located in Lewiston and owning a large tract of vacant land, divided it into lots with streets projected on a plan and in conveying inserted in each deed of the lots now owned by the parties to this cause, and also in the deeds of the other lots fronting on Ash Street, a restriction that no building should be erected within twelve feet of the street line.

Such a restriction in deeds of land on another street was held by this court in *Leader* v. *Laflamme*, 111 Me., 242, to have been imposed by the Franklin Company for the benefit of the principal estate and that it ran with the land for the benefit of each succes-

sive grantee whether mentioned in the subsequent deed or not. The land involved in this action was a part of the same original tract as that in the case above cited, and we see no reason to hold otherwise than was held in that case, viz.: that a permanent easement was created in the twelve-foot strip for the benefit of adjoining lot owners which ran with the land for the benefit of each successive grantee.

There is no question but that the defendants in the case at bar have interfered with this easement, if it still exists, by constructing an addition one story high in front of the building owned by them, and extending to the street line. The addition being a wooden structure to serve as a show or display window for the store occupying the street floor, and so far as the case discloses could be readily removed and the building restored to its former condition.

A jury found that the defendants had violated this restriction and that the value of the plaintiffs' adjoining property was thereby diminished and assessed damages to the amount of one thousand dollars.

The case is before this court on defendants' motion for a new trial on the grounds that the verdict is against the law and that the damages awarded are excessive.

The defendants urge in support of their first ground: (1) that the evidence discloses an abandonment of the easement by all the abutting owners on this street; (2) that the neighborhood has so changed in character that the purpose for which the easement was originally created would no longer be served by its enforcement and that it would be inequitable to enforce it; (3) that the plaintiffs were aware of the building of the addition and permitted its erection without protest and further had violated the restriction themselves and, therefore, should now be estopped from recovering in this action, and (4) that the plaintiff Caron was a grantor of the immediate predecessor in title of the defendants and if recovery is had in this action, the defendants may recover the amount of the award from the plaintiff Caron, and recovery in this action would only result in a circuity of action, which the courts do not favor.

We think none of these defenses can prevail. There is not sufficient evidence to warrant a finding of an abandonment of this easement, at least in its entirety by the abutting owners in the

immediate vicinity of the property of the plaintiffs and defendants. The jury must have so found, and we think without error in law or judgment.

Neither is there sufficient evidence of such a change up to this time in the character of the neighborhood as to render the enforcement of this restriction inequitable as was held in *Jackson* v. *Stevenson*, 156 Mass., 496, and *McArthur* v. *Hood Rubber Co.*, 221 Mass., 372. In those cases the changes were such as to practically extinguish the ground for the restriction, in effect resulting in a complete abandonment. Here the neighborhood appears to be still residential in its general character, though the restriction was not expressly limited to dwelling houses, as in *McArthur* v. *Hood Rubber Co.*, supra.

The evidence also fails to show that the jury was clearly wrong in finding that the plaintiffs were not estopped because of any knowledge of the construction of the building without protest. Caron appears to have been absent from the city until the addition was nearly completed, and it does not appear that knowledge of its beginning was brought home to the plaintiff Langelier. Neither does it appear that the plaintiffs have ever voluntarily violated the restriction. It appears from the record that, with one exception, the foundations of all the abutting owners in this vicinity were within ten feet eight inches of what the city engineer now says is the true street line. It is evident, however, there has been in the past some confusion as to the location of the street line on this side of Ash Street. All abutters evidently have understood that they were locating the foundations of their buildings on a fixed line, and there is no evidence it was done for the purpose of violating this restriction or of abandoning the easement. Their act may constitute an abandonment of so much of the easement, but so far as the record discloses can not be held to estop them from asserting their rights in the remainder of the restricted area.

It appears from the record to be true that the defendants may have a right of action against the plaintiff Caron for damages for a breach of warranty, he having in his conveyance to their immediate grantor warranted the premises free of all incumbrances, which warranty was also contained in the deed to the defendants; but this action is brought by Caron and a co-tenant, who, it ap-

pears, is his partner and who did not join in the deed to the defendants' grantor. A defense to an action by Caron, if suing alone, can not avail in a joint action by Caron and another. *Jones* v. *Vinalhaven Steamboat Co.*, 90 Me., 120. To so hold would result in Langelier, Caron's partner, being prevented from recovering any damages at all.

The verdict, therefore, can not be set aside as against the law. The damages, however, are clearly excessive, and from the record must have been assessed by the jury on an erroneous basis.

The addition is clearly of the nature of a continuing nuisance. It is not of such a permanent nature that it can not readily be removed and thus abated. Upon its being established as a nuisance in an action at law, equity will enforce its abatement. *Tracy* v. *LaBlanc*, 89 Me., 304; *Bliss* v. *Judkins*, 107 Me., 425. In such cases, damages in an action at law are only recoverable to the date of the writ. The future may be taken care of by successive actions at law, or by applying to the equity courts for its abatement. *C. & O. Canal Co.* v. *Hitchings*, 65 Me., 140; *Dority* v. *Dunning*, 78 Me., 381; *Williams* v. *Water Co.*, 79 Me., 543, 546; *Tracy* v. *LeBlanc*, supra; *Sterling* v. *Littlefield*, 97 Me., 479; *Bliss* v. *Judkins*, supra.

Clearly, damages of one thousand dollars are excessive as damages to the date of the writ or even as to any permanent injuries shown by the record. Owing to an erroneous conception by counsel at the trial of the cause as to the basis of damages in such cases, this court can not find in the record any sound basis for ordering a remittitur as an alternative of a setting aside of the verdict. The verdict is, therefore, set aside and the case remanded to the court for a new trial, but only upon the question of damages.

So ordered.

JAMES A. SIMPSON ET AL

vs.

RICHMOND WORSTED SPINNING CO. ET AL.

Sagadahoc. Opinion October 3, 1929.

APPEAL. EXCEPTIONS.

When a case has been heard on a former appeal and the decree reversed and the case remanded to the lower court for proceedings in accordance with the opinion, the lower court is bound by the mandate to proceed in all subsequent stages of the cause in accordance with the opinion. The law of the case can rise no higher than its source.

On appeal and exceptions. A bill in equity for an accounting. The cause was before the Law Court for the second time having been remanded to the court below "for proceedings in accordance with the opinion." Plaintiffs filed their motion that the court so decree to enable them to present different questions than had been presented, or even suggested before. To the refusal of the presiding Justice to so rule plaintiffs excepted and appealed from the final decree. Exceptions overruled. Appeal dismissed. Decree below affirmed.

The case sufficiently appears in the opinion.

George W. Heselton,

Fred F. Lawrence, for plaintiffs.

James A. Pulsifer,

J. E. Reagan, for defendants.

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

DUNN, J. The appeal and the exceptions in this equity case raise the same question. *Turner* v. *Hudson,* 105 Me., 476.

James A. Simpson, the payee of an overdue promissory note, pledged it. Then, he and his pledgee brought this suit against the

makers of the note, and in the same bill sued the Richmond Worsted Spinning Company, a corporation which the makers had formed.

Jurisdiction over the makers or their property never was obtained. One Harry L. Pond interposed and became a party to the pending proceeding. The corporation went to receivership.

In the receivership, decree was entered directing the deposit in court of certain money to await determination whether the money should go to the plaintiffs, or either of them, or to the intervener. The deposit was accordingly made. Thereupon the receivers were dismissed from this litigation.

Pond, the intervener, charges fraud on the part of Simpson, one of the plaintiffs, concerning the sale of an option, asserted theirs in equal ownership, though it stood solely in Simpson's name, for the purchase of a spinning mill at Richmond, Maine.

There is prayer that against Simpson may be the entry of judgment for Pond for the amount which shall be found to be his due; and that, toward the satisfaction of such judgment, the money on deposit may apply, on proof of the agreement by the corporation to pay the note in suit — the last of three notes given Simpson on assignment and transfer by him of the option that the spinning mill corporation in succession acquired.

Replication by the plaintiffs leaves no charge or assertion of the intervener undenied.

On bill, answer, replication and proof, there was full hearing. The question of liability, the extent thereof, whether a certain release were bar to recovery, all these and other matters were in evidence.

Final decree, adverse to the intervener, was signed, filed, and entered. An appeal was made. The appeal was sustained, and the decree below reversed. The mandate of the appellate court remands the case for proceedings in accordance with the opinion. 128 Me., 22.

Undecided only by the appellate court is, if there had been reimbursement to Simpson for the five hundred dollars paid by him for the option; if unreimbursed, he to have credit in the proceedings. 128 Me., 22.

The case being back, plaintiffs filed below their motion to decree

that they account to the intervener to enable them to present different questions than had been presented, or even suggested, before.

The motion was overruled. No evidence was introduced.

So, nothing remained to do, preliminary to final decree, but to assemble the figures, compute the interest, and strike the balance from the record theretofore made.

This the Justice did, without the intermediate assistance of a master, as it was competent for him to do. Then he wrote his decree.

Plaintiffs' appeal and exceptions lack savor.

The law of the case could not rise higher than its source. It was for the lower court, bound by the mandate, to proceed in all the subsequent stages of the cause "in accordance with the opinion." *Whitney* v. *Johnston*, 99 Me., 220; *Farnsworth* v. *Whiting*, 106 Me., 543; *Fenderson* v. *Franklin, etc., Company*, 121 Me., 213.

Appellants make no attack on the decree, except upon the whole of it, and in such respect the assault must fail.

Exceptions overruled.
Appeal dismissed.
Decree below affirmed.

ADELBERT F. CALLAHAN *vs.* AMOS D. BRIDGES SONS, INC.

Androscoggin. Opinion October 4, 1929.

MOTOR VEHICLES. NEGLIGENCE. PRESUMPTIONS.

The care and vigilance required on the part of vehicular travelers will necessarily vary according to the exigencies of the situation.

An automobile driver is bound to use his eyes, bound to see seasonably that which is open and apparent, and take knowledge of obvious dangers. When he knows, or reasonably ought to know, the danger, it is for him to govern himself suitably. Thoughtless inattention spells negligence.

The law of the road must yield to extraordinary junctures.

In the case at bar the fact that the steam shovel was shown to have been on the left of the road raised a prima facie presumption of negligence. Such presumption was, however, open to explanation, and full explanatory evidence was introduced by the defendant.

The plaintiff failed to sustain the burden of proving that at the time of the accident he himself was in the exercise of due care.

On general motion for new trial by defendant. An action on the case to recover damages sustained in collision between automobile of the plaintiff and self-propelling steam shovel of defendant, upon a highway in the town of Livermore. The jury rendered a verdict of $240 for the plaintiff. A general motion for new trial was thereupon filed by the defendant. Motion sustained. New trial granted.

The case sufficiently appears in the opinion.

Fred H. Lancaster,

Seth W. Norwood, for plaintiff.

Oakes & Farnum, for defendant.

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

DUNN, J. An hour and a half before sunset on September 22, 1928, the automobile of the plaintiff and the self-propelling steam shovel of the defendant were being operated, in opposite directions, upon a highway in the town of Livermore. They collided.

The steam shovel was on the wrong side of the road. That is, instead of being to the right of the middle of the traveled part of the way, so far that it and the automobile could pass without interference, the shovel was to the left of that middle. R. S., Chap. 26, Sec. 2, as amended.

This is the only allegation of negligence.

On issue joined, plaintiff prevailed; the jury award of damages being $240.00.

Defendant moves to set the verdict aside because it is not supported by the evidence. The ground of excessiveness, not having been argued, is deemed waived.

When the allegation is that the failure of the defendant to observe the law of the road was the proximate cause of the damage, the plaintiff takes upon himself the burden of establishing, not only the negligence of the defendant, but that the plaintiff himself was free from any contributory fault.

The fact that the steam shovel is shown to have been on the left of the road raises a prima facie presumption of negligence. Procedurally, then, it is for the defendant, in reference to the point to which the presumption relates, to go forward with the evidence.

Prima facie presumptions are open to explanation. *Raymond* v. *Eldred*, 127 Me., 11.

Defendant introduced testimony that, to make the curve, it was essential that the machine be where it was.

There need not be pause to consider what effect the jury could have given to the explanatory evidence. When the plaintiff, in the exercise of common prudence, reasonably could have seen the steam shovel on the wrong side of the street, it was then seven hundred and sixty feet, in unobstructed view, ahead of him.

The steam shovel was eight feet wide, fifteen feet high, with an excavating bucket attached to a manipulatory arm, elevated above its roof. It had a coating of gray paint. Speed capacity one mile an hour. Soft coal smoke was pouring from its stack.

There is uncontradicted testimony that, on seeing the automobile approaching the operator of the steam shovel stopped it, and motioned to the plaintiff to pass on his left-hand side.

Plaintiff testified that, on first seeing the steam shovel, twenty-five or thirty feet off, he braked his automobile, turned still farther to the right, but could not, in the narrow space available, avoid collision.

What the apostle said of a greater law may be said of the law of the road: "The Law is admirable — provided that one makes a lawful use of it." 1 Tim., 1, 8 (Moffatt).

The law of the road yields to extraordinary junctures. *Marquis* v. *Fitts*, 127 Me., 75.

Care and vigilance on the part of vehicular travelers should always vary, according to the exigencies which require vigilance and attention. An automobile driver is bound to use his eyes, bound to see seasonably that which is open and apparent, and take knowl-

edge of obvious dangers. When he knows, or reasonably ought to know, the danger, it is for him to govern himself suitably. Thoughtless inattention on the highway, as elsewhere in life, spells negligence.

Whatever the other aspects of this case, plaintiff clearly failed to sustain the burden of proving that, at the time of the accident, he himself was in the exercise of due care.

Motion sustained.
New trial granted.

DAVID B. SILVERMAN *vs.* CHARLES W. USEN.

York. Opinion October 9, 1929.

STREETS. NEGLIGENCE. MUNICIPAL CORPORATIONS. NUISANCE. LANDLORD AND TENANT.

No person has a right to permanently use a public street for private purposes.

Streets, including sidewalks, are for use in traveling, but a traveler is not obliged to keep "moving on." One may make stops of reasonable duration without losing his rights as a traveler.

In the absence of testimony that one was impeding public travel a stop of fifteen or twenty minutes' duration can not, as a matter of law, be said to have changed his status from that of a traveler to that of a trespasser or nuisance.

A shooting gallery is not per se *a nuisance. It is not a nuisance if licensed by competent public authority under R. S., Chap.* 32.

Though licensed it may be dangerous, but it is not a tort to lease property for a use which a licensing board created by a legislature has, even though injudiciously, licensed as legitimate.

In all actions for tort the burden is upon the plaintiff to show some breach of a legal duty owed him by the defendant.

A lessor as such, is not liable for the negligence of his lessee. A lessor of a shooting gallery properly licensed, is not liable to third persons for injuries resulting from the lessee's negligence.

In the case at bar there was no evidence that the accident was due to improper construction, nor that the gallery was leased to be used without a license.

The plaintiff showed no breach of legal duty owed him by the defendant and was not entitled to recover.

A nonsuit was properly ordered.

On exceptions by plaintiff. An action on the case brought by plaintiff to recover damages for the loss of the sight of his right eye. Plaintiff was standing on a public sidewalk in the town of Old Orchard, in front of premises owned by defendant and leased by him to one Garmanack. While he was so standing a bullet was deflected from the target or steel wall striking his right eye and destroying its sight. Trial was had at the September Term, 1928, of the Supreme Judicial Court for the County of York. At the conclusion of plaintiff's testimony defendant moved for a nonsuit, which was granted by the presiding Justice. To this ruling plaintiff seasonably excepted. Exceptions overruled.

The case fully appears in the opinion.

Emery & Waterhouse, for plaintiff.

F. R. & M. Chesley,

Strout & Strout, for defendant.

SITTING: DUNN, DEASY, STURGIS, BASSETT, FARRINGTON, JJ.

DEASY, J. In July, 1925, the defendant was the owner of a tract of land bordering upon a public street in Old Orchard.

Upon a part of it was a building equipped as a shooting gallery. It was so planned and arranged that a person using it stood very near or upon the public sidewalk and shot across a gun table at a target about thirty feet distant within the building.

The defendant leased the gallery thus equipped to one Charles Garmanack who operated the shooting gallery.

The plaintiff wishing to see Mr. Garmanack, the lessee, went to the premises. Not finding Garmanack at once he waited and while waiting, walked along the sidewalk in front of the gallery. Attracted by it he paused to watch the shooting. A projectile was deflected by the target or by the steel wall beyond it and rebounded, striking the plaintiff in the eye, destroying one eye and threatening the loss of both.

Upon defendant's motion a nonsuit was entered. The defendant's brief stresses the doctrine of liability to an invitee, contrasting it with liability to a mere licensee. But the plaintiff was neither the one nor the other. At the time of the injury he was upon the sidewalk, a part of the public street, not by virtue of any invitation from any person, but in the exercise of his right as a traveler.

The defendant contends that the plaintiff had forfeited his rights as a traveler by loitering upon the sidewalk to watch the shooting. Not so.

"No person has a right to permanently use (the streets) for private purposes." 13 R. C. L., 252.

This rule may well apply to the defendant who so planned and equipped his shooting gallery that the sidewalk was used as a platform by those engaged in target practise.

It does not apply to the plaintiff who paused temporarily upon the sidewalk to look at the shooting gallery and observe its use.

Streets, including sidewalks, are for use in traveling, but a traveler is not obliged to keep "moving on" like poor Joe in "Bleak House."

"In order to be a traveler it is not necessary that one should be constantly moving on." *Commonwealth* v. *Henry*, 229 Mass., 22.

"During these stops of reasonable duration one should not lose his rights as a traveler and the protection thus afforded to his person or property." *Smethurst* v. *Church*, 148 Mass., 266; See *Britton* v. *Cummington*, 107 Mass., 347; *Leighton* v. *Dean*, 117 Me., 40.

The plaintiff testified that he waited for Mr. Garmanack's return for "an hour or something like that." Not, however, that he stood upon the sidewalk while waiting. In answer to another question he testified that he remained "there before anything happened" — "fifteen or twenty minutes."

In the absence of testimony that he was impeding public travel such a stop can not, as a matter of law, be said to have changed his status from that of a traveler to that of a trespasser or nuisance.

But he did not mean (thus the context plainly indicates) that he stood in one place upon the sidewalk even that length of time.

It can not properly be said as a matter of law that the plaintiff had lost his rights as a traveler.

If there were no other ground for it, the ruling granting a nonsuit would have been erroneous.

But the defendant advances another reason for sustaining the nonsuit.

The action is brought not against the lessee who was in sole possession, maintaining and operating the shooting gallery, but against its owner.

When a leased structure is at the time of the letting defective and dangerous by reason of faulty construction or want of repair, the lessor may be liable to a third party suffering injury thereby. 16 R. C. L., 1076.

Likewise a landlord who leases premises for a purpose which is *per se* a nuisance may be held liable to a third person injured by it. "To charge the landlord the nuisance must necessarily result from the ordinary use of the premises by the tenant for the purpose for which they were let." 2nd Wood on Landlord and Tenant, Sec. 536; *Kennedy* v. *Garrard* (Tex.), 156 S. W., 570.

A shooting gallery is not *per se* a nuisance. It is not a nuisance if licensed by competent public authority under R. S., Chap. 32.

"The legislative sanction makes the business lawful and defines what must be accepted as a reasonable use of property." *Sawyer* v. *Davis*, 136 Mass., 242.

Though licensed it may be dangerous, but it is not a tort to lease property for a use which a licensing board created by the Legislature has, even though injudiciously, licensed as legitimate.

In *Leonard* v. *Hornellsville et al*, 58 N. Y. S., 266, the headnote fairly summarizing the opinion says: "The owner of premises in a city who leased them for a shooting gallery which the tenant conducted in a manner prohibited by the City Charter, thereby injuring a person while on the street adjacent to the premises is not liable for the injuries in the absence of proof that she (the owner) knew that the tenant was using the premises in violation of the charter."

In another shooting gallery case wherein the lessor was held to be responsible the Court says: "The theory upon which the landlord is held to be liable where the premises are leased with a nuisance is that he created the nuisance and will be presumed to have intended the continuance thereof." *Larson* v. *Park Company* (Utah), 180 Pac., 599; 4 A. L. R., 731.

But when the property is leased to be used as a shooting gallery under proper public license it can not be properly said that the nuisance is intended.

Even if a shooting gallery be duly licensed the lessee or person operating it is responsible for injuries caused by his negligence. But it is elementary that a lessor as such is not liable for the negligence of his lessee.

It is true that the course of the projectile which destroyed the plaintiff's eye was not affected by license or want of it. But as in all actions of tort, the burden is upon the plaintiff to show some breach of legal duty owed him by the defendant. It is not shown and can not be assumed that the defendant leased the premises to be run without public license and therefore illegally. 16 C. J., 241.

No breach of the defendant's legal duty is proved.

Exceptions overruled.

ALBERT S. SULLIVAN'S CASE.

York. Opinion October 15, 1929.

WORKMEN'S COMPENSATION ACT. "ARISING OUT OF THE EMPLOYMENT" AND "IN THE COURSE OF THE EMPLOYMENT." DEFINED.

Under the Workmen's Compensation Act to be compensable an accident must have arisen "out of the employment" and "in the course of the employment."

The words "arising out of the employment" used in the Workmen's Compensation Act mean there must be some causal connection between the condition under which the employee worked and the injury which he received. The injury must be due to a risk "because employed."

The words "and in the course of the employment" refer to the time, place, and circumstances under which the accident takes place. The injury must have been due to a risk "while employed."

Both elements must appear. One is as essential a condition as is the other.

An accident arises in the course of employment, when it occurs within the period of the employment, at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incidental thereto.

If an accident does not occur "in the course of the employment" it can not "arise out of the employment."

When, as in the case at bar, an employee whose duty it is to carry cloth from one place to another in a mill-room and to assist any of the operatives who may need him, goes to the front of a nap shearing machine when it is in motion to inquire if his services are needed, and while standing there extends his hand for mere curiosity to feel of a moving piece of cloth connected with the machine, and his hand is drawn by the cloth into a cylinder and mangled, the injury does not arise in the course of or out of his employment.

A Workmen's Compensation case. Appeal from the decree of a single Justice affirming a decision of the Chairman of the Industrial Accident Commission, denying compensation to Albert S. Sullivan for injuries to his left hand consisting of the loss of four fingers and part of the thumb, sustained while employed in the woolen mill of Newichawanick Company, South Berwick, Maine, and alleged by petitioner to have arisen out of and in the course of his employment. Appeal dismissed. Decree affirmed.

The case fully appears in the opinion.

George D. Varney, for petitioner.

Eben F. Littlefield,

William B. Mahoney, for respondent.

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

BASSETT, J. Appeal from the decree of a single Justice rendered in accordance with the decision of the Chairman of the Industrial Accident Commission, denying compensation to Albert S. Sullivan for a personal injury.

Sullivan, a boy about eighteen years of age, had been employed in a woolen mill as a general helper for some four weeks. His duty was to carry cloth from one place to another and to assist any of the operatives who might need him. He had been employed in this particular room the day before for the first time. In it was a machine used to shear nap from cloth and operated by one Taber.

The back of the machine was toward the center of the room. In front of and under it was a rack in which a cut of cloth was placed. The cloth ran from a rack up over the front of the machine, under a rapidly revolving cylinder of knives about four or five feet from the floor, and came out into a rack on the back side of and under the machine. When the cuts of cloth were removed from this last rack, it was necessary for the operative to have some one to assist him.

Sullivan had, during the day before, been asked by Taber several times to assist him in removing the cloth from the back rack and had assisted, standing at the back of the machine. He had been around in front of the machine several times when it was stopped but could not recall that he had, when it was in motion. He had seen the blanket of cloth moving up under the cylinder and knew that the cylinder had knives, having seen them when not in motion.

At the time of the accident, about eight o'clock in the morning, the machine was running. Taber had just put on a fresh cut of cloth, which was passing up over the front. He was sweeping up the floor to provide a clean place for laying down the next cut, which would replace the one in the machine when it was taken off. He observed Sullivan coming around the machine from his left and toward the front where he was standing. Sullivan, who had with a fellow worker been carrying cloth from another room into the finishing room and had completed this job, without reporting to the overseer for further orders, walked over to the shearing machine for the purpose, as he said, of ascertaining whether Taber desired his help in removing a cut of cloth from the back rack.

Taber had not called him or given him any signal or indication that he needed him for such purpose nor was there any cloth in the rack apparently ready to be moved. Sullivan, when he reached the machine, made no inquiry of any kind of Taber but after a word of greeting stood near the machine in front while Taber turned his back to sweep up the floor.

Sullivan stated that he went around in front of the machine to ask Taber if the cuts were ready to be taken out and waited for him to finish sweeping before asking; that as he stood waiting, he "just naturally" stepped up to the machine and reached out his hand and "touched the blanket that was moving," "just out of

curiosity," "trying to see how it felt moving along." He was at the time standing about a foot from the machine, looking at Taber, and extended his left hand to the blanket. He could not explain just what did happen, but his hand was carried quickly to the knives and four fingers and a part of the thumb severed.

The Commission quoted from *Saucier's Case*, where the hand of an employee was injured in an exhaust fan, 122 Me., 325, at 330, "We are unable to see how her employment can be ascribed at all as the cause of her injury; it did not call her or require her to go to or near the fan; it was not something that happened as the natural and probable consequence of her employment, but was the result of her own voluntary act, entirely independent of any duty she was required to perform, and one for the sole purpose of satisfying her curiosity." and added, "This language, by merely changing the pronoun and substituting for the word 'fan' the words 'front of the machine' applies with equal force to the present case."

The accident must have arisen "out of the employment" and "in the course of the employment" to entitle the employee to compensation.

It was early held by this court that these words, "arising out of" the employment mean there must be some causal connection between the conditions under which the employee worked and the injury which he received, *Westman's Case*, 118 Me., 133, 143; that the injury must have been due to a risk "because employed," *Mailman's Case*, 118 Me., 172, 180; *Gray's Case*, 123 Me., 88. The subsequent decisions have held that the words refer to the origin or cause of the accident. *Dulac* v. *Insurance Co.*, 120 Me., 39; *White* v. *Insurance Co.*, 120 Me., 67; *Webber's Case*, 121 Me., 412; *Saucier's Case*, 122 Me., 329; *Gray's Case*, 123 Me., 88; *Washburn's Case*, 123 Me., 404; *Healey's Case*, 124 Me., 148; *Beers' Case*, 125 Me., 3; *Fogg's Case*, 125 Me., 170; *Paulauskis' Case*, 126 Me., 34; *Taylor's Case*, 126 Me., 451; *Gooch's Case*, 128 Me., 86.

It was also held in the same two cases that the words "and in the course of" the employment refer to the time, place and circumstances under which the accident takes place. *Westman's Case*, supra, 142; that the injury must have been due to a risk "while employed," *Mailman's Case*, supra, 180. The subsequent decisions

have followed these definitions. *Dulac* v. *Insurance Co.*, supra; *White* v. *Insurance Co.*, supra; *Fournier's Case*, 120 Me., 236; *Charles E. Harriman's Case*, 121 Me., 491; *Fogg's Case*, supra; *Paulauskis' Case*, supra; *Taylor's Case*, supra; *Butler's Case*, 128 Me., 47.

"Both elements must appear." *Mailman's Case*, supra. "One is just as essential a condition of the right to compensation as the other." *Fournier's Case*, supra.

"The words 'in the course of the employment' relate to the time, place and circumstances under which the accident takes place. An accident arises in the course of the employment when it occurs within the period of the employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incidental thereto." *Fournier's Case*, supra.

"An accident arises in the course of the employment if it occurs, as to time, place and circumstances, during employment, or in the course of activities incidental thereto, at a place where the workman may properly be found, and under circumstances that negative the idea of voluntary self infliction or any statutory bar." *Butler's Case*, supra.

"The phrase 'in the course of the employment' is too frequently lost sight of and is seldom discussed. It is often clear that the accident did not 'arise out of' because it did not occur 'in the course of' but only the former reason is assigned for the decision. . . . If an accident does not occur 'in the course of,' it can not 'arise out of.'" *Fournier's Case*, supra.

No question was raised as to the time. It would seem from the wording of the decision that the Commissioner found that the place where Sullivan was at the time of the accident was not, as in the Saucier Case, a place to which or near which the employee had occasion to go. This finding of fact by the Commissioner is conclusive because there was evidence to support it.

The Commissioner also found that Sullivan's extending his hand to touch the moving cloth was his own voluntary act and, as admitted by Sullivan, done for the sole purpose of satisfying his curiosity. This finding of fact is conclusive.

From these findings of fact, it would follow as a necessary con-

clusion that the injury was the result of Sullivan's own voluntary act done only out of curiosity, entirely independent of any duty required to be performed or incidental thereto, and consequently not in the course of the employment and therefore not arising out of the employment.

The mandate must therefore be

Appeal dismissed.
Decree affirmed.

CHARLES M. HAMLIN *vs.* N. H. BRAGG & SONS.

CHARLES M. HAMLIN, JR., PRO AMI *vs.* N. H. BRAGG & SONS.

Penobscot. Opinion November 4, 1929.

APPEAL. STIPULATIONS. NEGLIGENCE, CONTRIBUTORY AND IMPUTED.

Where evidence is admitted subject to exceptions by a defendant and a verdict is directed for the defendant with the stipulation that "if it shall be found that these actions upon this evidence can be maintained, the liability of the defendant is determined by that finding, and the cases will come back to be heard only on the question of damages," to which ruling the plaintiff excepted and the case is before the law court on the plaintiffs' exceptions. Held:

That without a limitation in the stipulation that the issue presented by the plaintiffs' exceptions is to be determined on the admissible evidence, it must be determined on all the evidence admitted by the Justice presiding;

That such a stipulation does not present the case to the law court as on report, but first presents the usual question raised by an exception to a directed verdict for the defendant, viz.: was there any evidence to go to the jury;

That the evidence admitted in these cases not only warranted the submission of the cases to the jury, but was sufficient to sustain a verdict for the plaintiffs.

On exceptions. Two actions on the case, one brought by a five year old child, Charles M. Hamlin, Jr., by his father and next friend Charles M. Hamlin to recover for personal injuries occasioned by being struck by the automobile of the defendant, and the other by the father to recover for expense to which he was put by the injuries to his child. The actions were tried together. At the close of the testimony the presiding Justice directed the jury to bring in a verdict for the defendant with the stipulation, "that

if it shall be found that these actions upon this evidence can be maintained, the liability of the defendant is determined by that finding and the cases will then come back to be heard only upon the question of damages, with rights with reference thereto preserved by all parties." To this ruling plaintiffs seasonably excepted. Exceptions sustained. Cases remanded for the assessment of damages.

The cases fully appear in the opinion.

George E. Thompson,

Abraham M. Rudman, for plaintiffs.

Fellows & Fellows, for defendant.

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

WILSON, C. J. Actions by a father in his own behalf and as next friend of an infant child for personal injuries to the child resulting from the alleged negligence of a servant of the defendant.

After the evidence of the plaintiffs was in, the defendant's counsel moved for a directed verdict, which the presiding Justice granted, but with the following stipulation: "that if it shall be found that these actions upon this evidence can be maintained, the liability of the defendant is determined by that finding and the cases will come back to be heard upon the question of damages."

To this ruling the plaintiffs excepted and the case is before this court upon the plaintiffs' bill of exceptions.

The case as submitted presents unusual questions by reason of the form of the stipulation. As the cases were tried, evidence was admitted against defendant's objection and to the admission of which exception was taken but not, of course, perfected by reason of the verdicts being directed in their favor. The evidence objected to was in the form of a statement by the servant of the defendant as to how the accident occurred made some time after the accident.

It was the only evidence in the case as to what actually transpired at the time of the accident. Without it the case is barren of affirmative proof of any negligence on the part of the defendant.

With the evidence in the case contained in the statement of the driver of the truck to a relative of the child after the child had

been taken to the hospital and the driver was, as an act of courtesy, conveying the relative back to her home, there could be no question of their being sufficient evidence to submit to the jury.

It is urged by the defendant's counsel, however, that on an exception to a ruling to direct a verdict this court must base its conclusion on the admissible testimony, and cites *Wellington* v. *Corinna*, 104 Me., 255, and *Ford* v. *Dilley*, 174 Iowa, 243, 248 (L. R. A., 1917-B, 1245).

In the first case the question of the admissibility of the evidence was before this court on a bill of exceptions and in the latter case under the Iowa statutes cases come before the appellate court on appeal and not by bill of exceptions under which procedure in that state any question raised below may be considered on appeal.

If the case were here without the stipulation and the exceptions were sustained the case would go back for a new trial on the merits and the defendant could protect itself in case the verdict was against it by perfecting a bill of exceptions to the admission of this evidence on a new trial; but with the stipulation incorporated in the bill of exceptions and assented to by the defendant's counsel to the effect that if it shall be found that these actions upon the evidence can be maintained, the liability of the defendant is thereby determined. It is not an unusual practice to submit a case to this court after a directed verdict on such a stipulation where there is no question as to the admissibility of any of the evidence. *Rosen* v. *Insurance Co.*, 106 Me., 229; *Johnson* v. *N. Y. N. H. & H. R. R. Co.*, 111 Me., 263.

The question at *nisi prius* was whether there was sufficient evidence admitted by the presiding Justice to go to the jury on the disputed issues to sustain a verdict for the plaintiff. The issue before this court on a bill of exceptions to a ruling directing a verdict for the defendant with a stipulation that, if a verdict can be maintained on the evidence, without expressly limiting it to the admissible evidence, is whether upon the case as it stood at the close of the plaintiffs' testimony, with the evidence objected to in the case, it can be maintained.

We do not think this stipulation can be construed as submitting the case to this court as on report. Otherwise the bill of exceptions is without purpose. It must be construed as having the same

effect as the stipulations in the cases above referred to.

As the court said in *Rosen* v. *Insurance Co.*, supra, as the case is presented "the test is whether a verdict for the plaintiff could be sustained by this court on the evidence," and as in *Johnson* v. *N. Y. N. H. & H. R. R.*, supra, "We are not called upon to express our own judgment on the probative force of the testimony whatever our own conclusion might have been. If there was evidence which the jury were warranted in believing and upon the basis of which honest and fair minded men might reasonably have decided in favor of the plaintiff, then the exceptions must be sustained."

According to the testimony, the injured child was not quite five years of age. Just prior to the accident he had been playing on the lawn at the home of his grandparents, which fronted on the main street in the town of Orono. Between the lawn and the travelled part of the street there was a sidewalk and ditch and then the car track of an electric road. Across the ditch from the sidewalk was a plank platform to permit passengers to enter and leave the electric cars at that point.

Just before the accident, the mother of the child, who had been seated on the front piazza of the home at which they were visiting for the purpose of watching the child at play, had gone into the house for her sewing and after coming out had just stooped to pick it up when she heard the "terrible screech" of the brakes of the truck as the driver had put them on to avoid the accident.

Apparently while she was in the house the child had gone onto the platform and was either seated or standing and as the truck approached had started to cross the street, so far as the evidence shows unconscious of the approaching truck.

According to the statement of the driver made to a relative after the accident, which was admitted over the defendant's objection, the driver, as he was coming along the street nearly one thousand feet away, saw the child standing on the platform leading from the sidewalk to the car tracks. He was then driving thirty-five miles an hour. He admitted he was in a hurry to reach his home for his supper. He does not say he slowed down as he approached the point of the accident; and though he saw the child on the platform, he gave no warning signal of his approach for fear, as he stated, of startling the child, though it is not clear why, if he startled him,

he expected that he might start to cross the street rather than toward his mother, the source of refuge of every child in case of alarm.

Just before he reached the point of the accident, the child did start across the street, and though the driver turned to the left and put on his brakes till they "screeched," the child was run into or over and severely injured.

While a driver of a motor vehicle may not be held, even without a warning signal of his approach, to anticipate that an adult will attempt to cross a street without exercising some degree of care in looking for possible approaching traffic, unless in a congested part of a city at points provided for pedestrians to cross, yet he may not be held free of negligence if seeing a child of tender years standing on a platform or walk leading from the sidewalk to the electric car track and to the travelled part of the street, and without any warning signal of his approach, fails to keep his motor vehicle under such control that he can not readily stop it in case such child attempts to cross the street. The driver in this case did not state that the child suddenly darted out from the platform, but that when he observed him cross the tracks to the roadway, it was too late for him to stop or turn out sufficiently to avoid him.

Upon such evidence a jury may well have found that the driver was guilty of negligence.

It is urged that the time which elapsed between the accident and his stopping and picking up the child and with the mother starting for the hospital indicates that the driver was travelling slowly at the time of the accident, but his admission that one thousand feet back he was travelling at thirty-five miles per hour and was hurrying home to supper and the application of his brakes to the extent that the protesting brake drums were heard one hundred and fifty feet away and in the house, would warrant a jury in finding that he did not have his car under proper control under the circumstances.

Upon the issue of contributory negligence, either on the part of the child or of imputed negligence on the part of its parents under the circumstances disclosed by the testimony in the case, the court can not say as a matter of law that a child of that age is not capable of exercising some degree of care or that there was or was

not imputed negligence on the part of its parents in permitting a child of his age to play on a front lawn of considerable size, though adjoining a much travelled thoroughfare, without constant watching. It was a question for the jury to determine.

The child, of course, did not testify, and there is no evidence in the case as to his mental development or familiarity with the dangers of street traffic. Even if we can attribute to him the judgment of the ordinary child of five years of age, it can not be said as a matter of law that a child of that age failed to exercise the care the law requires of him in attempting to cross a street, no warning having been given him of an approaching motor vehicle. It has been held that, as a matter of law, even an adult is not obliged to stop and look before crossing a street. It is a question for the jury to say under the circumstances whether crossing a street without looking for approaching traffic is negligence. *Shaw* v. *Bolton*, 122 Me., 232.

Neither can it be said as a matter of law that a mother is guilty of negligence for not keeping constant watch over the play of a five year old child on a spacious lawn. *Grant* v. *Bangor Railway & Elec. Co.*, 109 Me., 133, 137.

To leave him unwatched during a brief period while she was going upstairs for some sewing and stooping to pick up material she had laid down on the piazza floor can not be held as a matter of law to be negligence which would be imputed to a five year old child, who while she had been watching him had disclosed no intention of going into the street. Her attention had not been attracted to the approaching motor vehicle by any warning signal. The test is whether she exercised that degree of care which an ordinarily prudent person would have exercised under like circumstances. *Coughlin pro ami* v. *Bradbury*, 109 Me., 571, 573.

The alleged negligence on the part of the child and of the mother were jury questions, and it can not be said that a jury of twelve reasonable men might not have found for the plaintiffs upon the evidence admitted, or that, if they so found, their verdict was clearly wrong.

The exceptions must be sustained, and in accordance with the stipulation, the cases remanded for the assessment of damages.

So ordered.

THOMAS F. LAMSON *vs.* DIRIGO FISH COMPANY.

Cumberland. Opinion November 6, 1929.

PLEADING AND PRACTICE. TROVER. EVIDENCE. LANDLORD AND TENANT. SET-OFF. JURY FINDINGS. VERDICTS.

Mere non-compliance with a written demand without refusal is insufficient to support an action of trover in cases where the party upon whom the demand is made is under no duty to make redelivery.

Evidence of such a demand, however, in the first instance is admissible. Unaccompanied by evidence of a refusal, it may become immaterial; but it is a necessary preliminary to evidence of a refusal, and no exception lies to its admission.

A charge for rent of real estate based upon a contract for a sum liquidated or one that may be ascertained by calculation may properly be presented in set-off.

When, as in the case at bar, a special finding of a jury plainly indicates that no attention whatever was given to a proper instruction of the court concerning the subject matter on which the special finding is based, and no reasonable construction of the evidence sustains such finding or the general verdict based upon it, a motion to set aside the verdict will be sustained.

On exceptions and general motion for new trial by defendant. An action of trover and case. Plea of the general issue was filed and an account in set-off for unpaid rent. To the admission of certain testimony defendant seasonably excepted, and after the jury had rendered a verdict for the plaintiff on the count in trover for the sum of $296.42 and on the count in case for $24.40, filed a motion for new trial. Motion sustained. New trial granted.

The case fully appears in the opinion.

Cram & Lawrence,

George E. Hill, for plaintiff.

Gerry L. Brooks, for defendant.

SITTING: DEASY, C. J., DUNN, STURGIS, PATTANGALL, FARRINGTON, JJ.

PATTANGALL, J. On exceptions and motion. Trover and case.

Plea of general issue and count in set-off for unpaid rent. Special verdicts rendered in favor of plaintiff on count in trover, $296.42; on count in case, $24.40. On count in set-off, nothing was found due defendant.

Defendant was lessee of certain property including a small building which it sublet to plaintiff, who became its tenant at will and who installed therein a plant for manufacturing cod-liver oil, which business he carried on during the year 1923. The business was unsuccessful and on March 1, 1924 he owed defendant, for rent and for merchandise purchased from it, approximately $600 which he was unable to pay.

He discontinued active business about that time and on March 24, 1924 gave a note secured by mortgage of his plant to defendant for the amount due on March 1. He never resumed manufacturing on the premises although he expressed an intention to do so but the mortgaged property, together with certain chattels of his not covered by the mortgage, remained in the building until July 1, 1925. On that date, defendant's lease expired and plaintiff's tenancy automatically terminated. Plaintiff's note still remained unpaid and defendant took possession of the property, storing a part of it on the new location to which it removed and a part in a building of which it had right of occupancy.

In November 1928, plaintiff made final payment on the note and immediately thereafter sought to repossess himself of the mortgaged property. He inquired of defendant's treasurer as to its whereabouts and, being dissatisfied with the result of the inquiry, brought this action.

Plea of general issue was filed with a count in set-off in which rent was claimed from March 1, 1924 to July 1, 1925.

The issues raised at the trial below were: first, was there a demand and refusal upon which the count in trover could properly be based, and, if so, what goods had been converted and of what value; second, was defendant guilty of negligence in the care of plaintiff's property after taking same into its possession, and, if so, to what extent was plaintiff damaged thereby; third, had defendant a just claim against plaintiff for rent after March 1, 1924.

The jury found for the plaintiff upon each of these propositions.

The sole exception relied upon by defendant is to the admission

of a letter written by plaintiff's counsel to it, dated November 20, 1928, some three weeks prior to the issuance of the writ, demanding the return of the property which plaintiff alleges was converted.

The objection to the admission of the letter rested on the proposition, as stated in the bill of exceptions, that it was admitted "without laying a foundation therefor by showing any duty on the part of the defendant to deliver such goods to the plaintiff." *Fifield* v. *Maine Central Railroad*, 62 Me., 83, is relied upon in support of this objection.

But that is not the doctrine of the authority quoted. It was there held that mere non-compliance with a written demand, without refusal, was insufficient to support an action of trover, in cases where the party upon whom the demand was made was under no duty to make redelivery.

The written demand, in the instant case, standing alone, was insufficient. It was, however, admissible. Unaccompanied by evidence of a refusal, it became immaterial and might even be deemed to have been prejudicial if no evidence of refusal had been offered. But there was such evidence and the jury passed upon its value after having received presumably correct instructions on the point. Defendant takes nothing by this exception.

Defendant's motion, so far as the affirmative verdicts in plaintiff's favor are concerned, presents no question to this court. That defendant did in 1925 take possession of plaintiff's property and has since retained it, is admitted; that in November 1928, plaintiff became entitled to repossess it, is also admitted. There is no question but that return was demanded and whether that demand was or was not refused, as to a portion of the property, was essentially a question for the jury. The finding, in this respect, can not be disturbed.

The jury also found that the portion of the property which was finally returned had been slightly depreciated by defendant's negligence and there was evidence warranting that finding.

A more disturbing question arises concerning the negative verdict regarding defendant's claim in set-off. This was for rent of the premises occupied by plaintiff as tenant at will, during the period between March 1, 1924 and July 1, 1925, which, at thirty dollars per month, amounted to $480.

The original contract was for rent at $30 per month. In the absence of a later agreement to the contrary, this contract continued in force until the termination of the tenancy. There is no evidence of such termination prior to July 1, 1925. Nor is there any evidence of a change in the amount of rent to be charged. True, plaintiff testified that at some time he said to the president of defendant company, "I wish you would go as lightly as you can on that rent. I don't know what I am going to do about it"; and that the president replied that he would see the treasurer of the company about it and, "he guessed that would be all right"; and plaintiff added, "That was all."

Certainly there was no new contract there; nor any modification of the existing contract. Defendant did not, after March 1, 1924, carry any charge for rent against plaintiff on its books. The reason given was that it regarded such a charge as probably uncollectable. The charge for rent might not have been pressed excepting for this litigation. But that does not affect the legality of defendant's claim.

The presiding Justice instructed the jury that the tenancy did not terminate until July 1, 1925, and that the rent continued at $30 a month unless there was an agreement to change the rental, in which case defendant was entitled to such an amount in set-off as the evidence warranted. Apparently the jury paid no attention to this instruction. There certainly was no evidence of an agreement that plaintiff should cease to pay rent after March 1, 1924. Defendant made no attempt to collect rent after that date but this is not surprising in view of the fact that it was not until within a few days before the beginning of this suit, in December 1928, that it succeeded in collecting what was due from plaintiff for rent prior to March 1, 1924, and then only after having instituted disclosure proceedings on two different occasions.

No reasonable construction of the evidence sustains the finding of the jury that nothing was due defendant on his count in set-off.

Plaintiff urges, on the authority of *Hall* v. *Glidden*, 39 Me., 445, that a charge for rent of real estate can not be sustained in set-off. The case does not so hold. It holds that such a charge can not be made the subject of set-off where there is no contract for price; in other words, where the claim is unliquidated. There is no reason

why a charge for rent, based upon a contract, for a sum liquidated or one that may be ascertained by calculation, should not be presented in set-off. Such a claim is within the statutory limits. Sec. 75, Chap. 87, R. S. 1916.

Plaintiff also claims that the final payment on the note of March 24, 1924, made in November 1928, was in full satisfaction of all claims of defendant against plaintiff. There is no foundation for this claim. True, plaintiff testified that at the time he made the last payment on the note, he asked the attorney for defendant who was employed to collect it, "If there was anything more of any shape, form or manner, and he said 'No.' " This conversation obviously referred to matters then in the attorney's hands for collection. The inquiry was doubtless made for the purpose of ascertaining if the entire claim secured by the mortgage, principal, interest and costs, including costs of disclosure, was entirely paid. All claims then in the attorney's hands had been satisfied. He could not speak for his clients concerning claims which had not been entrusted to him and about which he knew nothing.

Plaintiff suggests that judgment in the present case might properly be affirmed without prejudice to the right of defendant to bring a new action for rent. Defendant raises certain objections to such action on the part of the court which seem to be based on sound legal and eminently practical grounds.

Motion sustained.
New trial granted.

LEOLA A. STEARNS *vs.* THEODORE RITCHIE ET AL.

Penobscot. Opinion November 8, 1929.

REVIEW. BASTARDY. JUDGMENTS.

A bastardy complaint is a civil action and the provisions of Sec. 1, *Chap.* 94, *R. S.* 1916, *providing for review in civil actions, apply to proceedings under such complaints.*

When a plaintiff is entitled to judgment in a suit on a statute bond, the judgment should be for the penal sum of the bond.

Execution, however, should be limited to the amount of damages which have accrued at the time of judgment, the judgment standing as security for future damages to be recovered in scire facias.

On exceptions by defendant. An action on a bond to obtain supersedeas upon petition for review of bastardy proceedings. To the exclusion of certain testimony offered by the defendant and to rulings and to the findings and judgment of the Court defendant seasonably excepted. Exceptions overruled.

The case fully appears in the opinion.

Mayo & Snare, for plaintiff.

James D. Maxwell,

Ross St. Germain, for defendant.

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

PATTANGALL, J. On defendants' exceptions. Action on bond given to obtain supersedeas upon petition for review of bastardy proceeding.

The plaintiff instituted bastardy proceedings against the defendant Ritchie, who gave bond for $800 for his appearance at the May term, 1926 of the Penobscot County Superior Court and to abide the order of the court. The case was entered at the May term, the defendant entering his appearance, and was continued from term to term until on December 8, 1927 defendant was defaulted, decree of affiliation filed, and defendant ordered to pay $477 for plaintiff's expenses and $35 costs, judgment being entered therefor, also to pay $3.50 per week for the support of the child, and to give bond of $1,000 to perform the order. On the same day *capias* issued and on December 27 defendant was committed to jail.

On January 17, 1928, defendant brought a petition for review of the decree in the bastardy proceeding returnable at the April term of the Supreme Judicial Court and filed a bond, approved by the Justice to whom the petition was presented, with the National Surety Company as surety in the sum of $1,135 conditioned upon the payment of the judgment in the bastardy proceeding if the petition for review was denied or the amount of the final judgment on review if the petition was granted. Supersedeas was issued.

The defendant was not liberated by virtue of the supersedeas but on July 12, 1928 by taking the poor debtor oath as provided by statute. The petition for review had meanwhile been denied at the April term.

This action was brought July 3, 1928 and was heard by the presiding Justice without the intervention of a jury with right of exception in matters of law reserved.

On December 8, 1928 judgment was entered for the penal sum of the bond, damages assessed at $734.66, execution to issue for the latter amount. Defendants' exceptions relate to the exclusion of certain evidence, to rulings of the presiding Justice on questions of law, and to the findings and judgment of the Court, including the assessment of damages.

In support of the exceptions, defendants rely upon the following propositions:

(1) That a bastardy proceeding is not a civil action within the meaning of the statute relating to review.

(2) That review not being authorized in bastardy proceedings, the bond given in this case is wholly void and not enforcible even as a common law obligation — because no consideration.

(3) If review is authorized in bastardy proceedings, the bond sued on does not comply with the statute.

(4) At best the bond is good only as a common law obligation, and subject to be chancered, and only such damages assessed as are equitably due plaintiff.

(5) Whether the bond is a statute or common law obligation, want of consideration and mitigation of damages may be shown under the pleadings.

(6) That judgment was ordered and damages assessed improperly.

It is provided in Sec. 1, Chap. 94, R. S. 1916, that review in civil actions may be granted by any Justice of the Supreme Judicial Court and specifically provided in Paragraph VII of that section that "a review may be granted in any case" provided that certain conditions exist.

The words "any case" are limited by the words "civil actions." A bastardy complaint is a civil action. *Hodge* v. *Sawyer*, 85 Me., 287, and cases cited. In *Priest* v. *Soule*, 70 Me., 414, a defendant

in bastardy brought error to reverse a judgment recovered against him by default. The court denied the writ saying "His remedy after judgment thus entered upon his default, if the same was suffered inadvertently when he had a good defense, is by petition for review."

The earlier view of our court was otherwise. The question was discussed in *Gowen's Case*, 4 Me., 58 (1821). The opinion gives the views of all of the members of the court on this point, although it was not directly in issue. Weston, J., said, "Whether that court (Court of Common Pleas) has jurisdiction to order a re-examination of the facts in issue in a prosecution under the act for the maintenance of bastard children, from the view I have taken of the application before the court, I do not deem it necessary to give an opinion." Preble, J., "expressed some doubt whether the statutes authorizing reviews and new trials in certain cases could be construed to extend to prosecutions under the statute for the maintenance of bastard children." Mellen, C. J., "The statute of Massachusetts and of this state giving power to the Supreme Judicial Court to grant review in civil actions never embraced prosecutions for the maintenance of bastard children and constant usage and construction confirm this." Early cases in Vermont were in accord with the statement of the Chief Justice. *Robinson* v. *Dana*, 16 Vt., 475; *Sweet* v. *Sherman*, 21 Vt., 23.

The statute then in force in this state authorized the granting of reviews "in all civil actions" but did not specifically include complaints under the bastardy act.

In 1840 the legislature, doubtless influenced by the view of the law expressed in *Gowen's Case*, supra, amended the statute by adding the words "including also prosecutions for maintenance of bastard children." Sec. 1, Chap. 123, R. S. 1840.

The Revision of 1857, Sec. 1, Chap. 89, authorized "one review in civil actions," and did not specifically mention complaints in bastardy. But in the meantime, this court in *Eaton* v. *Elliott*, 28 Me., 436, had distinctly and definitely decided that such complaints were included in the term "civil actions." And in *Robinson* v. *Swett*, 26 Me., 378, the opinion declared, "A bastardy prosecution is a civil case." In *Murray* v. *Joyce*, 44 Me., 348, "In this state also such proceedings have by judicial discretion been held

to fall within the provisions of statutes relating to civil suits," citing *Eaton* v. *Elliott*, supra; *Mahoney* v. *Crowley*, 36 Me., 486; *Smith* v. *Lint*, 37 Me., 546. The opinion adds, "In view of these decisions, it is to be presumed that the legislature intended to include in the language used by it all such cases as had before been determined by this court to fall within the meaning of the terms they employed." *Priest* v. *Soule*, supra, was decided in 1879, the Court, at that time, apparently taking the view that the revision of 1857 was not intended to make any change in the 1840 statute but that the new wording of the law was adopted for the purpose of simplifying the language of the old statute and avoiding unnecessary repetition.

No change affecting the point appears in our statutes since 1857, nor has the question directly in issue been discussed in any opinion since *Priest* v. *Soule*, supra, although *Hodge* v. *Sawyer*, supra, and *Eaton* v. *Eaton*, 112 Me., 106, affirm the proposition that proceedings in bastardy are civil actions.

In view of the preceding, we have no hesitation in deciding that, under our present statute, review will lie in bastardy proceedings. This finding necessarily disposes of the second point raised by the defendants.

Sec. 5, Chap. 94, R. S., 1916, provides that

> "On presentation of a petition for review, any Justice of said court may in term time, or in vacation, stay execution on the judgment complained of, or grant a supersedeas, upon a bond filed with sureties approved by him, or by such person as he appoints, in double the amount of the damages and costs, conditioned to pay said amount if the petition is denied, or the amount of the final judgment on review, if it is granted, with interest thereon at the rate of twelve per cent from the date of the bond to the time of final judgment."

The bond filed in this case contained this provision:

> "Now, therefore, if the above bounden parties, or either of them, or his or their legal representatives, shall pay the amount of the said judgment, debt and costs in case his said petition is denied, or the amount of the final judgment, if any, against him on review, if the same is granted, with interest

thereon at the rate of twelve per cent from the date hereof to the time of final judgment, then this obligation shall be void, otherwise shall remain in full force and effect."

Plaintiff complains that the bond does not comply with the statute in that the provision "to pay said amount" in the statute refers to "damages and costs," whereas the bond recites that defendant is bound, in case the petition is denied, to pay the amount of "judgment, debt and costs" and cites authority that "damages" and "judgment" are not synonymous terms.

But damages here, as is usually the case before review is sought, had been reduced to judgment. Thus the terms became identical and the words "debt and costs" are certainly equivalent to "damages and costs." The ruling that the bond was a good statute bond was correct.

Defendants have no cause to complain of that ruling. The bond was filed by them as a basis for procuring supersedeas which issued and by virtue of which they were granted a hearing in review. Now that review has been denied, the law should not be unduly strained to enable them to successfully attack the validity of the instrument upon which they based their whole proceeding. The exercise of good faith toward the court to which the bond was presented and upon which it acted at defendants' request negatives the suggestion.

Defendant offered certain evidence for the purpose of showing that the bond was given without consideration. This evidence was properly excluded. *VanValkenburg* v. *Smith*, 60 Me., 97.

Judgment in the penal sum of the bond was rightfully ordered. *Goding* v. *Beckwith*, 116 Me., 396. But execution was limited to the amount of damage which had accrued at time of judgment, the judgment standing as security for future damages, to be recovered in *scire facias*. *Corson* v. *Dunlay*, 83 Me., 32.

Exceptions overruled.

PETER LEBLANC *vs.* FRANK STURGIS.

Oxford. Opinion November 12, 1929.

MASTER AND SERVANT. NEGLIGENCE. ASSUMPTION OF RISK.

The relation of master and servant does not cease to subsist because the employer assists in the performance of the manual labor necessary to execute his order.

An employee has the right to assume that his employer will not subject him to unnecessary peril.

A workman, merely by his contract of employment, does not assume the risk of accident caused by the negligence of his employer. Proof may show the voluntary assumption of such risk.

In the case at bar the evidence was sufficient to take the case to the jury to determine in final analysis if liability exist for the consequences, not of danger, but of negligence.

On exceptions by plaintiff. An action on the case to recover for personal injuries received by the plaintiff while in the employ of the defendant, occasioned by the alleged negligence of the defendant in the operation of a steam saw. At the conclusion of plaintiff's evidence a nonsuit was granted on motion of the defendant, to which ruling and instruction plaintiff excepted. Exceptions sustained.

The case fully appears in the opinion.

Albert Beliveau, for plaintiff.

Harry E. Nixon,

Roy Sturgis, for defendant.

SITTING: WILSON, C. J., DUNN, DEASY, BASSETT, FARRINGTON, JJ.

DUNN, J. Common-law principles govern this personal injury case, the number of workmen regularly in the employ of the defendant at the time of the accident having been but five. R. S., Chap. 50, as amended by 1919 Laws, Chap. 238.

On December 1, 1928, defendant was in the steam sawmill busi-

ness at a place called Grindstone. He personally directed the work in his mill, and besides was sawyer. Plaintiff was marker. Another employee performed the duties both of fireman and engineer.

There is testimony that, before the mill had been started for the day on this December first, plaintiff, then standing near a circular saw, was ordered by the defendant to assist him in turning the saw, to effect the detail of throwing the shafting belt on or off, the evidence being indefinite which.

Plaintiff appears to have obeyed the order and to have been injured.

The gravamen of the declaration is that plaintiff's injuries were received through the negligence of the defendant, in his failure to have the steam shut off from the engine.

Nonsuit was imposed at the close of the plaintiff's evidence. Exception was taken.

The jury could have found that, when the plaintiff, himself in the exercise of due care, had, with the aid of the defendant, turned the saw, and thus overcome the dead center of the crank and connecting rod on the engine, the engine suddenly rapidly rotated the saw, which caught the plaintiff's glove and drew him into contact, to his damage.

There is evidence that, though plaintiff did not know the steam was on, he did know the custom of the fireman to be, when the work for the day had been done, to close the steam valve on the boiler, and "warm" his engine by gradually turning on steam the next morning, before beginning to saw.

The relation of master and servant did not cease to subsist, because the defendant assisted in the performance of the manual labor necessary to execute his order. *Rhoades* v. *Varney*, 91 Me., 222, 225; *Meagher* v. *Crawford, etc., Co.*, 187 Mass., 586, 589.

On facts which the jury could have found the plaintiff would have been justified in regarding the order to do that which, the steam off, could be done with reasonable safety, as not manifestly unreasonable.

In obeying the order (*Jensen* v. *Kyer*, 101 Me., 106; 39 C. J., 483; *Eaves* v. *Atlantic, etc., Company*, 176 Mass., 369), the employee had the right to assume that his employer would not subject him to unnecessary peril. *Jensen* v. *Kyer*, supra; *Illinois Steel*

Company v. *Schymanowski*, 44 N. E., 876 (Ill.); *Aho* v. *Adriatic Mining Company*, 136 N. W., 310 (Minn.).

True, it is not in evidence that defendant let on the steam; but it was on, and the giving of the order to turn the saw, when the defendant, either from his experience must have known, or by ordinary forethought or reasonable care could have known, that, the engine being under steam pressure, performance of the order would be attended with grave danger, would warrant conclusion by the jury that the defendant was negligent. *Carroll* v. *Fore River, etc., Company*, 208 Mass., 296.

A workman, merely by his contract of employment, does not assume the risk of accident caused by the negligence of his employer. *Elliott* v. *Sawyer*, 107 Me., 195. Still, proof might show the voluntary assumption of such a risk. *Richards* v. *Railroad Company*, 125 Me., 347.

The evidence was sufficient to take the case to the jury, to determine in final analysis if liability exist for the consequences, not of danger, but of negligence.

Exception sustained.

THOMAS M. SHAW *vs.* THOMAS S. PINKHAM AND TRUSTEE.

Aroostook. Opinion November 15, 1929.

BILLS AND NOTES. ESTOPPEL. INSTRUCTIONS TO JURY.

In an action against an endorser of a note by the payee, the question whether or not the note sued on was paid by a larger note, alleged to have been given as a substitute for and as payment for the note in suit, is one of fact to be determined by the jury.

No estoppel arises unless one relying upon another's representation does or omits some act to his prejudice thus "altering his position for the worse."

In the case at bar the positive and unqualified instructions given to the jury that statements of the payee to the maker constituted absolute payment of the

note, thus releasing the endorser was erroneous. The question of payment was one of fact to be submitted to the jury.

On exceptions and general motion for new trial by plaintiff. An action of assumpsit by plaintiff, the payee, against the defendant as endorser of a negotiable promissory note. Defendant pleaded the general issue with a brief statement that the note declared on in this action had been paid by the subsequent giving of a larger note by the maker to the plaintiff and the acceptance of the same, in payment of the note which defendant endorsed. Hearing was had at the February Term of the Supreme Judicial Court for the County of Aroostook. To certain rulings and instructions given by the presiding Justice plaintiff seasonably excepted and after the jury had rendered a verdict for the defendant, filed a general motion for new trial. Exceptions sustained.

The case fully appears in the opinion.

A. S. Crawford, Jr., for plaintiff.

A. J. Nadeau,

H. T. Powers, for defendant.

N. F. Stevens, for trustee.

SITTING: DEASY, C. J., DUNN, STURGIS, FARRINGTON, JJ.

DEASY, C. J. In this action the plaintiff, Thomas M. Shaw, seeks to recover of the defendant Pinkham the amount of a promissory note payable to the plaintiff, dated May 4, 1926, of which note Cyrille Belanger was the maker and the defendant, Thomas S. Pinkham, the indorser, waiving demand and notice.

About a year after this note matured the maker, Belanger, gave to the plaintiff Shaw a mortgage and note to secure the sum of $24,300.

The defendant Pinkham, learning of this mortgage at the Registry of Deeds, talked with the plaintiff Shaw about it by telephone. The defendant relates this conversation as follows:

> "A. I called Mr. Shaw of Presque Isle on the telephone, and asked him. I said I understood he had taken that mortgage loan from Cyrille Belanger covering practically everything he had. And I asked him if Cyrille had met the full amount of debts; and he hesitated for a moment and he then said 'Yes.'

I says 'Does that include the note I endorsed for him?' And he said, 'Yes.' I says, 'Now Mr. Shaw, if that don't you have left out one thing you have not taken in this real estate mortgage and collateral mortgage and I still have time to cover myself and I can take care of the note, and protect myself.' 'No,' he says, 'Your note is taken care of in that mortgage.' "

The verdict was for the defendant. Plaintiff brings the case forward upon motion and upon exceptions to certain rulings of the presiding Justice.

The rulings excepted to are in the bill of exceptions summarized as follows:

(1) If the endorser called the payee and asked him flat "Am I longer holden?" and he answered, "No," then he is no longer holden.

(2) If Mr. Shaw said to Mr. Pinkham "I am looking to other security for the debt and I am not looking to you for the debt," then Mr. Pinkham is not liable.

These instructions given thus unqualifiedly are erroneous. The conversation as related by the defendant is evidence tending to show that the large note was given as a substitute for and as a payment of the note in suit. But whether the note sued was thus paid is a question of fact to be submitted to a jury.

But even if the large note were not a payment of the note in suit the conversation as related by the defendant may be the basis of an equitable estoppel which would be a complete defense.

But no estoppel arises unless the defendant relying upon the plaintiff's representation did or omitted some act to his prejudice, thus "altering his position for the worse," i.e., unless he in reliance upon the representation delayed or omitted to secure payment or security from the principal debtor. *Forsyth* v. *Day*, 46 Me., 176; *Tower* v. *Haslam*, 84 Me., 86.

Whether the defendant relying upon the representation made by the plaintiff delayed or omitted to obtain payment or security is a question for a jury to determine.

The instruction that the mere statements made by the plaintiff as testified to, as a matter of law prevent recovery, can not be sustained.

The defendant argues that the plaintiff having omitted to request further or qualifying instructions "can not now complain

that instructions were not sufficient." This point would be well taken if the instructions were merely incomplete. Not so when instructions are explicit, apparently complete and are erroneous.

The exceptions must be sustained.

It is unnecessary to pass upon the motion.

Exceptions sustained.

MICHAEL J. ELLIS *vs.* CHARLES PLUMMER EMERSON.

Cumberland. Opinion November 19, 1929.

ATTORNEY AND CLIENT. R. S., CHAP. 87, SEC. 109, CONSTRUED.

Attorneys represent their clients. Their acts of omission and commission are to be regarded as the acts of parties they represent.

Lawyers are bound to exercise the highest degree of honor and integrity and the utmost good faith in the trial of causes. A disregard for the purity of jury trials by attorneys who are officers of the court, finds no defense in ignorance or inattention.

R. S., Chap. 87, Sec. 109, which provides that a verdict may be set aside because of the giving by any party to the cause, to any of the jurors, who tried the cause, any treat or gratuity is remedial in its nature. The mischief to be remedied is public as well as private. The integrity of jury trials lies at the very foundation of our judicial system and a weakness found there breaches public confidence. The statute seeks to safeguard the verdict during the term, after, as well as before, the trial. It is the duty of this court to give such liberal construction to the statute as will most effectually meet the beneficial end in view, prevent a failure of the remedy and advance right and justice. To effectuate the legislative intent cases within the reason of the law must be included. Its strict enforcement is imperative.

In the case at bar the invitation while extended only in the spirit of courtesy and hospitality must be recognized and condemned as "gratuity" within the prohibition of the statute.

On general and special motion for new trial by defendant. An action on the case for personal injuries sustained by plaintiff when

he was struck and knocked down through the alleged negligent operation of an automobile of the defendant. The jury rendered a verdict for the plaintiff in the sum of $4,500. General motion for new trial was thereupon filed by the defendant and a special motion alleging a violation by plaintiff's attorney of the provisions of R. S., Chap. 87, Sec. 109, in that the plaintiff's attorney after the verdict extended an invitation to the jury to dinner. This invitation was later withdrawn. Special motion sustained. New trial granted.

The case fully appears in the opinion.

Hinckley, Hinckley & Shesong, for plaintiff.

Jacob H. Berman,
Benjamin L. Berman,
Edward J. Berman,
David V. Berman, for defendant.

SITTING: DEASY, C. J., DUNN, STURGIS, FARRINGTON, JJ.

STURGIS, J. This case comes forward upon a motion by the defendant for a new trial upon the usual grounds with a special motion alleging misconduct of the plaintiff's attorney.

"If either party, in a cause in which a verdict is returned, during the same term of the court before or after the trial, gives to any of the jurors, who try the cause, any treat or gratuity, * * the court, on motion of the adverse party, may set aside the verdict and order a new trial." R. S., Chap. 87, Sec. 109.

This statute, expressing the strong purpose of the lawmaking body that party litigants are entitled to jurors free from all improper influences, affirms the seal of condemnation at all times placed by courts upon improper interference with the impartiality of jury verdicts. Included in Chapter 84 of the Public Laws of 1821 and in all subsequent revisions, the power of reversal there given has been exercised by this court consistently where violations of the statute were made to appear. The law is founded upon public policy. Its strict enforcement is imperative.

In *Bradbury* v. *Cony*, 62 Me., 223, Appleton, C. J., in stating the opinion of the court said: "Every party litigant is entitled to a fair and impartial trial without bias or prejudice on the part of

jurymen and without any interference by the opposing party or his relatives or friends. * * It is immaterial whether such interference is the result of design or of ignorance; the effect in either case is the same. * * * In the trial of a cause, the appearance of evil should be as much avoided as evil itself. It is important that jurymen should be devoid of prejudice. It is hardly less so, that they should be free from the suspicion of prejudice."

In *Shepard* v. *Street Railway*, 101 Me., 591, the opinion of the court is "It need not be said that Courts are jealous of the purity of jury trials and that they will use their full power to prevent partial and prejudiced verdicts and to set them aside if once obtained. It is necessary that litigating parties should be able to try their rights before jurors impartial, unbiased and unprejudiced by passion or affection. It is equally necessary in the administration of justice that parties and the public should have reason to feel that the trial has been impartial and that the verdict has not been clouded by the suspicion of prejudice. The error in judgment of a merely human tribunal will be forgiven and forgotten, but not any taint of unfairness."

In the case at bar it is stipulated that on the day following the rendition of a verdict for the plaintiff, his attorney invited the jurors, who sat on the case, to take dinner with him. On the next day, with the exception of two or three then absent, the jurors accepted the invitation and the dinner was ordered. Before the dinner hour, however, this statute was called to the attorney's attention and he withdrew his invitation. It is agreed that the attorney did not have prior knowledge of the statute and did not contemplate extending the invitation before the verdict.

Attorneys represent their clients. Their acts of omission and commission are to be regarded as the acts of parties they represent. *Beale* v. *Swasey*, 106 Me., 35. Lawyers are bound to exercise the highest degree of honor and integrity and the utmost good faith in the trial of causes. A disregard for the purity of jury trials by attorneys, who are officers of the court, finds no defense in ignorance or inattention. The improprieties of this case can not be excused.

The statute is remedial. The mischief to be remedied is public as well as private. The integrity of jury trials lies at the very

foundation of our judicial system and a weakness found there breaches public confidence. The statute seeks to safeguard the verdict during the term, after, as well as before, the trial. It is the duty of this court to give such liberal construction to the statute as will most effectually meet the beneficial end in view, prevent a failure of the remedy and advance right and justice. To effectuate the legislative intent cases within the reason of the law must be included. *Steward* v. *Allen*, 5 Me., 107; *Quimby* v. *Buzzell*, 16 Me., 474; Endlich on the Interpretation of Statutes, Secs. 103, 108; Sutherland on Statutory Construction, Vol. 2, p. 1244.

To the jury which brought in the plaintiff's verdict, there was voluntarily given an invitation to dinner. It was given free and without recompense. It may have been extended only in the spirit of genial courtesy and hospitality but it permits of the construction that, within the definition of "gratuity" by the lexicographer, it was "something voluntarily given in return for a favor or service." We are convinced that it must be recognized as a gratuity prohibited by the statute and the seal of condemnation put upon it.

Without a consideration of the general motion, upon the defendant's special motion a new trial is granted.

Special motion sustained.
New trial granted.

NAPOLEON LANDRY *vs.* OSIAS J. GIGUERE.

OSIAS J. GIGUERE *vs.* NAPOLEON LANDRY.

Kennebec. Opinion December 3, 1929.

REAL ACTIONS. EXCEPTIONS. DEEDS.

When a case has been sent back from the Law Court with the mandate merely, "exceptions sustained," trial de novo is the consequent.

When a demandant in a real action relies on a record or paper title, which does not reach back to the state, a title prima facie is shown by a deed from someone who had possession. A recorded warranty deed is presumed to pass

title, seizin and title corresponding. Such a deed in evidence, it is for the opposing party, if he has a better or stronger title, to prove it, and until he does the prima facie title prevails.

In the case at bar the evidence introduced by Landry was sufficient to sustain the burden of proof resting upon him, while that introduced by Giguere failed to sustain such burden.

On report. Two real actions brought for the determination of title to a rectangular piece of land situated near the corner of Main and Silver Streets, in Waterville. After the evidence was taken out the causes were, by agreement of the parties, reported to the Law Court for determination. In the action, *Landry* v. *Giguere*, judgment for the plaintiff for possession of the demanded premises. In the action, *Giguere* v. *Landry*, judgment for the defendant.

The cases sufficient appear in the opinion.

F. Harold Dubord,

J. A. Letourneau, for Landry.

Harvey D. Eaton, for Giguere.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

DUNN, J. Two real actions reserved at nisi prius, with consent of the parties, for decision by the full court on the legally admissible evidence.

The actions relate to land in Waterville. That in which Landry is plaintiff was begun first. Disclaimer acts on the declaration in the writ in the action by Giguere, but leaves it still demanding an area inclusive of that which the Landry action claims.

The shape of the land in dispute approximates a right angle triangle with converging lines from an imperfect apex, and from the point of convergence a mere line, as shown on the plan, to Silver Street; the distance from apex to street being fractionally more than twenty-six feet. The ten-foot base of the triangle is the northern line of land occupied by a stranger to the title in suit, one Paganucci. The perpendicular extends about thirty-five feet along the western wall of Giguere's brick building. Landry owns the wooden building whereof the eastern wall, and a projection thereof, forms the hypothenuse of the triangle.

In his action Landry claims a small portion of land about six feet square in the southern part of the triangle. Giguere's suit against Landry involves the whole triangle and to the end of the line at the street.

Nul disseizin having been pleaded and joined, the Landry case came on to be heard and decided, at a term prior to that at which it was reserved for this court, by the presiding Justice without the aid of a jury. R. S., Chap. 82, Sec. 53. Landry lost. But he won on exceptions. Decision in the appellate court turned on the point that the showing of record title had not been met by any proof of adverse possession. 127 Me., 264.

Three days later, Giguere sued. Nul disseizin is the plea. By way of brief statement is the disclaimer, and besides res ajudicata is set up.

The evidence in the two cases was taken out at the one time, the two, as has been noticed above, are on report together, and so present for consideration.

Argument by counsel for Landry in behalf of the applicability of the doctrine of res ajudicata is not sustainable. The mandate which sent the case back to nisi prius merely reads: "Exceptions sustained." 127 Me., 264. Trial de novo is the consequent. *Merrill* v. *Merrill*, 65 Me., 79; *Hayden* v. *Railroad Company*, 118 Me., 442.

Landry relies on record title. His warranty deed is from William Levine. It bears date November 20, 1924, is recorded, and includes the locus.

When the demandant in a real action relies on a record or paper title, which does not reach back to the state, a title prima facie is shown by a deed from someone who had possession. A recorded warranty deed is presumed to pass title, seizin and title corresponding. *Blethen* v. *Dwinel*, 34 Me., 133. Such a deed in evidence, it is for the opposing party, if he has a better or stronger title, to prove it, and until he does the prima facie title prevails. *Thompson* v. *Watson*, 14 Me., 316; *Blethen* v. *Dwinel*, supra; *Rand* v. *Skillin*, 63 Me., 103; *May* v. *Labbe*, 112 Me., 209.

Landry's deed is proof prima facie of title. This is a better title than that possession which the action seeks to end. Additionally to this deed only one other deed is in evidence by Landry. It is a quit-

claim deed from Benjamin H. Kimball to William Levine, who became grantor to Landry. The deed is dated May 2, 1924, and recorded. But evidentially it weighs for nothing. It does not add strength to the warranty deed, because under it there is no showing of possession, and it lacks connection with any deed of older date which had had the accompaniment of possession. True, the grantor in the quitclaim, in support of his claim of title by inheritance, recites himself to be the sole heir of Elah E. Kimball. The recital, not being in an ancient deed, amounts to a bare claim of heirship. *Potter* v. *Washburn*, 13 Vt., 558. Thirty years, among other things, are requisite to make a deed ancient. *Little* v. *Palister*, 4 Me., 209, 212; *Havens* v. *Sea Shore Land Company*, 47 N. J. Eq., 365. Not only this, but if Elah E. Kimball ever had the title to the land the title does not deduce to Benjamin H. Kimball, nor for that matter is the fact established that Elah is dead, nor that Benjamin was his heir.

However, if contention stopped here, the prima facie title which the warranty deed to Landry makes, would seem quite sufficient to entitle him to judgment.

But Giguere claims also under a recorded warranty deed. His deed is dated June 12, 1913, from Napoleon Poulin and A. P. Marcou. This proves an earlier seizin and makes better title in Giguere, providing Giguere's deed includes the place.

Giguere's deed is bounded on the north and east by streets; on the south by land the present occupation of which is by Paganucci. The western line is "land of heirs of Sophia Lashus, formerly of Jeremiah Furbush, and the Kimball land." The location of that line, of which the eastern line of this land of Lashus is the beginning, is the important thing.

Giguere claims that such line corresponds with the eastern line of Landry's building and thence by projection southward to the northwest corner of the land Paganucci occupies. Landry's contention is that the line of the land of heirs of Sophia Lashus must be held to have meant the line of three lots, which together make up one lot, once the property of Cynthia Ellis, and through mesne conveyances in ownership by Landry himself when his suit was begun; this line being to the eastward of the greater portion of Landry's building, and to the eastward of much of the western

wall of Giguere's building, to which wall disclaimer limits Landry.

Numerous deeds, aside from the title deeds, are in evidence for the light they may throw on controversy. All the deeds are confusing but there is testimony tending to identify the boundary line, that by a land surveyor being especially helpful.

Giguere further claims title by adverse possession. The evidence on his side is not sufficient to warrant a finding that title had been so acquired. Nor is there room in the evidence for the conventional line doctrine, for which counsel argues, to affect the issue.

Conclusion is, that in the action against Giguere, Landry fairly sustains the burden of proof, and that Giguere fails to sustain such burden in his action against Landry.

These are the judgments: *Landry* v. *Giguere*, judgment for plaintiff for his possession of the demanded premises, costs following; *Giguere* v. *Landry*, judgment for defendant, for costs only.

So ordered.

PENOBSCOT PRODUCE COMPANY *vs.* WILLIAM H. MARTIN.

Penobscot. Opinion December 10, 1929.

EQUITY. CHATTEL MORTGAGES. FORECLOSURES. CORPORATIONS.

The Supreme Judicial Court in equity has jurisdiction to entertain a bill to redeem a chattel mortgage.

No foreclosure being shown, no length of possession of a mortgaged chattel by the mortgagee will bar redemption, if the possession is held by virtue of the right of possession in the mortgagee as such.

When a mortgagee of a building on leased land is in possession his obtaining renewals of the lease is consistent with his holding as mortgagee.

A corporation's right of redemption from a mortgage is not extinguished by its securing from the Attorney General a certificate excusing it from filing annual returns upon the ground that it has ceased to transact business.

On appeal by defendant. Bill in equity to redeem a chattel mortgage. Appeal dismissed. Decree below affirmed.

The case sufficiently appears in the opinion.
Ryder & Simpson,
Wilfred I. Butterfield, for plaintiff.
H. M. Cook, for defendant.

SITTING: DEASY, C. J., STURGIS, BARNES, FARRINGTON, JJ.

DEASY, C. J. Bill in equity to redeem a chattel mortgage.

This court has jurisdiction to entertain such a bill. Whitehouse, Equity, Sec. 72.

The question mainly involved in this case is whether long possession by mortgagee of a mortgaged chattel, no foreclosure being shown, will bar redemption.

This answer is obviously "No," if the possession is held by virtue of the right of possession in the mortgagee as such.

In this case the mortgaged chattel is a potato house situated on land leased of the Maine Central Railroad Company.

The mortgage is from the complainant to Jerome Butterfield, dated July 12, 1909, and was assigned by Butterfield to the defendant September 2, 1913.

About this time the defendant took possession of the potato house and has ever since kept it. No foreclosure is shown.

The defendant has obtained renewals of the lease from the railroad company, but this being necessary to protect his rights as mortgagee is entirely consistent with the holding as such.

On September 18, 1913, the complainant corporation was by the Attorney General excused from filing annual returns on the ground that it had "ceased to transact business"; but its right of redemption is not thereby extinguished.

A preliminary hearing was had before a single justice at which it was determined that the complainant is entitled to redeem, and was decreed that the matter be referred to a master for an accounting of sums due on the mortgage and rents and profits.

The final decree, dated December 18, 1928, accepts the master's report, finds that the defendant is indebted to the complainant as of the date of August 16, 1928, over and above the amount necessary to fully satisfy the mortgage debt and interest in the sum of four hundred and fifty-three dollars and eighty-four cents ($453.84), and decrees that the defendant shall forthwith deliver

to the complainant the full and free possession of the potato house; that the decree shall operate to assign to the complainant the lease of the land upon which said potato house is located, and that the defendant forthwith pay to the complainant said sum of four hundred and fifty-three dollars and eighty-four cents ($453.84), together with costs of suit, and that execution issue.

No error of law is perceived.

No manifest error in the findings of facts appearing they must be accepted as final. *Proctor* v. *Rand*, 94 Me., 313.

Appeal dismissed.
Decree below affirmed.

GENERAL MOTORS ACCEPTANCE CORPORATION

vs.

LITTLEFIELD, CROCKETT COMPANY.

Penobscot. Opinion December 11, 1929.

REPLEVIN. PLEADING AND PRACTICE. FINDINGS OF FACT.

When one is lawfully in possession of goods, an action of replevin will not lie, until after a demand.

While as a general rule the time when a writ is actually made with an intention of service is deemed the commencement of the action, it is established law in this state that when a replevin writ is made provisionally, to be used only in case of the refusal of the defendant to surrender the property, the action is not prematurely brought.

When a presiding Justice, hearing without a jury, makes no specific findings of fact, in order for his decision to be conclusive and not open to exceptions, there must be such evidence, with the legitimate inferences to which it is susceptible, viewed most favorably for the one in whose favor the decision is made, as can support the judgment.

In the case at bar from the evidence disclosed only one legitimate inference could be drawn, viewed most favorably for the defendant, namely, that the demand was made in pursuance of instruction to the officer not to use or serve the writ until he had first demanded the goods from the defendant, and not to use it or make service until after the defendant refused to surrender the goods on such demand.

On exceptions by plaintiff. An action of replevin heard without jury by the presiding Justice of the Superior Court for Penobscot County. Right of exception in matters of law was reserved by both parties. After hearing, the Justice rendered judgment for the defendant and ordered the property replevied returned to the defendant, to which order of judgment and order of return the plaintiff seasonably excepted. Exceptions to judgment for defendant sustained.

The case fully appears in the opinion.

E. P. Murray,

William F. Bryne, for plaintiff.

Edgar Simpson, for defendant.

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

FARRINGTON, J. This was an action of replevin heard, without jury, by the presiding Justice at the November Term, 1928, of the Penobscot County Superior Court. Right of exceptions to matters of law reserved by both parties. Defendant pleaded the general issue and for a brief statement that (1) defendant had possession of the replevied automobiles by license and permission of the plaintiff and that no demand for possession was made by plaintiff prior to the time of the issuing of the writ or of service of same upon defendant, (2) that plaintiff's title was invalid as against defendant's trustee in bankruptcy and that the replevied automobiles should be restored to defendant and become subject to control of the District Court, and (3) a prayer for return to the defendant. Judgment was rendered for the defendant, and the property replevied was ordered returned to him. The case comes up on exceptions by the plaintiff to the decree of judgment and to the order of return. Writ, pleadings and evidence are made a part of the exceptions.

In the Summer and Fall of 1927 the defendant bought the re-

plevied automobiles from Eastman Kelleher Company, Inc., paying that Company ten per cent of the purchase price and financing the rest of the transaction by giving the plaintiff certain conditional sales agreements, called trust receipts, which were never anywhere recorded. The automobiles were taken to defendant's garage.

On February 18, 1928, the defendant filed its petition in bankruptcy, and adjudication was made on the same day, but both filing and adjudication were subsequent to the seizure under the writ. A Trustee was appointed March 16, 1928.

A day or two prior to the filing and adjudication, one Thomas Marshall, a field man for the plaintiff corporation, had had some conversation with Mr. Littlefield, Treasurer of the defendant Company, and also with its attorney, which at least indicated that the defendant Company was not sound financially, and the attorney testified that he told Mr. Marshall bankruptcy papers were prepared and that he was about to start to take them to Mr. Littlefield for signature. Mr. Marshall on the same day, February 17, 1928, called the Boston office of the plaintiff Company and "received authority from the office to replevin" the automobiles. On the same day he took out the writ of replevin on which this case is based, and after securing the services of a deputy sheriff, W. A. Small, handed him the writ. He found Mr. Small, the deputy, about 10.30 or 11 P.M., February 17, 1928, and in his presence the deputy from his own house, about midnight or past, called by telephone the home of Mr. Littlefield. The telephone conversation on the one side was all through the deputy, and on the other side was all through Mr. Littlefield's wife, Mr. Littlefield being present in the house. The deputy was not called as a witness.

In determining the rights of parties in this case, the first question to be considered is whether or not it was necessary for the plaintiff to make a demand. This question must be answered in the affirmative, as the evidence is conclusive and undenied that the defendant was rightfully in possession of the automobiles when the action was brought.

When one is lawfully in possession of goods, an action of replevin will not lie until after a demand. *Galvin* v. *Bacon*, 11 Me., 28; *Newman* v. *Jenne*, 47 Me., 520; *Automatic Sprinkler Company of America* v. *Central Amusement Company*, 176 N. W. (Ia.), 786;

Hennessey Co. v. *Wagner et al*, 220 Pac. (Mont.), 99, and this same view is recognized in an earlier case of *Seaver* v. *Dingley*, 4 Greenleaf, 306, cited in *Newman* v. *Jenne*, supra.

The next question to be considered is whether or not there was demand and refusal. For the purposes of this case, in determining when, if at all, a demand was made, the inquiry can be confined to the period following the time when the writ was made, taken by Mr. Marshall and handed to the deputy sheriff, W. A. Small.

Convincingly clear evidence warrants the conclusion that a demand was made some time during the telephone conversation which was of nearly an hour's duration. The trial of the case clearly proceeded on the assumption that there was a demand and that there was a refusal of that demand communicated to the plaintiff, the defendant conceding both demand and refusal. Nothing to the contrary appears in the trial of the case nor in argument of counsel, except as to whether the demand was made seasonably or not, so that in the consideration of the exceptions which are before this court the fact that a demand was made and that there was a refusal may be regarded as established.

The real point involved, as far as a judgment for either the plaintiff or the defendant is concerned, is whether or not the writ of replevin in the present case was a provisional writ within the doctrine of *Littlefield et als* v. *Maine Central Railroad Company*, 104 Me., 126.

It appearing that possession was rightful and that consequently a demand was necessary, and it also appearing that a demand was made and refused, the next question is whether or not the demand was made seasonably.

While, generally speaking, the time when a writ is actually made with an intention of service is deemed the commencement of the action, it is well recognized law in this State and in Massachusetts that "where a replevin writ is made provisionally to be used only in case of the refusal of the defendant to surrender the property, the action is not prematurely brought." *Littlefield et als* v. *Maine Central Railroad Company*, supra (citing *O'Neil* v. *Bailey*, 68 Me., 429, and *Grimes* v. *Briggs*, 110 Mass., 446); *Badger* v. *Phinney*, 15 Mass., 359; *Seaver* v. *Lincoln*, 21 Pick., 267.

There is no direct evidence of what was said to the deputy

sheriff when the writ was placed in his hands, but it is not an uncommon practice, in the use of a replevin writ, to place it in the hands of an officer and tell him not to use it unless, after demand on the party having the goods, there is a refusal to surrender.

The circumstances in the case of *Cross* v. *Barger* (R. I.), 15 Atl., 69, an action of trover, were very similar to those obtaining in this case. Matteson, J., in his opinion, says, "The case at bar would be identical in principle with *Badger* v. *Phinney*, 15 Mass., 359; *Seaver* v. *Lincoln*, 21 Pick., 267, and *Grimes* v. *Briggs*, 110 Mass., 446, so far as the question we have considered is concerned, if it appeared from the statement of the evidence that when the writ was delivered to the officer he was instructed not to serve it until he had first demanded the goods from the defendants, and not to make service of it unless they refused to surrender the goods upon such demand. Inasmuch, however, as it does appear that the officer did make such a demand in behalf of the plaintiffs, and before serving the writ, we think we may fairly infer that the demand was so made in pursuance of instructions to that effect from the plaintiffs or their attorney. We are of the opinion, therefore, that such demand and refusal were prior to the commencement of the suit;***"

In this case the presiding Justice made no specific findings of fact, but in order for his decision to be conclusive and not open to exceptions there must be such evidence, with the legitimate inferences to which it is susceptible, viewed most favorably for the defendant, as can support the judgment. *Chabot & Richards Co.* v. *Chabot*, 109 Me., at p. 405.

From a careful examination of the instant case it appears to the court that only one legitimate inference can be drawn, from the evidence disclosed, viewed most favorably for the defendant, namely, that the demand was made in pursuance of instructions to the officer not to use or serve the writ until he had first demanded the goods from the defendant, and not to use it or make service until the defendant refused to surrender the goods on such demand. The evidence is convincing that a demand was made early during the telephone conversation between the deputy sheriff and Mrs. Littlefield and that the deputy sheriff waited nearly an hour after the demand until flat refusal finally came from Mr. Littlefield, who told

his wife to tell the deputy that he could not have the cars. The time between the demand and the refusal was at least partly occupied in an effort on the part of the Littlefields to get in touch with counsel, and they finally succeeded, and then, permission not having been given at the hearing to state what counsel said, there followed immediately the flat refusal as above. It is clear that further parley and effort to obtain a voluntary surrender of the automobiles would have been useless. The situation can not be reconciled with any conclusion other than that the deputy sheriff had been instructed not to use his writ unless there was a demand on and a refusal from the defendant, as action under the writ followed at once when the refusal was made known.

Our conclusion is, therefore, that the action was not prematurely brought and that the demand was seasonably made, and that the plaintiff's exceptions to the judgment for the defendant should be sustained. Inasmuch as the case must go back for a new trial, it becomes unnecessary to consider the exceptions to the order for return of the goods to the defendant.

Exceptions to judgment for defendant sustained.

FRANK X. FOURNIER *vs.* THE GREAT ATLANTIC & PACIFIC TEA CO.

JOSEPH W. HUTCHINS *vs.* THE GREAT ATLANTIC & PACIFIC TEA CO.

Penobscot. Opinion December 16, 1929.

SUBROGATION. WORKMEN'S COMPENSATION ACT. DAMAGES, GENERAL AND SPECIAL. PLEADING AND PRACTICE. EVIDENCE.

Subrogation under Sec. 8 of Chap. 222 of the Public Laws of 1921 amending the Workmen's Compensation Act of this State, is a matter of law. Without an assignment, the employer, upon paying or becoming liable for compensation awarded his employee for injuries received at the hands of a third person, is at

once vested with the injured beneficiary's right of action against the wrongdoer, and an action may be brought either in the name of the employer or in the name of the employee for the benefit of the employer.

In an action by an employer under its statutory right of subrogation, it is unnecessary to allege or prove that the employer refused to pursue its remedy against a wrongdoer for ninety days after written demand so to do, filed by the employee.

General damages such as naturally, logically and necessarily result from the injury complained of need not, in actions of negligence, be specially pleaded but may be proved and recovered under a general allegation of damage. To permit recovery of special damages, they must be specially averred.

Without allegations of special damages the plaintiff can prove only such damages as are the necessary as well as the proximate result of the acts complained of.

An express averment that injuries received are permanent is not necessary where facts, from which the permanency of the injury will necessarily be implied, are alleged.

If, however, the description of the injuries for which damages are claimed shows only that their permanence is possible or merely probable, permanence must be averred if evidence thereof is to be offered.

The right to amend pleadings so as to conform them to proof must be exercised prior to the introduction of the proof, if that when offered, be objected to on the ground of variance between pleading and proof.

The granting of an authorized amendment is recognized as a matter of judicial discretion. It must, however, be sound discretion exercised according to the well-established rules of practice and procedure and guided by the law so as to work out substantial equity and justice, and, if palpable error has been committed or an apparent injustice has resulted, the discretionary ruling is reviewable.

In the case at bar the averment that the action was brought for the benefit of the City of Brewer and further averments and proof that awards of compensation to the nominal plaintiffs had been paid or liability therefor incurred by the City of Brewer, with nothing to the contrary appearing, warranted the inference that the City brought the action under its right of subrogation and further evidence of that issue was unnecessary.

The description of the alleged injuries sustained by Frank Fournier, as stated in his declaration, did not necessarily warrant a finding that they were of a permanent character. Hence, for lack of special averment, evidence of the permanency of Fournier's injuries, when offered, was not admissible and its

admission was error. This error was not cured by the amendment later offered by which allegations of permanent injuries were added to the original declaration. The same applied to the Hutchins case.

The allowance of the amendments against the defendant's objection on the ground of surprise was prejudicial error.

On exceptions and general motion for new trial by defendant. Two cases, one by Frank X. Fournier and the other by Joseph W. Hutchins, both against The Great Atlantic & Pacific Tea Co., brought for the benefit of the City of Brewer, to recover damages for personal injuries received by Fournier and Hutchins because of the alleged negligence of defendant in causing its automobile to be driven against them while they were at work for the City of Brewer on a public street of the city. The City of Brewer having paid damages under the Workmen's Compensation Act caused these actions to be brought under its right of subrogation. During the course of the trial plaintiffs offered an amendment to their respective declarations to include permanent injuries. To the allowance of the amendments defendant excepted. To certain rulings and instructions of the presiding Justice defendant likewise seasonably excepted, and after the jury had rendered a verdict for plaintiff Fournier, in the sum of $8,333.70, and for plaintiff Hutchins, in the sum of $10,888.00, filed a general motion for new trial in each case.

Exceptions sustained.

The cases fully appear in the opinion.

A. M. Rudman,

Charles J. Hutchings,

Donald F. Snow, for plaintiffs.

Gillin & Gillin, for defendant.

SITTING: DEASY, C. J., DUNN, STURGIS, PATTANGALL, FARRINGTON, JJ.

STURGIS, J. The City of Brewer, having paid or become liable for compensation awarded the nominal plaintiffs for injuries alleged to have been received by them as a result of the negligence of an employee of the defendant corporation, brings these two actions under its right of subrogation given by the Workmen's Compensation Act in Sec. 26, Chap. 238 of the Public Laws of 1919, as

amended by Sec. 8 of Chap. 222, Public Laws of 1921. Tried together below, the cases come forward in one record on exceptions and general motions for new trials.

The two cases are given a single consideration on this review. It will extend only to a determination of the controlling questions of law and those which of necessity will be involved in further trials of the same or similar causes of action.

I. At the close of the testimony the defendant moved in both cases for directed verdicts on the ground there was no evidence that (1) the actions were brought by the employer under its statutory right of subrogation, or (2) that the employee filed written demands on the employer to pursue its remedy against the defendant, or (3) the employer refused so to do for ninety (90) days thereafter. The motions were denied and exceptions reserved.

The pertinent provisions of Sec. 8, Chap. 222, P. L., 1921, are:

> Sec. 26. When any injury for which compensation is payable under this act shall be sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee may, at his option, either claim compensation under this act, or obtain damages from, or proceed at law against such other persons to recover damages; and if compensation is claimed and awarded under this act, any employer having paid the compensation or having become liable therefor shall be subrogated to the rights of the injured employee to recover against that person * *,
>
> The failure of the employer or compensation insurer in interest to pursue his remedy against the third party within ninety days after written demand by a compensation beneficiary shall entitle such beneficiary or his representatives to enforce liability in his own name * *."

Subrogation under this section is a matter of law. Without an assignment, the employer, upon paying or becoming liable for compensation awarded his employee for injuries received at the hands of a third person, is at once vested with the injured beneficiary's right of action against the wrongdoer, and an action may be brought either in the name of the employer or in the name of

the employee for the benefit of the employer. *Donahue* v. *Thorndike & Hix*, 119 Me., 20.

In the instant cases the plaintiffs, in their writs, each declared that his action is brought "for the benefit of the City of Brewer." They each aver that their award of compensation has been paid or liability therefor incurred by the City of Brewer and proof supporting this averment is plenary. With judicial knowledge of resulting legal subrogation, and nothing to the contrary appearing, it is to be inferred and must be presumed, we think, that the real plaintiff, in these actions (the City of Brewer), brings these suits under its right of subrogation. Further evidence on this issue seems unnecessary.

The defendant takes no more by the second ground advanced in support of its motion. The employer's right of action by subrogation, once vested by the statute, continues until and unless the employer fails to pursue its remedy for ninety days after demand by the compensation beneficiary. Failure to bring suit within the ninety day period is deemed an express waiver of the employer's right of action and the employee is then reinvested with his original right of action and alone can pursue it. In his suit, the issues involved "Center about tortious liability of the defendant." Waiver of the subrogated right of the employer need not be alleged or proved in an action by the employee. *Foster* v. *Hotel Co.*, 128 Me., 50.

In an action by the employer under his right of subrogation, the same principles must apply. The action is the common-law action of the employee assigned by law to the employer. *Insurance Co.* v. *Foss*, 124 Me., 399. The issues of fact there, as in a suit by the employee, pertain to the "tortious liability of the defendant" and allegations or proof of nonwaiver of the employer's right of subrogation are as unnecessary as like allegations and proof of waiver are in actions by the employee. Nonwaiver is a matter of defense with the burden upon the defendant to prove it.

The motion for directed verdicts in these suits was properly denied by the presiding Justice.

II. In the suit in the name of Frank X. Fournier, the plaintiff, in his original declaration, specifically describes his injuries in these words: "he was violently knocked to the ground and dragged

by said automobile of the defendant thereby dislocating the right knee and rupturing the ligaments of the leg of said Frank X. Fournier and causing shock and multiple abrasions especially of the legs and back of the said Frank X. Fournier * *; and that thereby he, the said Frank X. Fournier, was caused to have and endure great pain and suffering for a long space of time and is still enduring great pain and suffering and will continue to endure great pain and suffering and has been unable to follow his course of employment or do any work whatsoever and will be unable to do any work for a great space of time, and has been obliged to expend large sums of money for nursing, hospital care and doctors and will be obliged to continue to expend large sums of money for hospital care and doctors, medicine and medical supplies * *,".

In the course of the trial, upon this pleading, the presiding Justice, against the objection of the defendant, admitted and refused to strike out on motion, evidence tending to prove that the plaintiff's injuries were permanent. Exceptions were taken. At recess, immediately following, against objection with exception reserved, an amendment was allowed adding an allegation that "said injuries are permanent." The evidence of permanency of injuries, previously admitted, was not re-offered.

The distinction between general and special damages and the necessity of a special averment to permit proof and recovery of special damages is well settled. General damages, that is, such as naturally, logically and necessarily result from the injury complained of, need not be specially pleaded but may be proved and recovered under a general allegation of damage. *Hunter* v. *Stewart*, 47 Me., 419. To permit recovery of special damages they must be specially averred. *Brown* v. *Linn Woolen Co.*, 114 Me., 266; *Tyler* v. *Salley*, 82 Me., 128; *Thoms* v. *Dingley*, 70 Me., 100; *Furlong* v. *Polleys*, 30 Me., 491.

So, too, with proof of special damages. Without allegations of special damages, the plaintiff can prove only such damages as are the necessary as well as the proximate result of the acts complained of. *Veazie* v. *Moor*, 14 How. (U. S.), 568; *Tomlinson* v. *Derby*, 43 Conn., 562; *Adams* v. *Gardner*, 78 Ill., 568; *Brown* v. *Cummings*, 7 Allen (Mass.), 508; *Roberts* v. *Fitzgerald*, 33 Mich., 4; *Gumb*

v. *St. R. Co.*, 114 N. Y., 411; *Stanfield* v. *Phillips*, 78 Pa., 73; 1 Chitty on Pleading, 16 Am. Ed., 411; 2 Greenleaf on Evidence, Sec. 254; 17 Corpus Juris, 1004.

The crucial question upon this branch of this case is whether a permanent injury in an action of negligence for personal injuries is to be deemed general or special damages. The question has not been decided in this State.

In Massachusetts, where, by Public Statutes, Chap. 167, Sec. 94, the ad damnum is a sufficient allegation of damage in all actions of tort in which special damages are not claimed, in *McCarthy* v. *Boston Elevated Railway*, 223 Mass., 568, 573, a claim for permanent injury was regarded as general damages to be recovered under the ad damnum.

The same view is taken in Illinois. In *West Chicago St. R. R. Co.* v. *McCallum*, 169 Ill., 240, that court affirming its earlier decisions, reaches the conclusion that the jury may award damages for permanent injury not specially alleged, upon the reasoning that the permanency of the plaintiff's injury is merely evidence to be considered by the jury in determining its severity and the plaintiff is not required to set forth in his declaration the evidence upon which he relies.

The weight of authority, however, seems to support a different rule. In 17 Corpus Juris, 1012, under the title of Damages, the editor writes: "If it is expressly averred that the injuries are permanent, proof thereof is, of course, admissible; but such an express averment is not necessary, where facts, from which the permanency of the injury will necessarily be implied, are alleged. Where a permanent disability is, however, not a probable result of the injury alleged, there must be a special averment in order that there may be a recovery therefor."

In Thompson on Negligence, Vol. 6, Sec. 760, we find it said, "It is not required that the complaint should specifically allege that the injuries are permanent where a fair construction of the allegations shows this fact, such damages being regarded as general and not special."

In *Kaiser* v. *Detroit United Railway*, 167 Mich., 288, that Court says: "The rule is well settled that a claim for permanent injury must be plainly averred in the declaration, either in exact words

or by an equivalent statement of facts and circumstances from which such result naturally and necessarily follows. Where a statement of the nature of the injury contains in its allegations which indicate it must necessarily be permanent, like the loss of an arm, leg, or eye, there can be no misunderstanding or surprise, and in such cases permanent injury would be sufficiently pleaded; but in the case at bar the injuries stated in the declaration are not such as to be necessarily permanent, and there is no averment in exact language that such is the case. * * In the absence of proper averments in the declaration there can be no recovery for permanent injuries and it was error for the Court to charge the jury that damages could be awarded therefor."

In *Denton* v. *Ordway*, 108 Iowa, 487, the petition not alleging the injuries complained of to have been permanent, the admission of testimony of a physician that the injury "would likely be permanent" was held erroneous and prejudicial.

In *MacGregor* v. *Rhode Island Company*, 27 R. I., 85, the conclusion of that court upon the question is "The declaration contains no averment of permanent injury, and while such an averment is not required when it appears from the nature of the injury that permanent incapacity must inevitably result, yet the rules of good pleading require such an averment when the injuries complained of are not necessarily permanent in their nature.

"Thus in 1 Chitty, 16th Am. Ed., Sec. 411, the rule is thus stated: Whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent the surprise on the defendant which might otherwise ensue on the trial, the plaintiff must in general state the particular damage which he has sustained, or he will not be permitted to give evidence of it. This is but an amplification of the familiar rule of pleading that special damages must be specially averred. In the case of an injury resulting, for example, in the loss of a limb or of an eye, it is obvious that the element of permanency is necessarily implied in the very description of the injury and consequently an averment to that effect is not requisite. But there are many injuries the description of which shows that their permanence is merely probable, as well as many other injuries where permanence is more doubtful and more improbable, but neverthe-

less is within the bounds of possibility. We think it is no hardship to require a plaintiff in such cases to aver permanence if he wishes to offer evidence of it."

In *Wallace* v. *New York City Ry.*, 92 N. Y. S., 766, the ruling is: "The Justice erroneously admitted evidence tending to show that certain injuries suffered by plaintiff were permanent, although that fact was not pleaded. We are bound to assume that the evidence thus erroneously admitted enhanced the verdict to some extent, although, of course, we cannot tell precisely by how much."

In *Green* v. *Johnson*, 110 N. Y. S., 104, the plaintiff alleged that "she suffered a fracture of three ribs and an injury to her back, and was otherwise injured, bruised, and wounded, so that she became sick, sore, and disabled, and so remained, and has ever since been, and will for a long time to come, be prevented from attending to her business, etc." Upon a motion for a bill of particulars as to, among other things, whether each injury was claimed to be permanent, that court says the allegations of the complaint are insufficient to warrant a recovery for permanent injuries.

As a forerunner of the New York cases just cited, the dissenting opinion of Ingraham, J., in *Lynch* v. *Third-Avenue R. Co.*, 13 N. Y. S., 236, presents a well-reasoned and convincing consideration of this question of pleading permanence, reaching the conclusion, that upon the facts alleged in that case, the law could not imply permanent injury, hence permanent injuries must be particularly specified in the declaration or the plaintiff will not be permitted to give evidence of them at the trial.

We think the majority rule should be applied in this state. It is consistent with the general rules of pleading damages and the admission of evidence thereunder. It has the support of sound reasoning and the weight of opinion. Applying it to the allegations in the instant case, for lack of special averment, evidence of the permanency of Mr. Fournier's injuries, when offered, was not admissible. It does not necessarily follow from what was originally alleged that his injuries are of a permanent character. That result may follow but it is not a necessary result which can be implied by law.

It is urged, however, that this error was cured by the amendment later offered by which allegations of permanent injuries were

added to the original declaration. This contention can not be sustained. The general rule that amendments, not introducing a new cause of action, may be made to conform pleadings with proof, at any stage of the trial, is well settled. *Kelley* v. *Bragg*, 76 Me., 207; *Waiczenko* v. *Oxford Paper Co.*, 106 Me., 110; *Charlesworth* v. *American Express Co.*, 117 Me., 222. But allowable as the introduction of such an amendment may generally be, it can not cure the error of the prior admission of evidence admissible only under the amended allegations. The common-law rule is that the right to amend pleadings so as to conform them to proof must be exercised prior to the introduction of the proof, if that, when offered, be objected to on the ground of variance between pleading and proof. 1 Enc. Pleading and Practice, 585; 31 Cyc., 452; *Rogers* v. *Union Stone Co.*, 130 Mass., 581; *Beard* v. *Tilghman*, 66 Hun (N. Y.), 12. Had the plaintiff, after the amendment was allowed, again introduced its proof of the permanency of Mr. Fournier's injuries, the evidence would have been admissible.

In the suit of Frank X. Fournier the verdict was for $8,333.70. In the words of the court in *Wallace* v. *New York City Ry.*, supra, "We are bound to assume that the evidence thus erroneously admitted enhanced the verdict to some extent, although, of course, we can not tell precisely how much." This exception must be sustained.

III. As already noted, exception was reserved to the allowance of the amendment in the Frank X. Fournier suit by which an allegation that the "injuries are permanent" was added to the original declaration. A similar amendment was allowed against objection with exception reserved in the Joseph W. Hutchins suit. Both exceptions are brought forward in the Bill and relied upon in argument.

The record discloses that the primary objection of the defendant to the allowance of these amendments was on the ground of surprise. The statement of counsel for the defendant was:

> "If the amendment is to be allowed in view of the statement that I am surprised, I will ask for a continuance permitting me an opportunity to ascertain exactly what the available evidence is on the point and to produce such as is available that I have not at hand."

The record of the rulings of the Court is:

"Motion to amend the writ granted and allowed. Exceptions for the defendant in each case."

The single inference remains that the presiding Judge failed to rule on the defendant's equivalent for a motion for a continuance, and the trial proceeded with an intention and understanding on the part of Court and counsel that the defendant's rights were preserved by the allowance of the exceptions to granting the amendments.

In fact and circumstance, the situation thus arising in these cases finds close analogy in those recorded in *Charlesworth* v. *American Express Co.*, supra. In that case, during the progress of the trial, plaintiff's counsel sought to introduce evidence of injuries not alleged in the original declaration. Contrary to the practice followed here, the presiding Justice there excluded the evidence.

Amendment conforming pleading to proof was then offered and allowed. Counsel made no objection to this allowance but immediately presented a motion for continuance on the ground of surprise. This motion was overruled and exception noted.

On review this court held that the exception in that case must be sustained on the ground of surprise, the additional allegation introduced by the amendment being an important one, opening a new and wide field of investigation.

There seems to be no fixed rule of practice in this State governing trial situations such as arose in the instant and the cited case. The practice followed in *Charlesworth* v. *American Express Co.* is an approved practice but no statute or rule of court makes it exclusive. The orderly and speedy conduct of the trial may be preserved and a just result obtained by following the practice resorted to here. An objection, on the ground of surprise, to the allowance of an amendment, made to conform pleading and proof, and perfected by exception, as effectually raises the question of unjust and prejudicial abridgment of the adverse party's rights as does an exception to a refusal to grant a continuance on like grounds.

The granting of an authorized amendment is recognized as a matter of judicial discretion. It must, however, be, as was said in

the Charlesworth case, "Sound discretion exercised according to the well established rules of practice and procedure, a discretion guided by the law, so as to work out substantial equity and justice," and, if palpable error has been committed or an apparent injustice has resulted, the discretionary ruling is reviewable.

In the instant cases the learned Judge exceeded, we think, the bounds of sound judicial discretion. To have ruled upon and granted the motions for continuance with an allowance of the amendments offered, would have preserved the rights of all parties and worked out "substantial equity and justice." To withhold a ruling upon the motion for continuance and allow the amendments against the defendant's objection on the ground of surprise, introduced a right of proof and recovery of substantially increased damages without giving the defendant reasonable opportunity to investigate the facts and prepare its defense. This was prejudicial error and entitles the defendant to new trials in both cases.

Upon these conclusions, it is unnecessary to consider the other exceptions or the motions. The entry must be in each case,

Exceptions sustained.

STATE OF MAINE *vs.* HERSEY WRIGHT.

Franklin. Opinion December 16, 1929.

CRIMINAL LAW. PLEADING AND PRACTICE. JURY.

Criminality is not predicated upon mere negligence necessary to impose civil liability, but upon that degree of negligence or carelessness which is denominated gross or culpable.

A jury is bound by the instructions, on questions of law, given by the presiding Justice and must be presumed to have followed them.

Errors of law in criminal cases are not, as a general rule, open to review on appeals to this court. The appropriate practice is to present such errors by a Bill of Exceptions, and a departure from this practice is not to be encouraged.

In this State, the principles applicable to a review of civil trials on a general motion for a new trial govern appeals in criminal cases.

The Law Court must, therefore, recognize in criminal appeals the exception to the general rule of practice above stated, viz., that, where and only where manifest error in law has occurred in the trial of the case and injustice would inevitably result, the law of the case may be examined upon appeal and the verdict, if clearly wrong, set aside.

The verdict in the case at bar was based upon a misconception of the law and was responsive only to a measure of criminal guilt foreign to the indictment and unknown to the law.

On exceptions and appeal. An indictment charging the respondent with manslaughter. Upon the trial of the case, the jury rendered a verdict of guilty: thereupon the respondent filed a motion in arrest of judgment which the presiding Justice overruled, to which ruling the respondent excepted. The respondent also filed a motion to set the verdict aside, which motion also was denied by the presiding Justice, and from which ruling the respondent appealed. The respondent also filed exception to a portion of the charge of the presiding Justice. Appeal sustained.

The case fully appears in the opinion.

Carll N. Fenderson, County Attorney for State.

Frank A. Morey, for respondent.

SITTING: DEASY, C. J., DUNN, STURGIS, PATTANGALL, FARRINGTON, JJ.

STURGIS, J. The respondent was indicted for manslaughter. At the trial, the prosecution relied upon involuntary manslaughter and offered evidence to prove that the respondent, while on a hunting trip, negligently shot the deceased as he rode by on horseback. Criminality is not predicated upon mere negligence necessary to impose civil liability but upon that degree of negligence or carelessness which is denominated gross or culpable. *State* v. *Pond*, 125 Me., 453; *Fitzgerald* v. *State*, 112 Ala., 39; *People* v. *Adams*, 289 Ill., 339, 345; *Com.* v. *Pierce*, 138 Mass., 165; *Aiken* v. *Street Railway*, 184 Mass., 271; *State* v. *Lester*, 127 Minn., 285; *State* v. *Rountree*, 181 N. C., 538; *People* v. *Angelo*, 221 N. Y. S., 49; 45 Corpus Juris, 1372; 29 Id., 1154. In his charge to the jury, the presiding Justice inadvertently failed to observe this distinction be-

tween civil and criminal negligence, instructing the jury to measure the respondent's guilt by the rules of negligence applicable only to civil cases. The jury were bound by these instructions, *State* v. *Stevens*, 53 Me., 548, and must be presumed to have followed them.

After verdict, counsel for the respondent moved for a new trial on the ground, among others, that the verdict was against the law. The motion was denied by the presiding Justice and an appeal taken to the Law Court under R. S., Chap. 136, Sec. 28. No exception to this erroneous instruction was reserved.

In our practice, in civil cases, errors of law are not as a general rule open to review on a motion for a new trial directed to this court. The same general rule applies to statutory appeals in criminal cases. The appropriate practice is to present such errors to this court in a Bill of Exceptions, and a departure from this practice is not to be encouraged.

In civil cases, however, an exception to this general rule has been recognized, and where, and only where, manifest error in law has occurred in the trial of cases and injustice would otherwise inevitably result, the law of the case may be examined upon a motion for a new trial on the ground that the verdict is against the law, and the verdict, if clearly wrong, set aside. *Pierce* v. *Rodliff*, 95 Me., 346, 348; *Simonds* v. *Maine T. & T. Co.*, 104 Me., 440, 443.

The same exception must be recognized in the review of criminal appeals. In this state the principles applicable to the review of civil trials on a general motion govern appeals in criminal cases. *State* v. *Dodge*, 124 Me., 243, 245; *State* v. *Stain et al*, 82 Me., 472, 489. And so in its review of criminal appeals, where the single question considered under the appeal was whether the verdict was against the evidence, this court has repeatedly ruled that the only question there to be determined was whether, in view of all the testimony in the case, the jury were warranted in believing beyond a reasonable doubt, and therefore in finding, that the respondent was guilty of the crime charged against him, *State* v. *Lambert*, 97 Me., 51; *State* v. *Mulkerrin*, 112 Me., 544; *State* v. *Howard*, 117 Me., 69; *State* v. *Pond*, supra; *State* v. *Dodge*, supra.

In the instant case, however, this review is not limited to the single question of whether the verdict is against the evidence as in the cases last cited. That question, on this record, we do not and

can not determine. We are here concerned with a verdict based on a misconception of the law and responsive only to a measure of criminal guilt foreign to the indictment and unknown to the law. Such a verdict is against the law, and to allow it to stand is not justice. The rule of exception, adopted in *Pierce* v. *Rodliff* and *Simonds* v. *Maine T. & T. Co.*, both supra, can, without conflict with the opinions in *State* v. *Lambert* and affirming cases cited, be here applied. That it should be, is clear.

Without a consideration of the Bill of Exceptions or the sufficiency of the evidence to sustain the charge laid in the indictment, the entry is,

Appeal sustained.

BURRIDGE'S CASE.

Kennebec. Opinion December 18, 1929.

WORKMEN'S COMPENSATION ACT. FINDINGS OF COMMISSIONER.

Under the Workmen's Compensation Act when there is any reasonable evidence which supports the finding of the Commissioner, such finding is not subject to review.

In the case at bar there was no evidence of accident, but there was sufficient evidence to support the finding of the Commissioner that the labor, from a legal standpoint, was not a contributing cause of the heart failure.

On appeal by claimant from finding of the Industrial Accident Commission that the employee suffered death not from accident.

Appeal dismissed.

Decree below affirmed.

The case fully appears in the opinion.

A. L. Thayer,

Oscar H. Emery, for claimant.

~~*Franklin Fisher*, for respondent.~~

Clement F. Robinson, Attorney General.

Richard Small, for State Highway Commission.

SITTING: DEASY, C. J., BARNES, PATTANGALL, FARRINGTON, JJ.

BARNES, J. On appeal by claimant, widow and dependent of an employee of the State Highway Commission, from ruling below affirming the finding of the Industrial Accident Commission that the employee who died, Sept. 9, 1926, while engaged in his usual work, did not meet his death after accident.

The employee was on a truck, dipping water from a barrel, using a pail that would hold from nine to twelve quarts, and handing the pail to his helper, on the ground, when he ceased labor, walked to the camp, asked for and drank a mixture of acid and soda, and within a half hour died, without speaking more.

A physician, called at once, but arriving after the death, reported "that death was the result of chronic heart disease."

The record is meagre in the extreme; the testimony scanty, but undoubtedly all that was available and of value.

The first problem for the commissioner to solve was whether or not, under the law, there had occurred an accident arising out of and in the course of the employment of the decedent.

If any there were, it must have happened in the course of the last moments of his work, at labor undoubtedly of the lightest.

The commissioner found in the negative, and claimant urges that such conclusion was of law and subject to appeal.

There was no evidence of accidental happening; there was evidence of death from heart disease. Despite his report that the death was the result of heart disease, the physician testified, at the hearing, that the work being performed "was a material contributing cause to his death at that time."

Another physician, an expert in the treatment of patients suffering from diseases of the heart, gave it as his opinion that the particular malady causing employee's death was that which comes commonly in periods of rest, and often in sleep, that the immediate cause of the heart failure was a clot within an artery, and that the work being done would not cause the clot.

Decision of the primary problem was one of fact, upon the weight of evidence.

Of the occurring of an accident, and of the weight of evidence the commissioner is made, by statute, the arbiter.

If there be evidence to support the finding, it shall stand. We

find total lack of evidence of accident, and abundant material to support the conclusion that the weight of evidence justifies the finding that the labor was not a contributing cause of the heart failure, as understood at law, and there is no suggestion of fraud.

Appeal dismissed.
Decree below affirmed.

NELSON SPEAR *vs.* WILLIAM H. HOFFSES.

EDWIN S. VOSE *vs.* WILLIAM H. HOFFSES.

Knox. Opinion December 30, 1929.

DAMAGES. TREES. R. S., CHAP. 30, SEC. 17.

While a grove of trees may be considered a part of the real estate upon which the trees are growing, they have an intrinsic estimable value other than what they add to the value of the real estate. The owner may treat them as personal property and sue for their value as though they had been detached from the realty, in which case his measure of damages is the value of the trees separate and apart from the soil.

Where, however, one sues to recover damages for injury, permanent in nature, caused his land by the loss of the trees, the measure of damages is the market value of the land immediately before and immediately after the injury. The wrongdoer may thus be held responsible for all injury necessarily and naturally resulting from his tortious act, whether forseen by him or not.

Damages may be recovered for loss occasioned by the destruction of the scenic beauty of growing trees in an oak grove.

On exceptions and motion for new trial by defendant. Two actions on the case for damages occasioned by the alleged negligence of the defendant in setting a fire on his own land which was communicated to plaintiffs', whereby certain oak trees were destroyed and other damage done their respective properties. The jury awarded one plaintiff $300, the other $500. To the refusal of the presiding Justice to give certain instructions asked by the defendant and to the admission of certain evidence defendant seasonably

excepted and after the jury had found for plaintiffs in each case filed a general motion for new trial. Exceptions overruled. Motions overruled.

The cases fully appear in the opinion.

Oscar H. Emery, for plaintiffs.

Rodney I. Thompson, for defendant.

SITTING: DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

DUNN, J. These two cases were tried together. The gist of each declaration is that the defendant, in kindling and tending a grass fire on his own land in Cushing, on April 16, 1927, when the soil was uncommonly dry and the wind blowing freshly, did so at an unsuitable time and was wanting in care and prudence, to the property damage of the different plaintiffs on two acres and five acres of their several lands, to which the fire spread, destroying the value and beauty of oak groves and doing other damage to their respective properties.

Plea, the general issue.

The jury awarded one plaintiff three hundred dollars; the other, five hundred dollars.

Exceptions raise the point that damages, apparently found from evidence admitted over objection, tending to prove that the trees in the destroyed groves were of other and greater value than for timber, namely, that the groves enhanced the value of the tide-water lands for summer cottage lots, are not recoverable as the necessary and proximate result of the wrongful acts set out in the declarations.

And there are motions to set aside the verdicts as against the evidence, and the weight thereof, and for excessiveness of damages.

The actions are in case. They are based on a statute which contemplates damages to produce just results. R. S., Chap. 30, Sec. 17.

The first question relates to the rule of damages given to the jury. The jury were told, in effect, that, in the event the matter of damages came on for attention, it would be for the jury to find from the evidence how much, with respect to the most valuable purpose or use of the trees, either for timber or shade or beauty, but not both, the market value of the lands had been reduced;

regard being had to their character, situation, present and probable use.

While a grove of trees is generally a part of the real estate upon which the trees are growing, and the trees have an intrinsic, estimable value, may be more, may be less, than they add to the value of the real estate, still the owner may treat them as personal property, and sue for their value as though they had been detached from the realty, in which case his measure of damages is the value of the trees separate and apart from the soil; but where one sues to recover damages for injury, permanent in nature, caused his land by the loss of the trees, the measure of damages is the market value of the land immediately before and immediately after the injury. The law makes damages commensurate with damage. *Look* v. *Norton*, 55 Me., 103, 105. Thus may the wrongdoer be held responsible for all injury necessarily and naturally resulting from his tortious act, whether foreseen by him or not.

These actions were commenced to recover original damages for injuries to lands, each injury being alleged to have been primarily caused by the destruction of the scenic beauty of growing trees in an oak grove; but besides this allegation, in the single count of the declaration, is the allegation for the further damage which the fire did on and to the land the declaration bounds and describes.

No ground to except to the instruction given the jury is perceived, qualified as the instruction was to exclude indirect, indefinite, conjectural, or speculative damages, and damages aside from the direct diminution of the value of the real estate for any use to which it might reasonably have been appropriated.

It is not to be said, on consideration of the motions, that either verdict is against the evidence, or its fair preponderance, or that the damages are excessive.

Exceptions overruled.
Motions overruled.

PIERRE LAVOIE *vs.* CITY OF AUBURN.

Androscoggin. Opinion December 30, 1930.

PLEADING AND PRACTICE. ACTIONS. MUNICIPAL CORPORATIONS. FALSE REPRESENTATIONS.

Where claim is made for reimbursement of money paid under an alleged mistake of fact, though question of title under a deed may be involved, assumpsit is a proper form of action.

In the purchase of real estate from a municipality, as from a private citizen, the rule, caveat emptor, *applies, and to sustain his claim for reimbursement the plaintiff must prove fraudulent representation by the grantor.*

Representations made by any citizen or official other than the agent to whom authority to make the contract of sale had been delegated, can not be relied upon to establish a fraudulent transaction and to recover the purchase price from a municipality.

In the case at bar the evidence disclosed that the plaintiff before purchasing, knew the City's title to the property. Possessed of this knowledge he sought the City Manager, and there was no testimony in the record of any representations made by the Manager except such, if any, as were in the deed.

It must be concluded that the plaintiff knowingly gave his money for such title as the city had.

An action in assumpsit to recover of a city the purchase price of a farm, conveyed by quitclaim deed, and brought to this court upon report.

Judgment for the defendant.

The case is sufficiently stated in the opinion.

P. F. Tremblay,

H. E. Holmes, for plaintiff.

Fred H. Lancaster, for defendant.

SITTING: DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

BARNES, J. The plaintiff, in the fall of 1926, interviewed the collector of taxes of the defendant city with the purpose of purchasing what title the city had to a farm.

Such title as the city had was by virtue of prior tax deed.

It is alleged that the collector of taxes falsely represented to plaintiff that the city had full title to convey the premises; that the plaintiff relied on the representation as true; that he paid a substantial sum for the city's title believing it a good title, and that he had been dispossessed by another having a better title, and hence that he should be reimbursed, under the second count in his writ in assumpsit, the common count for moneys had by defendant to plaintiff's use.

The form of action is proper. "The action of assumpsit for money had and received is comprehensive in its reach and scope. Though the form of procedure is in law it is equitable in spirit and purpose and the substantial justice which it promotes renders it favored of the courts." *Dresser* v. *Kronberg*, 108 Me., 423.

But in the purchase of real estate from a municipality, as from a private citizen, the rule, *caveat emptor*, applies, and to sustain his claim for reimbursement the plaintiff must prove fraudulent representation by the grantor. *Butman* v. *Hussey*, 30 Me., 263; *Monson* v. *Tripp*, 81 Me., 24.

The deed to plaintiff is put in evidence. It is a quitclaim deed in common form, executed by "City of Auburn By F. W. Ford, Jr., City Manager."

Authority delegated to any agent to sell the land is not put in evidence. But it is assumed that a city may sell property of a private nature.

The official who acted was the City Manager.

Testimony was offered and received over defendant's objection that plaintiff had conversation with the collector of taxes as to the quality of the city's title. The objection appears to have been later waived by the city's counsel.

But in any event representations made by any citizen or official other than the agent to whom authority to make the contract of sale had been delegated can not be relied upon to establish a fraudulent transaction and to recover the purchase price from the municipality.

On the part of the defense it is argued that plaintiff was given a deed "with the same qualifications as a tax deed."

Just what is meant by the phrase quoted is not entirely clear

but from plaintiff's testimony it is evident he knew before he purchased that he was buying property taken by the defendant under the statutes providing for sales to recover taxes, and in the deed that he accepted is notice to him that the title of his grantor was so derived.

He must be assumed to have bargained for the property with knowledge that he was acquiring less than an indefeasible title.

He admits, under examination, it was his idea that he was paying his money "for tax deeds from 1915 to 1926," and the testimony of the city auditor is clear and full upon the point that on the occasion when the tax collector, at the request of the plaintiff, calculated the amount of the city's lien on the property, he advised the plaintiff it would be a quitclaim deed and not a deed of warranty that the city would give.

It seems clear that plaintiff, before purchasing, knew the city's title to the property. Possessed of this knowledge he sought the City Manager, and there is no testimony in the record of any representations made by the Manager except such, if any, as is in the deed.

So the conclusion must be that plaintiff knowingly gave his money for such title as the city had.

Point is made that after the sale the tax collector failed to lodge with the city treasurer a certificate of the parcels of land sold for taxes, with other particulars, as required by statute.

Four years after the sale such certificate can not be found. There is no proof that the collector for 1925 did not prepare and file such certificate, and in a somewhat similar case, our court has said, "The law presumes that official persons conduct legally and perform their duties until proof is made to the contrary." *Treat* v. *Orono*, 26 Me., 217.

So far as the plaintiff is concerned or would have been aided by perpetuation of the certificate required of a collector selling land for taxes, it goes only to the question of notice of defendant's title.

Of this it is plain in the record that plaintiff had actual notice.

The case is here upon report, and our finding must be,

For defendant.

STATE OF MAINE *vs.* ROMEO ROY.

Kennebec. Opinion January 7, 1930.

CRIMINAL LAW. EVIDENCE. INSTRUCTIONS TO JURY.

Violations of the liquor law, like violations of other criminal law, may be proved by presumptive or circumstantial evidence, consistent with guilt and inexplicable on the theory of innocence, of the requisite degrees of convincing power, where that is the best evidence obtainable.

When, in a criminal prosecution, there is a total want of evidence to support some material allegation, the jury should be instructed to return a verdict of not guilty, and refusal so to do is reversible error.

In the case at bar both the direct and indirect evidence were insufficient to justify conviction and the motion by counsel for respondent for a directed verdict of not guilty ought to have been granted.

On exceptions. Respondent was tried on a complaint in three counts for violation of different provisions of the Liquor Statute. At the conclusion of the testimony counsel for respondent moved for a directed verdict, which motion was denied. To this ruling respondent seasonably excepted. Exception sustained.

The case sufficiently appears in the opinion.

Frank E. Southard, County Attorney for State.

Carl F. Fellows,

F. Harold Dubord, for respondent.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

DUNN, J. This prosecution for violations of different provisions of the liquor statute was begun by complaint. From the municipal court, in Augusta in Kennebec county, the respondent made an appeal, and the case came on for trial by jury in the superior court.

In the complaint there were three counts. First, in brevity, the charge of the unlawful transportation by the respondent of one gallon of alcohol; next, the deposit by him of that quantity of alcohol in the boiler room of the Kennebec courthouse, with intent

to sell the liquor; finally, the delivery by the respondent to a person in the custody of the county sheriff, of one gallon of alcohol.

The divers offenses charged were not strictly kindred in nature, which a single trial might settle, but there was no request that the prosecutor elect, and the respondent was brought to trial upon the several counts.

At the conclusion of the testimony, reads the bill of exceptions, the respondent, by his attorneys, made a motion that the court direct a verdict of not guilty.

The trial court overruled the motion. An exception preserves the point.

There was no sufficient direct evidence against the respondent. The State, however, was not restricted to direct evidence. Violations of the liquor law, like violations of other criminal law, may be proved by presumptive or circumstantial evidence, consistent with guilt and inexplicable on the theory of innocence, of the requisite degree of convincing power, where that is the best evidence obtainable.

The jury could have found it proven sufficiently by circumstantial evidence, that one gallon of alcohol had been carried in a can from one place to another, the latter being the aforementioned boiler room, by somebody; but there was dearth of evidence, direct or indirect, to connect the respondent with the act of transporting.

The evidence had been, in the jail yard, a week or ten days before, it was said to the respondent by a prisoner, a trusty, that if one would get a little liquor for him, he should appreciate it; to which statement no reply was made. On the day the liquor was found, but before the finding, the respondent had been seen coming up a public street, and thence along the street of its intersection, to a point opposite the back door of the courthouse, whence he walked to and into the building. It is said, in evidence, that he inquired for the custodian of the building, for whom he was told to look upstairs, and that he asked also if the prisoner was yet in jail. Soon afterwards he went away. Overalls and blouse in union or combination, the overalls noticeably loosely fitted and the blouse unbuttoned, were being worn by the respondent. He had in his hands a pair of pincers and a hammer.

The elements necessary to commit the misdemeanor which the

second count alleges are actual or constructive possession of intoxicating liquor, which alcohol is, coupled with the design or purpose to sell it. Under this count, the same and no other showing was made, than under the first count.

Under the third count evidence was sufficient to establish the fact that the person in custody had had intoxicating liquor; there was utter lack of evidence that the liquor had been delivered to him by the respondent.

When, in a criminal prosecution, there is a total want of evidence to support some material allegation, the jury should be instructed to return a verdict of not guilty, and refusal so to do is reversible error. Thus remarks this court in *State* v. *Cady*, 82 Me., 426. See too *State* v. *Donahue*, 125 Me., 516; *State* v. *Shortwell*, 126 Me., 484. The trial court erred in denying the motion.

Exception sustained.

FRANK SMITH

vs.

THE RELIEF ASSOCIATION OF PORTLAND FIRE DEPARTMENT.

Cumberland. Opinion January 7, 1930.

CHARITABLE CORPORATIONS. PUBLIC CHARITIES DEFINED.
R. S., CHAP. 62, SEC. 6.

The benefits of a public charity need not be available to any resident but may be restricted to certain specified recipients.

Distribution of benefits to a class may be for charitable or benevolent purposes.

The class must be of those who have a natural right to share benevolence from charity, a non-artificial classification, a class to whom the public is under obligation.

Neither power to lay assessments, nor contributions of money by inmates to pay a portion of the expenses of their maintainance, renders a public charity private.

In the case at bar the income of the defendant was derived mainly from charity, and claim for its bounty was not founded upon contract. Its distribution was general and to recipients, though of a class, still, as individuals, indefinite, fluctuating and unascertained. Its purpose met a public need and lessened the public burden. The defendant was therefore within the protection of the statute precluding suits against corporations organized for charitable or benevolent purposes.

On exceptions by defendant. An action on the case brought by plaintiff to recover from defendant certain weekly benefits alleged due him because of injuries sustained while he labored as a member of the Portland Fire Department. At the close of the evidence defendant moved for a directed verdict on the ground that it was a corporation rendered immune by the provisions of R. S., Chap. 62, Sec. 6, from action against it by its members. To the refusal of the presiding Justice to so rule, and to certain instructions given by him, defendant seasonably excepted. Exceptions sustained. New trial granted.

The case fully appears in the opinion.

Hinckley, Hinckley & Shesong, for plaintiff.

Joseph E. F. Connolly, for defendant.

SITTING: DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

BARNES, J. The defendant is a mutual benefit association incorporated in 1852, and existing at the present day, for the benefit of members of the Portland Fire Department, or their families in the event of their decease, when injury is received in the discharge of their duties as such members.

On December 17, 1926, the plaintiff was a substitute call-man working at a fire, and received grave physical injury. So far as affects his right to receive benefits from the defendant, it is admitted that he was a member of the Fire Department.

Under the constitution of the association, as last revised in 1908, its funds are held and disbursed by its trustees; a member, seeking relief after injury, gives notice to the relief committee, investigation is made and the trustees, upon finding of bodily injury or im-

pairment of health incurred in the performance of duties as a fireman, may award to the injured member "fifteen dollars per week for the first four weeks and at the rate of two dollars per day for the remainder of such sickness or disability."

Subsequent to the injury, notice was given and relief furnished, until September 7, 1927.

It is the contention of the plaintiff that incapacity to labor continued for 177 days after the last relief was furnished, and he has brought suit for $354.

By its brief statement, pleaded with the general issue, defendant claimed exemption from suit, and authority to dispense relief according to the regulations of its charter and constitution relating thereto, under the provisions of our statute regulating organization and conduct of charitable and benevolent corporations.

At the close of all the evidence, the defendant moved for a directed verdict upon the grounds set out in its plea. This motion was denied and exception to its denial taken.

In his instructions to the jury the Court eliminated all consideration of the question whether or not the defendant is a corporation whose members, under the law, can not sue it for benefits or relief, and charged that the plaintiff was entitled to recover if he had shown that he was entitled to the benefits which he claimed.

Exception was allowed to this portion of the charge.

Under the first exception defendant claims the judge erred in not declaring it a corporation protected from suit, upon the evidence, and under the second that he erred in his charge in declaring it not a corporation protected from suit.

The judge must deny a motion for a directed verdict when he feels there is evidence as to matters of fact upon which a verdict for the other party, found by a jury, would properly be sustained.

And if the existence of such evidence forces the refusal to direct a verdict, by the same token it requires submission of disputed questions of fact to the jury.

Whether the defendant corporation is an organization for charitable and benevolent purposes is a question of fact, and should have been submitted with proper instructions to the jury.

The plaintiff argues it is not exempt from suit by a member, because the rights of the member and the obligations of the associa-

tion are not of charity and benevolence, but those of a mutual insurance company, and for the reason that under defendant's constitution it may levy assessments upon its members, and the further reason, as plaintiff alleges that its revenues are chiefly derived from sale of tickets to its annual ball, and are not wholly donations of the charitable for public benevolence.

The list of cases decided by courts of last resort in this country is long, on what constitutes a charity, charitable use or charitable trust; when property is exempt from taxation because devoted to purposes of charity and benevolence, and that mutual insurance companies are not charitable and benevolent organizations.

In our state the first enactment of a general statute authorizing the organization and continuance of corporations to hold and dispense funds for charitable and benevolent purposes was passed by the legislature of 1847, and specifies certain powers and limitations.

The enabling act contains this limitation, "Sec. 7. No power granted by this act shall confer the right, upon any society, to sue any of its members for dues or contributions of any kind, nor shall it authorize any member to sue the society for any benefit or charity; but all such rights and liabilities, dues and benefits, shall remain as they now are or may hereafter be provided for, in the by-laws, rules and regulations of said societies."

By the revision of 1857, this limitation became Sec. 5 of Chap. 55, R. S., as follows:

"No corporation, organized for charitable or benevolent purposes, shall sue any of its members for dues or contributions of any kind, or be sued by any member for any benefit or sum due him, but all such rights and benefits, dues and liabilities, shall be regulated and enforced only in accordance with its by-laws." And the law has been so phrased and promulgated throughout all the general revisions of statutes to this day, and so reads in Sec. 6, Chap. 62, R. S.

It is probably not possible to pronounce a definition of a public charity, or society for charitable and benevolent purposes, in the legal sense, that must include all bodies entitled to that classification; but a definition quoted with approval by many text writers, and very widely adopted by courts, is contained in *Jackson* v. *Phillips*, 14 Allen, 556.

"A charity, in legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."

"The true test of a public charity is the object sought to be attained; the purpose to which the money is to be applied; not the motive of the donor." *Fire Insurance Patrol* v. *Boyd*, a Pa. case, 15 Atl., 553-556.

Nor is it essential to a public charity that its beneficence is not available to any resident, but restricted to certain specified recipients.

"Distribution of benefits to a class may be for charitable or benevolent purposes." *Coe* v. *Washington Mills*, 149 Mass., 543; *Dascomb* v. *Martin*, 80 Me., 223; *Webber Hospital Ass'n* v. *McKensie*, 104 Me., 320.

The class must be of those who have a natural right to share benevolence from charity, a non-artificial classification, a class to whom the public is under obligation. *Philadelphia* v. *Masonic Home*, 160 Pa., 572, 23 L. R. A., 545.

"Public, or as they are frequently termed, charitable trusts, are those created for the benefit of an unascertained, uncertain and sometimes fluctuating body of individuals in which the *cestuis que trustent* may be a portion or class of a public community." *Webber Hospital Ass'n* v. *McKensie*, supra; *Minns* v. *Billings*, 183 Mass., 126; 5 L. R. A. (N. S.), 686.

By its constitution defendant provides that a special assessment may be laid upon the members of the association; and we are urged, because the association has the power to lay assessments, to rule that it, therefore, is not a public charity. In the enabling statute the use of the words, "dues or contributions of any kind," may well be stressed in support of the argument that the legislative intent was that power to exact dues or to lay assessments would not render a charitable organization a private charity. It is true that in the record there is no evidence of an assessment having been laid; and the testimony of two members, one of thirty-two and the

other of thirty-nine years' standing, was that no assessments had been laid since their membership began.

But we note that the power to lay assessments does not place defendant outside the statute.

"The fact that its (a public charitable institution's) funds are supplemented by such amounts as it may receive from those who are able to pay for the accommodation they receive does not render it the less a public charity. All sums thus obtained are held upon the same trust as those which are the gifts of pure benevolence." *McDonald* v. *Mass. Gen. Hospital*, 120 Mass., 432.

"Contribution of money by inmates to pay a portion of the expense of their maintainance does not render a public charity private." *Philadelphia* v. *Women's Christian Ass'n*, 125 Pa., 572; 17 Atl., 475; *Ingleside Ass'n* v. *Nason*, 109 Pac. (Kan.), 984; 29 L. R. A. (N. S.), 190, and L. R. A., 1917, B. 782.

Gifts to colleges and schools where tuition fees are charged are invariably upheld as gifts to charity.

"Likewise, a trust for the erection of convenient and healthful tenements for the laboring classes, and their maintainance in proper repair in a clean and tidy condition, creates a good charity, although they are to be let to laborers for rent, and not to be gratuitously furnished to them." *Webster* v. *Wiggin*, 19 R. I., 73; 31 Atl., 824; 28 L. R. A., 510.

A large portion of defendant's funds was admittedly amassed from donations of property owners in Portland.

Again in the preamble to its constitution we are reminded that the casualties to which defendant's members are exposed, in the line of duty to the public, are frequently very injurious, and sometimes ruinous to the health, comfort and pecuniary circumstances of those on whom they fall.

Reparation for such loss is now universally recognized as a proper burden on the public served; hence charity dispensed under existing laws to aid the public in bearing this burden is in the legal sense a public charity.

"Whatever is gratuitously done or given in relief of public burdens, or for the advancement of the public good, is a public charity." *Episcopal Association* v. *Philadelphia*, 150 Pa., 572; 29 L. R. A., 603.

Again, plaintiff contends that an annual increment to the funds of defendant, approximating $2,000.00, is realized from sale of tickets to the firemen's ball, at two dollars per ticket. All firemen are supposed to purchase tickets, but none will deny that the main body of such tickets is sold to the general public, and our conclusion is inescapable that the average citizen pays for the ticket which he buys as a contribution to this worthy charity. The many cases cited by plaintiff lack the essential element of indefiniteness in the immediate objects, or that of gratuity in the contribution, or are in regulation of mutual benefit associations deriving their funds wholly from fees and assessments.

Defendant is a corporation without capital stock and is not dividend paying; its benefits are by authority of the statute to be distributed as provided by its by-laws; if it arrives at dissolution, according to the only section of its constitution which is "unalterable," its funds are still to be applied to carry out the designs and intentions of the association.

We have seen that its income is derived mainly from charity; that claims for its bounty are not founded upon contract; that its distribution is general and to recipients, though of a class, still, as individuals, indefinite, fluctuating and unascertained; that its purpose meets a public need and lessens the public burden.

Hence we conclude that defendant is within the protection of the statute, and at most, if the learned judge was uncertain as to his duty to direct a verdict, the instruction to the jury that the determination whether this defendant was within the exemption of the statute was not for them, was error.

Exceptions sustained.
New trial granted.

LENA JACOBSON *vs.* CHARLES LEAVENTHAL.

PHILIP JACOBSON *vs.* CHARLES LEAVENTHAL.

Cumberland. Opinion January 9, 1930.

LANDLORD AND TENANT. CONTRACTS. NEGLIGENCE.

If a lessor contracts to repair premises in the possession and under the control of his tenant, his liability is no greater or different than would be the liability of a third party, i.e., a carpenter or other mechanic who contracts to make such repairs.

The general principle is that a tenant takes leased premises for better or for worse with no obligation on the part of the lessor to make repairs.

The liability for injuries caused by a dangerous concealed defect known to the lessor and not made known to the tenant is an exception to this rule. A lessor's liability for the safe condition of common passageways and stairways is not an exception since the lessor retains the possession and control and it is only the use in common that is demised.

A person who contracts to repair a building in the possession and control of another, even though it be his tenant, if he fails to perform the contract is liable in an action on the contract for consequences that may reasonably be anticipated but is not by reason of breach of his contractual duty liable to an action of tort for negligence.

On exceptions. Two actions on the case brought to recover for injuries sustained by the plaintiff, Lena Jacobson, because of the alleged negligence of the defendant in failing to repair a certain flight of stairs, and for consequent pecuniary injuries to Philip Jacobson, her husband, the tenant of the defendant. At the close of the plaintiff's evidence the defendant moved for a nonsuit which was granted by the presiding Justice. To this ruling plaintiffs excepted. Exceptions overruled in each case.

The cases sufficiently appear in the opinion.

Arthur D. Welch, for plaintiffs.

Robinson & Richardson, for defendant.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

DEASY, C. J. In 1927 Philip Jacobson became the tenant of an apartment on Water Street, Portland, under a lease from the defendant.

In passing down a stairway leading to a cellar, which was a part of the leased premises, Lena Jacobson, wife of the tenant broke through a defective stair tread and suffered injuries.

These actions of tort for negligence were brought. The judge of the superior court ordered a nonsuit. The case comes forward on plaintiffs' exceptions.

The alleged defective stairway was not a common stairway remaining in the lessor's possession and control for the care and repair of which he is responsible (as in *Sawyer* v. *McGillicuddy*, 81 Me., 318).

It is not contended that the injury was due to a latent defect known to the lessor who failed to call it to the attention of the tenant (as in *Minor* v. *Sharon*, 112 Mass., 487) nor that the defendant had made repairs to the stairway in a negligent manner (as in *Gregor* v. *Cady*, 82 Me., 131).

The theory of the plaintiffs' counsel is that the defendant is liable in tort by reason of the admitted fact that at or before the leasing the defendant promised and agreed with the plaintiff, Philip Jacobson, that he, the defendant, would repair the defective cellar stairway. The defendant's counsel not questioning the making of the alleged agreement, nor its binding force as a contract, contends that he is not liable in tort for negligence but at most only for breach of contract and that the injury suffered by Mrs. Jacobson is not an element of damage for which he is responsible for the reason that such a consequence could not have reasonably been anticipated when the contract was made.

The defendant's position is supported by what we deem the better judicial authority.

If the lessor contracts to repair premises in the possession and under the control of his tenant, his liability is no greater or different than would be the liability of a third party, e.g., a carpenter or other mechanic who contracts to make such repairs.

That this is the rule prevailing in many jurisdictions is not questioned by the plaintiffs' learned counsel but he argues that by a series of decisions and dicta the court of Maine shows or indicates a disagreement with such rule.

The general principle not questioned by either party is that a tenant takes the leased premises for better or for worse with no obligation on the part of the lessor to make repairs. The liability for injuries caused by a dangerous concealed defect, known to the lessor and not made known to a tenant, is an exception to this rule. The lessor's liability for the safe condition of common passageways and stairways is not an exception since the lessor retains the possession and control and it is only the use in common that is demised.

In stating the general rule, the court of Maine has sometimes added such language as "unless he (the lessor) has made an express valid agreement (to make repairs)," *Bennett* v. *Sullivan*, 100 Me., 118; *Hill* v. *Foss*, 108 Me., 467, and in *Miller* v. *Hooper*, 119 Me., 528, it is said that he (the lessor) "must make such repairs as he expressly agrees to make."

These quoted passages can not be objected to as unsound, but there is nothing in them nor in the cases cited indicating that a lessor who contracts to repair leased premises and thus becomes charged with the contractual duty, if he breaks the contract, is liable in tort for negligence.

Other cases cited by the plaintiffs' counsel are *Campbell* v. *Portland Sugar Co.*, 62 Me., 552; *Toole* v. *Beckett*, 67 Me., 544; *McKenzie* v. *Cheatham*, 83 Me., 550; *Smith* v. *Preston*, 104 Me., 156; *Milford* v. *Electric Co.*, 104 Me., 233.

The opinion in *Smith* v. *Preston*, supra, states the rule of liability thus: "in all cases the criterion of liability is the obligation to maintain and repair with the right of control for that purpose."

Thus a lessor being under legal obligation to maintain and repair common passageways and stairways and having the right of control for the purpose may be held liable in tort for failure to perform his duty. While on the other hand, the lessor in the present case had no right of control of the stairway which was a part of the leased premises. His liability does not fall within the rule as laid down in *Smith* v. *Preston*.

In *Campbell* v. *Portland Sugar Co.*, supra, the defendants were held liable not by reason of a contract to repair but by reason of their "holding out (the wharf) as a place of public travel."

In *Toole* v. *Beckett*, supra, the lessor was held liable for injury to his tenant caused by the negligence of the lessor in respect to a part of a tenement house which was not leased and of which the lessor retained exclusive control.

McKenzie v. *Cheatham*, supra, simply reiterates the principle that one who creates a nuisance upon his property does not by leasing the property relieve himself from liability to a person injured by the nuisance.

Milford v. *Electric Co.*, supra, comes nearer to supporting the plaintiffs' contention. Property of the plaintiff town was destroyed by fire because of the failure of the defendant corporation to perform its contract to furnish a sufficient supply and head of water to extinguish fires. A demurrer to the declaration in case for negligence was overruled but this is far from holding that a lessor who has no right of possession or control of any part of the leased premises is liable in tort for failing to keep his contract to make repairs.

A person who contracts to repair a building in possession and control of another, even though it be his tenant, if he fails to perform his contract is liable in an action on the contract for consequences that may reasonably be anticipated, but is not, by reason of breach of his contractual duty, liable to an action of tort for negligence.

As stated by the Massachusetts Court in *Tuttle* v. *Manufacturing Co.*, 145 Mass., 169, "otherwise the failure to meet a note or any other promise to pay money would sustain an action in tort for negligence and thus the promisor be made liable for all the consequental damages arising from such failure."

The opinion in this case is supported by *Shackford* v. *Coffin*, 95 Me., 69; *Stewart* v. *Cushing*, 204 Mass., 157; *Anderson* v. *Robinson*, 102 Ala., 615; *Hart* v. *Coleman*, 192 Ala., 447; *Kushes* v. *Ginsberg*, 91 N. Y. S., 216 (affirmed, 188 N. Y., 630); *Clyne* v. *Holmes* (N. J.), 39 Atlantic, 767; *Davis* v. *Smith* (R. I.), 58, Atlantic, 630.

It is unnecessary to consider the alleged assumption of risk by Mrs. Jacobson. Mandate in each case must be,

Exceptions overruled.

MARIE ROUX *vs.* FRANK A. MOREY ET AL, EXECUTORS.

Androscoggin. Opinion January 9, 1930.

BILLS AND NOTES. NEGOTIABLE INSTRUMENTS ACT.

A promissory note made payable in money or "in my property," if the quoted words relate to the medium of payment, is non-negotiable because the N. I. L., Sec. 1, *provides that such a note to be negotiable must be payable "in money."*

A note is negotiable though payable at a place certain or several places, the option of presenting at one or another place being with the holder.

One suing on a promissory note has the burden prima facie *of proving the delivery of such note to him, but the possession of it by him and his introduction of it in evidence is sufficient to sustain such burden. This is true under Sec.* 16 *of the N. I. L., but is also true independently of the statute.*

One suing on a promissory note must prove that it was issued for a valuable consideration. But if the note is negotiable, the prima facie *presumption created by the N. I. L., Sec.* 24, *sustains such burden. In a negotiable note the words "value received" are not necessary. In an unnegotiable note such words are tantamount to an admission by the maker that the consideration has been received and this admission is* prima facie *sufficient to sustain the plaintiff's burden of proof.*

In the case at bar, about the time of the appraisal of the estate of the maker of a $75,000 note payable to the maker's housekeeper (the plaintiff) she, the plaintiff, was asked by one of the appraisers if she had a $75,000 note, he saying "It has been reported so." She replied, "No, that don't amount to nothing." This admission by the plaintiff was neither denied nor explained and notwithstanding the *prima facie* presumption justified the jury in finding either want of delivery or want of consideration and in agreeing with the plaintiff that the note amounted to nothing.

On general motion for new trial by plaintiff. An action on the case for money had and received, brought by plaintiff against the

Executors of Robain Arsenault. The issue involved the validity of a promissory note for the sum of $75,000 alleged to have been given by Robain Arsenault to the plaintiff. Trial was had in the Supreme Judicial Court for the County of Androscoggin at the September Term, 1929. The jury found for the defendant. Plaintiff thereupon filed a general motion for new trial. Motion overruled.

The case sufficiently appears in the opinion.

Skillin, Dyer & Payson,

Frank T. Powers, for plaintiff.

Frank A. Morey, for defendants.

SITTING: DEASY, C. J., STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

DEASY, C. J. Action for money had and received, brought by Marie Roux against the executors of Robain Arsenault.

The plaintiff was Robain Arsenault's housekeeper. She was reputed to be his wife, and was generally known as Mrs. Arsenault. She brings this suit, however, as Marie Roux, not claiming to have been the wife of the testator.

Robain Arsenault's estate is being settled as an insolvent estate. One of the claims presented was a note for seventy-five thousand dollars payable to the plaintiff, Marie Roux. The claim was disallowed by the Commissioners. The plaintiff claimed an appeal, and as authorized by statute perfected her appeal by this action for money had and received.

The defendant pleaded the general issue and (by brief statement) want of delivery and want of consideration.

The jury's verdict was for the defendant. The plaintiff brings the case forward on general motion.

The note is written upon a blank form filled in with pencil, except that the signature is written in ink. This is the form:

"$75000 Auburn, Maine, Sept. 22 1922

On demand after date I promise to pay to the order of Marie Roux Seventy-five thousand dollars at any bank in Maine or in my property Value received

Robain Arsenault."

Whether or not this note is negotiable is a sharply contested

issue. If it lacks negotiability it is by reason of the words "or in my property." If these words relate to the medium of payment the note is non-negotiable, because the Negotiable Instruments Act, Sec. 1, provides that such a note must be payable "in money."

But the plaintiff contends that the words relate not to the medium but to the place of payment. The note, she says, is payable at any bank or "in my property," i.e., at my house or place of business. If the latter is the true construction the note is still negotiable. A note is negotiable though payable at a place certain or several places, the option of presenting at one or another place being with the holder.

But the decision of this case does not depend upon the negotiability or non-negotiability of the note. In either event the plaintiff has sustained *prima facie* the general burden of proof resting upon her. If the instrument is negotiable this is by reason of the expressed terms of the Negotiable Instruments Law (cited as N. I. L.), Laws of 1917, Chap. 257. "Where the instrument is no longer in the possession of a party whose signature appears thereon a valid and intentional delivery by him is presumed until the contrary is proved." Sec. 16.

But the plaintiff had possession of the note and introduced it in evidence. This (independently of statute) raises a *prima facie* presumption of delivery.

As to the defense of want of consideration the N. I. L., Sec. 24, provides that "Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration." This is true whether the instrument contains an acknowledgment of receipt of consideration or not.

In an unnegotiable note the words "value received" as employed in the note in suit are tantamount to an admission by the maker of the note that a consideration has been received, and this admission is *prima facie* sufficient to sustain the plaintiff's burden of proof.

"The words 'value received' are equivalent to proving an admission by (the maker) in his lifetime that there was an original consideration for the note." *Palmer* v. *Blanchard*, 113 Me., 385; *Noyes* v. *Smith* (Maine), 5 At., 530.

For authorities definitely applying this rule to unnegotiable

notes see *Owens* v. *Blackburn*, 146 N. Y. S., 966; *Hunt* v. *Eure* (N. C.), 125 S. E., 484.

It follows that the introduction of the note by the plaintiff *prima facie* sustained the burden and that it was unnecessary for her, in the first instance, to produce further evidence of delivery or consideration.

But the defendants offered the testimony of Arthur S. Tucker, one of the appraisers, who at the time of making the appraisal, having been requested to do so by one of the executors, questioned the plaintiff about the note. "I asked her 'Have you got a $75,000 note,' I says, 'It has been reported so,' and she says 'No' — 'No,' she says, 'that don't amount to nothing.' "

This admission by the plaintiff was neither denied nor explained and notwithstanding the mere *prima facie* presumption, justified the jury in finding either want of delivery or want of consideration, and in agreeing with the plaintiff that the note amounts to nothing.

There was evidence from which the jury might have found that legitimate service rendered by the plaintiff was the inadequate but yet sufficient consideration for the note. The jury apparently did not so find, and was not bound to. The verdict is not manifestly erroneous.

Motion overruled.

STATE *vs.* FRANK SKERRY.

Androscoggin. Opinion January 9, 1930.

CRIMINAL LAW. PLEADING AND PRACTICE.

In a complaint charging crime the respondent was alleged to have committed the crime "at said Livermore in said County." In the preceding part of the complaint two counties had been named, to wit: Androscoggin, the seat of the Court, and Franklin, the residence of the complainant. East Livermore had been mentioned but once in the preceding part of the complaint and was there described as "East Livermore in the County of Androscoggin." It was contended that the venue is insufficiently stated.

HELD

That the words "East Livermore in said County" referred for its antecedent to that part of the complaint wherein East Livermore is described as in the County of Androscoggin and that the statement of venue is sufficient.

On exceptions. Respondent, tried on complaint of operating a motor vehicle upon the public highway while under the influence of intoxicating liquor, was found guilty by the jury. After the verdict, but before sentence, respondent filed a motion in arrest of judgment. This motion was overruled by the presiding Justice. To this ruling exceptions were taken. Exceptions overruled. Judgment for the State.

The case sufficiently appears in the opinion.

Fred H. Lancaster, County Attorney, for the State.

Frank T. Powers, for respondent.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

DEASY, C. J. The respondent, Frank Skerry, was in the Superior Court for Androscoggin County found guilty of driving a motor vehicle while under the influence of intoxicating liquor. After verdict and before sentence he filed a motion in arrest of judgment. This being overruled he reserved exceptions.

This motion is based upon the contention that the original complaint before the Livermore Falls Municipal Court, upon which complaint he was tried, was defective and uncertain in its statement of venue.

So much of the complaint as for purposes of this opinion is necessary to be recited is as follows:

"State of Maine

Androscoggin ss:

To the Judge of our Livermore Falls Municipal Court for the Towns of East Livermore, Livermore and Leeds, in the County of Androscoggin:

H. B. Dennison of Farmington in the County of Franklin, State of Maine, on the fifth day of July in the year of our

Lord one thousand nine hundred and twenty-nine, in behalf of the State, on oath complains: that Frank Skerry of East Livermore, in said County, laborer, on the third day of July in the year of our Lord one thousand nine hundred and twenty-nine at said Livermore, in said County, with force and arms and unlawfully did drive and operate a motor vehicle, &c —"

The respondent contends that the statement of venue consists in the words "in said County," and two counties having been before named the complaint is uncertain and defective. He argues further that "in said County" is a relative term. He invokes the rhetorical rule that for the antecedent of the term we must look back to the next preceding name of a county which is Franklin County, over offenses committed in which the Livermore Falls Municipal Court has no jurisdiction.

The answer to the respondent's contention is that by the complaint the venue is laid in the words "*at said Livermore* in said County." Livermore is mentioned but once before. Applying the rule invoked by the respondent, we look for the antecedent of "said Livermore" and find it in the second line of the complaint, wherein Livermore is described as in Androscoggin County.

There is no uncertainty in the statement of venue.

Exceptions overruled.
Judgment for the State.

LEONARD ADVERTISING COMPANY *vs.* ROSCOE M. FLAGG.

Penobscot. Opinion January 11, 1930.

CORPORATIONS. PLEADING AND PRACTICE. ABATEMENT. DEMURRER. R. S., CHAP. 51, SECS. 107, 108.

The fact that a plaintiff foreign corporation has not complied with the statute imposing conditions precedent to its right to maintain an action in the state where such action is brought is a matter for abatement and must be so pleaded.

It is not necessary that the plaintiff should plead its compliance with such a statute.

A brief statement does not take the place of a plea in abatement, demurrer, motion to dismiss, or other dilatory plea.

Neither irrelevant matter not constituting a defense nor defenses open under the general issue should be included in a brief statement.

Demurrer will lie, or in lieu thereof a motion to strike out the offending portion may properly be sustained, when the brief statement violates these limitations.

On exceptions by defendant. An action on the case brought by plaintiff to collect from defendant a balance of $794.75, with interest, alleged to be due it on a certain check alleged to have been given by the defendant to the plaintiff. Defendant pleaded the general issue with a brief statement and specifications alleging non-compliance with the provisions of Secs. 107 and 108, Chap. 51, R. S., also certain matters of alleged equitable defense. A motion was made by the plaintiff to strike out both allegations from the brief statement and specification of defendant, which motion the presiding Justice granted. To this ruling defendant seasonably excepted. Exceptions overruled.

The case fully appears in the opinion.

Maxwell & Conquest, for plaintiff.

D. I. Gould, for defendant.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

PATTANGALL, J. On exceptions. Plaintiff, a foreign corporation, brought an action in assumpsit to recover a balance claimed to be due it on account. Defendant pleaded the general issue with brief statement and later filed specifications of defense.

Both in his brief statement and specifications, he alleged that plaintiff had not complied with the provisions of Secs. 107 and 108 of Chap. 51, R. S. 1916, wherein it is provided that foreign corporations doing business in this state shall file with the secretary of state certificates containing certain information and that while failure to do so shall not affect the validity of any contract with such corporation, "no action shall be maintained or recovery had

in any of the courts of this state by any such foreign corporation so long as it fails to comply with the requirements of said sections." And he also alleged that plaintiff had "in its hands $1,000 in cash which in equity and good conscience belonged to the Electric Advertising Corporation or to this defendant and in any event did not belong to this plaintiff."

The case was continued and at a later term plaintiff moved to strike out both of these allegations from the brief statement and the specifications of defense; the first on the ground that such a defense could be properly pleaded in abatement only, and the second on the ground that it "was irrelevant, not properly within the scope of a brief statement and did not constitute a defense."

The presiding Justice granted the plaintiff's motion, to which ruling defendant seasonably excepted.

"The general issue may be pleaded in all cases and a brief statement of special matter of defense, or a special plea, or double pleas in bar, may be filed." Sec. 35, Chap. 87, R. S. 1916. But a brief statement does not take the place of a plea in abatement, a demurrer, a motion to dismiss or other dilatory plea. Nor may irrelevant matter not constituting a defense be set out in a brief statement. *Stewart* v. *Smith*, 98 Me., 104.

Plaintiff's motion to strike out from the brief statement matters not properly included therein was in the nature of a demurrer. "Brief statements should contain a specification of matters relied upon in defense, aside from such as would come under the general issue" and "be certain and precise to a common intent." *Washburn* v. *Mosely*, 22 Me., 163. "Demurrer to a brief statement will lie when such a statement sets up a defense which may properly be made under the general issue or contains matter in justification but fails to state enough to afford justification." *Corthell* v. *Holmes*, 87 Me., 24.

The statement that plaintiff "had in its hands $1,000 in cash which in equity and good conscience belonged to the Electric Advertising Corporation or to this defendant" neither states a defense nor can it be said to be "certain and precise." It was properly stricken from the pleadings. Defendant urges that in support of that portion of his brief statement he intended to show agency and payment by his principal. The defense of payment was open to him

under the general issue. *Hibbard* v. *Collins*, 127 Me., 383. And if he could show payment of this particular indebtedness by his principal, the opportunity to do so could not be denied him under that issue. If this paragraph was inserted for the purpose claimed, it was unnecessary and was further open to the serious objections of duplicity and ambiguity.

The court below also ruled correctly in sustaining the motion to strike from the brief statement the paragraphs relating to the failure of plaintiff to comply with the provisions of Secs. 107 and 108 of Chap. 51, R. S. 1916.

A plea of the general issue admits the capacity of the plaintiff to sue. *Clark* v. *Pishon*, 31 Me., 503; *Brown* v. *Nourse*, 55 Me., 230; *Strang* v. *Hurst*, 61 Me., 9; *Bresnahan* v. *Soap Co.*, 108 Me., 128.

True, "it is a good defense, under the general issue, that the writ was sued out before the right of action had accrued and it cannot be made a plea in abatement." *Wingate* v. *Smith*, 20 Me., 287. But here the cause of action had accrued; the right to maintain it waited the compliance by the plaintiff with the conditions imposed upon it by the statute.

The fact that a plaintiff foreign corporation has not complied with the statute imposing conditions precedent to its right to maintain an action in the state where such action is brought is a matter for abatement and must be so pleaded. *Weaver Coal and Coke Company* v. *Rhode Island Coöperative Coal Company*, 27 R. I., 194; *Model Heating Company* (Del.) v. *Margarity*, 81 Atl., 665; *Walter A. Wood Machine Co.* v. *Caldwell* (Ind.), 23 Am. Rep., 641.

It is not necessary that plaintiff should declare that it has complied with the statute in question. *Friedenwald Co.* v. *Warren*, 195 Mass., 435.

Exceptions overruled.

VERMEULE ET ALS *vs.* BRAZER.

York. Opinion January 14, 1930.

REVIEW. R. S., CHAP. 44, SEC. 1. REAL ACTIONS. NOTICE.

One who is actually a party in interest, but who was not an original party to an action, may, as provided in R. S., Chap. 44, Sec. 1, become a petitioner for a review of the original action provided that his petition sets forth the fact of his interest, and upon filing of bond with sufficient surety or sureties, approved by the presiding Justice, to secure the party of record against any judgment recovered by the defendant in review.

If one is bound by a judgment in the original suit, it is just that he should be given the right to bring a petition for its review; hence a warrantor, who has been avouched in to defend a real action against his warrantee, can bring a petition for review as a party in interest because, after such avoucher, the warrantor is bound by the judgment rendered therein even though he does not appear and defend the suit.

No definite form of notice to the avouchee is required; the question usually is whether the warrantor has had reasonable notice of the suit and an opportunity to defend it; if he has, he is bound by the proceedings.

In the case at bar the uncontradicted evidence was that after suit had been brought against the other two petitioners in review, Vermeule was notified of the pendency of the suit, volunteered to assume the defense without the service of any notice upon him; that he took part in the preparation of the defense and employed counsel for that purpose; he therefore was properly avouched in to defend and became a party in interest.

On exceptions by petitioners. A petition for writ of review. The matter comes before the Law Court on petitioners' exceptions to the finding and decree of the presiding Justice on petitioners' second petition for review. Exceptions sustained. Parties to be heard further as to the merits of the case.

The case fully appears in the opinion.

Ray P. Hanscom,

Leroy Haley, for petitioners.

E. P. Spinney, for respondent.

SITTING: DEASY, C. J., DUNN, STURGIS, PATTANGALL, FARRINGTON, JJ. PHILBROOK, A. R. J.

PHILBROOK, A. R. J. The proceeding technically termed a review is expressly authorized by statute in some states, and where it exists the language of the particular act creating the remedy must determine its scope and the right to resort thereto, 23 R. C. L., 1111. Such statute exists in this state, R. S., Chap. 94.

In *Elwell* v. *Sylvester*, 27 Me., 536, decided in 1847, under the statute as it then existed, the Court held that where a review was granted our legislative act made no provision for the introduction of a new party; proceedings between the same parties only were contemplated.

By Chap. 94, Sec. 3, P. L., 1859, the statute providing for review of a civil action was amended so as to read as follows:

> "Sec. 3. An action prosecuted or defended by a party in interest who is not the party of record, may be reviewed on petition of the party in interest setting forth the fact of such interest, but the writ of review in such case shall not issue until the petitioner has filed a bond with sufficient surety or sureties, approved by the presiding judge, to secure the party of record against any judgment recovered by the defendant in review."

This amendment now obtains in R. S., Chap. 94, Sec. 1, par. III, subject to slight verbal changes made by revisions of the general statutes since its enactment, and reads thus:

> "On the petition of a party in interest who was not a party to the record, setting forth the fact of such interest, and upon filing a bond with sufficient surety or sureties, approved by the presiding Justice, to secure the party of record against any judgment recovered by the defendant in review."

In the instant case the plaintiffs joining in the petition for review are three in number, namely, Adrienne Vermeule, Sarah W. Pickering and Mary O. Pickering. In the original action, review of which is here sought for, Vermeule was not a party of record. That action was brought by Norman Brazer, defendant in this petition, against the two Pickerings. The action was a writ of entry. The writ was sued out in August, 1927, entered at the September term of the same year, the Pickerings defaulted at the latter term for non-appearance, judgment for possession issued, and Brazer put in possession of the property on October 19, 1927. Vermeule was

the grantor in the Pickering chain of title. In November, 1927, after the case had been defaulted, but, according to the bill of exceptions, before any of the petitioners became aware of the default, the Pickerings deeded the fee in the disputed land back to their grantor, Vermeule, retaining an easement in the land. According to the bill of exceptions, this was done (as found by the Court) in order that Vermeule might take charge of and conduct the defense. The bill of exceptions discloses:

1. The Court ruled as a matter of law that Vermeule needed to be a party of record, or to have been avouched in, in order to qualify him as a party in interest, and not having been avouched in to defend and not being a party of record, the writ of review could not be granted jointly to the Pickerings and Vermeule;

2. That Vermeule needed to become a party of record or to be avouched in to defend in order to become a "party in interest";

3. That on the testimony and evidence in the case, Vermeule not having been avouched in to defend the action, nor having been a party of record, was not a party in interest within the meaning of the statute, and that the writ could not be granted upon the petition of Vermeule and the Pickerings jointly.

A very large part of the record is applicable to the question whether the writ should be granted, provided proper parties were seeking the review, but the question raised by the bill of exceptions is not whether the writ should be granted on the merits of the case, but whether the proper parties were before the court. Therefore the only question for us to determine is whether the ruling in the court below was correct in that respect.

It being conceded that Vermeule was not a party of record in the original suit, it remains to be seen whether he is a party in interest, as to the petition at bar, by reason of proper avouchment. If one is bound by a judgment in the original suit, it is just that he should be given the right to bring a petition for its review. Hence it has been held that a warrantor, who has been avouched in to defend a real action against his warrantee, can bring a petition for review as a party in interest, because after such voucher the warrantor is bound by the judgment rendered therein, even though he does not appear and defend the suit. *Farnsworth* v. *Kimball*, 112 Me., 238; *Glovesky* v. *Realty Bureau*, 116 Me., 378.

No case has been brought to our attention which prescribes any definite form of notice to be given to one who is said to be avouched to assume defense of an action. In *Chamberlain* v. *Preble*, 93 Mass., 370 (11 Allen), it was held that the question usually is whether the warrantor has had reasonable notice of the suit and an opportunity to defend it. If he has, he is bound by the proceedings. It is not necessary that the notice should appear of record and no particular form of words is necessary. In some cases a verbal notice has been held sufficient, in others the presence of the warrantor and his participation in the defense have been enough to render the judgment conclusive and hence to make the warrantor a party in interest. In *Glovesky* v. *Realty Bureau*, supra, it was held that if the indemnitor in that case had appeared and defended the action brought against his indemnitee, or had the latter notified the indemnitor of the pendency of the suit and asked him to take upon himself its defense, he would then have been a party in interest. "When a person is responsible over to another, either by operation of law or by express contract, and notice has been given him of the pendency of the suit and he has been requested to take upon himself the defense of it, he is no longer regarded as a stranger to the judgment that may be recovered because he had the right to appear and defend the action equally as if he were a party to the record." *Davis* v. *Smith*, 79 Me., 351; *Penobscot Lumber Association* v. *Bussell*, 92 Me., 256.

In the *Glovesky Case*, supra, the Court found that the indemnitor, who was the petitioner in review, took no part in the defense of the original suit against his indemnitee, was not requested to assume the defense, and knew nothing of it. Hence in that case he had no standing under the statute to ask a review of a judgment to which he was a stranger.

In the instant case the uncontradicted evidence seems to be plenary that, after suit had been brought against the Pickerings, Vermeule was notified of the pendency of the suit and volunteered to assume the defense without service of any notice upon him; that his intention to do so was made known to Brazer's attorney; that he took part in the preparation of the defense and employed counsel for that purpose. We are therefore compelled to hold that

Vermeule was properly avouched in to defend and became a party in interest.

It appears that the ruling of the court was made after hearing only a part of the evidence which the petitioners and the respondent sought to be introduced and the mandate must be,

Exceptions sustained.
Parties to be further heard
as to the merits of the case.

STATE OF MAINE *vs.* ROCCO LEO.

Penobscot. Opinion January 15, 1930.

SCIRE FACIAS. PLEADING AND PRACTICE. INTOXICATING LIQUORS. R. S., CHAP. 127, SECS. 20 & 43. R. S., CHAP. 135, SECS. 24 & 25. P. L. 1923, CHAP. 167.

A motion to dismiss lies only to a defect apparent on inspection of the writ and can not be sustained where proof dehors the writ is necessary to support or resist the motion.

The authority of the Superior Court for Penobscot County to remit the penalty or discharge the sureties in an action of scire facias *on a forfeited criminal recognizance is not inherent. It is conferred and measured by Revised Statutes, Chap.* 135, *Sec.* 24.

The authority there given can not be exercised when the recognizance sued upon was taken under specified provisions of the Maine Liquor Law, R. S., Chap. 135, *Sec.* 25; *R. S., Chap.* 127, *Sec.* 43.

Sec. 20 *of Chap.* 127, *R. S., is to be construed as if it originally contained the amendment of Sec.* 1 *of Chap.* 167, *Public Laws,* 1925, *prohibiting the transportation of intoxicating liquors within this State without a Federal permit. The sureties on a recognizance taken thereunder can not be exonerated.*

Death of the principal in a recognizance taken in a liquor case does not permit a departure from the prohibition of the Statute.

Upon default of the recognizance in such a case, the liability of the sureties is fully and finally fixed, and a surrender of the body of the principal thereafter, alive or dead, will not authorize any exoneration of the sureties.

On appeal. An action of *scire facias* against the defendant as surety on a forfeited recognizance taken in a liquor case. After default of the principal and sureties, the State began its *scire facias* action to recover the penalty of the bond. Pending the action and before trial, the principal was accidentally killed. Defendant's motion to dismiss the action because of the principal's death was denied by the presiding Justice. To this ruling, and to a further ruling sustaining a demurrer by the State to a plea in bar, defendant seasonably excepted. Judgment was rendered for the full penalty of the bond. Exceptions overruled.

The case sufficiently appears in the opinion.

George F. Eaton,

Albert G. Averill, County Attorney, for State.

Arthur L. Thayer, for respondent.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

STURGIS, J. Action of *scire facias* against a surety to recover the penalty of a forfeited recognizance. The case comes forward on exceptions.

The bill discloses that one John Ambrosia, convicted of a violation of the Maine Liquor Law before the Municipal Court of Millinocket, took his appeal to the next term of the Superior Court to be holden in Penobscot County. The defendant was a surety on the respondent's recognizance.

At the term to which the appeal was taken, the principal failed to appear and both he and his sureties were called and duly defaulted. On March 15, 1928, this writ of *scire facias* was issued, returnable at the May Term following, and in order for trial at the next September Term. June 24, 1928, the respondent, John Ambrosia, was killed in an automobile accident.

The first exception is to the denial of the defendant's motion to dismiss the action of *scire facias* because of the principal's death. Proof of that fact lies only in the certificate filed with the motion and was not apparent on the face of the writ. This court has repeatedly held that a motion to dismiss lies only to a defect apparent on inspection of the writ and can not be sustained where

proof dehors the writ is necessary to support or resist it. *Richardson* v. *Wood*, 113 Me., 328; *Hubbard* v. *Limerick W. & E. Co.*, 109 Me., 248; *Hunter* v. *Heath*, 76 Me., 219. Regardless of the reason assigned by the trial Judge for the dismissal of this motion, his ruling was correct and is not exceptionable.

The defendant, however, included the same defense in a special plea in bar, demurrer to which by the State was sustained and final judgment rendered for the full penalty of the bond. The defendant's remaining exception is to this ruling.

The defendant relies on the rule in force in some states that where the performance of the conditions of a criminal recognizance is rendered impossible by an act of God, such as the death of the principal, this excuses the sureties from the obligation of their undertaking. 3 R. C. L., 55; 18 American Decisions, 451, note; 99 American Decisions, 216, note. We think, however, that this rule does not apply in Maine.

This action originated in the Superior Court for Penobscot County. Its jurisdiction over actions of *scire facias* is conferred by Chap. 9, P. L., 1919. Its authority to remit the penalty or discharge the sureties in an action of *scire facias* on a forfeited criminal recognizance is not inherent. It is conferred and measured by R. S., Chap. 135, Sec. 24, which reads:

> "When the penalty of a recognizance in a criminal case is forfeited, on *scire facias* against principal, sureties or witnesses, the court, on application of any defendant, if satisfied that the default of the principal was without the consent or connivance of the bail, may remit all or any part of the penalty; or the sureties may surrender the principal in court at any time before final judgment on *scire facias*, and may, on application therefor, be discharged by paying costs of suit, provided, that the court is satisfied as aforesaid."

Section 24 does not, however, apply to recognizance taken in liquor cases. By Sec. 25, Chap. 135, R. S., it is expressly provided that Section 24, preceding, shall not apply to recognizances taken under the last thirty-eight sections of Chap. 127, R. S., which, as amended, is the present Maine liquor law. And by Sec. 43 of Chap. 127 itself, this prohibition against relief in liquor cases is made more explicit and comprehensive. That Section reads in part:

"No portion of the penalty of any recognizance taken under so much of this chapter as relates to intoxicating liquors shall be remitted by any court in any suit thereon, nor shall a surety in any such recognizance be discharged from his liability therein by a surrender of his principal in court after he has been defaulted upon his recognizance unless the principal has been actually sentenced upon the indictment or complaint on which the recognizance was taken."

The recognizance taken from the respondent and his sureties in the case at bar was upon an appeal from a conviction under Sec. 20, Chap. 127, R. S., as amended by Sec. 1, Chap. 167, P. L., 1923, prohibiting the transportation of intoxicating liquors within this state without a federal permit and providing a penalty therefor. Section 20 is to be construed as if it originally contained the amendment. *State* v. *Goddard*, 69 Me., 181; *Byron* v. *Co. Comm'rs*, 57 Me., 340. The recognizance here sued on is within the prohibitions of Sec. 25, Chap. 135, and Sec. 43, Chap. 127, of the Revised Statutes.

Such is the jurisdiction and power of the Court in the case at bar. It has no inherent power to remit the penalty of the bond or discharge the surety as in *State* v. *McNeal*, 18 N. J. L., 333, or in *People* v. *Wissig*, 7 Daly (N. Y.), 23. The defendant could neither, as of right nor by indulgence, surrender his principal alive after forfeiture of his recognizance and be discharged as in *State* v. *Cone*, 32 Ga., 663, or in *Mather* v. *People*, 12 Ill., 9. All the cases cited by the defendant in support of the application of the rule of *vis major* or act of God rest on judicial power which is here lacking, or upon reasoning from premises which the statutes exclude. They can not control in this jurisdiction.

Under the law here, upon the default of a recognizance taken in a liquor case under the designated sections of Chap. 127, R. S., the liability of the surety is fully and finally fixed, and a surrender of the body of the principal thereafter, alive or dead, will not authorize any exoneration of the surety. Death can not excuse that which life will not permit.

The entry must be,

Exceptions overruled.

ANNA E. GROSS ET AL *vs.* I. J. MARTIN.

Androscoggin. Opinion January 16, 1930.

EXCEPTIONS. PLEADING AND PRACTICE.

A party excepting to the exclusion of evidence always has the burden of showing affirmatively that the exclusion was prejudicial to him. He is bound to see that the bill of exceptions includes all that is necessary to enable the Law Court to decide whether the rulings, of which he complains, were or were not erroneous.

In the case at bar, what the record of the certificate of corporate organization would have shown does not appear in the bill of exceptions. The record was offered in evidence. It should have been printed as a part of the bill of exceptions.

On exceptions by plaintiffs. An action of assumpsit to recover for groceries ordered by the defendant. On the issue whether the credit was given directly to defendant or to a corporation, the presiding Judge refused to allow plaintiffs to introduce the certificate of organization of the corporation. To this ruling plaintiffs excepted. Exceptions overruled.

The case sufficiently appears in the opinion.

Tascus Atwood, for plaintiffs.

Harris M. Isaacson, for defendant.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

DUNN, J. The bill of exceptions recites this action as of assumpsit to recover for groceries ordered by the defendant. On the authority of the bill, these were the trial court issues: (1) Whether credit had been given directly to the defendant? (2) Whether defendant orally promised to pay the debt of a lunch concern? The jury found for the defendant. Exception by plaintiffs goes to the exclusion of evidence.

This question had been asked defendant on cross-examination:

"Mr. Martin, weren't the goods ordered before you had completed the organization of the corporation?"

He answered:

"No, I don't think so. I think it is about the same time. About — probably might be the same day or the day after, that I ordered the goods."

To show that, when the goods were ordered, the corporation had not been in existence, its organization not having been completed until some days later, plaintiffs' counsel proffered the registry record of the certificate of corporate organization in evidence. So, in substance, run recitals in the bill of exceptions.

Objection was sustained; the registry record of the certificate was excluded. This presents reversible error, is the point of the exception.

The exception can not be sustained, the reason being that the plaintiffs have not shown themselves prejudiced by the ruling which excluded the evidence.

A party excepting to the exclusion of evidence always has the burden of showing affirmatively that the exclusion was prejudicial to him. What the record of the certificate would have shown does not appear. The record was offered in evidence. It should have been printed as a part of the bill of exceptions. *Posell* v. *Herscovitz*, 237 Mass., 513, 516. Not being printed, it is out of the question to determine whether any prejudice was done the plaintiffs by the exclusion of the evidence. True, there is the statement in the bill of exceptions that the record of the certificate was offered to prove that the corporation was not in existence, but there is nothing before this court to show that the record of the certificate would have made such proof. It might, on inspection, show very differently than the recital of the bill implies. About that, on this record, no one can tell, "and no one has a right to guess." *State* v. *Dow*, 122 Me., 448. See, too, *State* v. *Wombolt*, 126 Me., 351. The excepting party "is bound to see that the bill of exceptions includes all that is necessary to enable us to decide whether the rulings, of which he complains, were or were not erroneous." *Barnes* v. *Loomis*, 199 Mass., 578, 581. The rule is one of practice. Enc. Pl. & Pr., 427 et seq.

Exception overruled.

LEWIS J. ROSENTHAL *vs.* WILLIAM LEVINE.

Kennebec. Opinion January 20, 1930.

BILLS AND NOTES. NEGOTIABLE INSTRUMENTS LAW.

When a promissory note is payable at any bank (in a city or town named) it is a sufficient presentment if at maturity it is actually in a bank (in such city or town) ready to be delivered on payment. If not paid, it is dishonored. No further evidence of dishonor is necessary.

To charge an endorser of a promissory note seasonable oral notice and demand which identifies the instrument and indicates that it has been dishonored are sufficient. Notarial protest is not essential.

In case of a note payable at a bank notice to an endorser that the note at its maturity was held by the bank and is unpaid is sufficient notice of dishonor.

Notice of dishonor by the last endorser to charge prior endorsers is seasonable if given before close of business hours of the day following his own receipt of such notice.

As respects one another endorsers are prima facie *liable in the order in which they endorse but evidence is admissible to show that as between or among themselves they have agreed otherwise.*

In the case at bar the jury was justified in finding and deciding that the parties had not agreed otherwise.

On general motion for new trial by defendant. An action on the case by plaintiff, payee of a promissory note, to recover from defendant, an endorser thereof. Trial was had at the May Term of the Superior Court for the County of Kennebec. The jury rendered a verdict for the plaintiff. A general motion for new trial was thereupon filed by defendant. Motion overruled.

The case fully appears in the opinion.

Merrill & Merrill, for plaintiff.

F. Harold Dubord,

Frank E. Southard, for defendant.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

DEASY, C. J. The negotiable promissory note which is the subject of this suit against an endorser is in the following form:

"Boston, Mass. June 4, 1928

$5000.

Four months after date we promise to pay to the order of Louis J. Rosenthal Five thousand and m/100 Dollars Payable at any bank in Waterville Value received with interest

J. Miller
F. Miller."

The note is endorsed by Wm. Levine and thereafter by Lewis J. Rosenthal. The payee, Louis Rosenthal, is the same individual as Lewis Rosenthal, the last endorser.

J. Miller is the husband of F. (Freida) Miller, the co-maker. The defendant is her father and the plaintiff her cousin. It is a family quarrel.

The plaintiff recovered a verdict for the full amount of the note with interest. The defendant brings the case forward on general motion. The issues of law in this case invoke an application and construction of Public Act of 1917, Chap. 257, known as the Negotiable Instruments Law (cited as N. I. L.). The sections and parts of sections which apply to and control the case are as follows:

"Sect. 68. As respects one another indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves, they have agreed otherwise."

"Sect. 87. Where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

"Sect. 96. The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored."

"Sect. 103. Where the person giving and the person to receive the notice reside in the same place, if given at the place of business of the person to receive notice it must be given 'before the close of business hours on the day following.' "

"Sect. 107. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving

notice to antecedent parties that the holder has after the dishonor."

The order of endorsements was such that *prima facie* (if presentment, dishonor and notice be proved, the defendant was liable to pay the note in full to the plaintiff. True, the defendant says that it was "agreed otherwise" (Sec. 68). The making of such agreement is disputed. This issue of fact was passed on by the jury. (See infra this opinion.)

The defendant contends that there is not sufficient evidence of presentment and dishonor: The note is payable at "any bank in Waterville." At maturity it was held by the Ticonic National Bank in Waterville. No further evidence of presentment is required.

"Where a note is payable at a bank it is sufficient that the note is there ready to be given up on payment should the promisor come to pay it." *Gilbert* v. *Dennis*, 3 Met., 496.

"It is sufficient presentment of a note payable at a bank if it is actually in the bank at maturity ready to be delivered on payment." Brannan's N. I. L., Pg. 652, and cases cited.

The note was dishonored. The makers had not and have not paid it. This fact is not shown by any direct categorical testimony, but the non-payment by them was assumed throughout the trial and there is abundant evidence in the case to justify the jury's finding that the note has not been paid either by the makers or by the defendant. But assuming presentment and dishonor, the defendant says that no sufficient notice thereof was seasonably given to him.

The note fell due October 4, 1928. It was dishonored. Notice was duly received by the plaintiff, the last endorser, on October 5. He had the following day to give notice to "antecedent parties," i.e., to Levine, the defendant. (Secs. 103 and 107.)

On October 6 the plaintiff went to the defendant's place of business in Waterville, rather late but evidently before the close of the defendant's business hours, taking with him two notes amounting together to $5,000, intended as a renewal of the note now in suit. The defendant refused to endorse and deliver the renewal notes unless the plaintiff would so endorse them as to become jointly and equally liable. This the plaintiff declined to do.

The testimony of both parties shows clearly that at this inter-

view the plaintiff informed the defendant that the note was at the Ticonic National Bank dishonored.

Thus the presentment and dishonor of the note are proved, also seasonable notice thereof to the defendant.

That the note was afterward and unseasonably, formally protested, is of no importance.

Such formal protest is not necessary to charge the endorser of a promissory note. Oral notice sufficient to "identify the instrument" and "indicate that it has been dishonored" is all that the law demands. (Sec. 96.) Such oral notice was given, or at all events the jury was justified in so finding.

The defendant's counsel cites and relies upon the opinion of Judge Walton in *Page* v. *Gilbert*, 60 Me., 488, in which he says:

> "A notice to the endorser of a note, which merely informed him of the non-payment of the note and demands payment of him, without stating that payment has been demanded of the maker, or giving any legal excuse for not demanding it of him, is not sufficient to charge the endorser."

But the note in suit, unlike that in *Page* v. *Gilbert*, is payable at a bank. The significance and importance of this difference is stated by Chief Justice Shaw thus:

> "If then, after the time of payment has elapsed (in case of a note payable at any bank and at maturity held by a bank) notice be given to the endorser, that the note is unpaid, it is notice that it is dishonored; whereas, in the case of a private holder, notice in the same words, that the note is unpaid, would not necessarily imply that it was dishonored because the fact might be strictly true, though the note had never been presented." *Gilbert* v. *Dennis*, 3 Met., 498.

The defendant testifies that when the note in suit was given and endorsed it was agreed that he, the defendant, and the plaintiff should be jointly and equally liable as endorsers. This testimony was disputed. The jury heard the parties and found this issue of fact in favor of the plaintiff. In this finding there is no manifest error.

Motion overruled.

NIMAN J. KARAM, PET'R *vs.* HAROLD C. MARDEN ET AL.

Somerset. Opinion January 21, 1930.

POOR DEBTORS. R. S., CHAP. 115, SECS. 51 AND 53.

The statute enacting the method of examining poor debtors provides for the furnishing of knowledge of property of the imprisoned debtor to the creditor as well as a means of restoration of liberty to the debtor.

Two disinterested Justices of the Peace may, under the law, become a court, for the purpose of examining the debtor who has applied for this statutory procedure.

They are empowered by Sec. 53, Chap. 115, R. S., to "examine the citation and return" provided for in Section 51, and if that is "found correct," the authority of a tribunal may be assumed by them.

In the case at bar the record shows that the Justices did not have before them the citation under the hand and seal of its author. The statute was not followed; the law was disregarded, and exceptions must be sustained.

On petitioner's exception to the decree of a sitting Justice at *nisi prius*, denying petitioner's prayer that the defendants, as Justices of the Peace, bring forward their records of proceedings in the disclosure of a poor debtor. Exceptions sustained.

The case sufficiently appears in the opinion.

H. R. Coolidge, for petitioner.

A. D. Billings, for respondents.

SITTING: DEASY, C. J., DUNN, BARNES, PATTANGALL, FARRINGTON, JJ.

BARNES, J. This is on exception to the decree of a Justice sitting at *nisi prius*, denying petitioner's prayer that the defendants, as Justices of the Peace, bring forward their records of proceedings in the disclosure of a poor debtor.

Petitioner, the creditor, alleged that service was not made on him as required by law; and that the defendants, assuming to act under the statutes providing method of trial of facts in procedure for the relief of poor debtors, set themselves up as a court without the evi-

dence of authority prescribed by law, namely a citation, by a Justice in the county where the debtor was arrested, and under his hand and seal. At the alleged examination of the debtor, creditor was not present, either in person or by attorney.

The learned Justice before whom the petition was heard, denied the same, his decree being, "It does not affirmatively appear that the citation was not under the seal of the Justice issuing it. It does appear that the original citation was served upon the creditor who is petitioner in these proceedings, but I am not of the opinion that this is a defect in service warranting a quashing of the proceedings before the Trial Justice."

One object of our state in enacting the method of examining poor debtors was undoubtedly the commendable purpose of allowing the utterly indigent to be dismissed from prison, when incarcerated for debt.

Another was to furnish to the creditor knowledge of property of an imprisoned debtor, if such he had. These are important rights under the law; to the debtor a promise of liberty; to the creditor a pledge of restoration of property, under some circumstances.

More than a hundred years ago this court said, 3 Me., 447, "this spirit of liberality toward them (debtors in execution) has increased."

But liberality toward poor debtors is to be exercised strictly within the limitations that hedge in and direct its bestowal.

Two disinterested Justices of the Peace may, under the law, become a court, for the purpose of examining the debtor who has applied for this statutory procedure.

They are empowered by Sec. 53, Chap. 115, R. S., to "examine the citation and return" provided for in Sec. 51, and if that is "*found correct*," the authority of a tribunal may be assumed by them. *Perry* v. *Plunket*, 74 Me., 328.

The record shows that the Justices in the case at bar did not have before them the citation, under the hand and seal of its author.

The "return" of the Justices sets out, over their signature, "That the Justices examined the citation and return and upon being notified that the original citation had been served instead of a copy and that the officer had made his return on the copy and that

the original served on the creditor had a proper seal attached, etc."

More need not be said. Here was no court.

Any pronouncement of men in the premises is a nullity.

The statute was not followed; the law was disregarded.

Exceptions sustained.

BASIL C. EMERY *vs.* STANWOOD E. FISHER.

York. Opinion January 21, 1930.

PHYSICIANS AND SURGEONS. VERDICTS. JURY FINDINGS.

The liability of physicians or surgeons is limited within certain clearly defined lines. They neither warrant against accidents nor guarantee results. They contract to possess ordinary skill, to use ordinary care, and to exercise their best judgment in the application of their skill to the cases they treat.

The verdict of a jury is not to be set aside if it is possible to reconcile it with any reasonable interpretation of the evidence, but a conclusion reached by triers of fact must rest upon a rational basis and be arrived at by a logical process in order to be accepted as final in a court of last resort. To hold otherwise would confer arbitrary powers upon a jury or a presiding Justice to whom a cause is first presented.

While this court does not review questions of fact, when a conclusion of fact fails of support in evidence a question of law is raised which may properly be considered to justify this court in sustaining a verdict. There must be substantial evidence in support of the verdict, evidence that is reasonable and coherent and so consistent with the circumstances and probabilities of the case as to raise a fair presumption of its truth.

On general motion for new trial by defendant. An action on the case for alleged malpractice by defendant, a practicing physician, which comes before the Law Court for the second time. At the conclusion of the second trial before the Supreme Judicial Court for the County of York the jury rendered a verdict for the plaintiff in the sum of $2,733.33. A general motion for new trial was thereupon filed by defendant. Motion sustained. New trial granted.

The case fully appears in the opinion.

Emery & Waterhouse,
Cecil J. Siddall, for plaintiff.
Locke, Perkins & Williamson,
Edward S. Titcomb, for defendant.

SITTING: DEASY, C. J., STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

PATTANGALL, J. On general motion by defendant. Action for damages resulting from alleged negligence of surgeon. The case was recently before this court on defendant's exceptions, *Emery* v. *Fisher*, 128 Me., 124. Exceptions were sustained, new trial resulted and verdict was a second time awarded to plaintiff.

The only present issue is whether or not the record contains evidence which, reasonably analyzed and interpreted, warrants the conclusion reached by the jury.

The plaintiff had been suffering from diseased tonsils which defendant was employed by plaintiff's attendant physician, Dr. Hurd, with plaintiff's consent, to remove. The operation was performed at the Webber Hospital, defendant being assisted by the hospital nurses, Dr. Hurd, Dr. Larochelle and Dr. Bolduc.

In connection with the operation, a metal mouth gag, the ends of which were covered with removable rubber tips, was used as a protection to the teeth. At some time while plaintiff was under ether, one of the rubber tips became dislodged, was drawn into the plaintiff's bronchus, and later was removed by Dr. Smythe. In connection with the removal of the rubber tip from the bronchus, plaintiff incurred substantial expense, suffered considerable inconvenience and was subjected to the mental anxiety and nervous strain which necessarily accompanied the second operation.

The issue submitted to the jury was whether the rubber tip found its resting place in plaintiff's bronchus by reason of the negligence of defendant or by an accident not attributable to lack of due care on his part.

The case shows that while ether was being administered by the attendants, defendant being in an adjoining room preparing to perform the operation, plaintiff became cyanotic and defendant, called hastily to his aid, used the mouth gag to force open plaintiff's

mouth as the first step toward enabling him to regain ability to breathe. Defendant claimed that it was while acting in this emergency that the rubber tip slipped from the end of the mouth gag and that the fact was discovered shortly after breathing was restored when a search was made for the tip. It not being found, defendant suspected that it might have slipped off or been pulled off by contact with plaintiff's teeth and have been either swallowed or, what seemed less likely, drawn into the bronchus.

Considering the situation in the light then presented and especially in view of the patient apparently not being a good subject for etherizing, defendant decided that no harm could result, in fact that good judgment and good surgical practice demanded, in spite of the loss of the rubber tip and regardless of its final place of lodgment, the completion of the operation and proceeded to remove the tonsils.

After his work in this respect had been completed, a further search was made for the tip with no positive result. Defendant then suggested to plaintiff's attendant physician that the patient's stools should be carefully examined for the next few days to determine whether or not the tip had passed into the digestive tract and also that notice be taken as to whether or not plaintiff developed a cough indicating the presence of the tip in the bronchus.

A cough did develop, an x-ray was taken, the tip was discovered and removed.

There was no real conflict of testimony. Opposing counsel, analyzing like evidence, drew opposite inferences and conclusions and counsel for defendant argued that certain positive statements of plaintiff and his witnesses were unreasonable and therefore untrue, but the record contains no directly contradictory material evidence.

"This is not a case where the evidence is contradictory, imposing upon the jury the duty of determining where the truth is as between irreconcilable testimony." *Eldridge* v. *O'Connell*, 114 Me., 459.

It is strongly urged by counsel for plaintiff that the tip did not become detached from the mouth gag during the emergency caused by the cyanotic condition of plaintiff and that such could not have been the case because of the position in which plaintiff was lying at

the time. But the evidence is plenary on that point. A fair reading of the record establishes the truth of the defendant's contention in this respect.

There is no evidence that the appliance used was unfit for use, as alleged by plaintiff. This being true and assuming further that the tip was lost during the emergency mentioned, certainly no act of negligence, either of omission or commission, on the part of defendant caused the injury of which plaintiff complains.

On the question of whether or not there was negligent diagnosis, negligent treatment or negligent lack of treatment after the tip had found its lodgment, plaintiff argues that defendant, finding the tip gone after plaintiff had resumed breathing and realizing the possibility of that having happened which later was found to have actually happened, should have immediately taken steps to locate the tip and having so located it, removed it at once, instead of proceeding with the operation.

This was a matter which was distinctly up to the judgment of the surgeon. All of the experts, including Dr. Smythe, called by plaintiff, unite in commending the course which defendant pursued and the logic of the situation bears them out.

Assuming the tip to be in the bronchus, all that was eventually done to relieve the difficulty must necessarily have been done had the tonsil operation been deferred, the only difference being that the tip would have been removed a few days earlier.

The plaintiff suffered no harm from the delay and defendant balanced against the risk (if risk there was) incident to that delay the necessity of the operation and the danger of again administering ether to a patient who had proven cyanotic. In any event plaintiff suffered no appreciable damage because of the course pursued by defendant and defendant was acting with reasonable care in pursuing it.

The verdict apparently rested on no more secure foundation than that the tip found its way into plaintiff's bronchus and that plaintiff thereby incurred considerable expense and was subjected to the annoyance of another operation.

But accidents happen. Surgeons neither warrant against them nor guarantee results. Their liability is limited within certain clearly defined lines. "It has become a familiar and well established principle of law that the physician, undertaking the care and

treatment of the patient standing in need of his services and employing him, contracts that he possesses ordinary skill, that he will use ordinary care and exercise his best judgment in the application of his skill to the case which he undertakes." *Cayford* v. *Wilbur*, 86 Me., 414; *Ramsdell* v. *Grady*, 97 Me., 320; *Coombs* v. *King*, 107 Me., 378; *Nickerson* v. *Gerrish*, 114 Me., 356.

No claim is made that defendant was not skilled in his profession. There is nothing in the evidence to warrant the assumption that he did not use ordinary care and exercise his best judgment in the application of his skill to the case. An unfortunate result, arising from an accident, excusable under the circumstances, was made the basis of a finding of negligence.

The verdict of a jury is not to be set aside if it is possible to reconcile it with any reasonable interpretation of the evidence, but a conclusion reached by triers of fact must rest upon a rational basis and be arrived at by a logical process in order to be accepted as final in a court of last resort. To hold otherwise would confer arbitrary powers upon a jury or presiding Justice to whom a cause is first presented.

While this court does not review questions of fact, when a conclusion of fact fails of support in evidence, a question of law is raised which may properly be considered. To justify this court in sustaining a verdict, "there must be substantial evidence in support of the verdict, evidence that is reasonable and coherent and so consistent with the circumstances and probabilities of the case as to raise a fair presumption that it is true." *Moulton* v. *Railway*, 99 Me., 508; *Cyr* v. *Landry*, 114 Me., 191; *Raymond* v. *Eldred*, 127 Me., 11. "A verdict of a jury on matters of fact and within even their exclusive province cannot be the basis of a judgment where there is no evidence to support it or when they have made inferences contrary to all reason and logic." *Day* v. *Railroad*, 96 Me., 216.

Motion sustained.

JOHN DAMBROSIA *vs.* GEORGE T. EDWARDS.

Cumberland. January 21, 1930.

EXCEPTIONS. PLEADING AND PRACTICE. VERDICTS. EVIDENCE. MASTER AND SERVANT.

Exceptions to the direction of a verdict for the defendant can not be sustained when the evidence shows that, in any situation that could be assumed at the time of the accident, the plaintiff was (1) *either injured by a fellow servant, or* (2), *though in the employ of the defendant, the plaintiff was injured by a person in the employ of a third party, or* (3), *that neither the plaintiff nor the party injuring him were in the employment of the defendant.*

The exclusion of evidence which, if it had been admitted and had gone to the jury to be weighed with all the other evidence in the case, would not have contributed to justify a verdict contrary to that directed by the Justice presiding, is not prejudicial, and exceptions to its exclusion can not be sustained.

On exceptions by plaintiff. An action on the case brought to recover damages for personal injuries caused by an alleged breach of duty on the part of the defendant to the plaintiff. To the exclusion of certain testimony which he offered plaintiff excepted, and to the direction of a verdict for the defendant, at the conclusion of the testimony, he likewise seasonably excepted. Exceptions overruled.

The case fully appears in the opinion.

Edward J. Berman,
Jacob H. Berman,
Benjamin L. Berman,
David V. Berman, for plaintiff.
Francis W. Sullivan, for defendant.

SITTING: DEASY, C. J., DUNN, BARNES, PATTANGALL, FARRINGTON, JJ.

FARRINGTON, J. This was an action brought to recover damages for personal injuries.

For eight or nine seasons, beginning about the first of May and ending about the first of October of each year, the plaintiff had

worked for the defendant at a motor camp at Falmouth, Maine, owned and operated by the defendant individually.

The defendant was also President of George T. Edwards Real Estate Company, a corporation owning various tracts of land which were being developed, including one in Scarboro, Maine, known as Airport Park. The evidence shows that the defendant was, through his connection with the Company, in charge of these properties, including the development at Airport Park, and that the plaintiff, in the early Spring and in the Fall, after the work at the motor camp was ended, worked occasionally at these places, keeping his own time slips, and the defendant separated the items and himself paid the plaintiff for the work done for him individually, and for the corporation paid the plaintiff for the work done by him for it. The time slips which were introduced in evidence show that the charges were all made to the defendant, who testified that he had tried to explain to the plaintiff about his working for him individually and for the Company, according to the places where he worked, but that he was unable to make the plaintiff understand it. The plaintiff was paid at the rate of fifty cents an hour, and, in addition, at least one-half of his car fare was paid, the defendant stating that half the car fare was paid, and the plaintiff testifying rather vaguely but not stating that all his car fare was paid by defendant.

In the forenoon of September 25, 1928, the plaintiff was working for the defendant individually at the defendant's motor camp, and at some time in the morning of that day he was told by the defendant that in the afternoon he was to go to Scarboro to work, leaving the motor camp around noon.

The defendant had in his employ at the same time one Emil Belanger who worked at the motor camp, and at Scarboro when required, as the plaintiff did, and Belanger had been told by the defendant to go to Scarboro to work there in the afternoon of the same day, September 25, 1928.

On one point there is conflict of testimony. The plaintiff said that the defendant told him to go with Belanger in the latter's car, and in this connection the plaintiff's wife testified that she heard the defendant, in response to a question by the plaintiff, tell the plaintiff that he told Belanger to drive him to Scarboro. The defendant

testified that he first spoke to Belanger about going and then decided that he needed the plaintiff also and that he would have him go, and that, after telling him he was to go to Scarboro, he asked the plaintiff how he was going and the reply was that he was "going with Emil," and that the defendant then asked Belanger if it was all right for the plaintiff to go with him and received an affirmative reply.

About noon of September 25, 1928, the plaintiff and Belanger left the motor camp together in Belanger's car, bound for Scarboro for the afternoon's work there, and on the way occurred the accident in which the plaintiff sustained the injuries to recover for which he brought this action.

At the close of the testimony a verdict for the defendant was, on motion, directed by the presiding Justice. The case comes up on exceptions to the directed verdict, and also on exceptions to the exclusion of certain evidence offered by the plaintiff.

Assumption of the following situations at the time of the accident might be made:

(1) That the plaintiff and Belanger were both in the employ of the defendant individually and hence fellow servants;

(2) That the plaintiff and Belanger were both in the employ of the corporation and hence fellow servants;

(3) That Belanger was in the employ of the corporation and that the plaintiff was in the employ of the defendant individually and hence they were not fellow servants, the basis of (3) being that Belanger was loaned to the corporation, with his knowledge and consent, as is shown by the evidence, and that the plaintiff, never having understood the arrangement had never consented thereto and was still the servant of the defendant individually. *Berry* v. *New York Central & H. R. R. Co.*, 202 Mass., 197, citing *Morgan* v. *Smith*, 159 Mass., 570, and other cases. Under this assumption the plaintiff's action should have been against the corporation.

(4) That Belanger and plaintiff were both loaned to the corporation and, although Belanger had knowledge and gave consent and because the plaintiff did not have knowledge and had not given consent, they were still under the full control and direction of

defendant and hence defendant's servants, even though ostensibly loaned, and hence they were still fellow servants.

(5) That both the plaintiff and Belanger were loaned to the corporation with knowledge and consent, or under conditions which should have carried knowledge and consent, even on the part of the plaintiff, and although paid by the corporation were still under the full control and direction of the defendant individually and hence they were still fellow servants.

(6) That Belanger was in the employ of the corporation and that the plaintiff was in the employ of the defendant individually and that George T. Edwards was acting in his corporate capacity. Under this assumption, Edwards could not be liable individually.

In (1), (2), (4) and (5) of the above assumed situations the fellow servant rule, so well recognized in this State that citation of authority is unnecessary, would bar the plaintiff's right of action.

In (3) while the fellow servant rule would not be applicable, the action should have been against the corporation and the same is true of (6).

From the evidence in the case we are unable to find that the defendant was under any obligation to furnish transportation as such and attach no significance to the arrangement for car fare other than that of wages. Assuming the truth of the plaintiff's testimony that the defendant told him to go with Belanger, we are unable to see any situation, which might arise from the facts in the case, in which the plaintiff is not barred from recovery in this action, either because of the fellow servant rule or because he has sued the wrong party.

Assumption (7) might possibly be made that the plaintiff and Belanger were not in the employ of either the defendant or of the corporation at the time of the accident and hence neither the defendant nor the corporation would be liable.

Exceptions were also taken to the exclusion of certain evidence. The plaintiff was asked by his counsel, "When Mr. Edwards came down to your house to see you, what did he say to you relative to taking care of you and fixing everything up all right?" In the absence of the jury counsel stated that the answer would have been that on two occasions Mr. Edwards came to see the plaintiff and

that he told the plaintiff he was sorry that the accident had happened, that he would see that the plaintiff was taken care of and that everything would be all right. Testimony of the plaintiff's wife and that of two other witnesses was also offered in corroboration of what would have been testified to by the plaintiff as indicated above. This testimony was excluded by the presiding Justice. Exceptions were noted and allowed.

Assuming, without deciding, that the testimony should have been admitted and that, with all the other evidence in the case, it had gone to the jury, we fail to see where a verdict in favor of the plaintiff, under all the circumstances of the case including the excluded testimony, could have been justified or sustained. The exclusion of the evidence was clearly not prejudicial and for that reason the exceptions to its exclusion should be overruled.

For the reasons given above we find no error in the direction of a verdict for the defendant and that exceptions to that ruling should be overruled.

Exceptions overruled.

MRS. R. L. BEAN *vs.* MARK W. INGRAHAM ET AL.

Knox. Opinion January 22, 1930.

EXCEPTIONS. PLEADING AND PRACTICE. ACTIONS. SCIRE FACIAS.

When exceptions are sustained by the Law Court the case comes back to nisi prius *to be tried* de novo *unless it has been otherwise expressly decided and stated in the rescript.*

An action can not properly be dismissed by reason of any defect or omission in the declaration which in the discretion of the presiding Justice may be cured by amendment. Motions for dismissal are not permitted to usurp the office of demurrers.

A writ of scire facias *may be amended like any other writ.*

On exceptions by defendants. An action of *scire facias* against trustees. Defendants' motion that the action be dismissed was denied by the presiding Justice. To this ruling defendants excepted. Exceptions overruled.

The case sufficiently appears in the opinion.

Frank A. Tirrell, Jr.,

O. H. Emery, for plaintiff.

J. H. Montgomery, for defendants.

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

DEASY, C. J. Action of *scire facias* against trustees. The defendants moved that the action be dismissed. The presiding Justice refused the motion. To this ruling the defendants except.

After unfortunately protracted litigation this court held in *Bean* v. *Ingraham*, 128 Me., 238 — 147 Atlantic, 191, that upon the facts as stated in the bill of exceptions which were the same as stated in the writ, the action failed — failed because it did not appear that as required by R. S., Chap. 91, Sec. 73, a demand had been within the required thirty days made upon the trustees.

Thereupon, exceptions being sustained, the case came back to *nisi prius* to be tried *de novo*, it not having "otherwise been expressly decided and stated in the rescript." *Merrill* v. *Merrill*, 65 Me., 79.

Upon the facts which were before the court in 128 Me., 238, the plaintiff must fail but if there is error a Justice sitting at *nisi prius* may allow an amendment.

A writ of *scire facias* may be amended like any other writ. *Marsh* v. *Bellefleur*, 108 Me., 354.

> "A writ of *scire facias* is unquestionably amendable in the same manner as declarations in other cases." 24 R. C. L., 678.

An action can not properly be dismissed by reason of any defect or omission in the declaration which, in the discretion of a sitting Justice, may be cured by amendment.

> "Motions for dismissal are not permitted to usurp the office of demurrers."

R. C. L., Sup. Vol. 2, Pg. 768; *R. R. Co.* v. *Adams*, U. S., 45, L. Ed., 410.

A motion to dismiss is appropriate when upon the record there appears to be a lack of jurisdiction or want of sufficient service, but

> "Defects apparent on the face of the declaration, independent of any reference to the writ or its service are not pleadable

in abatement or the subject of a motion to dismiss." *Littlefield* v. *R. R. Co.*, 104 Me., 126-132.

The ruling of the presiding Justice in the instant case in refusing to dismiss the action was unquestionably correct.

Exceptions overruled.

FRANCES C. ANDREWS, PRO AMI *vs.* HARRY E. DAVIS.

Cumberland. Opinion January 27, 1930.

PHYSICIANS AND SURGEONS. MASTER AND SERVANT. NEGLIGENCE. RELEASE.

When an injured party uses reasonable care in the selection of a physician or surgeon to relieve an injury, the original tort-feasor is liable for any aggravation of such injury resulting from the unskilfulness or negligence of the physician or surgeon so employed; and a settlement with and release of such tort-feasor is a settlement of all claims which might exist against the attending physician or surgeon for his negligence.

Where one procures a physician or surgeon to attend a person whom he has injured and uses due and reasonable care in the selection of such physician or surgeon, he is not liable for the negligence or unskilfulness of the latter which results in an aggravation of the original injury.

The relation of physician or surgeon and patient does not exist between an injured person and a physician or surgeon employed by one responsible for the injury, or his insurer, to observe the case and examine the injured person for the purpose of advising his employer as to the nature and extent of the injuries sustained and to prepare himself to testify if litigation ensues.

The relation of servant and master does not exist between a physician or surgeon employed for such a purpose and the person so employing him, unless the employer undertakes to direct the employed as to what he shall do and how he shall do it. In the absence of the assumption of such directory power on the part of the employer, the relation of the physician or surgeon to the injured person is that of an independent contractor liable for his own torts.

The rule finds especially appropriate application when the negligence of the examining physician or surgeon results not in an aggravation of the original injury but in causing an entirely independent injury related in no way to the first by any rational line of causation.

In the case at bar the negligence of the surgeon caused an entirely independent injury.

The defendant Davis was responsible for the result of his own negligence. Bernstein, the defendant in the prior action, against whom judgment was had, was not liable for defendant Davis' negligence and the judgment against Bernstein for the claim which plaintiff had against him would not bar her claim against the defendant in this case.

On exceptions by defendant. An action on the case to recover for the alleged negligence of defendant surgeon, while making a physical examination of plaintiff. To rulings made by the presiding Justice defendant seasonably excepted. Exceptions overruled.

The case fully appears in the opinion.

S. Arthur Paul,

Laughlin & Gurney, for plaintiff.

Locke, Perkins & Williamson,

Jacob H. Berman, for defendant.

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

PATTANGALL, J. Action on the case to recover damages alleged to have been incurred by reason of injury caused by negligence of defendant. Hearing below was before presiding Justice, without the intervention of a jury, on agreed statement of fact and with the stipulation that liability only should be considered, case to be heard in damages later, provided that liability was found. Judgment was for plaintiff and the case comes to this court on exceptions.

Plaintiff, a child six years old, was struck by an automobile operated by one Louis Bernstein, sustaining a fracture of the right leg near the pelvis. After the accident, Bernstein carried the plaintiff in his car to her parents' home and engaged defendant, a surgeon, to attend her without consulting her parents in the matter. Defendant came to plaintiff's home and accompanied her and her mother to the hospital. He was a stranger to them. On the way to the hospital, the mother expressly informed him that she would not permit him to treat plaintiff. At the hospital another surgeon

operated on plaintiff, reduced the fracture successfully and shortly thereafter the bone properly knitted, forming a perfect union. On the day following the admission of plaintiff to the hospital, defendant was again told by both the mother and father of plaintiff that they did not desire him to treat plaintiff, whereupon he informed them that he was employed by Bernstein or by the insurance company with which Bernstein was insured to observe the case; and from time to time continued to go to the hospital while the surgeon in charge of the patient was attending to her needs, claiming the right to be present because of such employment, but taking no part in the treatment of the case.

In course of time, plaintiff returned to her home and shortly thereafter defendant visited her for the purpose of making an examination. While manipulating the injured leg, he negligently caused a new and independent fracture near the knee. It is for this injury that this suit is brought.

Plaintiff brought an action against Bernstein, which by agreement was defaulted, damages assessed and paid, and release given of all claims against him. Defendant claims that the judgment in that suit bars the present action. The declaration in the Bernstein case did not specifically eliminate nor specifically include the negligence complained of here.

Defendant's negligence is admitted. The injurious results which ensued are admitted. The sole issue is whether or not this action is barred by the judgment and release in the former suit.

Defendant states the issue in his brief: "Can plaintiff recover for alleged negligence of a surgeon who treated her and aggravated her damage originally caused by Bernstein against whom she recovered?"

The agreed facts modify the question somewhat. Defendant was not "treating" plaintiff. He had not been employed to treat her nor did he at any time undertake to do so. He was examining her in the interest of Bernstein and the insurer of Bernstein. He was not acting in her interest but to determine her injuries and to what extent she had recovered from them. He did not "aggravate her damage originally caused by Bernstein." He negligently caused an entirely new and independent injury for which it is admitted

plaintiff was entitled to recover damages, the only question being from whom they should be recovered.

It is familiar and well established law that when an injured party uses reasonable care in the selection of a surgeon to relieve an injury, the original tort-feasor is liable for any aggravation of such injury resulting from the unskilfulness or negligence of the surgeon so employed and that a settlement with and release of such tort-feasor is a settlement of all claims which might exist against the attending surgeon for his negligence. *Stover* v. *Bluehill*, 51 Me., 439; *Hooper* v. *Bacon*, 101 Me., 533; *Purchase* v. *Seelye*, 231 Mass., 434; Notes, 8 A. L. R., 507 and cases cited; *Pullman Parlor Car Co.* v. *Bluhm*, 109 Ill., 20, 50 Am. Rep., 601; *Lester* v. *Humphrey*, 41 Ohio St., 378, 52 Am. Rep., 86.

But where one procures a physician or surgeon to attend a person whom he has injured and uses due and reasonable care in the selection of such physician or surgeon, he is not liable for the negligence or unskilfulness of the latter which results in an aggravation of the original injury. *Secord* v. *St. Paul M. & M. R. Co.*, 18 Fed., 221; *Louisville & Nashville R. Co.* v. *Foard* (Ky.), 47 S. W., 342; *Quinn* v. *Kansas City M. & B. R. Co.* (Tenn.), 30 S. W., 1036; *Eighmy* v. *Union P. R. Co.* (Ia.), 61 N. W., 1056; *Atlantic Coast Line R. Co.* v. *Whitney* (Fla.), 56 So., 937; *Pittsburg R. R. Co.* v. *Sullivan* (Ind.), 40 N. E., 138.

Defendant contends against the application, in this jurisdiction, of the rule laid down in these cases, on the ground that it is contrary to the logic of *Stover* v. *Bluehill*, supra, and *Hooper* v. *Bacon*, supra, and to the doctrine of such cases as *Cleveland* v. *Bangor*, 87 Me., 259, and *Water Company* v. *Towage Co.*, 99 Me., 473, in which the familiar general rules are laid down that but one compensation can be recovered for a single injury and that recovery of damages from one tort-feasor bars a suit against a joint tort-feasor.

Our court has never passed on the precise question of whether or not one by whose negligence an injury was sustained would be liable for the negligence of a surgeon employed by him to treat the case, provided that due care was exercised in the selection of the surgeon. While that question arises here, there are peculiar factors which differentiate this case somewhat from those cited above.

A very important element to be considered is that this defendant was not employed by anyone to treat the injured plaintiff. He was employed by Bernstein or his insurer to observe the progress of the case and to examine plaintiff, obviously for the purpose of advising as to the nature and extent of her injuries and to prepare himself to testify if litigation ensued. The relation of surgeon and patient never existed between defendant and plaintiff. Bernstein offered defendant's professional services to plaintiff but the offer was rejected.

With this situation in mind, defendant claims freedom from liability on the ground he was the servant or agent of Bernstein and that judgment against his principal, followed by payment and accompanied by a release in full of all claims against the principal, bars recovery here.

In *Pearl* v. *West End St. Railway*, 176 Mass., 177, the question arose as to whether or not damages for an injury caused by the act of an examining surgeon could be recovered from his employer on the ground that the relation of principal and agent existed between them. Chief Justice Holmes, speaking for the court said, "The doctor was not an agent or servant of the defendant in making his examination; he was an independent contractor. There is no more distinct calling than that of the doctor, and none in which the employee is more distinctly free from the control or direction of his employer: See *Linton* v. *Smith*, 8 Gray, 147; *Milligan* v. *Wedge*, 12 Ad. & El. 737. In this case the doctor was informing himself according to the suggestions of his own judgment, in order to advise and perhaps to testify for the defendant. We must assume, in the absence of other evidence than his profession and his purpose, that what he should do and how he should do it was left wholly to him."

The principal invoked finds support in a long line of decisions dealing not only with cases in which the physician or surgeon was employed to make an examination but also in which he was employed by those responsible for the injury to treat the injured person. *Neal* v. *Flynn Lumber Co.* (W. Va.), 77 S. E., 325; *Sawdey* v. *R. R. Co.* (Wash.), 70 Pac., 972; *Poling* v. *Railroad Co.* (Tex.), 75 S. W., 69; *Galvin* v. *Hospital*, 12 R. I., 411; *Arkansas Midland R. R. Co.* v. *Pearson* (Ark.), 135 S. W., 917;

Virginia Iron, Coal and Coke Co. et al v. *Odle's Adm'r* (Va.), 105 S. E., 107; *Dyche* v. *Vicksburg S. & P. R. R. Co.* (Miss.), 30 So., 711; *Heggarty* v. *St. Louis K. & N. W. R. Co.* (Mo.), 74 S. W., 456; *Foote* v. *Shaw Stewart*, 49 Scot. L. R., 39; *Union P. R. Co.* v. *Artist*, 60 Fed., 365; *O'Brien* v. *Cunard S. S. Co.*, 154 Mass., 272; *Allan* v. *State S. S. Co.*, 132 N. Y., 91.

The natural consequence of such an injury as plaintiff sustained is the employment of a surgeon. Plaintiff is obligated to arrange for such employment in order to mitigate damages as far as it is practicable to do so but the obligation is fulfilled when a competent surgeon is employed. The injured person does not insure against the negligence of the surgeon and damages caused by such negligence may be recovered from the person responsible for the original injury.

If he who is so responsible, without being contractually liable so to do, furnishes gratuitous aid to the injured, he also must use due care in the selection of a surgeon but he is not an insurer against such surgeon's negligence nor is the relation of master and servant created by the employment unless the employer undertakes to direct the employed as to what he shall do and how he shall do it. In the absence of the assumption of such directory power on the part of the employer, the relation of the surgeon to the injured person is that of an independent contractor liable for his own torts.

Most emphatically is this the case when the arrangement does not include treatment but is limited to examination, and the rule finds especially appropriate application when the negligence of the surgeon results, not in an aggravation of the original injury, but in causing an entirely independent injury related in no way to the first by any rational line of causation.

Such is the position of defendant in this case. He must answer for the result of his own negligence. Bernstein was not liable therefor and the judgment against Bernstein for the just claim which plaintiff had against him does not bar her equally just claim against this defendant.

Exceptions overruled.
Damages to be assessed as stipulated.

DWIGHT H. EDWARDS *vs.* AMERICAN RAILWAY EXPRESS COMPANY.

Androscoggin. Opinion January 27, 1930.

PLEADING AND PRACTICE. EVIDENCE.

Proof of an issue lies within the limits of the allegations and must be of legal weight and sufficiency. Mere conjecture or choice of possibilities is not proof. A proposition is not proved so long as the evidence furnishes ground for conjecture only, nor until the evidence becomes inconsistent with the negative.

In the case at bar it was entirely possible that the horses got down and were injured from causes independent of the floor of the car.

It was only conjecture that the condition of the floor was the proximate cause of the loss of the horses and there was no determining fact in the case warranting the jury in selecting the possibility favorable to the plaintiff rather than one to the contrary.

On general motion for new trial by defendant. An action on the case to recover for injuries to horses purchased by plaintiff in New York and shipped to him at Auburn, Maine, two dying enroute, through the alleged negligence of the defendant. The jury found for the plaintiff and assessed damages in the sum of $475.00. A general motion for new trial was thereupon filed by defendant. Motion sustained. Verdict set aside.

The case sufficiently appears in the opinion.

Tascus Atwood, for plaintiff.

W. B. & H. N. Skelton, for defendant.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

STURGIS, J. The plaintiff on December 29, 1927, purchased twenty-eight horses in New York City and shipped them to Auburn, Maine, via American Railway Express. When the car reached Troy, N. Y., it was discovered that two horses were down and badly injured. They were unloaded and, by advice of a veterinary, immediately shot.

The shipment was made under the form of carrier's contract in

general use for the shipment of ordinary live stock, limiting the carrier's liability to injuries to or loss of the animals caused by its negligence or that of its agents or employees. The risk of loss or damage resulting from the nature or propensities of the horses was assumed by the shipper.

The plaintiff relies solely on his allegation that the Express Company negligently "shipped the horses in an improperly fitted car, the floor being wet and slippery, when it should have had a covering of hay or gravel." He must prove that his loss actually resulted from the negligence of the Express Company. *Grant* v. *Express Co.*, 126 Me., 489; *Morse* v. *Canadian P. R. Co.*, 97 Me., 77. His proof lies within the limits of his allegations and must be of legal weight and sufficiency.

Mere conjecture or choice of possibilities is not proof. A proposition is not proved so long as the evidence furnishes ground for conjecture only, nor until the evidence becomes inconsistent with the negative. To choose between two possibilities is guess work, not decision, unless there is something more which leads a reasoning mind to one conclusion rather than to the other. *McTaggart* v. *Railroad Co.*, 100 Me., 223, 230, 231; *Titcomb* v. *Powers*, 108 Me., 347, 349.

The record discloses that twenty-eight horses were loaded at New York. They were in good condition at Albany. But two horses were down and badly kicked and trampled upon at Troy. It is entirely possible that the horses got down in the first instance from causes independent of the condition of the floor.

Witnesses for the plaintiff, however, say that, when the car was unloaded at Troy and the injured horses taken out, the floor was wet and slippery, and horse shippers, called as experts, expressed the opinion that such a condition was the result of a failure to properly prepare the floor in New York.

Disregarding the affirmative evidence introduced by the defendant tending to prove that the floor of the car was properly bedded with sand and a layer of shavings when the horses were loaded, we are of the opinion that it is only conjecture that the condition of the floor was the proximate cause of the loss of the horses.

A careful examination of all the evidence leaves the conviction that there is no determining factor in this case which warranted the jury in selecting the possibility favorable to the plaintiff rather

than the one to the contrary. It is evident that they did no more.

For the reasons stated, the plaintiff should not hold his verdict. The motion for a new trial must be sustained.

Motion sustained.
Verdict set aside.

JOHN T. AMEY ET AL *vs.* AUGUSTA LUMBER COMPANY.

Kennebec. Opinion January 31, 1930.

WORDS AND PHRASES. "DUE" DEFINED. TIMBER PERMITS. PLEADING AND PRACTICE. TROVER. DAMAGES.

The meaning of the word "due" in any contract is to be determined by the context. It may express the mere state of indebtment or it may be used to express the fact that the debt has become payable.

A timber permit which is a formal document apparently intended to include the final result of negotiations can not be modified by any prior or contemporaneous oral agreement.

When a timber permit is given, authorizing the cutting of all cedar upon a certain specified territory for a lump sum, the owner reserving and retaining full and complete ownership and control of all timber until all payments due shall have been made, receipts given by the owner to the permittee for stumpage or railroad ties, in the absence of any explanatory evidence, does not include the rift, i.e., tops and butts.

In an action of trover the plaintiff is not bound to prove title. It is sufficient for him to prove possession or the right of immediate possession. Possession, however, or the right of possession may be shown by proving title, inasmuch as one having title is constructively in possession, unless there is testimony showing the contrary. When a party undertakes to prove possession or right of possession only by proving title, if he fails to prove title as to a part of the property he fails to establish his case as to such part.

The measure of damages in an action of trover brought by the absolute owner or brought against a stranger to the title is the fair market value of the chattels converted at the time and place of conversion. But such measure of damages does not apply when the ownership of the plaintiff is qualified and the suit is

against a party having an interest in the chattels or against a party in privity with him.

A plaintiff who has only a special property or qualified interest in goods which have been converted can only recover the value of such property or interest, not exceeding, however, the value of the goods, as against a defendant who had title to or was entitled to the remaining interest.

In the case at bar, after Mr. Boyd had commenced operations under the permit given to him by the plaintiffs a certain portion of the territory covered by the permit was entered on by the American Realty Company under claim of title. Boyd, by authorization and at the request of the plaintiffs, paid stumpage to that Company, although plaintiffs still claimed to own the whole territory. The contract was thereupon terminated by Boyd and no more timber cut by him. The cedar ties that he had cut and manufactured were sold by him to the Maine Central Railroad Company and releases obtained from the plaintiffs of all their reserved title to such ties. Such releases did not, however, cover the rift sold by Boyd to the defendant, who took possession of them. Such taking constitutes a conversion and renders the defendant liable to pay the value of the plaintiffs' qualified title.

On report. An action of trover brought for the alleged conversion of certain cedar lumber. The cause was heard before a jury at the October Term, 1928, of the Supreme Judicial Court, for the County of Kennebec. After the testimony was closed, by consent of the parties, the case was withdrawn from the jury and reported to the Law Court, that tribunal to pass upon all questions of law and fact and render its decision upon so much of the testimony as might be legally admissible. Judgment for the plaintiffs in the sum of $1,844.36.

The case fully appears in the opinion.

Locke, Perkins & Williamson,

Thomas Leigh, for plaintiffs.

Andrew, Nelson & Gardiner,

Burleigh Martin, for defendant.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

DEASY, J. Action of trover to recover damages for alleged conversion of certain cedar lumber bought by the defendant of Byron Boyd and claimed to be owned by the plaintiffs.

On the 10th day of July, 1924, the plaintiffs gave to Byron Boyd

a written permit authorizing him to "enter upon the Tomhegan and Brassua Water Shed of the Kennebec slope in Township 2, Range 3, N. B. K. P., Somerset County, Maine, commonly known as Soldiertown, and to cut and remove any or all of the cedar, whether said cedar shall be green or dry, standing or down." (Subject to an exception not affecting this case.) Quoting further from permit, "said cutting and removal may continue until April 1, 1933, but not thereafter. Any cedar remaining on said territory after the last named date shall revert to the grantors." The only stipulations contained in the permit material in this controversy are the following. The numbering of the following excerpts is for convenience in reference and is not found in the permit.

(1) "In further consideration for the cutting herein permitted the grantee agrees to pay the grantors as follows: $4000 July 15, 1924, $4000 on January 15, 1925, and $4000 on the 15th of each July and January until $32,000 and interest shall have been paid. To each payment after the first interest at 5%, payable annually from July 15, 1924, shall be added."

(2) "Said grantee hereby agrees that said grantors shall reserve and retain full and complete ownership and control of all timber, both cut and uncut under this permit wherever and however it may be situated until all payments due shall have been made in full. And said grantee further agrees that in case of default in payment for more than thirty days the grantors shall have full power and authority to take all or any part of said cedar that may have been cut wherever and however situated, and to sell and dispose of the same either at public or private sale for cash and after deducting legal expenses shall apply the balance on the debit account of said grantee."

(3) "In consideration of the premises it is further stipulated and agreed that in case the amount of cedar cut in any one year shall exceed the stumpage value of $8000 at six dollars per thousand feet the grantee herein shall pay according to dates of payment herein stated an additional amount necessary to make up six dollars per thousand feet."

Boyd paid at the date specified, or subject to a delay which was

waived, the first four payments of four thousand dollars each. He caused a considerable quantity of cedar to be cut and manufactured the principal portion of it into railroad ties which were sold to the Maine Central Railroad Company.

The butts and tops, called "rift," were sold to and claimed to have been converted by the defendant.

Meaning of Word "Due"

One point made and stressed by the defendant relates to the meaning of the word "due" in the phrase "until all payments due shall have been made," etc., contained in excerpt 2 above.

The defendant argues that the word "due" means immediately payable. If so, no ownership of or in the lumber sold the defendant is "reserved and retained," inasmuch as the first four payments with interest were made substantially at the dates specified, and inasmuch as the cedar, which is the subject of this suit, was cut before the last of such dates.

But while the word "due" is sometimes used in this sense, and "Courts even have used the word 'due' as synonymous with 'payable'" (*Hawes* v. *Smith*, 12 Me., 433), the word is more commonly used as a synonym of owed or owing. "A note may be due and not payable." (*Greenough* v. *Walker*, 5 Mass., 216.)

The truth is that "the word 'due' has a variety of meanings depending upon the connection in which it is used" (10 A. & E. Ency., page 277), and that "It is sometimes used to express the mere state of indebtment and sometimes to express the fact that the debt has become payable." (*U. S.* v. *Bank*, 6 Pet., 29.)

The word "due" is "defined variously." (12 Cyc., 819.) Its meaning in any contract is to be determined by the context. A careful study of the context in this case shows that the word is not here entitled to the meaning which the defendant's counsel attributes to it. In case of a default occurring after the first payment, the defendant's construction would result in the restoration or revival of the plaintiffs' ownership and control but would deprive of all legitimate meaning the words "reserve and retain," which were the words used by the parties.

SALE IN ORDINARY COURSE OF BUSINESS

The defendant contends further that at or before the signing of the permit it was agreed that Boyd should have the right to sell cedar in the ordinary course of business. But evidence tending to show this is inadmissible. The permit is a formal document, apparently intended to include the final result of negotiations, and is not to be modified by any prior or contemporaneous oral agreement. The doctrine of independent collateral parol agreements applied in *Neal* v. *Flint*, 88 Me., 72, clearly has no application in this case. The doctrine as there enunciated is not to be extended. (*Burnham* v. *Austin*, 105 Me., 196.)

Moreover, the practical construction placed upon the contract by the parties negatives any such agreement. Boyd did sell railroad ties which were the principal product of his operation, but whenever he sold them he applied for and received releases applying definitely to certain ties. Nothing in the evidence shows or suggests any agreement or understanding that any part of the product could be sold in the ordinary course of business without such release by the plaintiffs.

The defendant quotes from and relies confidently upon the case of *Wentworth* v. *Sargent*, 82 N. H., 111, 129, Atl., 878. This New Hampshire case involves a timber permit given to a man named Nichols. The reservation of ownership is expressed in language very much like that used in the permit given to Boyd. Nichols gave notes for the stumpage.

The permit provided that Nichols "should apply as payment on the notes the sum of not less than five dollars per cord for all the pulp wood cut on the premises and five dollars per thousand feet for all lumber cut." It was held that it should be implied from the language next above quoted that Nichols had the right to sell the lumber in the ordinary course, applying to the note the proceeds or not less than the above amounts per unit.

No language like that quoted is found in the permit given to Boyd. It is unnecessary to determine whether this Court would, if called upon, construe the above quoted language as did the New Hampshire Court.

ADVANCE PAYMENTS

But the defendant further argues that by the true construction of the permit, each payment of four thousand dollars was to be an advance payment for a certain amount of stumpage at six dollars per thousand, to be cut during the six months next following the payment. If such were the true construction of the contract, a complete defense would be made out, notwithstanding a literal, though hardly reasonable, construction of the permit, would still leave in the plaintiffs, for purposes of securing the performance of the entire contract, the ownership and control of lumber upon which the stumpage had been paid. But the defendant's theory of advance payments above summarized is at variance with the language of the permit and with its apparent meaning, and can not be adopted.

RECEIPTS FOR STUMPAGE PAID

The defendant defends further upon the ground that the plaintiffs gave to Boyd receipts which had the effect of releasing its claim to the cedar in question.

From time to time during the operation, upon payments made, the plaintiffs gave to Boyd receipts acknowledging payment for stumpage on railroad ties at twenty cents each. Altogether receipts were given for sixty-six thousand ties at twenty cents each, amounting to $13,200. The first of these receipts is dated September 1, 1924, for "stumpage on twenty thousand cedar railroad ties in Soldiertown at twenty cents," amounting to $4,000. The later receipts are similar in form, the total being stated above.

The production of these ties was the main object of Boyd's operation, the lumber sold the defendant being the butts and tops of the trees from which the ties were made. These receipts undoubtedly had the effect of releasing all the right and title to the ties which the plaintiffs in their permit "reserved and retained."

It is urged that the rift (butts and tops) was a mere by-product of the railroad tie operation, and that twenty cents per tie covered the stumpage of the principal product and also of the by-product. It is testified, and not denied, that fifteen cents per tie was equivalent to the basic stumpage price of six dollars per thousand, so that one-fourth of the amount paid and receipted for was for

stumpage of butts and tops, and that all title to such by-product was intended to be, and was released. The receipts, however, purport to cover railroad ties only, and there is no evidence that the plaintiffs intended to acknowledge stumpage payment on anything else.

PLAINTIFFS' TITLE

Again the defendant contends that the plaintiffs have failed to prove title to the lumber for the conversion of which they sue. The plaintiffs undertook to prove their title by introducing a warranty deed from the Essex Realty Company to the North American Spruce Company and a quit-claim deed from the latter corporation to the plaintiffs. Both deeds include all the land covered by the permit to Boyd, and would be sufficient *prima facie* to prove the plaintiffs' title, but for the fact that in the deed from the Essex Realty Company to the North American Spruce Lumber Company, lot No. 98 containing about two hundred acres is excepted from the warranty. As to lot No. 98, therefore, the plaintiffs produce only quit-claim deeds which do not make out even a *prima facie* title.

It is true that in an action of trover the plaintiff is not bound to prove title. It is sufficient for him to prove possession, or the right of immediate possession. In this case, however, the plaintiffs undertook to prove possession or right of immediate possession, only by showing title. Title, if proved, would be sufficient inasmuch as one having title is constructively in possession in the absence of testimony showing the contrary. The plaintiffs having failed to show title to lot 98, have failed to prove possession of that part of the cedar which came from said lot 98. Lot 98 is a very small part of the land described in the permit, which is stated to contain about twenty thousand acres. The cedar operation, however, covered only about twelve hundred acres, and lot 98, containing about two hundred acres of "good cedar territory," is a substantial part of the land available for the cedar operation. It is shown that the American Realty Company claimed title to lot 98 and took possession of it. Boyd obtained from that corporation permission to cut cedar upon said lot. The plaintiffs had notice of this, and on July 22, 1926, wrote to Boyd: "Whatever stumpage you pay, and whatever you have to pay in the future for cedar on this lot (No. 98) should be deducted from the sale price to you. We should how-

ever be consulted in the settlement of the stumpage because we have title to this lot, and we expect to contest in the courts with the American Realty Company."

It appears that a considerable quantity of cedar rift which was reserved and retained by the plaintiffs in their permit, the stumpage on which had not been released by them, was sold and delivered by Boyd to the defendant. A person who purchases, takes delivery of and holds chattels from one who has no legal right to sell them, is guilty of conversion. *Freeman* v. *Underwood*, 66 Me., 229; *Gilmore* v. *Newton*, 9 Allen, 171; *Cooper* v. *Newman*, 45 N. H., 339.

The measure of damages in an action of trover brought by the absolute owner or brought against a stranger to the title is the fair market value of the chattels converted at the time and place of conversion.

There is some evidence that the quantity of cedar purchased and received by the defendant coming from Boyd's operation in Soldiertown was 349,060 feet. There is also evidence that at the place where delivery was received the fair market value of the cedar was eighteen dollars per thousand.

Thus the damage claimed to be recovered by the plaintiffs is $6,283.08, plus some interest. But the above measure of damages does not apply when the ownership of the plaintiffs is qualified and the suit is against a party having an interest in the chattels or against a party in privity with him. "plaintiff who had only a special property or qualified interest in goods which have been converted, can recover only the value of such property or interest, not exceeding however, the value of the goods, against a defendant who had title to or was entitled to the remaining interest." (38 Cyc., 2,089.) "If the plaintiff having but a limited title brings his action against one having the remaining interest, or against one claiming under such residuary owner, he can then recover only according to his interest." (*Lumber Company* v. *Mfg. Company*, 104 Me., 206.) "If the property is converted by the owner of an interest therein, or by one acting in privity with him, the plaintiff can recover only to the extent of the value of his own interest in the property." (26 R. C. L., 1153.)

The plaintiffs' was plainly a qualified title.

By the language of the permit, they reserved and retained full

and complete ownership. But such reservation was clearly only for the purpose of security. The plaintiffs reserve title for the purpose of securing a performance of the contract by Boyd. The residuum of the title was in Boyd.

If the contract had been in full force at the time of the conversion, the balance then due on the contract was sixteen thousand dollars. In such case, the damage would have been not sixteen thousand dollars, but the market value of the cedar, because recovery can not exceed the fair market value of the chattels. (38 Cyc., 2089.)

RESCISSION OF CONTRACT

But the defendant says that the contract had been renounced and rescinded, and was not in force at the time of the conversion.

In 1926, after Boyd had, with the plaintiffs' consent, attorned to the American Realty Company, and paid that company stumpage upon a substantial part of the land covered by his permit from the plaintiffs, he notified the plaintiffs that the contract had been violated on their part, and that he was through operating upon it.

Whether or not the title of the American Realty Company to lot No. 98 was, or was not, superior to the title of the plaintiffs (a point which upon the evidence now before the court can not be determined), Mr. Boyd apparently had a right to treat the contract as at an end. By the original contract, the plaintiffs, in effect, guaranteed that they were the owners of the property specified in the permit, and authorized Boyd, in consideration of thirty-two thousand dollars, to be paid to them by him, to cut and carry away cedar from all parts of it. After the American Realty Company had taken possession of lot 98, the plaintiffs seem to have tried to amend their contract by substituting an agreement that if Boyd would buy stumpage of the American Realty Company upon lot 98, they, the plaintiffs, would reimburse him for any sum paid that company. Boyd might have assented to this modification, but he declined to do so, and treated the contract as at an end, and so notified the plaintiffs.

The rights under the permit being terminated, the value of the plaintiffs' qualified title must be estimated at the basic price of six dollars per thousand, or $2,094.86.

This, however, includes the cedar cut upon lot 98, and to this lot and the cedar taken from it, the plaintiffs have proved no title or right of possession. The stumpage value of this cedar may for purposes of this case fairly be estimated as the amount which Boyd paid the American Realty Company for stumpage, which was $250. Deducting this amount, the value of the plaintiffs' interest in the cedar in which they have proved even qualified title is $1,844.36.

In an action of tort to recover unliquidated damages, interest is not recoverable as a matter of right, but a jury, or a court exercising jury powers, may include a sum as interest or equivalent to interest as a part of the damages. (*Water Power Company* v. *Lewiston*, 101 Me., 564; 17 C. J., 820.)

No reason is perceived for adding interest in this case.

Judgment for plaintiffs for $1,844.36.

JOHN H. MACOMBER, SHERIFF *vs.* MOOR, FOSTER AND HILLGROVE.

Penobscot. Opinion February 4, 1930.

ACTIONS. PLEADING AND PRACTICE. REPLEVIN. EVIDENCE. DAMAGES.

Judgment for the defendant in a replevin suit does not necessarily determine the title to the property, and defendant in an action on the bond is entitled to show that it was not determined in such suit, or that the plaintiff's was a mere possessory right.

If the title has not been determined in the replevin suit, any pertinent facts may be shown in diminution of the claim.

The question of damages, so far as it has not been settled by any judgment, is therefore open to the defendants.

In such case the defendants may show anything in mitigation of damages, where it is not inconsistent with any judgment in the replevin suit.

While judgment for a plaintiff in an action on a replevin bond must be for the penalty of the bond, execution can issue for only so much thereof as is due for the breach proved.

In the case at bar the sheriff could recover only his damages. The abatement

of the writ, styled a replevin writ, did not in any manner determine the title to the wood.

The evidence offered, to show that a corporation owned the wood and that it was in no sense and no degree the property of the judgment debtor, was properly admitted. Title in another than the judgment debtor was rightly shown in the litigation in process, rather than in and by means of subsequent suits.

The nominal damages recovered were all that the plaintiff actually suffered.

On exceptions to the assessment of damages in an action of debt upon bond. Exceptions overruled.

The case is fully stated in the opinion.

Clinton C. Stevens, for plaintiff.

D. E. Hurley,

Rider & Simpson, for defendants.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

BARNES, J. The writ in this case was sued out against the three men named in the title, as individuals and also as a copartnership, of the same name, and otherwise styled, "Moor, Foster & Hillgrove Co."

The action is debt, upon a bond in a replevin suit of earlier date.

The plea was the general issue, not the bond of defendants, with brief statement that the property taken in replevin was at the date of replevin the property of a corporation, the Moor, Foster & Hillgrove corporation, and not the property of the individuals named above, whether as partners or in any other personal capacity, and that plaintiff had not sustained any damage, by reason of any supposed breach of the bond.

On issue joined, and during the process of trial, the defendants submitted to a default and the hearing proceeded for determination by the presiding Justice of the amount of damages, exceptions available to either party to rulings of law. Damages were assessed at one dollar, and exceptions allowed to plaintiff.

Pertinent facts in the case are that, having an execution against one Dorr, the Frank S. Sawyer Company put in the hands of Macomber, Sheriff of Hancock County, this execution with in-

structions to seize on the execution certain piles of wood to satisfy the same.

Seizure was made on January 27, 1928. Members of the corporation, Moor, Foster & Hillgrove, in the assurance that the corporation owned the wood, so by the sheriff seized, instructed an attorney to replevin the same.

A replevin bond was executed to the sheriff, and signed "Moor, Foster & Hillgrove Co.," presumably as principal, with Howard B. Moor, George S. Foster and L. R. Hillgrove, apparently signing as sureties. This bond accompanied a writ, served on the sheriff on February 2, 1928, and the wood disappeared from the confines of Hancock County before the next term of the Supreme Court.

Inspection of the writ showed that the attorney who drafted it had not named as plaintiff therein the corporation, but had declared in the names of the three men who signed the bond as sureties, wherefore at the next ensuing term of court the writ was abated and a writ of restitution issued, with one dollar and costs of suit allowed the sheriff as defendant.

On July 20, 1928, return on the writ of abatement and restitution was made, as satisfied, in the matter of collection of costs, but alleging that after diligent search the goods and chattels mentioned in the writ could not be found.

The date of the writ, upon which trial was had, is September 17, 1928.

At trial the qualified title to the wood in the sheriff who seized it on execution was admitted, but the ownership of Dorr, the execution debtor, in any stick of the several piles was denied.

Defendants, after default, claimed the right to present evidence and offered testimony to prove that at the time of seizure on execution and so long as the wood remained on the skids where seized it was the property of the Moor, Foster & Hillgrove corporation.

The learned Chief Justice, at trial, admitted, over objection, defendants' testimony tending to show the property in the wood to be in the corporation.

After the evidence was in, plaintiff moved to strike out all evidence, "in so far as it bears on the question of title in any one save the defendants in this case." The Court refused to grant the motion, and awarded damages in the sum of one dollar.

To the admission of testimony as above, and to the refusal to strike out evidence the plaintiff excepted.

He also excepted to the Court's finding of damages in the sum of one dollar.

That the sheriff had a partial, or qualified title in the wood which he had seized is not denied. And, on the other hand, it is admitted that had he proceeded to sell, under the execution in his hand, he would have been answerable in damages to the owner, if the judgment debtor was not the owner of the wood, or to the judgment debtor for any balance in his hands, after satisfaction of the judgment debt, and consequent costs and expenses, if a balance remained. The suit at bar is to recover the value of such title to the wood as the sheriff had, and to recover nothing more.

Burbank v. *Berry*, 22 Me., 483; *Philbrook* v. *Burgess*, 52 Me., 271; *Bradley Land and Lumber Co.* v. *Eastern Manufacturing Company*, 104 Me., 203; *Williams* v. *Dunn*, 120 Me., 506.

It would seem that the defendants here are not liable as sureties on a replevin bond, for our statutes, Chap. 101, Sec. 10, require that, "Before serving the writ (replevin), the officer shall take from the plaintiff, or someone in his behalf, a bond to the defendant, with *sufficient sureties*." Such bond the sheriff did not take. Principal and sureties in the so-called replevin bond are the same parties, a situation not contemplated in the statute cited.

But on whatever bond sued, the defendants have been defaulted.

The sheriff seeks to recover his damages. The abatement of the writ, styled a replevin writ, did not in any manner determine the title to the wood.

"Unless the title to the property is put in issue and determined, a judgment in the replevin suit determines nothing beyond the right of possession, and evidence bearing on title and real ownership is admissible in an action on the bond as affecting the measure of damages." 34 Cyc., 1587, and cases cited, note 5.

Judgment for the defendant in a replevin suit does not necessarily determine the title to the property, and defendant in an action on the bond is entitled to show that it was not determined in such suit, or that plaintiff's was a mere possessory right. *Crabbs* v. *Koontz*, 69 Md., 59; 13 Atl., 591.

"If the title has not been determined in the replevin suit, any

pertinent facts may be shown in diminution of the claim." *Easter* v. *Foster et al*, 173 Mass., 39.

This question was considered in *Jones* v. *Smith*, 79 Me., 452, where the Court says, "What damage is the plaintiff entitled to recover? The bond is given as an indemnity for whatever loss or damage the plaintiff may have suffered. There has been no judgment in the replevin suit determining the title to the property, and the question of property has in no way been passed upon. The question of damages, so far as it has not been settled by any judgment, is therefore open to the defendants. *Tuck* v. *Moses*, 58 Me., 476; *Buck* v. *Collins*, 69 Me., 448. There can be no valid objection to permitting the defendant, in a suit like the present, to show anything in mitigation of damages, where it is not inconsistent with any judgment in the replevin suit."

See also, *Fielding* v. *Silverstein*, 70 Conn., 605; *Crabbs* v. *Koontz*, supra; *O'Donnell* v. *Colby*, 153 Ill., 324; *Simmons* v. *Robinson et al*, 101 Mich., 240; *Bradley Land Co.* v. *Eastern Manufacturing Co.*, supra; *Harmon* v. *Flood et al*, 115 Me., 116.

The evidence proffered to show that a corporation owned the wood, and that it was in no sense and no degree the property of the judgment debtor was properly admitted. Right and justice demand that title in another than the judgment debtor may be shown in the litigation then in process, rather than in and by means of subsequent suits. *Williams* v. *Dunn*, supra. Defendants had submitted to default. The value of the sheriff's qualified title was the first issue in determining the amount to be awarded the sheriff after default.

"In an action on a replevin bond, judgment for plaintiff must be for the penalty of the bond, but execution can issue for so much thereof only as is due for the breach proved." 34 Cyc., 1608 (v).

In determining the amount of damages, the learned Justice made no error in law, unless it appear from the record that there was no legally admissible evidence upon which he based his computation or finding.

We find ample evidence that the sheriff had seized upon the Sawyer execution the property of the Moor, Foster & Hillgrove corporation, and not the property of the judgment debtor. We find uncontradicted evidence that all actual damage which plain-

tiff had suffered or could suffer in future, because of the attempted replevin of the wood has been paid him.

"Nominal damages only are recoverable for a technical breach where no actual damage is shown to have been sustained." 9 C. J., 130.

The mandate should be,

Exceptions overruled.

CENTRAL MAINE POWER COMPANY

vs.

INHABITANTS OF THE TOWN OF TURNER.

Androscoggin. Opinion February 6, 1930.

WATER POWERS. MILL PRIVILEGES. TAXATION.

Water power, as such, is not an independent subject of taxation, but land upon which a mill privilege exists is taxable at its worth as land enhanced by the value of its capacity for water power development, or by the value of the capability of the land for such use. If the privilege is undeveloped or, developed, is not utilized, the capacity of the land for power development, often termed its "potential development," is nevertheless an element of value to be considered in its tax valuation.

The chief value of a parcel of land may be that it has a privilege upon it, and, in so far as the land is made more valuable by the stream and fall within its limits, so far these elements are to be considered in its valuation.

Water power may be utilized in places far remote from the site of its creation. Its use in the operation of mills at or distant from the water fall which produces it may properly increase the value of the mills receiving the power and subject them to taxation accordingly. But the land in which the stream falls still retains its appurtenant capacity for power development, an element of value distinct from water power as such, and not lost by a transfer of the power elsewhere.

Failure to build a dam or the location of an unused dam upon the land, leaves

an unused privilege assessable, however, to the extent the land was "made more valuable by the stream and fall."

It is equally an unused privilege when submerged by its owner. It is not an accepted doctrine that the tax payer can fix the value of his land for the purposes of taxation by the use to which he puts it.

In estimating the value of land for the purposes of taxation all of its incidents should be considered and the elements of value which lead to its most profitable improvement fix the proper valuation of the land.

Assessors of taxes have the right to assess property upon a valuation based upon its highest profitable use.

In the case at bar the unused and undeveloped privileges owned by the appellant in Turner, before they were flowed out, had a taxable value of $200,000. Used as a part of the reservoir or pond of Gulf Island Dam, their value was $60,000. Their most profitable use was as a mill privilege and they were taxable accordingly.

On report on an agreed statement. An appeal from the refusal of the Assessors of the Town of Turner, on petition by the appellant, to abate taxes assessed against the appellant by the Town of Turner for the year of 1927. Judgment for the appellee against the appellant for $9,081.00 with costs.

The case fully appears in the opinion.

W. B. & H. N. Skelton,
Everett H. Maxcy,
Nathaniel W. Wilson, for appellant.
Clifford & Clifford, for appellee.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, JJ. PHILBROOK, A. R. J.

STURGIS, J. This appeal from the decision of the Assessors of the Town of Turner, refusing to abate the tax assessed for the year 1927 against the appellant, is reported to this court for final decision upon an Agreed Statement of Facts. The regularity of the assessment of the tax and the sufficiency of the appeal are conceded. The appellant's single claim of abatement is directed to the appraisement of its property for purposes of taxation.

As of April 1, 1926, the Power Co., appellant, owned two mill privileges extending along the westerly channel of the Andros-

coggin River in the Town of Turner. The upper privilege, known as Clark's Rips, had not been developed, but at the lower privilege, called the Babbit and Googin dam-site, there was a dam and actual power development. These privileges, as here admitted for the purposes of this case, then had a just value for purposes of taxation of $200,000, and were so assessed in the tax levy of that year.

Some time during the year following this assessment of 1926, the Power Co. completed the construction of its new hydro-electric plant on the Androscoggin River, below Turner, and in the cities of Auburn and Lewiston. The new dam, known as Gulf Island Dam, with a crest elevation not exceeding 260 feet above mean sea level, flowed back the waters of the river along the appellant's land in Turner, flowing out the Clark's Rips and Babbit and Googin privileges so that, at the date of the 1927 assessment, there was no fall of water and neither privilege, as then submerged, could be used as the site of a dam. Power in excess of all power which could have been developed at the Clark's Rips privilege or had, or could have been, developed at the Babbit and Googin dam-site was developed at the Gulf Island Dam, and in the cities of Auburn and Lewiston.

April 1, 1927, the Assessors of Turner again assessed Clark's Rips and the Babbit and Googin dam-site as mill privileges, denying the right of the appellant to a reduced valuation because of its impairment, or, as it says, the destruction of the present utility of these sites for power development.

The appellant concedes that its land and riparian rights should be assessed in Turner for their greatest value under present conditions, but contends that their value now lies in their use for storage or pondage purposes as a part of the reservoir created by Gulf Island Dam. The Town of Turner claims that the value of the capacity of these privileges for the development of water power should still be included in their valuation.

The question of the taxation of water power, as such or as an element of value incident to other property, first came before this court in *Union Water Power Co.* v. *Auburn*, 90 Me., 60. In that case the Assessors of the City of Auburn attempted to assess a tax on the water power developed by that part of a dam across the Androscoggin River, between Auburn and Lewiston, which lay within the limits of Auburn. The assessment was laid upon "dam

and water rights." The power created by the Auburn end of the dam, as well as that created on the Lewiston side of the river, was used to operate mills in Lewiston. This court there held, as it now holds, that water power is not a distinct subject of taxation, and expressed the opinion that water power is taxable only in connection with, and as incident to, the mills which it operates.

Six years later, in 1903, *Saco Water Power Co.* v. *Inhabitants of Buxton*, 98 Me., 295, came before the court. In that case there was a dam and a privilege but no mill. The power was developed but not used. Under the authority of *Union Water Power Co.* v. *Auburn*, the contention was made that, there being no mill operated by the power developed, the assessors could only include in their valuation the land through which the stream ran for what it was worth as land, independent of its appurtenant mill privilege, and the dam for what that was worth as a structure. The court held that, in so far as the land was made more valuable by the stream and fall upon it, so far these elements of increased value were to be considered in the valuation of the land. In reaching this conclusion the Court said:

> "Suppose there was no dam. Could it be successfully contended that the land was to be assessed only for its value as land for farming, or for any other use to which it might be put disconnected from the stream? Is land upon which there is a valuable unimproved water privilege, where no power is being developed, to be assessed only for the value of the land without the privilege? May it not be the chief value of the land that it had a privilege upon it? And does the fact that an unused dam has been built upon the privilege, make it any other than an unused privilege, and assessable for its value as a privilege? We think not."

In 1904, the *Union Water Power Co.* v. *Auburn* case again came up for consideration by this court. In *Penobscot Chemical Fibre Co.* v. *The Town of Bradley*, 99 Me., 263, the Fibre Co. was the owner of the entire privilege in the Penobscot River as it flows between Old Town and Bradley. By a dam there constructed, a water fall of 2,000 horse power was created, practically all of which, not running to waste, was used to operate the Fibre Company's pulp

and sawmills in Old Town. The power used at Bradley to operate a small cutting-up mill was of small amount. The assessment by the Town of Bradley, complained of, was upon a "mill privilege." The appellant, relying upon the *Union Water Power Co.* v. *Auburn* case, contended that, in as much as practically all the water power created by the dam was used in Old Town to operate the mills located there, the Bradley power privilege should be regarded as appurtenant to the Old Town mills and not included as an element of value in the assessment of the Fibre Company's Bradley property. This court then said:

> "The true rule was laid down and the distinction pointed out in *Saco Water Power Co.* v. *Buxton*, 98 Me., 295. Running water is not property, and is not taxable. So water power, as such, is not taxable. It was so decided in the Auburn case. But land upon which a mill privilege exists is taxable and the value of the land may be greatly enhanced by the fact that its topography is such that a dam may be maintained across a stream upon it and water power thereby created. The capability of the land for such use and the probability of certainty, as the case may be, of its use certainly affect its value. Such is the law of the Buxton case. The question here is a simple one. It is not, where is the water power created by the Appellant's dam used, but how much is its property in Bradley worth. How much is it worth as it stands, — not for farming merely, nor for house lots, nor for any one thing, but for any and all purposes for which it may be used? How much is it worth, taking into account that it is part of a valuable mill privilege, — one of the best on the Penobscot River, as witnesses on both sides say, — and upon which valuable water power is created? Although the power is used mostly in Old Town, and Bradley bank is just as essential to the creation of water power as that in Old Town. One is worthless without the other. If it did not own the Bradley shore, the Appellant must share the use of the water with the riparian owner on that side. It may be that the Bradley shore is not as valuable as the Old Town shore, for it may be assumed that the latter is more available as a mill site, and perhaps also for other uses.

> Nevertheless, it is not to the purpose to make a comparison of the values between the two sides. We come back to the original question, — what is the company's property in Bradley worth, taking into account all the conditions which affect its value?"

The inclusion of the value of the mill privilege as an element of value in the land, to which it was incident, was sustained.

In *Shawmut Manufacturing Co.* v. *Town of Benton*, 123 Me., 121 (1923), the rule of the Buxton case and the Bradley case was followed, and an assessment upon that part of the dam, the dam-site and its incident water privilege, situated in Benton, was sustained although the power developed was applied in Fairfield, across the river.

What is the rule for the valuation of water privileges and water power to be deduced from these decisions of this court? It is this. Water power, as such, is not an independent subject of taxation. But land upon which a mill privilege exists is taxable at its worth as land enhanced by the value of its capacity for water power development, or to use the language of *Fibre Co.* v. *Bradley*, by the value of "the capability of the land for such use." If the privilege is undeveloped or, developed, is not utilized, the capacity of the land for power development, often termed its "potential development," is nevertheless an element of value to be considered in its tax valuation. As was said in *Water Co.* v. *Buxton*, the chief value of a parcel of land may be that it has a privilege upon it, and, in so far as the land is made more valuable by the stream and fall within its limits, so far these elements are to be considered in its valuation.

Again, if, in the development of a stream, the head of water created by the dam is utilized to produce power only on one side of the river, the privilege on the other bank, furnishing a foundation for one end of the dam and a reservoir for its waters, and a contributing factor in the development of power by the dam, still retains a "capability" for power development which is an element of value in the land to which it is incident. *Fibre Co.* v. *Bradley*, supra; *Manufacturing Co.* v. *Benton*, supra.

It is a failure to distinguish the capacity of land to develop water power from water power when produced, we think, that has brought some apparent confusion into judicial expression upon

this subject. Water power may be utilized in places far remote from the site of its creation. Its use in the operation of mills at or distant from the water fall which produces it may properly increase the value of the mills receiving the power and subject them to taxation accordingly. But the land in which the stream falls still retains its appurtenant capacity for power development, an element of value distinct from water power as such, and not lost by a transfer of the power elsewhere.

In *Slatersville Finishing Co.* v. *Green et al*, 40 R. I., 410, a case in which the physical situation involved was practically identical with that in the case at bar, this distinction between the "capacity" of land for power development and power itself is recognized. That court says:

> "If land upon a stream has such topography, either natural or artificial, as to give to the land the capacity to control the current of the stream and to pour out the water of the stream from an elevation, thus creating water power, these circumstances enhance the value of that land and furnish a basis for taxation. This is true whether that capacity is employed to create water power to be used on that land or upon other land in another town or another state, and also even in case such capacity of the land is not employed at all. If water power thus created is conducted to mills situated elsewhere, and there applied, that circumstance may reasonably be regarded as increasing the value of the mills receiving such power and may be considered in the taxation of such mills; but no element of value is thereby taken from the land, where the power is created and transferred and made appurtenant to the mills where the power is used."

The same distinction is a sustaining reason for the conclusion reached in *Blackstone Manuf. Co.* v. *Blackstone*, 200 Mass., 82. In that case a power privilege in Blackstone, a town in Massachusetts, furnished power for the operation of mills just across the state line in Rhode Island. And while due consideration was given to the fact that the privilege was in one state and the mill in another the assessment upon the privilege, including as an element of its value the right to use the flow of the waters in connection

with the fall of the stream to produce power, was sustained. The Maine cases of *Power Co.* v. *Buxton* and *Fibre Co.* v. *Bradley*, interpreted to hold "that, while water power as a distinct subject for taxation could not be assessed except in connection with the property with which it was used, the land and fall and dam were properly assessable in reference to their value as a means of producing power," were cited in support of this decision.

An adherence to the same principle is found in New Hampshire. In *Manufacturing Co.* v. *Gilford*, 64 N. H., 337, 349, that court in a consideration of the taxation of a reservoir site used to supply power for mills on the stream below said:

> "It is immaterial where the property benefited by the use of the reservoir rights is situated. The rights are not less a parcel of the Gilford lands, in case their exercise is beneficial to mills in Massachusetts, than they would be if they were used and controlled for the sole benefit of mills in Gilford. It may be that the value of the mills in Massachusetts is increased by the existence of the reservoir rights, and that of the rights by reason of the existence of the mills. If so, and if each property is appraised for taxation at its full value, it does not follow that any portion of either property is included in the valuation of the other."

But the appellant says the capacity of power development of its privileges in Turner is destroyed by the back-flow of Gulf Island Dam. We can not accede to that position. The capacity of an undeveloped privilege for power development lies in the topography of the land and the character of the stream. Failure to build a dam, or the location of an unused dam upon the land, leaves an unused privilege assessable, however, to the extent the land is "made more valuable by the stream and fall." *Power Co.* v. *Buxton.* In principle, we think, it is equally an unused privilege when submerged by its owner. The capacity of the land to produce power is suspended so long as the waters of the stream are dammed from below. At the election of its owner, the land is used for storage purposes, admittedly, in the case at bar, a less profitable use than for the development of power. We do not think the land owner can thus fix the value of his taxable property. To so hold would permit

a riparian owner, having a dam below, to convert his upper privileges into less valuable storage basins for the day of assessment of taxes and reconvert them into more valuable power privileges the day following. It is not an accepted doctrine that the tax payer can fix the value of his land for the purposes of taxation by the use to which he puts it.

This conclusion accords with the "most profitable use" rule. It is conceded by the appellant that the "land is taxable according to the greatest value it possesses." This is the principle underlying the rule that, in estimating the value of land for purposes of taxation, all of its incidents should be considered and the elements of value which lead to its most profitable improvement fix the proper valuation of the land. The owner may not see fit to improve his land at all. He may put it to uses which are less profitable than others for which it is suited. But he can not thereby lessen its valuation for the purposes of taxation and deprive the assessors of taxes of the right to assess it upon a valuation based upon its highest profitable use. The common illustration of this rule is the city lot on the principal street of a large city. The owner may permit it to remain unimproved. He may use it for a purpose or in a manner which produces little or no return but its valuation is based, not upon its present use, but upon its favorable location and worth for building purposes. 26 R. C. L., 365.

This is the rule in *Slatersville Finishing Co.* v. *Green et al*, supra, where that court also said:

> "The value of land depends upon its capacity for improvement. The elements of its value may be its fertility, the minerals in its soil, its location, the configuration of its surface, and many other circumstances one or more of which may be incident to a certain tract of land. In estimating its value for the purposes of sale or of taxation, all of these incidents should be considered and the element or elements of value which lead to the most profitable form of improvement fixes the proper valuation of the land,"

and held that a privilege flowed out by a dam below is taxable at its value for use as a privilege and not as a storage basin or reservoir. See also *Blackstone Mfg. Co.* v. *Blackstone*, supra.

By the terms of the Report, the unused and undeveloped privileges owned by the appellant in Turner, before they were flowed out, had a taxable value of $200,000. Used as a part of the reservoir or pond of Gulf Island Dam, their value is $60,000. Their most profitable use is as mill privileges. They are taxable accordingly.

The tax assessed in 1927 was at the rate of forty-five mills upon the valuation made and aggregated the sum of $10,296. The valuation placed upon privileges of the appellant that year was $227,000. This valuation, by stipulation, must be reduced to $200,000 and other items aggregating $1,800 not being contested, the tax assessed by the Town of Turner upon the property of the appellant for the year 1927 abated accordingly.

And, it not appearing that the appellant has paid the taxes so assessed, judgment must be rendered for the Town of Turner in the sum of $9,081 with costs.

Judgment for the Appellee against the Central Maine Power Co., Appellant, for $9,081 *with costs.*

JANE B. MATTHEWS *vs.* WILLIAM E. MATTHEWS ET ALS.

Androscoggin. Opinion February 6, 1930.

SURETYSHIP AND GUARANTY. EQUITY.

One who furnishes collateral as an accommodation to secure a loan of another stands in the relation of surety to the one accommodated.

By the weight of authority a surety, after the debt for which he is liable has become due, without paying or being called upon to pay it, may file a bill in equity in the nature of a bill quia timet to compel the principal debtor to exonerate him from liability by its payment, provided no rights of the creditor are prejudiced thereby.

When a debtor and his surety have given security for a debt the surety has an equity to require the property of the principal to be sold first and the proceeds of the sale applied in satisfaction of the debt.

In the case at bar the decree of the presiding Justice commanding the payee to call for payment of the note and in the event of default of payment that resort be had to securities owned respectively by the makers of the note held by the payee as collateral, and finally to property belonging to the plaintiff to apply to any unpaid balance, the remainder to be returned to her, was proper and suitable to the purpose.

On appeal by defendants. A bill in equity brought by plaintiff against three defendants, in which plaintiff sought to recover from the Manufacturers National Bank certain securities pledged by her to the bank to secure an indebtedness of her husband, one of the defendants. To the decree of the sitting Justice sustaining plaintiff's bill, and granting plaintiff's prayer for relief defendants appealed. Appeal dismissed. Decree below affirmed subject to the fixing of a new time for the calling of the note in question.

The case fully appears in the opinion.

Clifford & Clifford, for plaintiff.

F. A. Morey,

H. E. Holmes, for defendants.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

DUNN, J. There are three defendants in this equity suit. The first is father-in-law to the plaintiff, the second her husband, and the third the national bank, which is payee and holder of the joint and several negotiable promissory note of the other defendants.

Appeal is by the individual defendants. The decree appealed from commanded the payee to call for payment of the note; it further provided that in the event of default of payment, resort be had to securities owned, respectively, by the makers of the note, held by the payee as collaterals; property belonging to the plaintiff to apply to any unpaid balance.

The facts admitted or undisputed, and those found below from ample evidence, may be stated briefly in the following way. In 1922, to enable plaintiff's husband to engage in the retail grocery business, five thousand dollars were requisite; the bank would lend that amount of money on security.

The three Matthewses, thus to speak collectively of the plaintiff and the individual defendants, participated in the arrangement

that plaintiff give security for twenty-five hundred dollars, and the father-in-law security for a like amount.

Plaintiff personally delivered bonds, together with an order on her savings account, to the bank teller, but did not define any instructions. Later, one of her bonds having been called for payment, plaintiff gave the bank, in substitution, an additional savings order. Certain stock certificates, which the father-in-law had at his home, he there endorsed in blank. The certificates were taken to the bank.

In the findings and decree below is detail of all the securities.

Neither plaintiff nor her father-in-law was present when the loan was made. Neither signed the demand notes, each for twenty-five hundred dollars, one dated August 16, 1922, the other August 17, 1922, executed by the husband to evidence the loan. "Each was to back me for twenty-five hundred dollars," he testified, "but I said nothing to the bank, taking it for granted as the notes were made out." Neither the plaintiff nor her father-in-law knew which note his securities had been pledged behind.

The notes remained in the bank until June 1, 1928. At this time, whatever may have been the fact about it before, the payee was cognizant of the ownership of the securities.

At the request of the payee the husband's notes were cancelled, and the joint and several note of the husband and father-in-law, payable on demand to the order of the bank for five thousand dollars, antedated in reference to interest to March 31, 1928, given and accepted in place of the cancelled notes; the father-in-law pledged his own securities, and the makers of the note purported to pledge the plaintiff's securities for payment of the renewal note. A Liberty Bond, the property of the plaintiff's husband, also was pledged.

The transaction of the renewal note was without the knowledge or consent of the plaintiff.

Several months afterward the husband, who since the original loan had been in business, mortgaged his stock in trade and trade fixtures and assigned his bills and accounts receivable to his father; the consideration being without relation to the loan at the bank. In the interim, plaintiff had endorsed a note for her husband. This

note, the face for four hundred and twenty-five dollars, is outstanding and unpaid. The husband is insolvent.

In the fifth paragraph of her bill, plaintiff alleges the promise by the individual defendants of reimbursement for any loss sustained in consequence of depositing her securities. On her husband's part such a promise would be implied. The conversations to which the plaintiff testifies, mere opinions expressive of the prospect for success in the store project, did not create any express promise.

Plaintiff prays for order and direction that payee call the renewal loan, and, if the makers of the note fail to pay it, then, agreeably to the power of sale which the note contains, that the securities of the makers be sold, the proceeds to apply towards payment of the note, plaintiff's own securities to defray any balance, and for general relief.

The payee, answering that the note should be paid, asks that the court decide who should make payment, and decide, too, the question of priority of the securities. Answer by the individual defendants sets up repudiation by the plaintiff of her undertaking respecting the loan, and prays dismissal of the bill.

One who is surety may waive the rights of a surety and contract as a principal.

Plaintiff furnished collateral to secure one-half of the loan to her husband. Her father-in-law's collateral was security for the other half. Cosuretyship was the result. Why the bank requested the renewal note is immaterial. The father-in-law was asked to sign that note, and he signed it. The cancellation of the original notes by the renewal note, and the extension thereby effected constituted a sufficient consideration to bind the cosurety as maker.

On the renewal note, the liability of the father-in-law is primary and absolute, not collateral and contingent. Besides, since the renewal, there has not been between the plaintiff and her father-in-law the mutuality of contractual relationship which makes for cosuretyship.

The father-in-law assumed and promised to pay the total loan, and thereupon the original notes were cancelled.

Although the plaintiff had not been consulted concerning the re-

newal note, she later lent at least silent sanction to what had been done.

She does not seek the complete exoneration of her securities, but of the excess beyond what may be necessary to discharge the renewal note. As has been seen, she is not cosurety with her father-in-law; she never had been cosurety with her husband; but she recognizes that her securities are collateral for the payment of the note.

One who furnishes collateral as an accommodation to secure a loan of another stands in the relation of surety to the one accommodating. *Eberhart* v. *Eyre-Shoemaker, Inc.* (Ind.), 134 N. E., 227. The great weight of authority supports the proposition that a surety, after the debt for which he is liable has become due, without paying or being called on to pay it, may file a bill in equity in the nature of a bill quia timet to compel the principal debtor to exonerate him from liability by its payment, provided no rights of the creditor are prejudiced thereby. 21 R. C. L., 1110; *Pavarini* v. *Title Guaranty, etc., Co.*, 36 App. Cas. (D. C.), 348, Ann. Cas., 1912C, 367, and note; *Bishop* v. *Day*, 13 Vt., 81; *Dobie* v. *Fidelity, etc., Co.* (Wis.), 70, N. W., 482; *Fidelity, etc., Co.* v. *Buckley*, 75 N. H., 506; *West Huntsville, etc., Co.* v. *Alter* (Ala.), 51 So., 338; 32 Cyc., 248; Storey, Eq. Jur., Sec. 849; Pom. Eq. Jur., Sec. 1417.

Where a debtor and his surety have given security for the debt, the surety has an equity to require the property of the principal to be sold first, and the proceeds of the sale applied in satisfaction of the debt. *Robbins-Sanford Mercantile Company* v. *Johnson* (Ark.), 266 S. W., 260; 37 A. L. R., 1258, and note.

A person who, without assuming any personal liability, has given security for another's debt, may maintain an action, the debt being due and unpaid, to compel the principal debtor to exonerate his property. 5 Pom. Eq. Jur., Sec. 2342, citing *Whitman* v. *Winchester*, 15 Gray, 453; *Bearse* v. *Lebowich*, 212 Mass., 344.

A demand note is due instantly. *Ware* v. *Hewey*, 57 Me., 391; *Sanford* v. *Lancaster*, 81 Me., 434. Collection of the renewal note will not prejudice this creditor; so says the creditor itself. The payee holds as security collaterals owned by the makers of the note. It holds still other collateral, that of this plaintiff. She, it is to be borne in mind, is not party to the note but surety for its

payment. The liability of a surety is secondary to the primary liability of the principal.

If the makers of the renewal note, or either of them, default payment of that note, let the payee first resort to the securities owned by the maker. If payment of the note shall still be undischarged, resort may be had to that collateral which is the property of the plaintiff, beginning with the savings orders. Any of the plaintiff's property, not required for payment of any balance remaining due on the note, shall be returned to her.

The decree of the single justice, Mr. Justice Morrill, was eminently suitable to purpose, and, like the logic and solidity of the reasoning of his opinion, appealing to common sense.

The appeal is dismissed.

The time which the decree fixed for calling the note is expired. A new time must be fixed. This may be done below. In other respects, the decree below is affirmed.

So ordered.

STATE OF MAINE *vs.* CHARLES K. DONNELL & ESTELLA EDWARDS.

Androscoggin. Opinion February 6, 1930.

CRIMINAL LAW. PHYSICIANS AND SURGEONS. EVIDENCE.

Statements to his physician, of one's bodily ailments, made for the purpose of enabling the physician to give proper medical advice and treatment, by forming an opinion of the cause of such ailments, may be testified to by the physician; not as evidence of the actual cause of the ailments, but in connection with testimony of the opinion formed partly upon such statements. Mere narration, however, by a patient to his physician of the cause of ailments, may not be told in evidence.

In the case at bar a medical witness for the prosecution in answer to a question by the Attorney for the State, whether he had any further talk with deceased about any other (than hospital) arrangements, was permitted against objection to state: "She made the remark —" "She supposed if she went back to the man who performed the operation that he would take care of her." Neither respondent, so far as the record showed, was present.

It was competent for this witness, after testifying as to the condition of his patient, and her complaints and symptoms, to give his opinion that these were such as might have been expected from incomplete abortion. Beyond this what the patient may have said to the doctor was mere hearsay.

It was not permissible for the State to claim that, because a part of the hearsay story had been recited, the rest of the conversation must be admitted. It is possible that the admitted evidence may have been injurious to the rights of both respondents and both are therefore entitled to a new trial.

On exceptions. Both respondents were tried under two counts, indictment No. 1410, charging them with manslaughter and one count charging them with abortion. Mrs. Edwards was likewise tried under two of six counts, indictment No. 1413, charging her with being an accessory after the fact, to the manslaughter charged against her and Dr. Donnell as principals in the other indictment. Dr. Donnell was not tried under any of the counts in this indictment. Both respondents were found guilty under indictment No. 1410. To the admission of certain evidence offered by the State respondents seasonably excepted. As to indictment No. 1410 exceptions sustained.

The case fully appears in the opinion.

Clement F. Robinson, Attorney General,
Fred H. Lancaster, County Attorney, for State.
Louis J. Brann,
Frank T. Powers,
John D. Clifford, Jr., for respondents.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

DUNN, J. The record concerns two indictments.

In one, Charles K. Donnell and Estella Edwards are jointly principals. The indictment has three counts. The first count charges, in statutory form, the felonious homicide of Thelma Smith; the degree of the crime, manslaughter. The second count is for the attempt, by instrumentation, in the absence of necessity for preserving Thelma Smith's life, to accomplish the destruction of her unborn child. Such an offense is a misdemeanor. R. S., Chap. 126,

Sec. 9, as amended. The third count pleads manslaughter at common law. The respondents were tried together.

Against the respondent Donnell, the other, or second, indictment charges the commission of the same crimes as the first. In each of three counts, Estella Edwards, she whom the first indictment names as principal, and one Jessie Edwards, were accused as accessories after the fact. The government had leave to nolle, and nolled, the count charging them as accomplices to the unsuccessful abortion. Of the three respondents in this indictment, Estella Edwards was the only one put upon trial. She was tried on the two indictments at the same time.

On the first indictment, the verdict was the general one of guilty. On the second indictment, there was neither verdict nor report of inability to agree upon a verdict. The jury was discharged.

There was evidence to warrant a finding by the jury that the death of Thelma Smith had occurred on March 22, 1929; that the place of her death was Estella Edwards' house in Lewiston, where both respondents then were; and that the proximate cause of death was hemorrhage from instrumental wounding of her vagina and womb, and the emptying of her uterus at some stage of pregnancy.

Of the various exceptions, one makes the point that the introduction, against exception, on the redirect examination of a witness for the government, of mere hearsay, prejudicially affected the respondents.

Thelma Smith lived in Portland. Theodore M. Stevens had been her physician.

At the trial, Dr. Stevens witnessed that, on March 19, 1929, at Thelma Smith's home, his diagnosis of her condition was incomplete abortion; the foetus had not been passed. He advised hospital treatment. His advice was not followed. The witness, on cross-examination, testified, without objection, that his patient, in giving the history of her condition, stated its cause to have been an operation in Bangor, by a Bangor doctor.

Other witnesses gave testimony which afforded an inference that the operation had been performed by the respondent, Donnell. Donnell has a license to practice medicine.

One witness said, in evidence, that she had accompanied Thelma

Smith from Portland to Lewiston, and back, on March 15. In Lewiston, on the authority of the witness, the Smith woman, on leaving the automobile, walked towards Donnell's house. Within twenty minutes, she was in the motor-car again.

Another witness testified that, on March 20 (the day following the visit of Dr. Stevens) Thelma Smith and her husband were passengers in the taxicab of the witness to the near vicinity of the Donnell house.

Then the government recalled Dr. Stevens.

The county attorney inquired whether there had been "any further talk about any other (than hospital) arrangement." When the witness had replied, "She made the remark —" an objection interrupted him. The objection was overruled. The trial court ordered the witness to reply. "Go ahead and answer," spoke the county attorney. Said the witness, "She supposed if she went back to the man who performed the operation that he would take care of her." Neither respondent, so far as the record shows, was present.

Specific exception, taken both to this testimony and the question which had called for it, on the ground of hearsay, saved the point.

Rehearsal of further evidence is not essential.

Statements to his physician, of one's bodily ailments, made for the purpose of enabling the physician to give proper medical advice and treatment, by forming an opinion of the cause of such ailments, may be testified to by the physician; not as evidence of the actual cause of the ailments, but in connection with testimony of the opinion formed partly upon such statements. *Com.* v. *Sinclair*, 195 Mass., 100; *Com.* v. *Smith*, 213 Mass., 563. Mere narration, by a patient to his physician, of the cause of ailments, may not be told in evidence. *Ross' Case*, 124 Me., 107.

It was competent for Dr. Stevens, after testifying to the condition of his patient, and her complaints and symptoms, to give his opinion that these were such as might have been expected from incomplete abortion. Beyond this, what the patient may have said to the doctor was mere hearsay.

The law seeks the truth from first rather than second-hand evidence. Hearsay, pure hearsay, therefore, is inadmissible. This is the general rule.

The general rule has its exceptions. Dying declarations of a

person, tending to show the cause and manner of his death, not made in the presence and hearing of the person accused of his murder, though strictly hearsay, are, a proper foundation being laid, admissible in evidence as a substitute for sworn testimony. 10 Am. and Eng. Enc. Law, 373.

Declarations called out by the circumstances of a transaction, and related to some relevant act, constitute a verbal part of the act itself. *Deer Isle* v. *Winterport*, 87 Me., 37; *Holyoke* v. *Holyoke*, 110 Me., 469.

Where a conspiracy to do an unlawful act is shown, the declarations of a conspirator, since deceased, during, and in furtherance of, the criminal enterprise, have been held admissible against his coconspirators, though the declarations were not made in their hearing. 1 C. J., 325.

Unless the evidence objected to come within some exception to the general rule, it must rate as hearsay, and nothing else. It is not a dying declaration, nor a verbal act, nor shown to be a statement by a conspirator.

There is a rule of practice that, on the introduction without objection of incompetent evidence creating prejudicial and harmful inference against the other side, such other side may, within the discretion of the presiding judge, introduce evidence in direct and strict contradiction. *State* v. *Witham*, 72 Me., 531.

If mere hearsay, admitted without objection, has been injuriously prejudicial to the opposing party, he may meet the situation by legal evidence; not by mere hearsay. To illustrate: the government could have introduced evidence, had it been available, that Thelma Smith did not make the statement about the operation; or that she had not been in Bangor.

It was not permissible for the government to claim that, because a part of the hearsay story had been recited, the rest of the same conversation must be admitted. No more was the rest admissible than it would have been originally in chief. *Wagner* v. *People*, 30 Mich., 384; *Karnes* v. *State* (Nebr.), 196 N. W., 676; *McCracken* v. *West*, 17 Ohio, 16.

"It may be shown by the most irrefragable proof that the defendant is guilty of the offense charged against him; but this does not justify the violation of well settled rules of evidence in order

to secure his conviction." *Schaser* v. *The State*, 36 Wis., 429.

The more important a fact to be proved is, the more important it is that it be proved by proper evidence. *Com.* v. *Felch*, 132 Mass., 22.

It is manifest, as to the respondent Donnell, that the hearsay was inadmissible; and it may have been injurious to his rights. *Sturgis* v. *Robbins*, 62 Me., 289.

In the case of the other respondent, prejudice is not, at first sight, so apparent. The evidence against the two is, however, interwoven. Double negatives seem appropriate to purpose; it is not to be said, trial of the respondents having been joint, that the hearsay may not have done this respondent prejudicial harm.

The exception is sustained.

The consequent is a new trial for both respondents.

It, then, is unnecessary to discuss the points which the other exceptions make. This applies only to the case the trial docket number of which is 1410.

In trial docket case No. 1413, it seems quite sufficient to say of the exceptions, that the respondent is not aggrieved. The exceptions are overruled.

The appeals are dismissed, but without the affirmance of judgment.

Let there be mandates accordingly.

So ordered.

FRED H. WATERHOUSE *vs.* JOSEPH P. CHOUINARD.

Androscoggin. Opinion February 14, 1930.

BILLS AND NOTES. NEGOTIABLE INSTRUMENTS ACT. WORDS AND PHRASES.

A note otherwise in proper form but containing the words, "with the privilege of discharging this note by payment of principal less a discount of five per centum within thirty days from the date hereof," does not contain a promise to pay a "sum certain" as provided in the Uniform Negotiable Instruments Act of Maine and such a note is therefore not a negotiable instrument.

There should be such a degree of certainty that the exact amount to become due and payable at any future date should be clearly ascertainable at the date of the note, uninfluenced by any conditions not certain of fulfillment.

In the case at bar the instrument sued on not being for a sum certain and therefore not a negotiable note, was open to all the defenses available as between the original parties and it was permissible for the defendant to introduce evidence to prove failure of consideration. The direction of a verdict for the plaintiff was reversible error.

On exceptions by defendant. An action of assumpsit brought by plaintiff to recover on a promissory note signed by the defendant payable to the order of C. E. Currier and endorsed by said Currier to the plaintiff. Defendant contending that the note was non-negotiable introduced evidence to prove a failure of consideration. A verdict for the plaintiff was directed by the presiding Judge, to which ruling the defendant seasonably excepted. Exceptions sustained.

The case fully appears in the opinion.

Harold L. Redding, for plaintiff.

Herbert E. Holmes, for defendant.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

FARRINGTON, J. The case comes up on exceptions to a directed verdict for the plaintiff.

This was a suit on a promissory note for $400.00 given by the defendant, dated October 31, 1928, and payable to the order of C. E. Currier and by Currier, the next day, on November 1, 1928, endorsed and sold to F. H. Waterhouse, the plaintiff in this action, for the sum of $342.00.

The form of the note, together with the form of an agreement to which, at the time of the sale to the plaintiff, it was attached, was as follows:

"C. E. Currier 39 Dennison Street Auburn, Maine.

COPPUS UNDER GRATE FORCED DRAFT BLOWER

Note and Agreement

Please deliver and install for me at 18 Blake St. City Lewiston,

County ——— State Maine, date 10/31, 1928, one Model Blower for $400.00 for which payment is made in cash and / or note below.

This contract shall be binding when accepted in writing on the bottom hereof or when cash or note is given and received in payment for the Blower and Thermostat before or after delivery.

The note may be detached and / or discounted at your pleasure.

Date paid		Amount
	Cash with order	
Six	months after date	$200.00
	months after date	
	months after date	
Twelve	months after date	200.00

Guarantee

The 'Coppus' Blower' is guaranteed to burn No. 1 Buckwheat Coal and regulate the pressure on steam plant and water temperature on hot water plant.

The life of this guaranty is one year, and if any service is necessary during this period, it will be rendered without additional charge.

This contract represents the only agreement existing between the purchaser and the seller.

Accepted
C. E. Currier
Seller

Joseph P. Chouinard
By — If a Firm or Corporation, sign name of such firm or corporation by agent.
Business address .....

$400.00 Lewiston, Maine, Oct. 31, 1928

For value received, I promise to pay to the order of C. E. Currier, Four Hundred Dollars, payable Two Hundred Dollars in six months after date and Two Hundred dollars in twelve months after date, with interest at six per cent per annum on payments overdue, with the privilege of discharging this note by payment of principal less a discount of five per centum within thirty days from the date hereof. The en-

tire principal of this note shall become due and payable on failure to pay any installment when due, whether demanded or not.

Joseph P. Chouinard."

At the trial the defendant, under objection, was permitted to state that he had never received the Coppus Blower and on that fact he relied, and now relies, for his defense, claiming that the instrument sued was not a negotiable note and that it was consequently open to all defenses available as between the original parties, including the defense of failure of consideration.

The first question, therefore, to be determined is whether the note in the case is a negotiable note under the Uniform Negotiable Instruments Act, Chapter 257, Laws of Maine, 1917.

Section 1 of the Act is as follows: "An instrument to be negotiable must conform to the following requirements:

(1.) It must be in writing and signed by the maker or drawer.

(2.) Must contain an unconditional promise or order to pay a sum certain in money;

(3.) Must be payable on demand, or at a fixed or determinable future time;

(4.) Must be payable to order or to bearer; and

(5.) Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty."

That the instrument in this case is in writing and signed by the maker is not controverted.

Does it contain "an unconditional promise or order to pay a *sum certain* in money"?

Although the point is not raised nor discussed by counsel, it becomes pertinent, as bearing on the question of whether the note was given for "a sum certain," to consider the effect on the promise to pay of the provision that it was "with the privilege of discharging this note by payment of principal less a discount of five per centum within thirty days from the date hereof."

As to whether or not such a provision in a note renders it non-negotiable the cases are in conflict. The Uniform Negotiable Instruments Act is silent as to the effect of such a provision.

In *Lamb* v. *Storey* (Mich.), 8 N. W., 87, it was held that an in-

strument payable on or before two years with interest at ten per cent was rendered non-negotiable by a provision that, if paid within one year, it would not draw interest. The decision is based on the element of uncertainty as to the amount promised.

The case of *National Bank* v. *Feeny* (S. D.), 80 N. W., 186, held that a stipulation in a note for a discount of twelve per cent, if it were paid before maturity, rendered it non-negotiable. In this case is quoted with approval the language of the Court in the case of *Merrill* v. *Hurley* (S. D.), 62 N. W., 958, that "This Court has placed itself in line with a class of authorities which require such a degree of certainty that the exact amount to become due and payable at any future date is clearly ascertainable at the date of the note, uninfluenced by any conditions not certain of fulfillment, and the rule thus established must control cases subsequently arising, where the facts are substantially the same."

Then the Court goes on to say, "Applying the test thus established to the notes in this case, the conclusion can not be avoided that they are non-negotiable."

In a later case of *Commercial Credit Co.* v. *Nissen*, 46 S. D., 303, 207 N. W., 61, were involved notes with a provision "with interest at 7% per annum payable annually. Principal or interest if not paid when due shall bear interest at 7% per annum payable annually." There was also a provision, "no interest if paid when due." It was held that the notes were not thereby rendered non-negotiable. The case involved a matter of interest and not a discount of the principal sum, as did the case which it seems to overrule. In any event we prefer the reasoning of the earlier case as applicable to the note in the case before this court.

In *Farmers' Loan & T. Co.* v. *McCoy et als*, 32 Okl., 277, 122 Pac., 125, 126, 40 L. R. A. (N. S.), 177, a provision in a note payable in four installments that "a discount of five per cent. will be allowed if paid within fifteen days from date" was held to render the note non-negotiable.

In *First National Bank of Iowa City, Iowa* v. *Watson* (Okl.), 155 Pac., 1152, a note payable in six installments contained the following provision: "A discount of six per cent. will be allowed if paid in full within fifteen days from date." In this case the Court said, "He (referring to the maker of the note) could if he saw fit, within

the prescribed period, discharge the debt at ninety-four per cent., or thereafter pay one hundred per cent. on the dollar. Under such condition the sum payable was at the time of the execution of the instrument, clearly indefinite and uncertain.

"Unless the rule of the law merchant which obtained in this jurisdiction with respect to the certainty required in the sum payable in a negotiable instrument has been changed by the Statute supra (referring to Negotiable Instruments Law), such rule still governs and the note in question is non-negotiable.

"In our opinion, it is obvious that the statutory provisions above quoted do not purport to prescribe a rule in this regard different from that recognized by the courts of this state before their enactment, in a case where a promissory note provided for the discount of a principal sum otherwise payable, if, at the option of the maker, payment is made before maturity."

In *Fralick* v. *Norton* (Mich.), 55 Am. Dec., 56, a note for $60.00, dated January 11, 1841, payable in two years, with a provision "if fifty dollars be paid on the first day of January, 1843, it shall cancel this note," was held to be non-negotiable.

In *Capital City State Bank* v. *Swift et al* (Okl.), 290 Fed., 505, a trade acceptance containing the provision "*if paid when due* a discount of $156.73, may be deducted reducing the face of this acceptance to $3142.92" was held negotiable. Phillips, District Judge, after stating that under the decided weight of authority in this country the provision contained in the trade acceptance in the above case did not render it non-negotiable, adds, "In making the foregoing statement, *I exclude those cases containing provisions which affect the instrument prior to its maturity*, and therefore during the time it is transferable as a negotiable instrument."

It will be noted that the acceptance in the last case provided for discount if paid when due, and the Court in the above statement clearly had in mind the necessity for certainty while it was a circulating medium before maturity, as it expressly excluded cases with provisions which would affect an instrument before it was due.

Cases holding that a provision for a discount before or at maturity does not render a note non-negotiable are, *Farmers' Loan & Trust Co.* v. *Planck* (Neb.), 152 N. W., 390; *Loring* v. *Anderson* (Minn.), 103 N. W., 722, citing 2 Ohio Cir. Ct., 96; *Harrison* v.

Hunter (Tex.), 168 S. W., 1036; also a case relating to rate of interest discount but not principal discount, *Union National Bank* v. *Mayfield* (Okl.), 174 Pac., 1034, affirmed in *Jackson* v. *Fennimore*, 230 Pac., 689; *First National Bank* v. *Rooney*, 11 Dominion L. R., 358, 24 West L. R., 163; *Stevens* v. *Baldy*, 67 Pa. Super. Ct., 145.

In the two lines of case cited there is a slight preponderance numerically in favor of those holding such an instrument negotiable, but this court is unable to escape the conclusion that the maker of the note in the case under consideration in promising to pay $400.00 one year after date in six months' installments of $200.00 each, "with the privilege of discharging this note by payment of principal *less* a discount of five per centum within thirty days from the date hereof," did not promise to pay a "sum certain," and we so find. There should be such a degree of certainty that the exact amount to become due and payable at any future date should be clearly ascertainable *at the date of the note*, uninfluenced by any conditions not certain of fulfillment. We may apply to this case the analogy of the statement by the Court in *Farmers' Loan & T. Co.* v. *McCoy*, supra, "he could if he saw fit, within the prescribed period, discharge the debt at 94 per cent, or thereafter pay 100 per cent on the dollar. Under such conditions the sum payable *was at the time of the execution of the instrument, clearly indefinite and uncertain.*"

The Uniform Negotiable Instruments Act is the product of careful and deliberate thought. If it had been the intention that a note like the one in the instant case should be regarded as containing a promise to pay "a sum certain," a provision to that effect could have been included in the section defining what constitutes "a sum certain," as has been done, for example, in the provision for costs of collections or attorneys' fees, with reference to which there was a conflict of decisions before the Negotiable Instruments Law was generally adopted.

Assume a note made payable in one year after date with a discount of 15% if paid within thirty days from date, and, if not paid within the thirty days, with the privilege of paying in full within sixty days with a discount of 10%, and, if not then paid, with a 5% discount if paid in full within ninety days. The element of un-

certainty is brought out and emphasized more clearly as the differing sums contained in such a promise are made manifest.

Basing the decision on our finding that the note in the case before us does not contain a promise to pay "a sum certain," we therefore hold that the note is non-negotiable, and that it was exceptionable error to have directed a verdict for the plaintiff.

In view of this finding, it becomes unnecessary to consider any other phase of the case.

Exceptions sustained.

FRANK E. SPAULDING

vs.

YORK COUNTY MUTUAL FIRE INSURANCE COMPANY.

Opinion. February 21, 1930.

INSURANCE. PRINCIPAL AND AGENT. WAIVER. ESTOPPEL. EVIDENCE. R. S. 1916, CHAP. 53, SEC. 119.

The issuing of a fire insurance policy on an application which without fraud contains no answer to certain questions waives the right to require answers thereto.

If a question in the application is not answered at all, there is no breach of warranty, provided the insurer accepts the application without objection, since if not satisfied the company should demand fuller information.

An insurer, by receiving an application for insurance with questions therein contained partially answered or wholly unanswered and issuing a policy thereon, waives imperfections in the answers and renders the omission to answer more fully immaterial.

By consenting to make a policy upon an application which fails to give exact information, the company waives claims to further answers.

When the application is filled out by the agent from his own knowledge, no information being sought from the insured, who signs the application in blank or without reading it relying on the agent's good faith and assumption of knowledge, the false statements or failure to make definite statements are the fault of the company through its agent and the insured can not be called upon to bear the consequences.

"Omissions and misrepresentations known to the agent shall be regarded as known by the company and waived by it as if noted in the policy." Sec. 119, *Chap.* 53, *R. S.* 1916.

The purpose of the statute is that those seeking insurance and those afterwards holding policies may as safely deal with the agents with whom alone they ordinarily transact their business as if they were dealing with the company itself.

Wherever the courts have held facts to constitute an estoppel which precluded an insurance company from taking advantage of alleged false statements, it has been held that parol evidence is admissible to show what the facts were.

The purpose of such evidence is not to vary or contradict the contract of the parties, but to prevent the party who had framed it from relying on incorrect recitals to defeat it when he himself had drafted these recitals and was morally responsible for their truthfulness.

In the case at bar, the statement in the policy that there was no other insurance on the property was a misrepresentation which would have avoided the policy if it had been made by plaintiff. It was not made by him but by the agent who by virtue of the statute is the company. The company, having made the statement on its own responsibility, is estopped from denying the truth thereof, and having issued its policy on the strength of its own misrepresentation, is bound by the contract just as conclusively as though it had given its consent in writing to the carrying of additional insurance.

On exceptions and general motion for new trial by defendant. An action of assumpsit on an account annexed to recover for loss by fire under an insurance policy of $2,000, issued by defendant company on plaintiff's property. To the refusal of the presiding Justice to allow the defendant to file a demurrer to the plaintiff's counter brief statement and to the admission of certain evidence offered by plaintiff, the defendant seasonably excepted, and after the jury had found a verdict for the plaintiff for $1,469.22 filed a general motion for new trial.

Motion and exceptions overruled.

The case fully appears in the opinion.

Albert E. Verrill, for plaintiff.

Clifford E. McGlauflin, for defendant.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

PATTANGALL, J. On exceptions and motion. Assumpsit to recover damage by fire under insurance policy. Plea general issue

with brief statement setting up as special matter of defense that under the terms of the policy, the policy should be void "if the insured now has or shall hereafter make any other insurance on the said property without the assent in writing or in print of the company." Verdict for plaintiff.

It is admitted that at the time the policy in controversy was issued, and at the time the insured property was totally destroyed by fire, the plaintiff had insurance on the same, additional to that claimed in this suit, and that the defendant had not assented in writing or in print to the carrying of such insurance and did not know of its existence.

The property which was burned was purchased by plaintiff in 1922, at which time it was insured by defendant for $2,000. A fair inference from the evidence is that there was no other insurance on the property at that time. The policy then in existence expired in 1924, was renewed for a term of three years and again renewed for three years on July 19, 1927. The fire occurred September 6, 1928.

Shortly before the last renewal, plaintiff placed additional insurance aggregating $2,000, the amount being divided between two companies and negotiated through agencies having no connection with that through which this policy was purchased.

Just prior to July 19, 1927, plaintiff received notice from J. P. Hutchinson & Co., defendant's agent, that the policy then existing was about to expire, and went to the agent's office for the purpose of renewing same. Application in writing was necessary and having no blank applications on hand, the agent agreed to procure one and mail same to plaintiff, which was done. The application was enclosed in a letter:

"July 12, 1927

Frank E. Spaulding

Dear Sir: Please sign the enclosed application for renewing the fire insurance on your buildings which will expire July 19th. Return it to us.

Sign twice where marked x.

Yours truly,

J. P. Hutchinson & Co."

The enclosure was a printed form which contained approximately one thousand words and included twenty-four questions to be answered by the applicant, one of which was "Is there other insurance on this property?" and another, "If other insurance, give companies, items and amounts."

None of the questions was answered by plaintiff. Apparently the agent did not expect it and plaintiff so understood. He followed literally the instructions contained in the letter, signed where indicated and returned the application to agent who filled in answers to eleven of the questions, leaving thirteen unanswered, among which were the two above quoted.

A policy was issued but was not delivered to plaintiff. In accordance with his instructions, it was forwarded to Federal Land Bank, his mortgagee.

The application was made a part of the policy by reference. In the policy, the words "No other insurance" appear. These words were necessarily written in by an agent of defendant, plaintiff never having seen the document.

It is not claimed that plaintiff purposely, wilfully or fraudulently withheld from defendant information concerning his insurance in other companies nor is there any evidence upon which such a claim could be based or such a conclusion reached. Neither actual misrepresentation nor fraudulent concealment is charged. Defense rests squarely and confidently on the fact that the contract contained the explicit statement that "This policy shall be void . . . if the insured now has or shall hereafter make any other insurance on the property in question without the assent in writing or in print of the company."

In addition to this principal defense upon which defendant bases his general motion for a new trial, certain exceptions, seven in number, are relied upon. The first relates to the refusal of the presiding Justice to permit defendant to file a demurrer to the counter brief statement filed by plaintiff. The record shows that after plaintiff's counsel had begun his opening statement to the jury, it was found that defendant's pleadings had not been filed. Defendant was then given time to prepare and file same and plaintiff after joining added a counter brief statement, to which defendant desired to demur. The presiding Justice declined to allow further delay in the

proceedings for that purpose, to which ruling defendant excepted.

The counter brief statement set out certain matters which defendant deemed immaterial and inadmissible and which might, very properly, under ordinary circumstances, have been brought before the court on demurrer. Demurrer will lie to a counter brief statement. But defendant was in no way aggrieved by the ruling of which it complains. Its remaining exceptions, relating to the admission of testimony in support of allegations contained in the counter brief statement, raise exactly the same issues which would have been raised by its demurrer.

The second, third, fifth, sixth and seventh exceptions are to the admission of evidence relating to the negotiations between plaintiff and defendant's agent prior to the renewal of the policy, involving the procurement of the application, its signing and filling out.

It is argued that these matters were immaterial and that the evidence violated the parol evidence rule. The questions involved were before this court in *Marston* v. *Insurance Co.*, 89 Me., 266, and decided contrary to the view argued by defendant. We have no hesitation in affirming that carefully considered and well reasoned decision.

The fourth exception is to the admission of the application for insurance. Defendant's brief states that "it is no part of the contract." But the record contradicts the assertion. As has already been noted, the application is incorporated in the policy by direct reference and specifically made a part thereof. It was not only admissible but plaintiff was obliged to offer it as part of his *prima facie* case. Defendant takes nothing by this exception.

The case, therefore, is reduced to the simple proposition whether or not, on the facts submitted, under appropriate instructions as to the law (for no exceptions were taken to the charge of the presiding Justice) a jury was justified in finding for the plaintiff.

Defendant issued the policy, although the application was silent as to the existence or non-existence of additional insurance. Under the circumstances, defendant has no complaint because of plaintiff's failure to answer the questions in the application which would have revealed the true condition of affairs. By accepting and acting upon the application as it stood, defendant waived its right to have the questions answered.

"The issuing of a policy on an application which without fraud contains no answer to certain questions is a waiver to those questions." 1 May Ins., 4th Ed., Sec. 166.

"An insurer, by receiving an application for life insurance with questions therein contained partially answered and issuing a policy thereon, thereby waives the imperfections in the answers and renders the omission to answer more fully immaterial," *Marston* v. *Kennebec Mutual Life Insurance Co.*, 89 Me., 266, and *a fortiori* the same is true where the insurer accepts an application containing questions unanswered. *Carson* v. *Jersey City Fire Insurance Co.* (N. J. L.), 39 Am. Rep., 584; *Dayton Insurance Company* v. *Kelley* (Ohio St.), 15 Am. Rep., 612.

"If a question in the application is not answered at all or if the answer is not false in any respect but upon its face is only incomplete, there is no breach of warranty, provided the insurer accepts the application without objection, since if not satisfied the company should demand fuller information." Richards Ins. Law, 3rd Ed., Sec. 113.

"The company did not elect to require an answer to the question. On the contrary, it issued the policy with that evasion appearing in the medical examination. If the answer was good enough when the company desired to collect premiums from the applicant, it ought to be good enough when the company is called upon to pay." *Peterson* v. *Manhattan Life Insurance Company* (Ill.), 91 N. E., 471; *Phoenix Insurance Company* v. *Raddin*, 120 U. S., 183.

"If the insurers desired more exact information, other questions should have been put accordingly. The fact that one question was unanswered is immaterial. In fact, many questions were not answered. The company, by consenting to make the policy upon the application as it was, waived all claims to further answers." *Hall* v. *People's Mutual Fire Insurance Co.*, 6 Gray (Mass.), 190.

"When the application is filled out by the agent from his own knowledge, no information being sought from the insured who signs the application in blank or without reading it, relying on the agent's good faith and assumption of knowledge, the false statements are the fault of the company through its agent and the insured cannot be called upon to bear the consequences." Cooley Briefs on Insurance Law, Vol. 3, Page 2558.

"The insured is not chargeable with such negligence as will render him liable for false answers inserted by the agent merely because he signed the application in blank and trusted to the agent to fill it out or because he signed an application filled out by the agent without reading it." *Ibid.*, Vol. 3, Page 2572.

The act of the agent who undertook to fill out the application and who omitted to answer the questions as to other insurance was the act of defendant and by receiving the application in this incomplete form and issuing its policy based thereon, defendant waived its right to require plaintiff to furnish the information.

The act of the agent in inserting in the policy the words "No other insurance" was the act of defendant for which plaintiff was in no wise responsible.

"Omissions and misrepresentations known to the agent shall be regarded as known by the company and waived by it as if noted in the policy." Sec. 119, Chap. 53, R. S. (1916.)

"The case discloses that the plaintiff placed full reliance on the agent and did just what he directed and the agent did the rest. If there was mistake or misrepresentation, it is not shown to have been the act of the plaintiff or that the same was specially authorized or consented to by her. The act of the agent was the act of the defendant." *Maxwell* v. *York Mutual Fire Ins. Co.*, 114 Me., 176.

"The simple purpose of the statute is that those seeking insurance and those afterwards holding policies may as safely deal with the agents, with whom alone they ordinarily transact their business as if they were dealing directly with the companies themselves." *LeBlanc* v. *Standard Ins. Co.*, 114 Me., 6.

The failure of an insurance company to inquire as to the existence of facts which by the terms of its policy avoid the insurance estops the company to object after the issuance of the policy to the applicant's inability to comply with the condition or conditions of the policy in the particulars as to which no inquiry is made, and precludes the insurance company from an avoidance of the policy on the ground of a variation of the conditions thereof in that respect.

The statement that there was no other insurance on the property was a misrepresentation which would have avoided the policy

if made by plaintiff. It was not made by him but by the agent who by virtue of the statute is the company. The company, having made the statement on its own responsibility, is estopped from denying the truth thereof, and having issued its policy on the strength of its own misrepresentation, is bound by the contract just as conclusively as though it had given its consent in writing to the carrying of additional insurance.

Motion and exceptions overruled.

L. L. CADWALLADER, ASSIGNEE *vs.* ALFRED DULAC ET ALS.

Kennebec. Opinion February 21, 1930.

BANKRUPTCY. ATTACHMENT OF REAL ESTATE.

A lien created by an attachment upon mesne process which was begun within four months before the filing of a petition in bankruptcy is dissolved by the adjudication, provided that it is shown that the bankrupt was insolvent at the time the attachment was made and provided that the trustee does not receive permission from the Court to become subrogated to the rights of the attaching creditor for the benefit of the estate.

But such a lien is void only at the instance of the trustee in bankruptcy. If he abandons property as valueless to the estate, it reverts to or remains in the bankrupt but subject to the lien.

Appointment of a trustee is necessary to divest a bankrupt of title to his property; and while the title of the trustee would relate back to the commencement of the proceeding, the title never passes out of the bankrupt if there is no trustee.

Liens on a bankrupt's property are not vacated for his benefit and bankruptcy proceedings do not divest a lien created by attachment where the bankrupt's property never passes to a trustee.

The statutory dissolution of liens is for the benefit of creditors, not for the benefit of the bankrupt, and as to him all such liens remain in force notwithstanding his adjudication in bankruptcy, both with reference to property which the trustee disclaims and property which never comes into his possession.

No trustee having been appointed in the case at bar, title to the property remained in Dulac or his grantee, subject to the lien created by plaintiff's attach-

ment. Dulac was released from personal liability and no judgment could be entered against him, but plaintiff might properly have judgment and execution against the property attached.

On exceptions by plaintiff. Suit on a promissory note. Defendant Dulac pleaded the general issue with a brief statement setting up his bankruptcy and his discharge therefrom. To the exclusion of certain evidence offered by the plaintiff and to the subsequent ruling of the Court dismissing plaintiff's action so far as Dulac was concerned, plaintiff seasonably excepted. Exceptions sustained.

The case fully appears in the opinion.

James L. Boyle, for plaintiff.

Louis L. Levine,

Perkins and Weeks, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ.

PATTANGALL, C. J. On exceptions. Suit on promissory note. Defense general issue and brief statement setting up bankruptcy and discharge in bankruptcy. The facts are not in dispute.

Real estate was attached and the attachment regularly recorded on March 8, 1929. Defendant Alfred Dulac filed a voluntary petition in bankruptcy on May 8, 1929, and received his discharge on November 15, 1929. Plaintiff proved no claim in bankruptcy. Dulac's petition disclosed no assets and no trustee was appointed.

The record shows that the note was offered in evidence and no defense presented, other than the fact of bankruptcy and discharge therein.

Plaintiff offered to show that on March 9, 1929, Dulac conveyed certain real estate, then under attachment in this suit, to one Rosenthal. This evidence was excluded and exceptions reserved. At the close of the evidence, the substance of which has been stated, the court dismissed the action so far as Dulac was concerned, to which ruling plaintiff excepted.

The ruling of the presiding Justice appears to have been predicated upon two assumptions: (1) That the attachment, having been made within four months prior to the filing of the petition in bankruptcy, was dissolved by the adjudication; and (2) that

Dulac, having been discharged in bankruptcy, was relieved from liability on the note. The latter was, of course, correct.

The former is subject to certain qualifications. As against a trustee in bankruptcy, a lien created by an attachment upon mesne process which was begun within four months before the filing of the petition is dissolved by the adjudication, provided that it is shown that the bankrupt was insolvent at the time the attachment was made, *Liberty National Bank* v. *Bear Tr.*, 265 U. S., 365; *Taubel-Scott-Kitzmiller Company, Inc.* v. *Fox et al, Trustees*, 264 U. S., 426, and provided that the trustee does not receive permission from the court to become subrogated to the rights of the attaching creditor, for the benefit of the estate, as provided in the Bankruptcy Act.

In the instant case, however, the trustee of Dulac is not a party. In fact, no trustee had then or has since been appointed. The provision of law relating to the dissolution of the lien created by the attachment was invoked by the bankrupt for his own benefit and that of his grantee. The effect of the dismissal of the suit was to relieve the property which Dulac sold on March 9 from the lien created by plaintiff's attachment on March 8.

Such a lien is void only at the instance of a trustee in bankruptcy and then only if the bankrupt was insolvent at the time of the attachment. If a trustee abandons property as valueless to the estate, it reverts to, or remains in, the bankrupt, subject to the lien. *Kobrin et al* v. *Drazin* (N. J. Eq.), 128 Atl., 796.

Appointment of a trustee is necessary to divest a bankrupt of title to his property and while the title of the trustee would relate back to the commencement of the proceeding, the title of the bankrupt never passes out of him if there is no trustee. Liens on a bankrupt's property are not vacated for his benefit and bankruptcy proceedings do not divest a lien created by attachment where the bankrupt's property never passed to a trustee. *Miller* v. *Barto et al* (Ill.), 93 N. E., 140.

"The provision of the Bankruptcy Act that liens obtained within four months prior to the filing of a petition shall be void and property shall be released therefrom was enacted solely for the benefit of creditors and does not affect a lien created by attachment as

against the bankrupt himself." *Rochester Lumber Co.* v. *Locke*, 72 N. H., 22.

"The effect of the Act is not to avoid the levies and liens therein referred to against all the world, but only as against the trustee in bankruptcy and those claiming under him." *Bank* v. *Eagle Sugar Refinery*, 109 Mass., 38; *Frazee* v. *Nelson*, 179 Mass., 460.

This statutory dissolution of liens is for the benefit of creditors, not for the benefit of the bankrupt, and as to him all such liens remain in force notwithstanding his adjudication in bankruptcy, both with reference to property which the trustee disclaims and property which never comes into his possession.

"Motion to quash writ of execution running against the property of the judgment debtor was properly overruled although defendant was adjudicated bankrupt within four months after rendition of judgment where no trustee was ever appointed in the bankruptcy proceedings, as liens are voided only as against a trustee in bankruptcy and those claiming under him." *Smith* v. *First National Bank* (Colo.), 227 Pac., 826.

Under the circumstances of this case, the attaching creditor was in exactly the same position as though his attachment had been made more than four months prior to the filing of Dulac's petition. No trustee having been appointed, title to the property remained in Dulac or his grantee, subject to the lien created by plaintiff's attachment. Dulac was released from personal liability and no judgment could be entered against him, but plaintiff might properly have judgment and execution against the property attached. *Coal Co.* v. *Goodwin*, 95 Me., 249.

The court below erred in dismissing the action.

Exceptions sustained.

CHARLES K. DONNELL, PETITIONER FOR WRIT OF CERTIORARI

vs.

BOARD OF REGISTRATION OF MEDICINE.

Androscoggin. Opinion February 24, 1930.

CRIMINAL LAW. WORDS AND PHRASES. "CONVICTION." PHYSICIANS AND SURGEONS. R. S., CHAP. 18, SEC. 14. R. S., CHAPS. 136 AND 137.

As naming the stage of a trial reached when respondent pleads guilty, or by a jury is found guilty, "conviction" is by many courts, and in Chapters 136 *and* 137 *of our Revised Statutes, as elsewhere therein, used to express the state of the respondent, before the conclusion of his case. That conclusion is the judgment of a Court having final jurisdiction of the case.*

"Conviction," as set forth in Sec. 14, *Chap.* 18, *R. S., regulating revocation of a physician's certificate of registration, is the judgment of the Court, which is to be reached before execution of sentence, and not the return of the adverse verdict.*

In the case at bar petitioner, one of the respondents in the case, *State* v. *Donnell and Edwards*, was entitled to more or perhaps other than trial in the Superior Court. The end of a criminal case is not reached when an appeal follows verdict, presenting a question of law. The case is pending, notwithstanding verdict and sentence. There was hence no "conviction" in the sense in which the term must be used in Sec. 14, Chap. 18, R. S., until judgment was ordered and nothing remained to be done except the discharge of the prisoner, or execution of sentence.

Petition for writ of certiorari.

Petition granted.

The case is fully stated in the opinion.

Louis J. Brann,

Frank T. Powers,

John D. Clifford, Jr., for petitioner.

Clement F. Robinson, Attorney General, for the State.

Fred H. Lancaster, County Attorney, for Board of Registration of Medicine.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

BARNES, J. In June, 1929, petitioner, a resident of Lewiston, was legally possessed of a certificate of registration as a physician or surgeon.

Unless registered he could not lawfully practice medicine or surgery within the state.

At the June term of the Superior Court of Androscoggin County, in 1929, in the case, *State* v. *Donnell and Edwards*, petitioner was indicted and tried, with another, for manslaughter.

The verdict of the trial jury was "guilty." Motion to the trial Judge, after verdict and before sentence, for a new trial, was overruled.

Appeal was entered to our court of last resort, and sentence was pronounced, its execution being suspended pending the appeal.

Thereafterward, the Board of Registration of Medicine, after notice and hearing, revoked the certificate and cancelled the registration of the petitioner, acting under authorization in Sec. 14, Chap. 18, of the Revised Statutes, which provides: "Said board, after a conviction before a proper court, for crime in the course of professional business, of any person to whom a certificate has been issued by them, and after hearing, may by vote of two-thirds of the entire board revoke the certificate and cancel the registration of the person to whom the same was issued."

At the September term of the Supreme Judicial Court, for Androscoggin County, and before decision on the appeal for a new trial under the indictment for manslaughter, petition for certiorari against the Board of Registration of Medicine was presented, the grounds alleged being that petitioner had not been "convicted" of the commission of crime.

The case, upon agreed statement of facts, was reserved for the Law Court, and is the case at bar.

Petitioner contends that return of a verdict of guilty is not the "conviction" which by the statute is a prerequisite to revocation of certificate in a case like this.

Even superficial reading of statutes and opinions of courts interpreting them reveals that in the language of criminal jurispru-

dence, here and in Great Britain, the word "conviction" has distinct and different meanings.

As naming the stage of a trial reached when respondent pleads guilty or by a jury is found guilty, "conviction" is by many courts, and in Chapters 136 and 137 of our Revised Statutes, as elsewhere therein, used to express the state of the respondent, before the conclusion of his case. *State* v. *Morrill*, 105 Me., 207; *State* v. *Stickney*, 108 Me., 136.

That conclusion is the judgment of a court having final jurisdiction of the case.

It is the contention of petitioner that in the statute regulating revocation of a physician's certificate of registration, conviction is the judgment of the court, which is to be reached before execution of sentence, and not the return of the adverse verdict.

With this interpretation of our statute we agree, and decisions of other courts, upon different statutes, can not be greatly helpful in the matter of construction of the Maine statute.

Perhaps the cases involving the removal of public officers, as disqualified for commission of a crime while in office, are most nearly analogous to the case at bar, but they are few in number.

Faunce v. *People*, 51 Ill., 311, deals with the question of what amounts to a conviction that will preclude the giving of testimony, under a statute declaring that a person convicted of a certain crime shall be rendered incapable of holding office, giving testimony, etc. There it is held that a judgment on the verdict is essential to conviction that will disqualify a witness; and it may be inferred that a similar construction would have been given the statute had that part of it been involved which declared the person convicted incapable of holding office.

In *Commonwealth* v. *Lockwood*, 109 Mass., 323, which required the interpretation of the word "conviction" in a constitutional provision relating to the pardoning power, the court say, in what in that case was but dictum, "The ordinary legal meaning of 'conviction,' when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while 'judgment' or 'sentence' is the appropriate word to denote the action of the court

before which the trial is had, declaring the consequences to the convict of the fact thus ascertained." This, then, is the usual and altogether the most common meaning of the word "conviction." *Munkley* v. *Hoyt et al*, 179 Mass., 108.

In a case where it was held that a verdict of guilty, upon which no judgment had been entered, was not within the provision of a statute excluding from the elective franchise persons convicted of felony, the court say, referring to the Lockwood case (Mass.), "Here we have a judicial intimation of much weight, to the effect that a constitutional disqualification dependent upon an officer having been convicted of bribery or corruption in procuring his office contemplates 'the judgment of the court upon the verdict or confession of guilt.'" *People* v. *Fabian*, 192 N. Y., 443, 85 N. E., 672.

In ruling on what constitutes conviction of crime as affecting the credibility of a witness the court held in *Commonwealth* v. *Gorham*, 99 Mass., 420, that "conviction" implied a judgment of the court. In that case the Court say, "The term 'conviction' is used in at least two different senses in our statutes. In its most common sense it signifies the finding of the jury that the prisoner is guilty; but it is very frequently used as implying a judgment and sentence of the court upon a verdict or confession of guilt."

To same effect see, *Dial* v. *Commonwealth*, 142 Ky., 32, 133 S. W., 976; *Commonwealth* v. *Kiley*, 150 Mass., 325; *Daughtrey* v. *State*, 46 Fla., 109, 35 S., 397; *Blaufus* v. *People*, 69 N. Y., 107; 25 Am. Rep., 148.

The most recent case that has come to our attention is, *Smith, Plaintiff in Error* v. *Commonwealth of Virginia* (1922), 113 S. E., 707, a proceeding brought to secure the removal from office of a County Attorney, where the complaint charged that while acting as such official Smith had been "convicted of an act constituting a violation of a penal statute involving moral turpitude." In this case it was held, "Where the context in which the word is found concerns not merely the particular case, but the effect of the conviction of the accused in one case, when pleaded or given in evidence in another, the word 'conviction' or 'convicted,' includes the judgment of the court upon the verdict or confession of guilt."

In this state, on the question of the competency of a witness before the removal of disability by Chapter 53 of the Laws of 1861, our court held: "Such evidence as could be admitted to establish the incompetency of the witness at the time of trial, on the ground of his infamy, was the record of a court having jurisdiction of the conviction and the judgment." *State* v. *Damery*, 48 Me., 327.

"'Conviction' is an adjudication that the accused is guilty." *Nason* v. *Staples*, 48 Me., 123; *Woodman of the World* v. *Dodd* (Tex.), 134 S. W., 254.

A later case is cited as not in accord with the above, but in that case we find the law correctly stated, "When no issue of law or fact remains to be determined, and there is nothing to be done except to pass sentence, the respondent has been convicted." *State* v. *Knowles*, 98 Me., 429.

To like effect, where a statute provided that the certificate of registration of a pharmacist should not be revoked until after conviction by a court of competent jurisdiction, in a case where a registered pharmacist had pleaded guilty of an offense punishable by law, and thereupon, respondent claiming no appeal, but moving that the complaint be placed on file, it was filed, and there had since been no other order or proceeding in the case, the Court say, "We are of the opinion that at this stage of the case the accused stands before the board of pharmacy exactly as before the court where his guilt has been established by his plea or by a verdict of a jury. If in that court his case is ripe for sentence, it must be considered as ripe for sentence before the board. It is the intention of the statute to give a pharmacist charged with crime the right to a trial in the court having jurisdiction of his offense, but if his guilt is there established so that the court may impose sentence according to its powers, then it is sufficiently established for the board of pharmacy to act upon their finding, and to impose the penalty according to their powers." *Munkley* v. *Hoyt*, supra.

In the case at bar an issue "remains to be determined"; the case is not "ripe for sentence."

Petitioner, one of the respondents in *State* v. *Donnell and Edwards*, was entitled to more or perhaps other than trial in the Superior Court. Not satisfied with the verdict there he appealed.

The end of a criminal case is not reached when an appeal fol-

lows verdict, presenting a question of law. The case is pending, notwithstanding verdict and sentence.

"They (such cases) shall be marked 'law' on the docket of the county where they are pending, and there continued until their determination is certified by the clerk of the law court to the clerk of courts of the county, etc.," Sec. 46, Chap. 82, R. S. of Me.

It goes without saying that the "determination" of the law court may not end the case. A new trial may be granted. The indictment, in that event, remains, and upon the grave charges therein another hearing must speedily follow, in the course of which it will be required of the Court to instruct the jury that the presumption of innocence, at the threshold of trial, protects the respondent.

Trial or plea of guilty must follow; the case is unfinished, still pending.

If on the other hand the law court overrules the appeal, judgment is to be entered of record. In fine there is no conviction in the sense in which we are now using the term, until judgment is ordered, and nothing remains to be done, except the discharge of the prisoner, or execution of sentence.

The case having come up on report, the mandate is,

Writ of certiorari to issue.

F. WALLACE DIPLOCK *vs.* JERRY F. BLASI ET AL.

Kennebec. Opinion February 24, 1930.

JUDGMENTS. PLEADING AND PRACTICE. JUDGES AND COURTS.

Before the final adjournment of a term in which he has issued an order of default, a Justice of the Superior Court has authority to reverse his decision and enter the requisite order on his docket.

For the promotion of justice and to avoid delay and the multiplication of suits, such action is discretionary with the Court.

To secure transfer of a case from the Superior Court to the Supreme Judicial Court, the defendant must plead by way of brief statement, matters of fact which if established will set up an equitable defense.

In the case at bar the brief statement, if established, was sufficient to warrant the transfer as prayed for. Under the statute as our courts stood at the time of trial the truth of the allegations was to be established, if anywhere, in the Supreme Judicial Court.

On exceptions by plaintiff. After hearing defendants' motion to transfer a civil action from the docket of the Superior Court to the Supreme Judicial Court, and recording his denial of the motion, the Court, later but during the same term, changed his ruling and record and ordered the case transferred. To this ruling plaintiff seasonably excepted. Exceptions overruled.

The case is fully stated in the opinion.

McLean, Fogg & Southard, for plaintiff.

Ralph W. Farris, for defendants.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

BARNES, J. The action at bar is in assumpsit on account annexed.

The declaration alleges that plaintiff had advanced money for defendants, doing business as co-partners; had been repaid in part and had brought suit for the unpaid balance.

When the case came to trial in the Superior Court of Kennebec County, at the January term, 1929, the plea was the general issue, with denial of the existence of a partnership between the defendants.

Defendants also filed a motion for transfer of the case to the docket of the Supreme Court, invoking Section 19, Chapter 87 of the Revised Statutes; in their motion denying the existence of a partnership between the defendants, and alleging that at the time of advancing money and receiving sums in repayment thereof by plaintiff as set forth in the declaration a partnership existed between plaintiff and one of the defendants; that "the acts of said plaintiff were that of a partner, and is a matter of accounting, and that they have an equitable defense under the statute."

The motion the Judge apparently denied, and exceptions were allowed to defendants.

Trial was ordered, and defendants informed the Court that pend-

ing decision on their exceptions they were "present but not defending."

Plaintiff filed an affidavit, under Section 127, Chapter 87, Revised Statutes, and rested. The Court then ordered a default to be entered for the amount set forth in the affidavit, "subject to the right of the defendants to take exceptions to the ruling of the Court denying motion to transfer said cause to the docket of the Supreme Judicial Court."

Later in the same term, and before adjournment, defendants filed a motion that default be stricken off. This motion appears in the record, though not among the docket entries reported.

According to the record, judgment for plaintiff was ordered on the sixth day of the term, and on the same day the record reads, "Above entry off."

On the fourteenth day of the term the record shows another entry, as follows: "Transferred to docket of Supreme Judicial Court for reasons set forth in motion on file."

To this order of the Court exceptions were taken by the plaintiff and an issue presented to this court is upon the authority of the Superior Court to vacate his former order of default and transfer the action.

In *Toothaker* v. *Pennell*, 106 Me., 188, where after verdict defendant presented a motion to set aside the verdict and for leave to plead in equity, this court held: "Both the motion to set aside the verdict and to transfer the case from the Superior Court to the equity side of the Supreme Judicial Court were matters addressed to the discretion of the court and to his decision no exceptions lie."

It is argued that the Judge of the Superior Court could not vacate his order of default and transfer the action to the docket of the Supreme Judicial Court; but we hold that if before the final adjournment of a term in which he has issued such an order the Judge concludes the order made through error, he has the authority to retrace his steps and enter the requisite order on his docket.

For the promotion of justice and to avoid delay and the multiplication of suits, such action is discretionary with the court, and we find his action proper in this case.

Allegations in the brief statement, which was treated at trial as a motion to transfer the case, might have been more perspicuously

phrased, but in treating of pleadings criticized as incorrect it has been held: "It is not indispensable that the plaintiff should state his cause of action with syllogistical accuracy." *Holt* v. *Penobscot*, 56 Me., 15.

"To secure transfer, defendant must plead, by way of brief statement, matters of fact which if established will set up an equitable defense." *Turner* v. *Burnell*, 126 Me., 192.

We find in the brief statement in the case at bar enough, if established, to warrant transfer as prayed for.

Under the statute as our courts stood at the time of trial the truth of the allegations were to be established, if anywhere, in the Supreme Judicial Court.

Exceptions overruled.

IN RE MILO WATER COMPANY.

Kennebec. Opinion February 24, 1930.

CONSTITUTIONAL LAW. PUBLIC UTILITIES.

The jurisdiction of the Public Utilities Commission is expressly limited by the terms of the act creating it to the utilities enumerated therein. Sewage companies are not included, whether maintained and operated independently or in connection with water companies.

While the constitutionality of a law is presumed until the contrary is shown beyond a reasonable doubt, it is the plain duty of the Court to pronounce invalid an act which violates an express mandate of the constitution, even though the legislature has determined such an act to be expedient and necessary.

Discriminatory statutes are not for that reason alone invalid. Classifications based on age, sex, occupation, degree of relationship, and density of population are familiar. But a classification must be reasonable and not arbitrary.

The legislature can not dispense with a general law for particular cases. It has no power to exempt any particular person or corporation from the operation of the general law, statutory or common.

The inhibition of the Fourteenth Amendment that no state shall deprive any person within its jurisdiction of the equal protection of law was designed to prevent any person or class of persons being singled out as a special subject for discriminating legislation. Hostile and favoring legislation are equally inhibited.

Legislation which designates the sewer system maintained by the Milo Water Company alone as a public utility and which therefore makes a separate classification of that sewer system is discriminatory and void because in direct violation of the Fourteenth Amendment.

On exceptions from a decision of the Public Utilities Commission requiring the Milo Water Company to file a schedule showing all rates, tolls and charges which it had established in connection with its sewer system. Exceptions were made pursuant to the provisions of Section 55, Chapter 55, R. S. 1916. Exceptions sustained.

The case fully appears in the opinion.

McLean, Fogg & Southard, for Milo Water Company.

Laughlin & Gurney, for Town of Milo.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ.

PATTANGALL, C. J. On exceptions. Certified to the Chief Justice from Public Utilities Commission under the provisions of Section 55, Chapter 55, R. S. 1916.

The Milo Water Company is a corporation organized under Chapter 173 of the Private and Special Laws of 1905. Its purposes as set forth in Section 2 of said Chapter are as follows:

> "The purposes of said corporation shall be to supply water for public and private use and for any and all purposes in the town of Milo, in Piscataquis county *and to construct, maintain and operate a system of sewers and drainage in and for said town.*"

Under the authority conferred by the foregoing act the Milo Water Company constructed, owns and operates a plant supplying water for public and private use in the Town of Milo. It also constructed, and maintains and operates, a sewer system in said Town, the receipts and expenditures of which are accounted for in its annual return to the Public Utilities Commission under the heading "Revenues and Expenses of Other Operations."

The foregoing Act was amended by Chapter 84 of the Private and Special Laws of 1929, adding thereto the following provision:

> "Such sewer system is hereby declared to be a public utility and as such subject to all the provisions of Chapter 55, Revised Statutes of 1916 and acts amendatory thereof and additional thereto."

Acting under this provision, the Public Utilities Commission on September 21, 1929, ordered said Milo Water Company

> "to file with the Public Utilities Commission on or before October 8, 1929, schedules showing all rates, tolls and charges which it has established in connection with said sewage system in accordance with the provisions of said Section 25 of Chapter 55 of the Revised Statutes, or to appear before the Public Utilities Commission at its offices, State House, Augusta, on the 8th day of October, 1929, at 10:00 o'clock in the forenoon, then and there to show cause, if any it has, why it should not comply with the provisions of said Section 25 and file with the Commission schedules as required thereby."

Schedules were not filed by the Milo Water Company and a hearing on the show cause order was held as provided therein.

Sewage companies as a class are not under the jurisdiction of the Public Utilities Commission and the Milo Water Company's sewage system is the only system which the legislature has declared to be a public utility.

At the hearing, the Milo Water Company contended that it should not be required to file schedules for its rates, tolls and charges in connection with its sewage system because it is not a public utility so far as its sewer system is concerned and because the above quoted legislative act, declaring the sewer system of the Company to be a public utility and subject to the provisions of the public utilities law, is unconstitutional and does not give to the Water Company the equal protection of the laws guaranteed by the constitution, but on the contrary singles out that company for discriminatory legislation, imposing upon it a burden that sewer companies as a class are not obliged to assume; that being uncon-

stitutional, and therefore void, the Act imposes no obligation upon the Water Company to comply with its terms.

After hearing on the show cause order and as part of order and decree made in connection therewith dated November 19, 1929, the Commission made the following finding:

> "We are convinced that regardless of our views upon the constitutional question involved, we must find that the Sewer System of the Milo Water Company is a public utility, made such by virtue of Chapter 84 of the Private and Special Laws of 1929, which act we shall presume to be constitutional in accordance with the tenor of this decision; that such sewer system is subject to all the provisions of Chapter 55 of the Revised Statutes of 1916 and acts amendatory thereof and additional thereto; that said Milo Water Company should file with this Commission schedules of all its rates, tolls and charges in connection with said sewer system in accordance with the order of this Commission dated September 21, 1929, and should be required to file such schedules within ten days from the date hereof."

And pursuant to this finding, the Commission made the following order and decree:

> "ORDERED, ADJUDGED AND DECREED that the Milo Water Company file schedules showing all rates, tolls and charges which it has established in connection with its sewer system, which it maintains and operates in said town of Milo, within ten days from the date hereof, and that said schedules be filed in accordance with the provisions of Section 25 of Chapter 55 of the Revised Statutes of Maine."

To which order and decree exceptions were seasonably taken.

The Water Company relies upon the proposition that the Public Utilities Commission was without jurisdiction prior to 1929 and that the Act of 1929, under which the legislature attempted to give it jurisdiction, is unconstitutional because discriminatory.

The Inhabitants of the Town of Milo, appearing in opposition to the Water Company, directly challenge both propositions, contending that the Public Utilities Commission had and has jurisdic-

tion irrespective of the Act of 1929 and that the Act is constitutional. Thus the issues presented here are clearly drawn.

The jurisdiction of the Commission is expressly limited by the terms of the Act creating it to the utilities enumerated therein.

> "The term 'public utility' when used in this chapter includes every common carrier, gas company, electrical company, telephone company, telegraph company, water company, wharfinger and warehouse man, as those terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of this chapter."

Sewage companies are not included. It is contended here, however, that when a water company conducts a sewage business, that branch of its activities is brought within the jurisdiction of the Commission. We can not agree with this contention. By like reasoning, if a railroad corporation maintained one or more hotels, the rates charged guests and the wages paid employees of such hotels would be subject to public supervision; or if an electrical company operated retail stores, the Public Utilities Commission would be entitled to fix the price at which it should sell electrical supplies. If the Commission has jurisdiction in this matter, it must be by reason of the Act of 1929; otherwise, it is entirely without authority in the premises.

If this Act is to be declared void, it must be because it is so manifestly in violation of the constitution as to leave no room for reasonable doubt. *Village Corporation* v. *Libby*, 126 Me., 549. "The constitutionality of a law is to be presumed until the contrary is shown beyond a reasonable doubt." *Laughlin* v. *Portland*, 111 Me., 486; *State* v. *Webber*, 125 Me., 321. "But it may be the duty of the Court to pronounce invalid an act which violates an express mandate of the constitution even if the act is expedient and has been determined by the legislature to be necessary." *Randall* v. *Patch*, 118 Me., 306.

The Act of 1929 referred to the Milo Water Company alone. It made the sewer system, established and maintained by that Company, a public utility. It had no effect upon the status of any other

sewer system or sewage company now in existence or which might come into existence.

Discriminatory statutes are not for that reason alone invalid. Classifications based on age, sex, occupation, degree of relationship and density of population are familiar. *Village Corporation* v. *Libby*, supra. But a classification must not be arbitrary; it must be reasonable. *State* v. *Leavitt*, 105 Me., 76; *Dirkin* v. *Paper Company*, 110 Me., 386; *State* v. *Lathan*, 115 Me., 176.

The legislature can not dispense with a general law for particular cases. *Lewis* v. *Webb*, 3 Me., 326. It has no power to exempt any particular person or corporation from the operation of the general law, statutory or common. *Milton* v. *Railroad Company*, 103 Me., 218.

"It is manifestly contrary to the first principles of civil liberty and natural justice and to the spirit of our constitution and laws that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances; or that anyone should be subjected to losses, damages, suits or actions, from which all others in like circumstances are exempted." *Holden* v. *James*, 11 Mass., 396; *Pierce* v. *Kimball*, 9 Me., 59.

"The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges upon the same conditions. The inhibition of the XIV Amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons being singled out as a special subject for discriminating and favoring legislation. Hostile and favoring legislation would seem to be equally inhibited." *State* v. *Mitchell*, 97 Me., 66.

"Recognizing the right of the classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed and that such equal protection is denied when, two parties being engaged in the same kind of business and under the same conditions, burdens are cast upon the one that are not cast upon the other." *Cotting* v. *Kansas City Stockyards*, 183 U. S., 79.

Authorities to the same effect might be added indefinitely.

The legislature did not make a general law covering all sewage

systems or even all water companies doing a sewage business. It made a separate class of the sewer system maintained by the Milo Water Company.

In determining the legality of classifications, the subject to be regulated, the character, extent and purpose of the regulation, the classes of persons or corporations affected by the regulation may all be considered. One of the essential requirements in order that the classification may not violate the constitutional guaranty as to equal protection of the law is that it must be natural and not capricious and arbitrary. The law requires something more than a mere designation of characteristics which will serve to divide into groups. Arbitrary selection or mere identification can not be justified by calling it classification. The characteristics which can serve as a basis of a valid classification must be such as to show an inherent difference in the subjects placed in separate classes which peculiarly requires and necessitates different or exclusive legislation with respect to them. A proper classification must embrace all who naturally belong to the class, or who possess a common disability, attribute or qualification, and there must be some natural and substantial difference germane to the subject and purposes of the legislation between those within the class included and those whom it leaves untouched.

"The legislature cannot take what might be termed a natural class of persons, divide that class into several, and then arbitrarily designate the dissevered fractions of the original unit as several classes and thereupon enact different rules for the government of each." *Fountain Park Company, App't* v. *George Hensler et al* (Ind.), 155 N. E., 465.

The effect of the legislation to which the Milo Water Company objects is to make a separate classification of the sewer system operated by that company. Even if it be assumed that a sewer company may, by appropriate general legislation, be designated as a public utility and made subject to the jurisdiction of the Public Utilities Commission, or, to narrow the question still more, if it be assumed that sewer systems operated by water companies might properly be so classified, the proposition would differ materially from that presented here.

The fact that Milo Water Company is the only water company

in the state, at the present time, operating a sewer system, if such is the fact (a matter not entirely clear in the record), has no bearing on the point at issue.

The next legislature might charter a dozen water companies and authorize each of them to maintain a sewer system. None of the sewer systems so maintained would be public utilities unless particularly designated as such. The sewer system of Milo might still be the only one under the jurisdiction of the Public Utilities Commission. Under such circumstances, the discriminatory nature of the amendment would be apparent. We think it is just as apparent in the present state of affairs, and we have no hesitation in declaring the legislation in question void because in direct violation of the Fourteenth Amendment to the Federal Constitution.

Exceptions sustained.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

LIDA M. BARTEAU *vs.* EDWARD E. RHOADES ET AL.

Cumberland County. Decided March 29, 1929. This was an action brought to recover damages which plaintiff claimed were due from the proprietor of a Merry-go-round at Old Orchard. Plaintiff was standing near the Merry-go-round when a child eight years old was thrown or fell or jumped from the machine, striking against her and injuring her. At the close of plaintiff's case, a non-suit was ordered and very properly so. There is nothing in the evidence upon which a jury could reasonably predicate a finding of negligence on the part of defendant. Exceptions overruled. *Hinckley, Hinckley & Shesong*, for plaintiff. *Emery & Waterhouse*, for defendants.

STATE OF MAINE *vs.* JAMES MCGEE.

Kennebec County. Decided April 20, 1929. This report, purporting to be upon an agreed statement of facts, lacks the certificate of the trial judge. A determining fact in issue is not agreed upon but is in controversy. As framed, this Report presents an abstract question only, and is neither in form nor substance entitled to consideration by this Court. Report dismissed. Case dis-

missed from the Law docket. *Frank E. Southard*, County Attorney, for State. *F. Harold Dubord, Gordon F. Gallart*, for respondent.

HAMILTON Y. FLINTON *vs.* ALEX C. SMART.

Penobscot County. Decided June 27, 1929. Motion by the defendant to set aside the verdict in an action for breach of the implied warranty of title to the automobile he bought.

Argument for the motion is based on evidence of tendency to show that, to the knowledge of the plaintiff, defendant had no other connection with the transaction of sale than to deliver the automobile and receive the purchase price, not for himself but for the actual seller.

But evidence on the side of the plaintiff, tending to establish that defendant acted for himself in the sale and delivery of the automobile, was found by the jury to outweigh the evidence which the defendant introduced.

On review it may not be said that the conclusion arrived at by the triers of fact is manifestly wrong.

The same thing might have been said had the jury found the opposite. The case presented a jury question pure and simple. Motion overruled. *William S. Cole, Donald F. Snow*, for plaintiff. *James Quine, B. W. Blanchard*, for defendant.

JUSTUS H. MILLER

vs.

NAUGHLER BROTHERS AND TRAVELERS INSURANCE COMPANY.

Cumberland County. Decided July 1, 1929. Workman's Compensation case. The employer denied that the workman's injury was caused by accident. This, the only issue before the Commissioner, was decided adversely to the petitioner. The issue was one of fact, and by mandate of the statute the decision of the Com-

missioner is final. There was some testimony in the case tending to prove that the petitioner's injury was accidental. The Commissioner apparently did not regard this testimony as convincing, and determined as a matter of fact that no accident was proved. No error of law appears. *Orff's case*, 122 Me., 114. Appeal dismissed. Decree affirmed. *Ellis Aldrich*, for petitioner. *Walter F. Bird, Verrill, Hale, Booth & Ives*, for respondents.

FRED J. BANVILLE *vs.* FIELD BROS. & GROSS CO.

Androscoggin County. Decided July 18, 1929. An action to recover damages for injuries due to alleged negligence of a servant of defendant.

The plaintiff was driving a horse attached to a wagon in which plaintiff was seated along High Street in the city of Auburn at a point opposite the entrance of the freight offices of the Maine Central Railroad. Just behind the plaintiff's team was an automobile going in the same direction driven by a young lady who, as she was approaching the entrance to the freight offices, sounded her horn and turned to the left to pass the plaintiff, who turned to the right to permit her to pass. As she was about to pass, the defendant's truck came out of the entrance to the freight offices, and to avoid a collision she turned her automobile to the right, her front right mudguard striking the plaintiff's wagon, and causing the injuries complained of.

The defendant claims the accident was due entirely to the negligence of the driver of the automobile in trying to pass the team without keeping watch for teams coming out of the entrance to the freight yard. The plaintiff claims if the driver of the automobile was negligent, there was also concurrent negligence on the part of the defendant's servant.

As to just the position of the three vehicles at the time of the accident the version of the witnesses differ, but upon the written statement of the defendant's driver made and signed by him before suit was brought that he saw the automobile coming about fifty feet

away and was aware that it was about to pass the plaintiff's team, but did not sound his horn before driving into the public street to warn the driver of the car of his intent, was sufficient on which a jury might have based a finding of concurrent negligence on his part.

We do not think upon the evidence this court can say that the verdict of the jury was clearly wrong. Motion overruled. *Louis J. Brann, Peter A. Isaacson*, for plaintiff. *Robinson & Richardson, Henry W. Oakes, Richard Small*, for defendant.

STATE *vs.* SARKIS KEIKORIAN.

Cumberland County. Decided October 1, 1929. Prosecution by complaint for the unlawful possession of intoxicating liquor. At the close of all the evidence, both for the state and the respondent, the respondent moved the direction of verdict in his favor, on the ground that the evidence would not justify conviction.

The motion was overruled and exception had.

Now, following the jury verdict of guilty, the exception is argued.

Little need be said. Only one witness testified for the State, the respondent alone on his side, and the testimony was sharply conflicting.

That for the State, though there may have been circumstances affecting its weight, was sufficient to warrant conviction, if believed. So, the trial judge sent the case to the triers of fact, and properly. Exception overruled. Judgment for the State. *Ralph M. Ingalls*, County Attorney, for State. *Samuel L. Bates*, for respondent.

HILAIRE BOLDUC *vs.* GEORGE NADEAU AND TRUSTEE.

Androscoggin County. Decided January 11, 1930. The writ in this case declared, on account annexed, for $507.90.

At the return term, defendant filed a plea in set-off, in the sum of $534.25, and the case was continued to the June term next.

On the second day of the June term the plaintiff was present with his witnesses and ready to proceed in trial, but the defendant's counsel presented a motion for continuance alleging that defendant, whose testimony was material, was ill and because of such illness unable to attend court at that term.

The motion was supported by affidavit of counsel, and testimony of defendant's attending physician.

The affidavit set out that during three wood-chopping seasons ending in 1928, under contract, plaintiff had delivered wood to defendant, and that for the wood defendant had paid according to the scale of plaintiff; that later defendant discovered plaintiff's scale was not a true scale, there being a deficiency in the quantity delivered during the first two seasons of 7⅔ per centum and in the last season of 15½ per centum; and that plaintiff had, without paying for same, taken of defendant's oak and pine timber amounts worth $33.50, so that plaintiff owed defendant $534.25, the amount claimed in set-off.

It was therefore evident that defendant's testimony might be not only material, but essentially requisite.

Counsel further offered, as a witness with reference to defendant's inability to attend court, a doctor, resident in Lewiston, whose qualifications as physician and surgeon were admitted.

At the request of the Court a physician of Auburn visited defendant, "returning to court in about an hour and reporting that he found defendant in bed, that his temperature was normal, pulse rapid, that he appeared nervous, but that in his opinion defendant could go to court and testify."

In answer to a question, "whether or not he thought defendant was in physical condition to be subjected to a long-continued and searching cross-examination, he said that it was possible that defendant might collapse under a cross-examination."

Defendant's physician was examined, and his testimony, covering eight pages of the record, reveals a dispassionate observer speaking of a patient whom he had known professionally for eight years or more, reporting the patient in bed in accordance with his order in a very nervous condition, following a collision of his truck,

patient driving four days before, with an automobile driven by a woman; that patient was suffering from nervous palpitation of the heart.

The physician was asked whether, in his opinion, defendant could with safety to his health come to court and testify. His answer was, "not at the present time." He thought he might testify in a week or two.

In ruling on the motion several courses were open to the Court. He could have continued the case, upon terms, to a later day in the June term, or to the next succeeding term.

He could have ordered defendant's counsel to proceed to trial.

He denied the motion for continuance, defaulted defendant, and allowed his exception to default.

The decision to default was irregular. Defendant had the right to have plaintiff put in testimony to prove his claim; and, however difficult and expensive it might have proved, he had the right to present such evidence as could be procured to disprove plaintiff's contentions, and to set up some or all of the charges contra plead in set-off. Exceptions sustained. *Clifford & Clifford*, for plaintiff. *Herbert E. Holmes*, for defendant.

WALTER L. HUNT, CLAIMANT IN SUIT OF FRANK S. SAWYER

vs.

ARTHUR G. ANDERSON ET ALS, AND LINCOLN PULP WOOD COMPANY, TR.

Penobscot County. Decided January 20, 1930. This case came up on report. In the course of taking out the evidence, Arthur G. Anderson, the principal defendant, by direction of his counsel, on the ground of inadmissibility, refused several times to answer certain questions put to him by counsel for Frank S. Sawyer.

As this case, under the stipulation and agreement of parties, comes to the Law Court for determination upon so much of the evidence as is legally admissible, the right to determine in advance

what is and what is not admissible does not rest in the parties to the case nor should that right be usurped by them.

The case is remanded to the court below by reason of incompleteness of report. So ordered. *Ryder & Simpson*, *Charles J. Hutchins*, for claimant. *Clinton C. Stevens*, for defendant.

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

Knox County. Decided January 22, 1930. This is an action brought on a judgment. The defendant filed a general demurrer to the declaration. This being overruled by the presiding justice, the defendant reserved exceptions.

It appears that an amendment to the declaration was allowed. No exception was taken to the allowance of the amendment so the case comes before this court as if the amendment were a part of the original declaration. Indeed, the defendant demurs to the "plaintiff's amended declaration."

The declaration seems to be in ordinary form. The defendant's counsel in their brief suggest some reasons not based on the record why this suit may be unnecessary and futile but they do not point out or refer to any defect or illegality in the declaration demurred to nor do we discover any. Exceptions overruled. *O. H. Emery*, *Frank A. Tirrell, Jr.*, for plaintiff. *J. H. Montgomery*, *Adelbert & Miles*, for defendant.

FRANK D. AMES, ADMR. *vs.* GEORGE WESTON.

Lincoln County. Decided January 29, 1930. On Motion. This was an action of replevin in which plaintiff sought to recover certain articles of furniture purchased by defendant from plaintiff's brother-in-law, claiming that the goods were a part of the estate of plaintiff's father, of which he is administrator.

Plaintiff's intestate died February 22, 1920. Administration was not taken out until April 7, 1925. Shortly thereafter an inventory

was filed, the entire assets of the estate consisting of the furniture in issue valued at $170.

Plaintiff and his sister, now deceased, were sole heirs of plaintiff's intestate. On the death of the father, a widower, with whom the sister and her husband were making their home, plaintiff took a portion of the furniture which was in the father's home and the sister retained possession of the remainder. After her death, her husband continued in possession of the furniture and finally sold same to defendant. Prior to the trial of this case, defendant's grantor had died.

The sole issue submitted to the jury was whether or not title to the goods claimed was in plaintiff's intestate at the time of his death. The burden of proof was on the plaintiff. The verdict was for the defendant.

We can not say that this result was manifestly wrong or that it was unsupported by reasonable evidence and logical inference. Motion overruled. *George A. Cowan*, for plaintiff. *Weston M. Hilton*, for defendant.

ALBERT G. AVERILL, ADMINISTRATOR *vs.* CHARLOTTE J. CONE.

Penobscot County. Decided December 14, 1929. This appeal in equity is not properly before this court. The case furnished is certified by the Clerk below only in part, and in form violates Rule XXIX.

The Appeal, therefore, is returned to the Clerk below for correction of these errors and recertification to the next term of the Law Court. So ordered.

RULES OF COURT

STATE OF MAINE

SUPREME JUDICIAL COURT Augusta
January 31, 1930.

All of the Justices concurring, the following rule of court is established.

Applications for admission to the Bar may be heard by single Justices on rule days.

LUERE B. DEASY,
Chief Justice.

STATE OF MAINE

SUPREME JUDICIAL COURT Augusta
April 12, 1930.

All of the Justices concurring, the following rule of court is established.

Regular sessions of the Supreme Judicial Court may be held on the first Tuesday of each month, with the exception of June, July, August and December, in any county whenever such sessions become necessary for the presentation of matters and transaction of business within the exclusive jurisdiction of said court or within the concurrent jurisdiction of the Supreme Judicial and Superior Courts, and process may be made returnable to the Supreme Judicial Court on said dates.

The Clerk of Courts in any county having a resident Justice shall notify such Justice of the pendency of any matter requiring such a session of the Court and such Justice shall preside thereat, unless otherwise ordered. In counties in which there is no resident Justice, the Clerks of Courts shall so notify the Chief Justice who will assign a Justice to so preside.

W. R. PATTANGALL,
Chief Justice.

ALBERT MOORE SPEAR

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT AUGUSTA, DECEMBER 5, 1929, IN MEMORY OF

HONORABLE ALBERT MOORE SPEAR

LATE ASSOCIATE JUSTICE OF THE SUPREME JUDICIAL COURT

Born March 17, 1852. Died January 31, 1929.

SITTING: DEASY, C. J., DUNN, STURGIS, BARNES, PATTANGALL, FARRINGTON, JJ.

The exercises were opened by HON. L. T. CARLETON, President Kennebec Bar Association, who spoke as follows:

MAY IT PLEASE THE COURT:

I am instructed by the Kennebec Bar Association to ask this Honorable Court to pause for a brief time, from its great and important work, and permit a Committee of the Kennebec Bar Association to present some resolutions, and submit some remarks as a tribute to the life, character and attainments of the late ALBERT M. SPEAR, a long time member of the Kennebec Bar Association and an associate Justice of the Supreme Judicial Court of the State of Maine.

MAY IT PLEASE THE COURT:

Before calling upon the Committee I beg leave to be permitted to say a few words, as my personal tribute, to the life, character and attainments of Mr. Justice SPEAR, in whose memory these services are being held.

It was my great privilege, and good fortune, to know Mr. Jus-

TICE SPEAR, somewhat intimately, for a great many years. In fact from the time, when as a boy, he was struggling against great obstacles to obtain an education in the common country schools, in college, and the study of the law.

Gifted with precision of thought, he yet became a jury pleader of great influence, because of his charm of manner and making other men see as he did. He rarely lost a case.

A country boy, he made himself one of the best men of the bar of this state. A wise counsellor, a brilliant lawyer, a great Judge, a wit, an orator, a friend of lasting attachments.

I would briefly sum up the story of his life in these words:

Loyalty, and clean thinking
Honesty, truthfulness
Consideration for others
His daily precept took the place of preaching.

During an extended span of life, in the midst of serious and difficult situations, he made his manly way, with good report, with increasing honor, and in the public confidence.

His generous and noble spirit became well known.

Personally I mourn his loss greatly. I am not sure, however, that we should mourn for our departed loved ones. I do not know which is better, life, or death. It may be that death is the greatest gift that ever came from nature's open hands.

But of one thing I feel certain, if we could live forever, we should care less for each other.

The fact that we must die, the fact that the feast must end, brings our hearts together and treads out the weeds between the path.

And so it may be, that love is a little flower that grows on the crumbling edge of the grave.

And it may be that if it was not for death there would be much less love, and without love, life would be a curse.

In paying tribute to one who has lived and worked with us here we find language inadequate.

In the varied and vexing cares and obligations of the day these are the things and the manner in which they are met, which enables us to appreciate the man, but of whom we can not adequately speak.

This it seems to me was particularly true of Judge SPEAR. He

looked upon his work in deep seriousness. A man of intense feeling, of strong convictions, indefatigable in energy and uncompromising in purpose.

He was a faithful public servant, and met his obligations with a keen sense of justice. It is often said that this or that person was "a self made man." The term often has little significance as applied. But it was and is true, in its fullest significance, with reference to Judge SPEAR. Born in poverty, and amidst most adverse environments, early thrown upon his own resources, he was compelled in every sense to make his own way and work out his own destiny.

By great application, with untiring industry, a persistence which never wearied, he obtained an education, became a successful lawyer, and won the exalted position of an Associate Justice of the Supreme Judicial Court of his native state.

His career was the result of his own handiwork. His life work will rank among the finest of his time. As an attorney and member of this court, he was a strong man of vigorous frame and creative mind. He was eminently fitted by natural ability and training for the great service he rendered his fellow man and his native state.

He has crossed the bar
He will not come back to us
but we shall meet him in the morning
A kindly, discerning, human
Just Judge.

Resolutions of the Kennebec Bar Association presented by GEORGE W. HESELTON, ESQ.

The members of the Kennebec Bar Association desire to record their appreciation of the splendid character, high attainments and long public service of former Justice ALBERT M. SPEAR and to place upon the records of this court their tribute to his memory.

We admired him for his clear, logical and well balanced mind; for his wisdom and impartial search for the truth; for his courage and his clear and accurate knowledge of the principles of the law; for his industry and unfaltering devotion to his profession.

We loved him for his kindness, his tolerance, his constant helpfulness; for his sympathy, his understanding, his generosity; for his grace and sparkling but always kindly wit and humor; and be-

cause we hold and cherish, and shall hold and cherish, in lasting memory the recollection of his useful life and many well deserved honors, we offer these resolutions:

Resolved: That in the death of ALBERT M. SPEAR, Retired Active Justice of the Supreme Judicial Court and as a member of Kennebec Bar we recognize not only the great loss to the bench and the legal profession, but also the personal loss of a true friend to each one of us.

Resolved: That these resolutions be presented to this court with the request that they be entered upon and become a part of the records of this court, and a copy of the same, attested by the Clerk of Courts, be sent to his bereaved widow.

Dated, Augusta, Maine,
this 3rd day of December, 1929.

GEORGE W. HESELTON
JOHN E. NELSON
ELLSWORTH E. PEACOCK
CARROLL PERKINS
ROBERT B. WILLIAMSON
Committee on Resolutions.

GOVERNOR WM. TUDOR GARDINER then spoke as follows:

MAY IT PLEASE THE COURT:

As a representative of the Kennebec Bar I wish to speak a few words regarding our member and your associate in fact as well as in law, the late Justice ALBERT M. SPEAR. Like every other member of the Bar in this county, or in fact throughout the state, I felt that the Judge was my special friend. This universality of friendship is in itself the strongest testimony that we can bring before your honors in paying our tribute of respect to him who has gone. Widespread friendship perhaps was fostered because of the extraordinary versatility in the Judge's mind. Law, music, study of the life of Christ, public affairs, and outdoor life all came within his special province. It may not be out of place at these memorial exercises to state that it is a real and continuing pleasure for me to possess the Judge's shotgun — a gunsmith's masterpiece in itself

and a gun that will carry with it the noble tradition of a splendid sportsman.

No details of a law case ever became dull or wearisome to Judge SPEAR. Difficulties merely added to his pleasure in work or in play. I remember one early spring fishing trip in this county with the Judge, when bad luck pursued us — no trout, uncomfortable weather, impassable roads, sticking in one ditch after another. The Judge refused to accept apologies for guiding him into such difficulties. He enjoyed them, and the word that he used to express his pleasure at the experiences was that they were all "romantic." He carried that same eagerness and love of life along in every field of his activity. His keen intelligence and imagination carried him to far spreading interests and let him overlook the minor difficulties that might have discouraged others.

The younger members of the Bar, particularly, will always remember the youthfulness of his heart. When he reached retirement age the strange appellation of our law fitted him precisely — he was indeed an "active" retired justice. Active in mind and body. Life for him was always stirring and absorbing. Perhaps it was these qualities which made it such a pleasure even to greet him a moment on the street. His career was indeed an honor to the Bar, to the Bench, to his City and to his State. He gave his service liberally for the public and we honor his memory not only in a very personal way but also for the gift of the service and for the quality of that service.

As CONGRESSMAN JOHN E. NELSON was obliged to leave to attend to his official duties in Washington, he requested the following be read at these memorial exercises as his personal appreciation of the late Hon. A. M. SPEAR.

Before doing so, that the records of these exercises may contain a brief resumé of the important events of Judge SPEAR's life, this summary was submitted by George W. Heselton, Esq.

ALBERT MOORE SPEAR was born in Madison, March 17, 1852, and died in Augusta, Maine, January 31, 1929. When six months of age his parents removed to Litchfield where he passed his youth. He received his early education in West Gardiner, Monmouth Academy and Coburn Classical Institute, and his collegiate edu-

cation in Bates College, where he graduated in 1875. He studied law with the law firm of Hutchinson and Savage. The junior member of this firm was the late Chief Justice Albert R. Savage of our Supreme Court. He was admitted to the Maine Bar in 1878 and began the practice of law January 1, 1879, in Hallowell where he resided until 1885, and then continued his practice in Gardiner, Maine. He was appointed to the Supreme Bench March 1, 1902. In March, 1923, having, according to the laws of this state, reached the age of retirement, he was appointed as an active retired justice of this court, but as an active retired justice he presided at several terms of the Supreme Court in various counties and performed many of the duties developing upon a Justice of this court.

While a resident of Hallowell he was twice elected as a member of the House of Representatives, and when a resident of Gardiner he was twice elected as a member of the Maine Senate serving as President of that body at the session of 1893. In 1890 he was chosen Mayor of the City of Gardiner, and served in that capacity until 1892.

In 1879 Judge SPEAR became affiliated with the Masonic order and became Eminent Commander of the Maine Commandery in 1891 and 1892, and was Most Worshipful Grand Master of the Grand Lodge of Maine, F. & A. M., in 1922 and 1923.

Remarks of CONGRESSMAN JOHN E. NELSON:

"Who is the happy Warrior? Who is he
That every Man in arms should wish to be?"

It is especially appropriate that here, in this chamber, enriched with the legal associations of a century, we members of the Kennebec Bar should gather to inscribe on the enduring records of this court our words of love, admiration, and respect for a dear friend and great jurist whose long and honorable life, greatly and nobly lived, has come to an end.

"God's finger touched him and he slept."

These exercises here today seek to give expression to the high regard and affectionate esteem in which Judge SPEAR was held not only by the lawyers of this county, but also by the Bar of Maine

and the people of the entire state. All who came in contact with him valued his friendship, recognized his ability, and admired his character and worth; but we who were privileged to know him intimately appreciate above all others how great a loss his death has meant to his family, his friends, and his native state.

It is difficult to speak of him today in terms of formal eulogy for the memory of the friend we loved overshadows the memory of the judge we admired and respected. We seek in these tributes to touch upon those things that made him lovable, the things that made him great; yet, though memory retains his image as a thing of yesterday, how difficult are words; how unsatisfying our efforts; how much is left untold!

The intimate facts of his life are fully known to the members of this Bar. We honor him for the vision, the courage, and the early struggles of his boyhood which broke the shackles of confining circumstance and set his feet in the high ways of life. As a man we loved him for his generosity, his hospitality, and good-fellowship, for his interest in the lives and fortunes of his friends, for his overflowing energy and his instinctive willingness to dedicate himself to every righteous cause, for his unshaken faith in humanity, in life, and the hereafter, for his love of America which was a part of his faith in life itself.

As a judge of our highest court for twenty-seven years he has left, written in the Maine Reports and in the hearts of our people, a name and a fame that comes to but few men in any state. He possessed in abundant measure those qualities of mind and heart that peculiarly fitted him for this high place of honor and responsibility. Dignified, able, virile, of rugged honesty and fearless courage, he loved the right and hated the wrong. Like the hero of Matthew Arnold's poem, the Scholar Gypsy, he had, as a judge, "one aim, one business, one desire," and that was ever to maintain unimpaired in the Courts of Maine the dignity of the law and the sanctity of justice. It is such a life as his that gives to the people of Maine a consciousness that on the bench of this state strong, clean hands and untiring eyes hold watch and ward over the rights and liberties of our people — a consciousness absolutely essential to the tranquillity and order upon which our civilization rests.

Judge SPEAR was not only learned in the law, but he was a man

of the widest cultivation and the most catholic interests, evidenced by the wide range of his friendships. On the bench he may, at times, have seemed stern to those who knew him not, but behind that professional screen lived a man of rare gentleness of soul, sweetness of mind, and tenderness of heart, a man of ready sympathies, of beautiful loyalties, of wonderful enthusiasms, a lover of all beauty in nature, art, and man — an idealist in aim and hope, a realist in action.

To Judge SPEAR, love and friendship and homely loyalty were the greatest things in all the world, greater than wealth or rank or power. To him old memories and associations were dear and anniversaries full of meaning. He loved all men because he understood, and we loved him because of that human understanding.

A tender and affectionate husband, a proud and devoted father, a loyal, helpful, wonderful friend, his home life was beautiful, his family relations, ideal. At his hearth-stone dwelt love and infinite tenderness. In those sweet memories of the past, in his good name and spotless reputation there is left to wife and children all that death can leave behind to alleviate its pang.

His was a life of glad service, well and bravely done, bringing its own reward in the good gift of peace. Judge SPEAR never grew old. Time touched his temples but missed his heart. He came to the twilight of his day with spirit young, with all its best impulses fresh and unfailing to the end. The evening shadows in his eyes dimmed not the light of new surprise. Death came, but its coming was like —

> "The shepherd serenely leading home his flock,
> Under the planet at the evening's end."

Death came, but found him in the midst of family and friends, loved and honored, still busy at his work, with no enthusiasm quenched, no dream surrendered, no ideal abandoned.

> "This is the happy Warrior; This is He
> That every Man in arms should wish to be."

HON. WARREN C. PHILBROOK, Justice of the Supreme Judicial Court, then addressed the court.

MAY IT PLEASE THE COURT:

In some cases eulogy finds expression in platitudes of such general nature that with slight alterations they may be adapted to any person, as a tailor may alter ready-made clothing to fit his customer. But in a spoken or written laudation of the life and character of a friend, well known and well beloved, it is not easy to avoid fulsome language. Such is the present task.

The photograph of Mr. Justice SPEAR, as it hangs upon the wall, quickly ceases to be mute when one studies the pose and features which portray a person worthy of special notice. Slightness of stature, fine poise of head, vigor of body and limb, are physical characteristics which the camera has caught and preserved, but the brisk movement, the untiring energy, the disdain of fatiguing effort, are only known to those who were his intimate companions. The physical powers which a person possesses are frequently the foundation upon which the superstructure of intellectual success may safely rest.

But we are more interested in the mental characteristics of those who, in passing, leave behind them a record of large success achieved in their chosen lines of life. The most helpful, valuable thinking remains a lamp under a bushel until, by expression strong and brilliant, it becomes a hilltop beacon with rays which illuminate a circumference whose radius is far reaching.

In written or spoken expression of thought, to a most remarkable degree, Mr. Justice SPEAR had a literary style which was preëminently marked for its frankness, courage and clarity. In controversy or concurrence he spoke his own thoughts as they came from his own line of reasoning. With him there was no supine endorsement of the views of others from whom he might differ, nor listless acquiescence as to those which he endorsed. This frankness had its taproot in courage. No one who knew Mr. Justice SPEAR would ever accuse him of cowardice. In the expression of his views he did not attempt to camouflage them, but on the contrary he wrote and spoke with extreme clarity, a most valuable element of literary style. There is small cause for wonder, therefore, when

we learn that his interesting and instructive judicial opinions gained careful examination by members of our Maine Bar, and received praise from courts located, and legal literature published, outside the jurisdiction of this court. His long and valuable service in the highest court of his native state has resulted in the illumination of many legal pathways otherwise dark, and brought encomiums for this tribunal from those in sister commonwealths.

Outside his high standing as a lawyer and a jurist Mr. Justice SPEAR was conspicuous in other walks of life. For many years before he left the ranks of practicing attorneys he was deeply interested in political and public questions. In legislative halls his ability to deal with matters of moment to the state and to her people quickly led to preferment as to honors which were therein capable of bestowment. In political campaigns he was a much sought speaker for more than twenty years. Here again his frankness, courage and clarity of speech rendered him a valuable exponent of the principles adopted by the political party of his choice. By him shams and sophistry were easily detected and were attacked without fear and without mercy. In this field of activity he constantly held his finger on the pulse of the people. He was the champion of what he conceived to be the powers, the demands, and the rights of the populace. In the larger area of national questions he was deeply interested until the close of life. For him the Congressional Record was not a publication to be thrown into the wastebasket with untorn wrapper. Its columns were carefully read, the speeches of Senators and Congressmen critically examined, and his judgment of the character, influence and ability of members of the federal legislature was intimate and sound.

May we now, for a moment, be permitted to draw the window draperies, dim the lamps, come nearer to the fireplace, and picture our departed associate in that closer circle which may be entered only by those who enjoyed most intimate communion with him. His home was the shrine at which he worshipped, the members of his family were the idols of his heart. When he came out from that home his warm heart was in sympathy with a multitude of friends. Their joys were among the pleasures of his life, their sorrows drew the quick tear of compassion. His nature was tender as that of a child. His faith was great enough to believe in a city which hath

foundation, eternal in the heavens, whose maker and builder is God. That faith enabled him, at the last, to wrap the drapery of his couch about him and lie down to pleasant dreams. The silver cord is loosed, the golden bowl is broken, and sincere mourners go about the streets.

HON. CHARLES F. JOHNSON, Justice United States Circuit Court of Appeals, paid the following tribute:

MAY IT PLEASE THE COURT:

During my practice Kennebec County was honored by three Justices of this court, Whitehouse, Cornish and SPEAR, a triumvirate distinguished not alone for their legal learning and judicial qualities, but also loved and honored for their manly virtues and their broad human sympathy. The first two became Chief Justice of this court. At their death resolutions and memorial addresses in honor of their memories and in acknowledgment of their eminent services were heard by your Honors in this courthouse. The third, after rounding out a service of more than a quarter of a century, died January 31, 1929. His death has removed the last member of this court to preside at any trial in which I took a part and I tried my last case in it before him.

When I began the practice of law in 1886, at Waterville, Justice SPEAR was at Gardiner, having removed there in the preceding year from Hallowell where he had been in practice since 1879. He had risen rapidly and was then looked upon as one who would assume a prominent position at the Kennebec Bar among such lawyers as Orville D. Baker, Herbert M. Heath and Leslie C. Cornish. At his appointment as an Associate Justice of this court, in 1902, he had reached this position. In addition to his experience as an attorney he had had legislative experience both in the House and in the Senate, serving as president of the latter body in 1893. His long experience as a practicing attorney in the trial of cases and his knowledge of human nature gained from his wide association with men especially fitted him for the conduct of trials at *nisi prius*. His broad legal learning and industry made him a most useful member of the law court.

As a trial judge he was courteous and patient, quick in his rul-

ings, never evasive, but ready to meet squarely every situation presented. There was never any doubt about the instructions given by him to the jury, and the rights of all were preserved. While his perceptions were quick, he was patient with counsel and parties and ready to hear both sides of every question before reaching a conclusion, but when one was reached he announced it in clear and simple language free from all ambiguity. He was careful never to encroach upon the province of the jury, but aimed to leave to them the determination of facts without the expression by him of any opinion upon them. He was a learned, upright and impartial judge, who enjoyed the confidence of counsel and parties. This was my opinion when engaged in active practice, which knowledge of him gained in subsequent years has confirmed.

His written opinions, appearing in twenty-seven volumes of the Maine Reports, expressed in clear, simple and apt language, show not only his wide knowledge of the law but great industry. They constitute a most valuable contribution to the law and a monument to his legal ability and industry which will stand forever, unaffected by storm or sunshine. In some of them, like that in the Chandler Will Case, he showed an accurate knowledge of the mental attitudes of men under varying conditions as well as the motives by which they are actuated. In this opinion he dealt with a record of nearly three thousand pages, covering the testimony of several medical experts and a large number of other witnesses. Concurred in by Chief Justice Wiswell and the other justices who sat in the case, it attracted wide attention. Justice SPEAR took a pardonable pride in it, and I have heard him allude to it as one that brought him great satisfaction.

In his death the state has lost a most valuable public servant, but I, in company with a host of others, have lost a friend, to whom the manly qualities of Justice SPEAR had endeared him, and who loved him for his broad, generous impulses, his good companionship and his human sympathies. Beneath the judicial robe he wore there was more than a judge — there was a man, who enjoyed the companionship of others, never finding it necessary to screen his true self behind a veil of artificial dignity; for nature had thrown around him a natural dignity respected by all, whether in the courtroom or in the society of his friends.

With what keen enjoyment he received his friends, and meetings of the Bar at his farm. Then his lovable character displayed itself. How he loved to point out the brooks where he had fished and the many scenes dear to him. We who were fortunate enough to enjoy his hospitality upon these occasions always bore away lasting memories of his kindly nature overflowing with delight at the pleasure afforded to others.

As a friend he was ever loyal, generous and true. While he had strong convictions, he readily granted to others sincerity in holding their own. To his memory, not only as a great justice but also as a friend whose warm and genial companionship it was my pleasure to enjoy for many years, with a deep realization of my personal loss, I bring this inadequate but sincere tribute.

Response for the Court by CHIEF JUSTICE LUERE B. DEASY.

MEMBERS OF THE COMMITTEE OF THE KENNEBEC BAR:

The inevitableness, the universality of death have been the theme of philosophers and poets through the ages.

Sang the Psalmist "As for man, his days are as the grass."

When the poor woman came bringing her dead babe, imploring that it be restored to life, Buddha, according to the beautiful poem of Sir Edwin Arnold, said to her, "Dear Sister, the dead are very many, and the living few; the whole wide world weeps with thy woe."

And William Cullen Bryant wrote, "All that tread the earth are but a handful, to the tribes that slumber in its bosom."

And in that splendid eulogy of Beck, John J. Ingalls said: "Every hour some world dies unnoticed in the firmament; some sun smoulders to embers and ashes on the hearthstone of infinite space."

We all recognize the inevitableness of death and its universality, but when it comes to us, to our own family circle, to our own group of friends and associates, it comes as a shock, as something unusual, abnormal; and this is especially true when it comes to a man as vital and as virile as was ALBERT M. SPEAR.

I knew him for many years. For nine years I served with him upon the bench. He was a man of strong convictions which he expressed forcibly, and to which he clung tenaciously, but he had no

inordinate pride of opinion. He listened with smiling tolerance to opposing opinions, and he was neither afraid nor ashamed to acknowledge himself in error.

Judge SPEAR's character has been so adequately analyzed, his life story so well summarized by those of the Bar who have spoken that I do not need to say for the Court more than to say that his associates loved him and honored his memory.

"No man can tell
what coming years shall bring
To him of joy or grief or suffering,
But what his soul shall bring
to each new hour,
To meet its challenge, that is in his power."

What splendid equipment the soul of ALBERT M. SPEAR brought to meet the "challenge of each new hour!" Yea, to meet the challenge of the new life that has opened to him, beyond the farthest star.

Gentlemen, your resolutions expressed so well and so eloquently are gratefully received by the court, and ordered spread upon the records, and a copy thereof forwarded to the bereaved family. And as a further mark of honor and esteem for a great jurist who has passed away, the court will now adjourn for the day.

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action itself where none existed before. The two causes are inherently distinctive. The common law gave to the personal representative a right of action to recover for conscious suffering up to the time of death but nothing for the death itself.

The object of the Campbell act was not to give a new right of action where ample means of redress existed, but to supplement the existing law, and give a new right of action in a class of cases where no means of redress before existed.

In the case at bar the death was caused by assault and battery inflicted by the defendant upon the plaintiff's intestate, but that would not make the present action an action of assault and battery; hence the present action would not fall within the inhibition of R. S., Chap. 91, Sec. 1, and it was error to order a non-suit.

Ames v. *Adams*, 174.

Actions of *scire facias* to enforce judgments in trustee suits are governed by the provisions of Secs. 67, 73 and 74, Chap. 91, R. S. 1916.

Bean v. *Ingraham*, 238.

The action for money paid is founded on equitable principles and no privity of contract between the parties is required except that resulting from circumstances showing an equitable obligation.

The obligation is not contractual, nor when said to be "implied" is it an implied contract. It is an implication of law. It is quasi contractual.

A quasi contractual obligation may arise against one in consequence of the payment of his obligation by another. Mere voluntary payment of the obligation gives no right of action at law or equity to recover from the debtor the money so paid. That one is benefited by the payment by another is not alone sufficient to raise such obligations against him.

The payor must not have made the payment officiously. If the payment made, though made without request, is not regarded in law as made officiously, the party so paying is entitled to be reimbursed to the extent that the debt as between the debtor and himself should in equity and good conscience have been paid by the debtor.

Payment must have been made by the debtor with the expectation of being recompensed therefor.

City of Biddeford v. *Benoit*, 240.

See *Simansky* v. *Clark*, 280.

An endorser who pays a judgment against himself by reason of his endorsement of certain notes, secured with other notes by a mortgage of real estate, the payment of which mortgage and all notes is assumed by a subsequent grantee

of the real estate, can, in an action for money had and received, recover from the purchaser of said real estate from said subsequent grantee, to the extent of the amount still due from said purchaser or the purchase price, together with interest from the time the amount became due.

The action for money had and received is a liberal action and may be as comprehensive as a bill in equity. The action may be supported without privity between the parties other than created by law. The law may create both the privity and the promise. When one person has in his possession money which in equity and in good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs and in such a case an action for money had and received may be maintained.

Webb v. *Brannen,* 287.

See Review — *Thomaston* v. *Starrett,* 328.

In an action of trover to recover the value of certain logs by a disseizee and sold to the defendant and where the demandant has recovered possession after the cutting, but made no claim in his writ of entry for rents and profits or waste, held:

That while the demandant in a real action can not recover of the tenant in another action for rents, and profits or for waste committed during the period when the tenant was in possession and prior to the date of the writ of entry, he may recover in trover of a third person who has purchased the fruits of the trespass;

That since a demandant at common law before the enactment of Secs. 14 and 18, Chap. 145, R. S. (1841), had the option of proceeding in trespass, once his title was established, against the disseizee for waste in the form of cutting and removing timber, or in trover against the purchaser of the disseizee, or against the purchaser in trover without first establishing his title in a real action, Secs. 11 and 15, Chap. 109, R. S. 1916, are not to be construed as depriving the demandant of his right of action against the purchaser where no claim for waste was included in the real action;

That while the purchaser of the disseizee may be a privy, no judgment obtained in a real action will estop the demandant from proceeding against a privy, who was not a party to the real action, and when the issue between them could not have been litigated in the real action and was not;

That the statutory prohibition against a demandant in a real action proceeding in trespass against a tenant for waste committed prior to the date of his writ of entry can not be extended to have the effect of a judgment shielding the purchaser of the fruits of the trespass from an action by the demandant for conversion, when no claim for such waste is made in the real action and, therefore, none could have been recovered against the tenant.

Bemis v. *Match Co.,* 335.

AGENT.

ALIENATION OF AFFECTIONS

ASSUMPTION OF RISK.

ATTACHMENTS.

ATTORNEY AND CLIENT.

Attorneys may be retained to collect taxes by suit, but they have no authority to abate, exempt or compromise the claim.

Inh. of Frankfort v. *Waldo Lumber Co.*, 1.

Attorneys represent their clients. Their acts of omission and commission are to be regarded as the acts of parties they represent.

Lawyers are bound to exercise the highest degree of honor and integrity and the utmost good faith in the trial of causes. A disregard for the purity of jury trials by attorneys who are officers of the court, finds no defense in ignorance or inattention.

R. S., Chap. 87, Sec. 109, which provides that a verdict may be set aside because of the giving by any party to the cause, to any of the jurors, who tried the cause, any treat or gratuity is remedial in its nature. The mischief to be remedied is public as well as private. The integrity of jury trials lies at the very foundation of our judicial system and a weakness found there breaches public confidence. The statute seeks to safeguard the verdict during the term, after, as well as before, the trial. It is the duty of this court to give such liberal construction to the statute as will most effectually meet the beneficial end in view, prevent a failure of the remedy and advance right and justice. To effectuate the legislative intent cases within the reason of the law must be included. Its strict enforcement is imperative.

In the case at bar the invitation while extended only in the spirit of courtesy and hospitality must be recognized and condemned as "gratuity" within the prohibition of the statute.

Ellis v. *Emerson*, 379.

AUTOMOBILES.

BANKS AND BANKING.

An indorsee of a promissory note, who has pledged the note to a bank as collateral security for another and smaller note given by him, can recover in his own name in a suit on the pledged note, brought with the knowledge and consent of the pledgee, against an indorser of that note, even though the suit is brought while the note itself is in the physical possession of the pledgee bank, when it is shown that the note on which suit was brought was delivered to the plaintiff indorsee at or before the time of the trial.

Simansky v. *Clark,* 280.

BANKRUPTCY.

See *Checkeway* v. *Paper Co.,* 163.

A lien created by an attachment upon mesne process which was begun within four months before the filing of a petition in bankruptcy is dissolved by the adjudication, provided that it is shown that the bankrupt was insolvent at the time the attachment was made and provided that the trustee does not receive permission from the Court to become subrogated to the rights of the attaching creditor for the benefit of the estate.

But such a lien is void only at the instance of the trustee in bankruptcy. If he abandons property as valueless to the estate, it reverts to or remains in the bankrupt but subject to the lien.

Appointment of a trustee is necessary to divest a bankrupt of title to his property; and while the title of the trustee would relate back to the commencement of the proceeding, the title never passes out of the bankrupt if there is no trustee.

Liens on a bankrupt's property are not vacated for his benefit and bankruptcy proceedings do not divest a lien created by attachment where the bankrupt's property never passes to a trustee.

The statutory dissolution of liens is for the benefit of creditors, not for the benefit of the bankrupt, and as to him all such liens remain in force notwithstanding his adjudication in bankruptcy, both with reference to property which the trustee disclaims and property which never comes into his possession.

Cadwallader v. *Dulac,* 519.

BASTARDY.

A bastardy complaint is a civil action and provisions of Sec. 1, Chap. 94, R. S. 1916, providing for review in civil actions, apply to proceedings under such complaints.

Stearns v. *Ritchie,* 368.

BILLS AND NOTES.

An indorsee of a promissory note, who has pledged the note to a bank as collateral security for another and smaller note given by him, can recover in his own name in a suit on the pledged note, brought with the knowledge and consent of the pledgee, against an indorser of that note, even though the suit is brought while the note itself is in the physical possession of the pledgee bank, when it is shown that the note on which suit was brought was delivered to the plaintiff indorsee at or before the time of the trial.

The mere pledging of a promissory note or other evidence of indebtedness as collateral security for the payment of a debt does not divest the pledgor of title and vest title in the pledgee. The general property and the title still remains in the pledgor.

Simansky v. *Clark*, 280.

An endorser who pays a judgment against himself by reason of his endorsement of certain notes, secured with other notes by a mortgage of real estate, the payment of which mortgage and all notes is assumed by a subsequent grantee of the real estate, can, in an action for money had and received, recover from the purchaser of said real estate from said subsequent grantee, to the extent of the amount still due from said purchaser or the purchase price, together with interest from the time the amount became due.

The action for money had and received is a liberal action and may be as comprehensive as a bill in equity. The action may be supported without privity between the parties other than created by law. The law may create both the privity and the promise. When one person has in his possession money which in equity and in good conscience belongs to another, the law will create an implied promise upon the part of such person to pay the same to him to whom it belongs and in such a case an action for money had and received may be maintained.

Webb v. *Brannen*, 287.

In an action against an endorser of a note by the payee, the question whether or not the note sued on was paid by a larger note, alleged to have been given as a substitute for and as payment for the note in suit, is one of fact to be determined by the jury.

In the case at bar the positive and unqualified instructions given to the jury that statements of the payee to the maker constituted absolute payment of the note, thus releasing the endorser was erroneous. The question of payment was one of fact to be submitted to the jury.

Shaw v. *Pinkham*, 376.

A promissory note made payable in money or "in my property," if the quoted words relate to the medium of payment, is non-negotiable because the N. I. L.,

Sec. 1, provides that such a note to be negotiable must be payable "in money."

A note is negotiable though payable at a place certain or several places, the option of presenting at one or another place being with the holder.

One suing on a promissory note has the burden *prima facie* of proving the delivery of such note to him, but the possession of it by him and his introduction of it in evidence is sufficient to sustain such burden. This is true under Sec. 16 of the N. I. L., but is also true independently of the statute.

One suing on a promissory note must prove that it was issued for a valuable consideration. But if the note is negotiable, the *prima facie* presumption created by the N. I. L., Sec. 24, sustains such burden. In a negotiable note the words "value received" are not necessary. In an unnegotiable note such words are tantamount to an admission by the maker that the consideration has been received and this admission is *prima facie* sufficient to sustain the plaintiff's burden of proof.

In the case at bar, about the time of the appraisal of the estate of the maker of a $75,000 note payable to the maker's housekeeper (the plaintiff) she, the plaintiff, was asked by one of the appraisers if she had a $75,000 note, he saying "It has been reported so." She replied, "No, that don't amount to nothing." This admission by the plaintiff was neither denied nor explained and notwithstanding the *prima facie* presumption justified the jury in finding either want of delivery or want of consideration and in agreeing with the plaintiff that the note amounted to nothing.

Roux v. *Morey*, 428.

When a promissory note is payable at any bank (in a city or town named) it is a sufficient presentment if at maturity it is actually in a bank (in such city or town) ready to be delivered on payment. If not paid, it is dishonored. No further evidence of dishonor is necessary.

To charge an endorser of a promissory note seasonable oral notice and demand which identifies the instrument and indicates that it has been dishonored are sufficient. Notarial protest is not essential.

In case of a note payable at a bank notice to an endorser that the note at its maturity was held by the bank and is unpaid is sufficient notice of dishonor.

Notice of dishonor by the last endorser to charge prior endorsers is seasonable if given before close of business hours of the day following his own receipt of such notice.

As respects one another endorsers are *prima facie* liable in the order in which they endorse but evidence is admissible to show that as between or among themselves they have agreed otherwise.

Rosenthal v. *Levine*, 447.

A note otherwise in proper form but containing the words "with the privilege of discharging this note by payment of principal less a discount of five per centum within thirty days from the date hereof" does not contain a promise

BUILDING RESTRICTIONS.

BURDEN OF PROOF.

CHARITABLE TRUSTS.

CHATTEL MORTGAGES.

The supreme Judicial Court in equity has jurisdiction to entertain a bill to redeem a chattel mortgage.

No foreclosure being shown, no length of possession of a mortgaged chattel by the mortgagee will bar redemption, if the possession is held by virtue of the right of possession in the mortgagee as such.

When a mortgagee of a building on leased land is in possession his obtaining renewals of the lease is consistent with his holding as mortgagee.

A corporation's right of redemption from a mortgage is not extinguished by its securing from the Attorney General a certificate excusing it from filing annual returns upon the ground that it has ceased to transact business.

Produce Company v. *Martin*, 386.

CHURCH.

The term "church" imports an organization for religious purposes and property given to it *eo nomine* in the absence of all declaration of trust or use must by necessary implication be intended to be given to promote the purposes for which a church is instituted.

Bates v. *Schillinger*, 14.

CONDITIONAL SALES.

See *Gaunt* v. *Allen Lane Co.*, 41.

See *Pinkham* v. *Acceptance Corporation*, 139.

CONSPIRACY.

A conspiracy at common law may be defined as an agreement or combination formed by two or more persons to do an unlawful act or to do a lawful act by unlawful means.

Conspiracy is a convenient form of declaration against two or more joint tortfeasors. Its averment adds nothing to the nature or gravity of the offense charged. The choice of tort in the nature of conspiracy may affect the applicability of evidence, but the gist of the action, its ground and foundation is the tort alleged.

Franklin v. *Erickson*, 181.

CONSTITUTIONAL LAW.

CONSTITUTION OF MAINE.

CONSTITUTION OF THE UNITED STATES.

CONTRACTS.

CONTRIBUTORY NEGLIGENCE.

CORPORATIONS.

COUNTY COMMISSIONERS.

COURTS.

CRIMINAL CONVERSATION.

CRIMINAL LAW.

Errors of law in criminal cases are not, as a general rule, open to review on appeals to this court. The appropriate practice is to present such errors by a Bill of Exceptions, and a departure from this practice is not to be encouraged.

In this State, the principles applicable to a review of civil trials on a general motion for a new trial govern appeals in criminal cases.

The Law Court must, therefore, recognize in criminal appeals the exception to the general rule of practice above stated, viz.: that, where and only where manifest error in law has occurred in the trial of the case and injustice would inevitably result, the law of the case may be examined upon appeal and the verdict, if clearly wrong, set aside.

State v. *Wright*, 404.

Violations of the liquor law, like violations of other criminal law, may be proved by presumptive or circumstantial evidence, consistent with guilt and inexplicable on the theory of innocence, of the requisite degrees of convincing power, where that is the best evidence obtainable.

When, in a criminal prosecution, there is a total want of evidence to support some material allegation, the jury should be instructed to return a verdict of not guilty, and refusal so to do is reversible error.

State v. *Roy*, 415.

In a complaint charging crime the respondent was alleged to have committed the crime "at said Livermore in said County." In the preceding part of the complaint two counties had been named, to wit: Androscoggin, the seat of the Court, and Franklin, the residence of the complainant. East Livermore had been mentioned but once in the preceding part of the complaint and was there described as "East Livermore in the County of Androscoggin." It was contended that the venue is insufficiently stated.

HELD:

That the words "East Livermore in said County" referred for its antecedent to that part of the complaint wherein East Livermore is described as in the County of Androscoggin and that the statement of venue is sufficient.

State v. *Skerry*, 431.

The authority of the Superior Court for Penobscot County to remit the penalty or discharge the sureties in an action of *scire facias* on a forfeited criminal recognizance is not inherent. It is conferred and measured by Revised Statutes, Chap. 135, Sec. 24.

The authority there given can not be exercised when the recognizance sued upon was taken under specified provisions of the Maine Liquor Law, R. S., Chap. 135, Sec. 25; R. S., Chap, 127, Sec. 43.

Sec. 20, Chap. 127, R. S., is to be construed as if it originally contained the amendment of Sec. 1 of Chap. 167, Public Laws, 1925, prohibiting the trans-

portation of intoxicating liquors within this State without a Federal permit. The sureties on a recognizance taken thereunder can not be exonerated.

Death of the principal in a recognizance taken in a liquor case does not permit a departure from the prohibition of the Statute.

Upon default of the recognizance in such a case, the liability of the sureties is fully and finally fixed, and a surrender of the body of the principal thereafter, alive or dead, will not authorize any exoneration of the sureties.

State v. *Leo*, 441.

Statements to his physician, of one's bodily ailments, made for the purpose of enabling the physician to give proper medical advice and treatment, by forming an opinion of the cause of such ailments, may be testified to by the physician; not as evidence of the actual cause of the ailments, but in connection with testimony of the opinion formed partly upon such statements. Mere narration, however, by a patient to his physician of the cause of ailments, may not be told in evidence.

In the case at bar a medical witness for the prosecution in answer to a question by the Attorney for the State, whether he had any further talk with deceased about any other (than hospital) arrangements, was permitted against objection to state; "She made the remark —" "She supposed if she went back to the man who performed the operation that he would take care of her." Neither respondent, so far as the record showed, was present.

It was competent for this witness, after testifying as to the condition of his patient, and her complaints and symptoms, to give his opinion that these were such as might have been expected from incomplete abortion. Beyond this what the patient may have said to the doctor was mere hearsay.

It was not permissible for the State to claim that, because a part of the hearsay story had been recited, the rest of the conversation must be admitted. It is possible that the admitted evidence may have been injurious to the rights of both respondents and both are therefore entitled to a new trial.

State v. *Donnell et al*, 500.

As naming a stage of a trial reached when respondent pleads guilty, or by a jury is found guilty, "conviction" is by many courts, and in Chapters 136 and 137 of our Revised Statutes, as elsewhere therein, used to express the state of the respondent, before the conclusion of his case. That conclusion is the judgment of a Court having final jurisdiction of the case.

"Conviction," as set forth in Sec. 14, Chap. 18, R. S., regulating revocation of a physician's certificate of registration, is the judgment of the Court, which is to be reached before execution of sentence, and not the return of the adverse verdict.

In the case at bar petitioner, one of the respondents in the case, *State* v. *Donnell and Edwards*, was entitled to more or perhaps other than trial in the Superior

Court. The end of a criminal case is not reached when an appeal follows verdict, presenting a question of law. The case is pending, notwithstanding verdict and sentence. There was hence no "conviction" in the sense in which the term must be used in Sec. 14, Chap. 18, R. S., until judgment was ordered and nothing remained to be done except the discharge of the prisoner, or execution of sentence.

Donnell, Petitioner v. *Board of Registration,* 523.

DAMAGES.

A minor, unemancipated and living with his father, and suing by the father as next friend, may recover under the Act for expenses and loss of wages resulting from his injuries.

Close v. *Terminal Co.,* 6.

In an action for damages occasioned by improper workmanship in realigning a broken crankshaft thereby necessitating the shutting down of a mill for six days with resultant loss of earnings and expenses of maintenance, the jury were justified in finding that the defendant's obligation imposed by its contract was not fulfilled, and including in their award loss of regular profits as well as operating costs.

Armstrong v. *Supply Corp.,* 75.

In an action to recover damages for personal injuries, a married woman, living with her husband, can only recover for her suffering, mental and physical, resulting from the defendant's negligence.

She is not entitled to recover for loss of ability to do domestic labor in her home, nor for expenses for her medical or surgical treatment necessitated by the accident, for which she has not undertaken to be personally responsible.

There is no standard by which physical and mental suffering can be measured. It is in the determination of the jury to award such damages as seem to them to be fair compensation. It is, however, the duty of the Court to see that what should be regarded as the ultimate bounds of fair compensation are not greatly overstepped.

The standard by which to test the validity of an award of damages is the present worth of our money.

Where a married woman, living with her husband, received a permanent displacement of the sacrolias joint with resulting nerve tension, justifying the opinion that she would be a permanent and chronic sufferer from sciatic pains, and where varicose veins of a permanent character developed, an award in the amount of $4,806.67 was not excessive.

Hachey v. *Maillet,* 77.

Evidence of injuries sustained in a later accident is only admissible in trial of an action to recover damages for injuries previously sustained as tending to

show that the later accident resulted from conditions created by the earlier one, and was a natural consequence thereof, thereby showing the extent of the injuries caused by the earlier accident and affecting the amount of damages recoverable.

Humphrey v. *Hoppe,* 92.

In assessing damages for bridges it must be considered that the franchise is the right to take tolls. Evidence of such value should be considered and should be shown by proof of the income, revenue and earnings derived by the owner of the ferry for several years preceding the opening of the bridge, causing the damage.

Damages should also include the diminution in the value of the boats and equipment used in the operation of the ferry caused by their being rendered useless for ferry service at its location.

The damages suffered by reason of the construction of the bridge in this case were those resulting from the natural and necessary consequences of the erection and use of the bridge. The opportunity afforded the public of evading the use of the ferry of necessity not only injuriously affected but entirely destroyed the value of the franchise of the ferry.

Waukeag Ferry v. *Arey et als,* 108.

Where there exists a fixed standard or scale by which damages may be calculated a jury will not be permitted to depart from it.

Dyer v. *Barnes,* 131.

Damages are recoverable for the loss of conjugal fellowship of the wife, her company, coöperation, and help in every connubial relation, as also are damages for mental suffering.

Indifferent or repugnant attitude of mind on the part of the wife toward her husband may mitigate compensatory damages in proportion to circumstances in evidence. Value of performance of duty to support, clothe, and care for wife, whose affections have been alienated from husband, may lessen amount of compensable injury in action for criminal conversation and alienation.

Where tort is malicious, wanton, or willful, damages called interchangeably exemplary, punitive, or vindictive damages, which would be beyond compensation or satisfaction for injury, may be superadded to compensatory damages by way of punishment and example.

Criminal conversation furnishes the necessary foundation for awarding punitive damages to aggrieved spouse.

Punitive damages are distinguishable from a fine. A fine is imposed on a person for a past violation of law, while punitive damages have reference rather to the future than to the past conduct of the offender as an admonition to him not to repeat the offense, and deter others from the commission of like offenses.

DECEIT.

DEEDS.

DEMURRER.

DEVISE AND LEGACY.

DISCLOSURE.

Two disinterested Justices of the Peace may, under the law, become a Court, for the purpose of examining the debtor who has applied for this statutory procedure.

They are empowered by Sec. 53, Chap. 115, R. S., to "examine the citation and return" provided for in Section 51, and if that is "found correct," the authority of a tribunal may be assumed by them.

In the case at bar the record shows that the Justices did not have before them the citation under the hand and seal of its author. The statute was not followed; the law was disregarded, and exceptions must be sustained.

Karam v. *Marden*, 451.

DIVORCE.

A petition for rehearing in divorce proceedings under the provisions of Sec. 11, Chap. 65, R. S., 1916, is in the nature of a petition for review.

When such a petition is based upon an allegation that final judgment was rendered against a libellee during a period of mental incapacity, evidence as to the mental condition of the libellee, both before and after the period directly in issue, is admissible.

It is error to exclude such evidence solely because a portion of it relates to a time prior to the date of the decree granting the divorce and was introduced at the original hearing, if the excluded evidence is connected with that concerning a later condition and the whole taken together constitutes a connected basis for the opinion of medical experts as to the sanity of the libellee during the intermediate period.

When a divorce is decreed for desertion and it is alleged in a petition for rehearing that the decree was obtained by the fraud of the libellant, evidence that the separation was by mutual arrangement between the libellant and libellee is entitled to consideration and may not be disregarded on the ground that such evidence might have been introduced at the original hearing.

Lourie v. *Melnick*, 148.

EASEMENTS.

In a hearing upon a bill in equity the ruling of the sitting Justice that an easement where its width was not definitely determined by the parties in the instrument creating it must be held to be of such width as is reasonably necessary to serve the use for which it was created, was correct.

Willband v. *Grain Co.*, 62.

The law is well settled that there may be implied reservations of easements as well as implied grants where the easement is one of strict necessity.

An implied reservation of an easement of necessity may exist even against the grantee even though the land may have been conveyed with covenants of warranty where the easement is open and apparent and in use at the time of the conveyance.

In the case at bar the title to the land of the plaintiff and defendant was derived from a common grantor. There was evidence sufficient to go to a jury tending to show that the drain across the defendant's land was open, that its use must have been apparent to the defendant at the time of the purchase of his lot, that the use of the drain was one of strict necessity to the enjoyment of the land now owned by the plaintiff.

York v. *Golder*, 252.

See Deeds — *Caron* v. *Margolin*, 339.

ELECTRIC LIGHT AND POWER COMPANIES.

A vendor of electricity, engaged in the distribution of current over its lines to consumers, is bound to exercise due care and diligence in the construction, maintenance, inspection and operation of its lines and in selection, installation and inspection of its appliances, so as to afford to the consumers assurance of a reasonable degree of safety.

It is the duty of a company conducting electric current of great intensity by means of wires not only to make the wire safe, but to use due care, commensurate with the danger inherent in their business, to keep them safe by inspection and repair.

An electric company is not an insurer. It can be held liable for damage to property only when negligence is shown.

While it is the duty of an electric light company to make reasonable and proper inspection of its appliances, this duty does not contemplate inspection which would absolutely forestall injuries.

In the case at bar the defendant, a public service corporation, was at the time of the fire engaged in the business of transmitting over its wires, upon poles exclusively used by it, electric current for light and power.

There was no contention that the poles, cross-arms, insulators, wires and necessary transformers were not of proper material and design at the time of installation; but it was claimed that at the time of the fire the interval between the poles in front of the house was too great, and that the high voltage wires sagged excessively, coming in contact thereby with the service wire running into the house and through it discharging a current of such voltage as to ignite the house and thus destroy it.

ELECTRICITY.

EQUITY.

ESTATES.

ESTOPPEL.

EVIDENCE.

a necessary preliminary to evidence of a refusal, and no exception lies to its admission.

Lamson v. *Dirigo Fish Company*, 364.

See *Fournier-Hutchins* v. *Tea Co.*, 393.

Violations of the liquor law, like violations of other criminal law, may be proved by presumptive or circumstantial evidence, consistent with guilt and inexplicable on the theory of innocence, of the requisite degrees of convincing power, where that is the best evidence obtainable.

When, in a criminal prosecution, there is a total want of evidence to support some material allegation, the jury should be instructed to return a verdict of not guilty, and refusal so to do is reversible error.

State v. *Roy*, 415.

Exceptions to the direction of a verdict for the defendant can not be sustained when the evidence shows that, in any situation that could be assumed at the time of the accident, the plaintiff was (1) either injured by a fellow servant, or (2) though in the employ of the defendant, the plaintiff was injured by a person in the employ of a third party, or (3) that neither the plaintiff nor the party injuring him were in the employment of the defendant.

The exclusion of evidence which, if it had been admitted and had gone to the jury to be weighed with all the other evidence in the case, would not have contributed to justify a verdict contrary to that directed by the Justice presiding, is not prejudicial, and exceptions to its exclusion can not be sustained.

Dambrosia v. *Edwards*, 458.

If the title has not been determined in the replevin suit, any pertinent facts may be shown in diminution of the claim.

The question of damages, so far as it has not been settled by any judgment, is therefore open to the defendants.

In such case the defendants may show anything in mitigation of damages, where it is not inconsistent with any judgment in the replevin suit.

The evidence offered, to show that a corporation owned the wood and that it was in no sense and no degree the property of the judgment debtor, was properly admitted. Title in another than the judgment debtor was rightly shown in the litigation in process, rather than in and by means of subsequent suits.

Macomber v. *Moor et als*, 481.

Statements to his physician, of one's bodily ailments, made for the purpose of enabling the physician to give proper medical advice and treatment, by forming an opinion of the cause of such ailments, may be testified to by the physician; not as evidence of the actual cause of the ailments, but in connection

EXCEPTIONS.

EXECUTORS AND ADMINISTRATORS.

One making claim against an estate is required by the provisions of Sec. 14, Chap. 92, R. S., as amended by P. L., 1917, Chap. 33, and P. L., 1919, Chap. 177, as a condition precedent to the maintenance of his action, to present his claim in writing to the administrator or executor or file it in the registry of probate supported by his affidavit, or that of some other person cognizant thereof, either before or within twelve months after the qualification of the administrator or executor.

While, before the claim is barred by the statute of limitations, presentment or filing may be waived by the personal representative, under a plea of the general issue, want of filing or presentment is in issue and failure to prove performance or waiver thereof bars an action by the claimant.

Kelley v. *Forbes*, 272.

FALSE REPRESENTATIONS.

See Actions — *Clark* v. *Morrill*, 79.

In the purchase of real estate from a municipality, as from a private citizen, the rule, *caveat emptor*, applies, and to sustain his claim for reimbursement the plaintiff must prove fraudulent representation by the grantor.

Representations made by any citizen or official other than the agent to whom authority to make the contract of sale had been delegated, can not be relied upon to establish a fraudulent transaction and to recover the purchase price from a municipality.

Lavoie v. *Auburn*, 412.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Master and Servant — *Close* v. *Portland Terminal Co.*, 6.

See *Birmingham* v. *Railroad Co.*, 264.

FERRIES.

All ferries in this state are governed by statute, either special or general, regulating their establishment, licensing and control by county commissioners.

The grant of a ferry franchise by the legislature, unless limited by some general law or restrictive provision in the grant, is necessarily exclusive to the extent of the privilege conferred.

FINDINGS OF FACT.

FORFEITURE.

FORECLOSURE.

FRANCHISE.

FRAUDULENT CONVEYANCES.

GUARANTY.

HABEAS CORPUS.

HEALTH AND ACCIDENT INSURANCE.

HUSBAND AND WIFE.

INFERENCES.

INDICTMENT.

See Criminal Law.

INSTRUCTIONS TO JURY.

See *Shaw* v. *Pinkham*, 376.

When, in a criminal prosecution, there is a total want of evidence to support some material allegation, the jury should be instructed to return a verdict of not guilty, and refusal so to do is reversible error.

State v. *Roy*, 415.

INSURANCE.

In an action to recover sick benefits under an accident and health policy which contained a "lapse" clause if the premium were not paid when due on the first day of each month and a reinstatement clause if paid after a lapse, held:

That there was no evidence warranting a finding of a waiver of the provision requiring payment of the premiums on the first day of each month.

That application of a premium unless accompanied by a stipulation that it be applied on a certain month is left to the insurer to apply, and having been once applied and repeated notice given, to the insured by receipts of later premiums without objection on his part binds him.

That a provision for ten days of grace for the payment of premiums when the policy has been in force for three consecutive months is held to mean continuously in force.

That the plaintiff's policy, by failure to pay the premium due October 1, 1927, until October 4, had elapsed and did not cover illness beginning October 3, the insurer not having knowledge of the illness of the insured when it accepted the premium.

That the acceptance of a premium when due in the month following a lapse had no effect on the past, but merely extended the policy into the future.

Brennan v. *Insurance Co.*, 184.

The issuing of a fire insurance policy on an application which without fraud contains no answer to certain questions waives the right to require answers thereto.

If a question in the application is not answered at all, there is no breach of warranty, provided the insurer accepts the application without objection, since if not satisfied the company should demand fuller information.

INTOXICATING LIQUORS.

INVITED GUESTS.

JOINT ADVENTURE.

JUDGMENT.

When a plaintiff is entitled to judgment in a suit on a statute bond, the judgment should be for the penal sum of the bond.

Execution, however, should be limited to the amount of damages which have accrued at the time of judgment, the judgment standing as security for future damages to be recovered in *scire facias*.

Stearns v. *Ritchie*, 368.

Judgment for the defendant in a replevin suit does not necessarily determine the title to the property, and defendant in an action on the bond is entitled to show that it was not determined in such suit, or that the plaintiff's was a mere possessory right.

If the title has not been determined in the replevin suit, any pertinent facts may be shown in diminution of the claim.

The question of damages, so far as it has not been settled by any judgment, is therefore open to the defendants.

In such case the defendants may show anything in mitigation of damages, where it is not inconsistent with any judgment in the replevin suit.

While judgment for a plaintiff in an action on a replevin bond must be for the penalty of the bond, execution can issue for only so much thereof as is due for the breach proved.

Macomber v. *Moor et als*, 481.

See *Diplock* v. *Blasi et al*, 528.

JUDICIAL SEPARATION.

Justifiable cause which will excuse a wife from living apart from her husband ordinarily involves, on the part of the husband with respect to the wife and to her knowledge, conduct inconsistent with the marital relation; not necessarily misconduct or ill treatment of such a character as might entitle her to a divorce from the bonds of matrimony, but such as could be made without turning on the same length of time, a foundation for a judicial separation under R. S., Chap. 66, Sec. 10.

A separation begun by a husband, his wife acquiescing or consenting, does not amount to desertion until some withdrawal of the acquiescence or consent or the occurrence of some act, or the making of a declaration indicative of a change in attitude.

Albee's Case, 126.

JURY.

A jury is bound by the instructions, on questions of law, given by the presiding Justice and must be presumed to have followed them.

State v. *Wright,* 404.

A jury finding based upon sufficient evidence, on the issues submitted to them, under proper instructions of law, is conclusive upon this court.

Goudy-Clark v. *Littlejohn,* 197.

LANDLORD AND TENANT.

Where a lease for five years, with a privilege of renewal for the same term, contains a proviso that the lessee shall give to the lessor at least sixty days' written notice of his desire for such renewal and such written notice is not given, the fact that the lessee, after the expiration of the lease, with knowledge of the lessor, allowed some of his personal property to remain on the leased premises, to aid in the effecting of a new renting, does not constitute a holding over on the part of the defendant which might be considered an election to extend the lease for a further period of five years, in view of the evidence in the case which shows that the arrangements for allowing the property to remain were made on the basis of a rental to be paid as long as the property was kept there.

While a holding over may constitute strong evidence of an intent to renew or extend a lease, yet where there is, as in this case, no intention shown to renew or extend, and where there is a new arrangement made for rental, the occupancy is merely a tenancy at will.

Sargent v. *Reed,* 269.

A lessor as such, is not liable for the negligence of his lessee. A lessor of a shooting gallery properly licensed, is not liable to third persons for injuries resulting from the lessee's negligence.

Silverman v. *Usen,* 349.

See *Lamson* v. *Dirigo Fish Company,* 364.

If a lessor contracts to repair premises in the possession and under the control of his tenant, his liability is no greater or different than would be the liability of a third party, i.e., a carpenter or other mechanic who contracts to make such repairs.

The general principle is that a tenant takes leased premises for better or for worse with no obligation on the part of the lessor to make repairs.

MARRIED WOMEN.

MASTER AND SERVANT.

MENTAL DISABILITY.

MILL PRIVILEGES.

MONEY HAD AND RECEIVED.

See *Webb* v. *Brannen*, 287.

MONEY PAID.

See *City of Biddeford* v. *Benoit*, 240.

MORTGAGES.

When mill machinery is installed in a mill and attached thereto in such manner as to become part of the realty, the title to such machinery is in the mortgagee of the real estate although the machinery may have been sold to the mortgagor under a conditional sale, provided the sale is subsequent to the date of the mortgage.

The so-called Massachusetts rule prevails in this state, which rule holds that a contract between a mortgagor and a third person, preserving the chattel character of property added to real estate during the life of the mortgage thereon, is ineffective as against the mortgagee unless he is a party to the transaction; and the question of whether it can or can not be removed without injury to the realty is immaterial.

Gaunt v. *Allen Land Co.*, 41.

MOTOR VEHICLES.

A gratuitous passenger must exercise due and reasonable care for his or her protection.

One riding as a passenger or guest may not place his or her safety entirely in the keeping of the driver.

Humphrey v. *Hoppe*, 92.

The rule laid down in Chap. 9, P. L., 1923, regulating the right of travelers at intersecting streets is not an absolute rule which frees a driver of a motor vehicle at intersecting streets from observing the ordinary rules of due care with respect to a motor vehicle approaching on his left.

A driver of a motor vehicle must always have his car under control when approaching the intersection of streets.

If a driver approaching on the left through negligence enters the intersection of two streets, the driver approaching on the right must still use due care and all reasonable means to avoid a collision.

In the case at bar, the evidence is clear that the defendant's truck had entered the intersection of the streets before the plaintiff's car had reached it and that

the plaintiff in the exercise of due care should have seen the defendant's truck in time to have avoided the collision.

Petersen v. *Flaherty,* 261.

The care and vigilance required on the part of vehicular travelers will necessarily vary according to the exigencies of the situation.

An automobile driver is bound to use his eyes, bound to see seasonably that which is open and apparent, and take knowledge of obvious dangers. When he knows, or reasonably ought to know, the danger, it is for him to govern himself suitably. Thoughtless inattention spells negligence.

The law of the road must yield to extraordinary junctures.

In the case at bar the fact that the steam shovel was shown to have been on the left of the road raised a *prima facie* presumption of negligence. Such presumption was, however, open to explanation, and full explanatory evidence was introduced by the defendant.

Callahan v. *Bridges Sons,* 346.

MUNICIPAL CORPORATIONS.

A Municipal corporation has no element of sovereignty, having only those powers which are clearly and unmistakably granted by the law-making authority.

When any power has been granted and the mode of its existence is prescribed, that mode must be strictly pursued.

The power of taxation is an attribute of sovereignty, and is essential to the existence of government. This power is not transferable. Whenever taxes are imposed, whether by a municipality or by the State, it is, in legal contemplation, the act of the State, acting either by her own officers or other agents designated for the purpose.

Inh. of Frankfort v. *Waldo Lumber Co.,* 1.

Neither a municipality nor a sewerage district assuming the obligations of a municipality with relation to providing sewage facilities is obliged to provide means by which surface water may be enabled to enter into and pass through its sewers.

Auburn Sewerage District v. *Whitehouse,* 160.

By usage in this state, a town may as a party to an action be properly described "the inhabitants of the town of (name)," as it customarily is, or "town of (name)"; and a city may as a party to an action be properly described by its exact corporate name only or with the additional words "inhabitants of the."

In an action by the inhabitants of the City of Biddeford, the exact corporate name of which municipality is City of Biddeford, to recover money alleged to have been paid under a contract made with it, a written contract between the City of Biddeford and the defendant, offered in proof of the allegation, is not a variance therefrom.

While in the case of individuals recovery may be had for money paid under a mistake of fact but not under a mistake of law, payments of public money made by officials under a mistake of law may be recovered. *Inhabitants of Livermore* v. *Inhabitants of Peru*, 55 Me., 469, overruled.

Where the money of a municipal corporation has been paid to discharge the debt of an individual under circumstances under which an individual making payment could not recover, yet if such payment be made under a mistake of law or under such circumstances that the debtor should, as between him and the corporation, in equity and good conscience repay the corporation, the latter may recover it from the debtor in an action for money paid.

In the case at bar the payment by the city officials of the premium on the bond was without consideration and legal authority and could be recovered from the defendant whose obligation to pay was discharged.

City of Biddeford v. *Benoit*, 240.

In the purchase of real estate from a municipality, as from a private citizen, the rule, *caveat emptor*, applies, and to sustain his claim for reimbursement the plaintiff must prove fraudulent representation by the grantor.

Representations made by any citizen or official other than the agent to whom authority to make the contract of sale had been delegated, can not be relied upon to establish a fraudulent transaction and to recover the purchase price from a municipality.

Lavoie v. *Auburn*, 412.

NEGLIGENCE.

A gratuitous passenger must exercise due and reasonable care for his or her protection.

One riding as a passenger or guest may not place his or her safety entirely in the keeping of the driver.

Humphrey v. *Hoppe*, 92.

The degree of care required of one whose breach of duty is very likely to result in serious harm is greater than when the effect of such breach is not near so threatening.

No liability to respond in damages will attach in the absence of negligence on the part of the company or its employees proximately causing the injury complained of.

NEW TRIAL.

NOTICE.

NUISANCE.

See *Caron* v. *Margolin*, 339.

A shooting gallery is not *per se* a nuisance. It is not a nuisance if licensed by competent public authority under R. S., Chap. 32.

Though licensed it may be dangerous, but it is not a tort to lease property for a use which a licensing board created by a legislature has, even though injudiciously, licensed as legitimate.

Silverman v. *Usen*, 349.

PARTNERSHIP.

Sharing in profits and losses does not necessarily constitute a partnership.

Joint adventure is not identical with partnership but is so similar in its nature and in the contractual relations created thereby that the rights as between the adventurers are governed practically by the same rules that govern partnerships.

Simpson v. *Spinning Co.*, 22.

PEDESTRIANS.

See Negligence — *Clancey* v. *Power & Light Co.*, 274.

PHYSICIANS AND SURGEONS.

The liability of physicians or surgeons is limited within certain clearly defined lines. They neither warrant against accidents nor guarantee results. They contract to possess ordinary skill, to use ordinary care, and to exercise their best judgment in the application of their skill to the cases they treat.

Emery v. *Fisher*, 453.

When an injured party uses reasonable care in the selection of a physician or surgeon to relieve an injury, the original tort-feasor is liable for any aggravation of such injury resulting from the unskilfulness or negligence of the physician or surgeon so employed; and a settlement with and release of such tort-feasor is a settlement of all claims which might exist against the attending physician or surgeon for his negligence.

Where one procures a physician or surgeon to attend a person whom he has injured and uses due and reasonable care in the selection of such physician or surgeon, he is not liable for the negligence or unskilfulness of the latter which results in an aggravation of the original injury.

PLEADING AND PRACTICE.

On report, technical questions of pleading may be treated as waived.

Thread Co. v. *Water Co.*, 218.

The statute permitting a plaintiff to prove an itemized account, *prima facie*, by affidavit (Sec. 127, Chap. 87, R. S., amended by Chap. 96, P. L., 1925) being in derogation of common law, must be strictly construed.

Whether a plaintiff shall or shall not be compelled to elect which of several counts in his writ he relies upon, is a matter within the discretion of the trial judge.

Sawyer v. *Hillgrove*, 230.

If no demand is made by the plaintiff in a trustee suit within thirty days after judgment, the attachment by the original process, as against the trustee, is dissolved, and, if no second attachment has intervened, the principal defendant may recover his goods, effects and credits in the hands of his trustee as if they had not been attached.

If demand is not made by the officer holding the execution issued in a trustee suit, within thirty days after final judgment in the original action, an action of *scire facias* can not be maintained to enforce the original judgment.

In the case at bar both demands being made more than thirty days after judgment the ruling below charging defendant, Mark W. Ingraham, as trustee, was error.

Bean v. *Ingraham*, 238.

See Executors and Administrators — *Kelley* v. *Forbes*, 272.

The doctrine of set-off did not exist at common law and the right in this state to set-off one demand against another is wholly regulated by the provisions of Sec. 74, Chap. 87, Revised Statutes.

Failure to file a brief statement of his demands in set-off during the term to which the writ is returnable, as required by Sec. 74, Chap. 87, Revised Statutes, precludes a defendant, where the rule of reference does not provide for adjustment of claims in set-off, from presenting such demands at the hearing before the referees, and the referees have no authority to receive such brief statement or to consider set-offs claimed under it.

Ingraham v. *Berliawsky*, 307.

See Review — *Thomaston* v. *Starrett*, 328.

See Actions — *Bemis* v. *Match Co.*, 335.

Mere non-compliance with a written demand, without refusal, is insufficient to support an action of trover, in cases where the party upon whom the demand is made is under no duty to make redelivery.

PLEDGOR AND PLEDGEE.

POOR DEBTORS.

POWERS OF MUNICIPAL OFFICERS.

PRESUMPTIONS.

PRINCIPAL AND AGENT.

PUBLIC UTILITIES.

REAL ACTIONS.

REFERENCE AND REFEREES.

A hearing before referees is not a continuation of a term of court at which the reference is made.

Failure to file a brief statement of his demands in set-off during the term to which the writ is returnable, as required by Sec. 74, Chap. 87, Revised Statutes, precludes a defendant, where the rule of reference does not provide for adjustment of claims in set-off, from presenting such demands at the hearing before the referees, and the referees have no authority to receive such brief statement or to consider set-offs claimed under it.

In the case at bar the referees therefore properly refused to receive the brief statement and to consider the set-off claimed under it, and their finding that the assignment of the judgment to the plaintiff was for a valuable consideration and was not colorable was a finding of fact not subject to review by the Law Court.

Ingraham v. *Berliawsky*, 307.

REPLEVIN.

See *Acceptance Corp.* v. *Littlefield, Crockett Co.*, 388.

RES ADJUDICATA.

See *Ketch* v. *Smith*, 171.

RESERVATIONS.

See *York* v. *Golder*, 252.

RES IPSA LOQUITUR.

The doctrine of *res ipsa loquitur* does not affect the burden of proof. It merely shifts the burden of evidence and requires the defendant to go forward with evidence tending to exonerate it. It does not affect the general rule, when the evidence is so clear and convincing that reasonable minds would not differ in their conclusions therefrom, the question of the defendant's negligence is for the court, and not for the jury.

Edwards v. *Power & Light Co.*, 207.

REVIEW.

A petition for review is addressed to the discretion of the Court and its decision can be revised upon exception only for erroneous rulings in matter of law.

A petitioner for review under R. S., Chap. 94, Sec. 1, Par. VII, providing "A review may be granted in any case where it appears that through fraud, accident, mistake or misfortune, justice has not been done, and a further hearing would be just and equitable" is not entitled to a review unless he proves to the satisfaction of the Court at *nisi prius* three propositions: (1) that justice has not been done; (2) that the consequent injustice was through fraud, accident, mistake or misfortune; and (3) that a further hearing would be just and equitable.

If the presiding Justice is satisfied of all these and grants the petition or is not satisfied of some one or more of them and denies the petition, his decision is final and not subject to review upon exceptions.

The mere order of dismissal by itself is in legal effect a determination by the sitting Justice that at least one of the three requisite propositions of the foregoing rule as a matter of fact or of law so far as either fact or law or both are involved has not been proved to his satisfaction.

Exceptions to such an order of dismissal can not be sustained where it does not appear that the sitting Justice expressed any opinion or gave any direction or judgment on any matter of law or gave any specific ruling in relation to any matter of fact or law, or that upon the record the order raised only a question or questions of law.

Thomaston v. *Starrett*, 328.

A bastardy complaint is a civil action and provisions of Sec. 1, Chap. 94, R. S., 1916, providing for review in civil actions, apply to proceedings under such complaints.

Stearns v. *Ritchie*, 368.

One who is actually a party in interest, but who was not an original party to an action, may, as provided in R. S., Chap. 44, Sec. 1, become a petitioner for a review of the original action provided that his petition sets forth the fact of his interest, and upon filing of bond with sufficient surety or sureties, approved by the presiding Justice, to secure the party of record against any judgment recovered by the defendant in review.

If one is bound by a judgment in the original suit, it is just that he should be given the right to bring a petition for its review; hence a warrantor, who has been avouched in to defend a real action against his warrantee, can bring a petition for review as a party in interest because, after such avoucher, the warrantor is bound by the judgment rendered therein even though he does not appear and defend the suit.

Vermeule v. *Brazer*, 437.

RULES OF COURT.

SALES.

SET-OFF AND COUNTER CLAIMS.

See Pleading and Practice.

SUBROGATION.

Subrogation under Sec. 8 of Chap. 222 of the Public Laws of 1921 amending the Workmen's Compensation Act of this State, is a matter of law. Without an assignment, the employer, upon paying or becoming liable for compensation awarded his employee for injuries received at the hands of a third person, is at once vested with the injured beneficiary's right of action against the wrongdoer, and an action may be brought either in the name of the employer or in the name of the employee for the benefit of the employer.

In an action by an employer under its statutory right of subrogation, it is unnecessary to allege or prove that the employer refused to pursue its remedy against a wrongdoer for ninety days after written demand so to do, filed by the employee.

Fournier-Hutchins v. *Tea Co.*, 393.

SUPERIOR COURT FOR PENOBSCOT COUNTY.

The authority of the Superior Court for Penobscot County to remit the penalty or discharge the sureties in an action of *scire facias* on a forfeited criminal recognizance is not inherent. It is conferred and measured by Revised Statutes, Chap. 135, Sec. 24.

The authority there given can not be exercised when the recognizance sued upon was taken under specified provisions of the Maine Liquor Law, R. S., Chap. 135, Sec. 25; R. S., Chap. 127, Sec. 43.

State v. *Leo*, 441.

SUPREME COURT OF PROBATE.

See Widow's Allowance — *Hilt* v. *Ward*, 191.

SURETYSHIP AND GUARANTY.

One who furnishes collateral as an accommodation to secure a loan of another stands in the relation of surety to the one accommodated.

By the weight of authority a surety, after the debt for which he is liable has become due, without paying or being called upon to pay it, may file a bill in equity in the nature of a bill *quia timet* to compel the principal debtor to exonerate him from liability by its payment, provided no rights of the creditor are prejudiced thereby.

When a debtor and his surety have given security for a debt the surety has an equity to require the property of the principal to be sold first and the proceeds of the sale applied in satisfaction of the debt.

In the case at bar the decree of the presiding Justice commanding the payee to call for payment of the note and in the event of default of payment that resort be had to securities owned respectively by the makers of the note held by the payee as collateral, and finally to property belonging to the plaintiff to apply to any unpaid balance, the remainder to be returned to her, was proper and suitable to the purpose.

Matthews v. *Matthews,* 495.

SURFACE WATERS.

See *Auburn Sewerage District* v. *Whitehouse,* 160.

TAXATION.

The levying of taxes is a power of sovereignty.

When assessing or collecting taxes municipal officers are the agents of the State, which is sovereign. They proceed only under such agency, and must act strictly as authorized and empowered.

The power of taxation is an attribute of sovereignty, and is essential to the existence of government. This power is not transferable. Whenever taxes are imposed, whether by a municipality or by the State, it is in legal contemplation, the act of the State acting either by her own officers or other agents designated for the purpose.

Taxes are to be collected in money. A promissory note can not be accepted in payment of taxes, its acceptance is against public policy, and a note so given for taxes can not discharge them.

The municipal officers can not ratify an unauthorized act of their agent in the collection of taxes.

Attorneys may be retained to collect taxes by suit, but they have no authority to abate, exempt, or compromise the claim.

Under the Constitution of Maine the State may never, in any manner, suspend or surrender the power of taxation.

Abatement of taxes may only be made by assessors proceeding strictly under the rules set forth in the statutes.

A tax is not a "demand." It is not a debt nor in the nature of a debt, but is an impost levied by authority of government upon the citizens or subjects, for the support of the State. It is not founded on contract or agreement.

Authority to remit, abate, or settle a tax must be in conformity to some provision of the statute, otherwise it is void.

Inh. of Frankfort v. *Waldo Lumber Co.,* 1.

TENANCY AT WILL.

See Landlord and Tenant — *Sargent* v. *Reed*, 269.

TOWNS.

See Municipal Corporations.

TRESPASS.

TROVER.

TRUSTS.

The definition of a charitable trust set forth in *Jackson* v. *Phillips*, 14 Allen, 539, 550, and in *Haskell* v. *Staples*, 116 Me., 103, adopted.

The beneficiaries of a charitable trust who may become beneficiaries must be an indefinite, unascertained, uncertain, fluctuating body of individuals. The beneficiaries who at a given moment are the beneficiaries entitled to receive the benefit of the trust and whom the trustee selects therefor must be ascertainable.

A valid charitable bequest must be for a purpose recognized in law as charitable. A religious purpose is a charitable purpose and has been uniformly so recognized in this court.

A court of equity will not allow a gift for charitable uses, otherwise valid, to fail for want of a trustee but will itself administer the trust or appoint a trustee to administer, although the gift for such use is to a voluntary association or unincorporated society, which is uncertain, indefinite and fluctuating.

Bates v. *Schillinger*, 14.

One occupying a *quasi fiduciary* relation to another with reference to mortgaged real estate, causing the other to rely on him to save the property from the result of foreclosure proceedings, and thereafterward obtaining title to the property himself and claiming to own the same, stands chargeable with constructive if not intentional fraud by reason of which the injured party is entitled to relief in equity.

In such a situation a bill in equity to enforce a trust is maintainable.

Thibeau v. *Thibeau*, 324.

TRUSTEE PROCESS.

VERDICTS.

WAIVER.

A grantee claiming waiver by his grantor of a condition subsequent contained in his deed can not prove it merely by showing waiver of similar conditions contained in other deeds from his grantor to other grantees.

Power Company v. *Waishwell*, 320.

See Insurance — *Spaulding* v. *Insurance Company*, 512.

WARRANTY.

See Deeds.

WATER COMPANY.

See *In re Milo Water Company*, 531.

WATER DISTRICT.

Every water district created under this State is a quasi-municipal corporation in its nature and a public utility and as such is subject to the control of the Public Utilities Commission.

When the legislature declared that the rates established by the trustees of the water district shall be uniform throughout, it required no more than is required under Secs. 16 and 33 of Chap. 55, R. S., viz.: that all rates shall be reasonable and just and without discrimination.

Absolute uniformity in utility rates, like uniformity in taxation, is the unattainable. It can only be approximated. Uniformity as required by the Act creating the district, must be held to mean that the rates established by the trustees must be reasonable and just and without unjust discrimination between takers of the same class, having reference to the nature of the service and the cost of supplying it.

Whenever the regulatory body created by the State, acting within the scope of its authority, has approved certain rates as reasonable and just and not unjustly discriminatory, no grievance having been claimed by those affected, the Court will assume the rates are uniform between all takers of the same class. The establishing of classes is vested finally in the Utilities Commission.

Water District v. *Town of Wells*, 256.

WATER POWER.

Water power, as such, is not an independent subject of taxation, but land upon which a mill privilege exists is taxable at its worth as land enhanced by

WATER RATES.

WIDOW'S ALLOWANCE.

WILLS.

A valid charitable bequest must be for a purpose recognized in law as charitable. A religious purpose is a charitable purpose and has been uniformly so recognized by this court.

If it appears that the intention of a testator was that a bequest, primarily for charitable uses, could be used for other than charitable purposes, the bequest is invalid. If a part may be so otherwise used, all of it may be.

The words of a specific bequest "for the said Society in any way it may deem best" are words of limitation on the way or manner in which the bequest can be used and necessarily imply a use for the object and purpose of the society. The purpose of such specific bequest is therefore valid.

Bates v. *Schillinger*, 14.

WORDS AND PHRASES.

"Church" and "society" defined — *Bates* v. *Schillinger*, 14.

"Arising out of" — *Gooch's Case*, 86.

"Arising out of the Employment" — *Sullivan's Case*, 353.

"In the Course of the Employment" — *Sullivan's Case*, 353.

"Sum certain" — *Waterhouse* v. *Chouinard*, 505.

"Conviction" — *Donnell, Petitioner* v. *Board of Registration*, 523.

WORKMEN'S COMPENSATION ACT.

Under the Workmen's Compensation Act an injury to be compensable must arise out of and also in the course of employment.

An accident arises in the course of the employment if it occurs, as to time, place and circumstances, during employment, or in the course of activities incidental thereto, at a place where the workman may properly be found and under circumstances that negative the idea of voluntary self infliction or any statutory bar.

The course of employment covers the period between the workman's entering his employer's premises and his leaving them within a reasonable time after his day's work is done.

In the case at bar it nowhere appeared in the evidence that the employer knew and allowed the practice of parking automobiles by its employees on its grounds.

The employee on the day of the accident had parked his car in a hazardous place. No evidence appeared that using this place and such parking was

Justifiable cause which will excuse a wife from living apart from her husband ordinarily involves, on the part of the husband with respect to the wife and to her knowledge, conduct inconsistent with the marital relation; not necessarily misconduct or ill treatment of such a character as might entitle her to a divorce from the bonds of matrimony, but such as could be made without turning on the same length of time, a foundation for a judicial separation under R. S., Chap. 66, Sec. 10.

Under the Workmen's Compensation Act, though the cause need not be utter and may become complete sooner than the divorce statute, yet desertion means wilful, wrongful, and continued separation with intent to desert, without consent.

A separation begun by a husband, his wife acquiescing or consenting, does not amount to desertion until some withdrawal of the acquiescence or consent or the occurrence of some act, or the making of a declaration indicative of a change in attitude.

Albee's Case, 126.

The fact that an employee is the general servant of an employer does not, as a matter of law, prevent him from becoming the particular servant of another.

But merely because the work in which the servant is engaged is superintended by the agent of someone other than the general employer does not relieve the latter from responsibility.

If servants are under the exclusive control of the special employer in the performance of work which is a part of his business, they are, for the time being, his employees, even though they may remain on the payroll of the general employer.

When an employee performs services for a third party by direction of his employer, such employer may be liable under the Workmen's Compensation Act for injuries sustained while performing the task, although the employee may be under the control of the third party as to the details of the work.

Gagnon's Case, 155.
Cayer's Case, 155.
Moore's Case, 155.
Sylvain's Case, 155.

While oral notice for an injury received by an employee does not take the place of the written notice required by Sections 17, 18 and 19, Chap. 50, R. S., 1916, as amended by Chap. 238, P. L., 1919, the Workmen's Compensation Act, yet such oral notice may result in the acquirement of knowledge on the part of an employer or its agent so as to bring the case within the remedial provisions of Section 20.

Such an agent need not be one of that narrow class upon whom written notice

but a finding by him can not stand unless the facts thus found are such as to entitle him reasonably to infer his conclusion from them.

The veracity of witnesses is for the Commissioner, but if he rejects none of the testimony the determination whether or not the service rendered is such as is within the contract as the same is proven by the testimony is a question of law.

In the case at bar there appears no evidence to support the Commission's decree and none which would justify an inference but the service rendered at the time of the accident did not arise out of and within the course of petitioner's employment. The decree was therefore error.

Farwell's Case, 303.

Under the Workmen's Compensation Act to be compensable an accident must have arisen "out of the employment" and "in the course of the employment."

The words "arising out of the employment" used in the Workmen's Compensation Act mean there must be some causal connection between the condition under which the employee worked and the injury which he received. The injury must be due to a risk "because employed."

The words "and in the course of the employment" refer to the time, place, and circumstances under which the accident takes place. The injury must have been due to a risk "while employed."

An accident arises in the course of employment, when it occurs within the period of the employment, at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incidental thereto.

If an accident does not occur "in the course of the employment" it can not "arise out of the employment."

When, as in the case at bar, an employee whose duty it is to carry cloth from one place to another in a mill-room and to assist any of the operatives who may need him, goes to the front of a nap shearing machine when it is in motion to inquire if his services are needed, and while standing there extends his hand for mere curiosity to feel of a moving piece of cloth connected with the machine, and his hand is drawn by the cloth into a cylinder and mangled, the injury does not arise in the course of or out of his employment.

Sullivan's Case, 353.

Under the Workmen's Compensation Act when there is any reasonable evidence which supports the finding of the Commissioner, such finding is not subject to review.

In the case at bar there was no evidence of accident, but there was sufficient evidence to support the finding of the Commissioner that the labor, from a legal standpoint, was not a contributing cause of the heart failure.

Burridge's Case, 407.

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.

ERRATA.

Substitute "plaintiff in review" for "defendant" in second line from top of page 329.