MAINE REPORTS

129

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

FEBRUARY 24, 1930, to DECEMBER 31, 1930

EDWARD S. ANTHOINE
REPORTER

PORTLAND, MAINE
THE SOUTHWORTH PRESS
Printers and Publishers

THE SOUTHWORTH PRESS

PORTLAND, MAINE

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

HON. WILLIAM R. PATTANGALL, CHIEF JUSTICE

HON. CHARLES J. DUNN

HON. GUY H. STURGIS

HON. CHARLES P. BARNES

HON. NORMAN L. BASSETT[1]

HON. FRANK G. FARRINGTON

HON. SIDNEY ST. F. THAXTER[2]

[1] Resigned September 15, 1930

[2] Appointed September 16, 1930

Active Retired Justices of the Supreme Judicial Court

HON. JOHN A. MORRILL HON. WARREN C. PHILBROOK

JUSTICES OF THE SUPERIOR COURTS

HON. WILLIAM H. FISHER

HON. GEORGE H. WORSTER

HON. ARTHUR CHAPMAN

HON. HARRY MANSER

HON. GEORGE L. EMERY

HON. JAMES H. HUDSON

HON. SIDNEY ST. F. THAXTER[1]

HON. HERBERT T. POWERS[2]

[1] Resigned October 1, 1930.

[2] Appointed October 1, 1930.

ATTORNEY GENERAL

HON. CLEMENT F. ROBINSON

REPORTER OF DECISIONS

EDWARD S. ANTHOINE

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1930

LAW TERMS

MARCH TERM.

SITTING: PATTANGALL, Chief Justice; DUNN, STURGIS, BARNES, FARRINGTON, Associate Justices; PHILBROOK, Active Retired Justice.

APRIL TERM.

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

MAY TERM.

SITTING: PATTANGALL, Chief Justice; DUNN, STURGIS, BARNES, FARRINGTON, Associate Justices; PHILBROOK, Active Retired Justice.

SEPTEMBER TERM.

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

OCTOBER TERM.

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

NOVEMBER TERM.

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

TABLE OF CASES REPORTED

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

HEUGHAN'S CASE.

Penobscot. Opinion February 24, 1930.

WORKMEN'S COMPENSATION ACT. PARTIAL DEPENDENCY PAYMENTS.

Under the Workmen's Compensation Act payments made to those partially dependent upon the employee for support at the time of his injuries are based on the wages of the deceased instead of the amount of injury caused to such dependents.

In determining the amount "contributed to dependents," no deduction of the cost of the deceased employee's board, while living at his parents' and paying no board, should be made.

Appeal from decree affirming a decree of the Industrial Accident Commission awarding compensation to the father and mother of a deceased minor employee. Appeal sustained as to amount of weekly payments only. Case remanded for new decree.

The case is fully stated in the opinion.

Arthur L. Thayer,

Milton R. Geary, for petitioner.

Reginald H. Harris, for respondent.

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

FARRINGTON, J. This case comes up on appeal from a decree based on the findings of the Chairman of the Industrial Accident Commission.

The employee, Kenneth Heughan, was killed on August 29, 1928, in an accident arising out of and in the scope of his employment.

The claimants are the father and the mother of the deceased employee. From the evidence presented at the hearing it was found, and it is agreed by the parties, that the claimants were partially dependent on the deceased son, a minor seventeen years of age. The Commissioner also found that on "average weekly wages" of $24.00 the weekly compensation under the Workmen's Compensation Act in case of *total* dependency would be $15.38. It was agreed between counsel, and so found by the Commissioner, that, during the year preceding the death, the deceased employee's cash earnings were $350.00, all of which, with the exception of $75.00 expended by him for clothing and spending money, was turned over to the claimants to be used toward the support of the family, leaving a net total of $275.00 of which the parents had the benefit during the year.

The Commissioner's decree was that the insuring Company pay, to the claimants jointly, compensation for partial dependency at the rate of $9.95 per week, beginning August 29, 1928, for a period not to exceed three hundred weeks. But by stipulation in writing, signed by counsel for all parties in interest, and filed with this court, it is agreed that this decree shall be changed to provide for payment at the rate of $8.10 per week for the period of three hundred weeks, instead of at the rate of $9.95 per week.

The Commissioner clearly reached his rate of $9.95 by figuring only seventy-five (75) days, at the customary rate of one dollar per day, as the period during which the deceased worked and was given his board in addition to his daily pay. By the above stipulation it is evident that parties are agreed that there were one hundred seventy-two (172) days during which the deceased employee received both board and pay. Instead of a fraction of 275/425 of $15.38, it is 275/522 of $15.38, which gives the agreed rate of $8.10 as the weekly payment.

As all questions of fact have either been agreed upon or are admitted to have been correctly found by the Commissioner, the only issue in the case, therefore, is whether or not in determining the amount "contributed to defendants" there should be deducted from this sum (agreed upon as $275.00) the cost of the deceased

employee's board during the 193 days, more or less, that he lived at his parents' home and paid no board.

The Workmen's Compensation Act, Section 12 of Chapter 50, Revised Statutes of Maine, in the language of the section as amended by Chapter 201 of the Public Laws of 1925, the last amendment affecting that section as applicable to the date of the accident in the present cases, provides as follows:

"If the employee leaves dependents only partly dependent upon his earnings for support at the time of his injury, the employer shall pay such dependents for a period of three hundred weeks from the date of injury, a weekly compensation equal to the same proportion of the weekly payments herein provided for the benefit of persons wholly dependent as the amount contributed annually by the employee to such partial dependents bears to the annual earnings of the deceased at the time of the injury."

In cases with facts essentially the same as in the present case, and with provisions in the Massachusetts Act like those in the Maine Act, the Court in the former state held, in reaching the amount of compensation, that the cost of the deceased son's maintenance should not be deducted from the amount contributed by him to the dependents. *Murphy's Case*, 218 Mass., 278; *Gove's Case*, 223 Mass., 187; and to the same effect, under facts essentially the same and with like statutory provisions, *In re Peters*, 65 Ind. App., 174, 116 N. E., 848; *Slater* v. *Milling Co.*, 106 Kan., 772, 189 Pac., 908; and to the same effect, *Mahoney* v. *Gamble Desmond Company*, 90 Conn., 255.

The Court *In re Peters' Case*, supra, says, "It might be contended that it would be unjust to allow compensation, based on the earnings contributed by a minor son, where the father supports such son, without deducting the cost of such support. But in view of the fact that the act in question does not purport to provide a method of determining the actual loss sustained by such father, and require full compensation for such loss, but only assumes to fix an arbitrary amount that shall be paid such father as compensation, based on such son's annual earnings and contributions therefrom to such dependent father, it is manifest there is no basis for such contention. There is no provision in the Act for any such deduction and no language from which such requirement can be in-

ferred. Hence we conclude on reason and authority that the cost of maintenance of a contributing minor son should not be considered in determining the amount of compensation to which a dependent father is entitled."

The Court in *Mahoney* v. *Gamble Desmond Company*, supra, says, "We are not, therefore, required in this case to strike a balance between the boy's earnings and the cost of his maintenance, with a view of ascertaining whether his death was a financial injury to the father. We are only to determine whether, at the time of the injury, the father was dependent upon the boy's earnings within the meaning of the Act. As to this we think there can be no doubt. It was the father's duty to support the boy, and it was his right to receive the boy's wages. The boy did not, as the respondent argues, give to the father his pay envelope in exchange for maintenance. Nor did the father maintain the boy in exchange for his wages. The boy's wages belonged to the father. Whatever earnings the boy turned over to his father were used by the father in discharging his legal obligation to support his family;**"

An apparently contrary result was reached in the case of *Milwaukee* v. *Wiecki*, 173 Wis., 391, 781 N. W., 308 (two Judges dissenting), and also in the case of *State Ex. Rel. Fleckenstein* v. *District Court*, 134 Minn., 324, 159 N. W., 755, in both of which States the Act provided compensation to partial dependents according to the amount used in "the support" of the dependents. The quoted words are not in the Acts of the States whose decisions are cited above as holding the other view.

The case of *Moll* v. *City Bakery*, 199 Mich., 670, 165 N. W., 649, also holds that the cost of maintenance should be deducted from the contributions made in determining the amount of compensation.

While this court has never passed on the exact point raised in the instant case, we are of the opinion that the Legislature of Maine, in the Workmen's Compensation Act, adopted the *wages* of the deceased as the basis by which the amount to be paid to a claimant was to be measured, instead of using as a basis the amount of injury caused to the dependents.

We agree with the reasoning and words of Loring, J., in *Gove's Case*, supra, where he says, "Where the claimant is *wholly* depend-

ent upon the deceased it is of no consequence whether he contributed all his wages or only a fraction of them to the dependent, and it is of no consequence whether the deceased did or did not receive any benefit from the dependent. The sum to be paid is measured by the wages of the deceased not by the injury done to the dependent. Where the dependents were only partly dependent upon the earnings of the deceased the amount to be paid is 'a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury.' (The same language essentially as in the Maine Act.) The amount to be paid in case the dependent was partly dependent only is to be a portion of that paid in case of those wholly dependent and the amount is to be determined on the same basis, that is to say, it is to be measured not by the injury done the dependent but by that proportion of the average weekly wages of the deceased which the amount of the wages contributed by him to the dependents bore to the amount of his annual earnings without regard to the benefits, if any, received by the deceased from the dependents."

We therefore hold in this case, that, in determining the amount "contributed to dependents," no deduction of the cost of the deceased employee's board, while living at his parents' and paying no board, should be made.

Appeal sustained as to amount of weekly payments only. Case to be remanded for new decree in Accordance with this opinion.

HARRY S. HIGGINS *vs.* BATES STREET SHIRT COMPANY ET AL.

Androscoggin. Opinion February 24, 1930.

WORKMEN'S COMPENSATION ACT. WORDS AND PHRASES. "EMPLOYEE" DEFINED.

The president of a corporation, acting only as such and performing no other duties than those pertaining to his office, is not an employee of the corporation within the meaning of the Workmen's Compensation Act.

He is not precluded from becoming an employee within the meaning of the Act. A corporation may hire its president to perform services for it under circumstances which will make him an employee. But the burden rests on the petitioning president to prove such a relation with the corporation.

The fact that the Workmen's Compensation Act, in defining the term "employee," expressly excludes "officials of the state, county, town or water district," does not by implication include in the term "employee" the officers of a private corporation.

Appeal from decree affirming a decree of the Industrial Accident Commission denying compensation to petitioner for injuries alleged to have been sustained by him as an employee of respondent company, and in the course of his employment. Appeal dismissed. Decree below affirmed.

The case fully appears in the opinion.

Thaxter, White & Willey, for petitioner.

William B. Mahoney,

Eben F. Littlefield, for respondent.

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

DEASY, C. J. In this Workmen's Compensation case the Commission refused to grant compensation and ordered the dismissal of the petition. The employer is the Bates Street Shirt Company (corporation) located at Lewiston. The petitioner was at the time of the accident President of that corporation. He resided at the Columbia Hotel in Portland. On the second day of February, 1929, he left his residence, went first to the office of the corpora-

tion's attorneys and then to the office of the corporation's auditors. In both cases his purpose was the transaction of business for the corporation. After leaving the auditors' office he took a car for Lewiston. Leaving the car after it reached Lewiston he walked along Bates Street toward the corporation's factory. When he had nearly reached the factory he fell and suffered the injury for which he claims compensation.

The Act provides compensation for employees injured by accident. It defines "employee" as one who performs services for another under any contract of hire, express or implied, subject to some exceptions not affecting the present case. The authorities hold that a president of the corporation is not precluded from becoming an employee within the meaning of the above definition. A corporation may hire its president to perform services for it under circumstances which will make him an employee. Honnold on Workmen's Compensation, Volume I, page 173; *Southern Surety Company* v. *Childers* (Okl.), 209 Pacific, 927.

But the burden rests upon the petitioner to make out his case (*Taylor's Case*, 126 Me., 450). He has the burden of proving that he was an employee as defined by the Statutes. In the instant case no evidence appears showing that the petitioner was *hired* by the corporation to perform services for it. So far as appears his duties were simply those pertaining to his office.

When the president of a corporation acts only as such, performing the regular executive duties pertaining to his office he is not an employee within the meaning of the Statutory definition. *Donaldson* v. *Donaldson Co.* (Minn.), 223 N. W., 772; *Atchinson* v. *Industrial Commission* (Wis.), 205 N. W., 806; *Skouitchi* v. *Cloak and Suit Co.*, 230 N. Y., 296, 130 N. E., 299.

See to same effect an exhaustive note citing many authorities in 15 A. L. R., page 1288.

It is argued that our Act in defining the term employee expressly excludes "officials of the State, County, Town, or Water Districts." If necessary to exclude such public officials it is said that a fortiori it would be necessary to except officers of a private corporation.

The Supreme Court of Errors of Connecticut, speaking through Judge Thayer answering a similar argument, says, rightly we think

that "there was no occasion for excepting them." *Sibley* v. *State*, 96 Atlantic, 163.

It not being proved that the petitioner was at the time of the accident an employee it is unnecessary to pass upon the other defenses raised. We hold that the Commission was right in dismissing the petition.

Appeal dismissed.
Decree below affirmed.

STATE OF MAINE *vs.* JOHN J. KELLEY.

Cumberland. Opinion February 25, 1930.

CRIMINAL LAW. INTOXICATING LIQUORS. JUDICIAL NOTICE.

Alcohol, within the judicial notice of the Court and the common knowledge of all men, is an intoxicating liquor.

Facts which all persons of ordinary intelligence are presumed to know need not be proven.

On exceptions. Defendant was tried under an indictment for the unlawful possession of intoxicating liquors. At the close of all the evidence and before arguments respondent filed a motion that the jury be instructed to return a verdict of "not guilty." To the refusal of the presiding Justice to so rule respondent excepted. Exceptions overruled.

The case sufficiently appears in the opinion.

Ralph M. Ingalls, County Attorney,
Walter M. Tapley, Assistant County Attorney, for the State.
William A. Connellan,
Harry H. Cannell,
Charles Cohen, for respondent.

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

STURGIS, J. Exception to the refusal of the presiding Judge to direct a verdict of "not guilty" at the close of the evidence, in

the trial of an indictment against the respondent for unlawful possession of intoxicating liquors.

Two witnesses testified that the respondent, having "alcohol" in his possession, in the kitchen of his house, sold a bottle of it to a State's witness. The respondent offered no defense.

With this proof that the respondent had "alcohol" in his possession with intent to sell the same without further evidence of the intoxicating quality or effect of the liquor, a verdict of guilty was warranted and the case properly submitted to the jury. This court has already declared "alcohol" an intoxicating liquor within its judicial notice and the common knowledge of all men. *State* v. *Clancy*, 121 Me., 83. Facts which all persons of ordinary intelligence are presumed to know need not be proven. *Com.* v. *Peckham*, 2 Gray (Mass.), 514; *State v. Dunn*, 221 Mo., 530; *Underhill's Crim. Ev.*, 53.

Exception overruled.
Judgment for the State.

ALBERT G. AVERILL, ADMR. *vs.* CHARLOTTE J. CONE.

Penobscot. Opinion February 27, 1930.

EQUITY. MORTGAGES. FORECLOSURE. ASSIGNMENTS. EXECUTORS AND ADMINISTRATORS. EVIDENCE.

To sustain an allegation of fraud, surmise or conjecture, not raised to the dignity of fair inference, can not be substituted for proof.

By an assignment of a mortgage unaccompanied by a transfer of the notes secured thereby, the legal title passes to the assignee but in naked trust for the owner of the mortgage debt.

Upon foreclosure of a mortgage so assigned, the legal and equitable estates thus created become real, not personal property, and the estate of the cestui que *trust, descends to his widow and heirs.*

An administrator can not maintain a Bill for the reconveyance to himself of land conveyed by his intestate without consideration and in trust for his own benefit.

In the case at bar the evidence was insufficient to prove that the transfer of the mortgage by the intestate, was fraudulent either as to his widow and chil-

dren or as to his creditors. The evidence, however, clearly disclosed that the assignment of the mortgage by the intestate was without consideration and unaccompanied by a transfer of the notes which it secured. The intestate at all times after the assignment and foreclosure retained full possession of and full control and dominion over the property. Defendant, therefore, held the bare legal title with the equitable estate in the plaintiff's intestate. On the death of the intestate his interest descended to his widow and heirs. It could not be recovered by the administrator in his legal capacity.

On appeal. A bill in equity brought by plaintiff as administrator of the estate of John N. Adams, deceased, to compel a conveyance by defendant to plaintiff, in his capacity as administrator, of certain real estate, the title to which it was alleged had been acquired from plaintiff's intestate by defendant illegally and without consideration. At the hearing the sitting Justice ruled that the defendant held the legal title to the property in trust for the plaintiff, in his legal capacity and by decree ordered a conveyance of the property to the plaintiff with an accounting of rents and profits. Appeal was thereupon taken by defendant. Appeal sustained. Bill dismissed.

The case fully appears in the opinion.

W. H. Waterhouse, for plaintiff.

Harry M. Briggs,
Ross St. Germain,
George E. Thompson,
R. W. Shaw, for defendant.

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

STURGIS, J. On this Appeal in Equity the plaintiff, in his capacity as Administrator of the estate of John N. Adams, late of Old Town, Maine, deceased, seeks to recover for sale to pay debts of his intestate's estate, a certain farm located in New Limerick, Maine, the legal title to which now stands in the defendant.

The Bill avers that John N. Adams, in his lifetime, held a mortgage on this New Limerick farm, given by one Bruce N. McKinnon to secure his six promissory notes of even date. The mortgagee began foreclosure, but on October 11, 1924, before the equity of redemption had expired, assigned the mortgage to his sister, the defendant in this action, who completed foreclosure of the mort-

gage and took title in her own name. The notes secured by the mortgage were held by the mortgagee during his lifetime, unindorsed and undelivered, and are now in the possession of the plaintiff, his Administrator.

It is further averred that the assignment by the mortgagee was without consideration, made in an attempt to defraud his wife of her rights by descent, and his estate being in fact insolvent, the assignment was a fraud upon his creditors, whose claims were outstanding at the time of the assignment.

The Answer alleges that the assignment of the mortgage was made in good faith and for a sufficient consideration, attributes the failure of the mortgagee to transfer the mortgage notes to neglect, and denies the allegations of fraud in the Bill.

The sitting Justice, below, found that the notes, secured by the mortgage, were not transferred with it to the defendant, ruled that the defendant holds the legal title to the property in question in trust for the plaintiff as holder of the mortgage notes, and by decree ordered a conveyance of the property to the plaintiff, with an accounting of rents and profits.

The plaintiff's allegations of fraud are not sustained. He charges that his intestate assigned the mortgage here in controversy to the defendant in an attempt to defraud his wife of her rights by descent. Assuming that this plaintiff is the proper party, and can set aside such a conveyance, the fraudulent attempt charged is not proven. Domestic difficulties and a separation, which are apparent on the record, give ground for surmise that fraud was practiced. But the evidence goes no further. Surmise or conjecture, not raised to the dignity of fair inference, can not be substituted for proof. *Titcomb* v. *Powers*, 108 Me., 347; *McTaggart* v. *Railroad Company*, 100 Me., 223.

No more does it appear that the assignment was in fraud of creditors as alleged in the Bill. The weight of the evidence does not show that, at the time of the execution of the assignment, the intestate was insolvent or that creditors, whose claims were then outstanding, are now creditors of the intestate estate.

Undoubtedly an Administrator of an estate duly represented and decreed insolvent in the Probate Court can invoke the aid of equity to set aside a conveyance made by his intestate in fraud of

creditors. *Frost* v. *Libby*, 79 Me., 56; *Pulsifer* v. *Waterman*, 73 Me., 233, 244. But assuming without deciding, that insolvency of an estate in fact will give equity jurisdiction to set aside such a conveyance, fraud as alleged is not proven, and the Bill can not be maintained on this ground.

The evidence does establish, however, that the assignment of the mortgage by the intestate was without consideration and unaccompanied by a transfer of the notes which it secured. The mortgage was foreclosed and title taken of record in the assignee. After the assignment and at all times after foreclosure, the intestate had and retained possession of and full control and dominion over the property. He collected all rents and profits. He offered the farm for sale as his own property and listed it under his own assets for purposes of credit. The defendant is and has been a simple depositary of the title to the New Limerick farm. These facts clearly indicate the existence of a simple or passive trust often termed dry or naked. *Dixon* v. *Dixon*, 123 Me., 470, 472.

The law conforms to the facts. The mortgage notes were not assigned with the mortgage. The result in equity is that the legal title passed to the assignee but in naked trust for the owner of the mortgage debt. *Stewart* v. *Crosby*, 50 Me., 130, 133; *Jordan* v. *Cheney*, 74 Me., 359; *Morris* v. *Bacon*, 123 Mass., 58; 20 Am. & Eng. Encyc. of Law, 1033.

The mortgage when assigned was personal property. Upon foreclosure a fee vested, the legal title being in the assignee, and an equitable estate in the plaintiff's intestate. Both estates were then real and not personal. On the death of the *cestui que* trust, his interest in the New Limerick farm descended to his widow and heirs.

An Administrator has no title to the real property of his intestate. At most, he can only sell when the Probate Court shall decree the sale necessary and grant license accordingly. A conveyance to the plaintiff by the defendant, in the case at bar, would clothe the Administrator with power to sell real property of his intestate outside and in disregard of the protections required by the law of probate. And Administrator can not maintain a Bill for the reconveyance of land conveyed by his intestate without consideration and in trust for his own benefit. It is so held in *Crocker*

v. *Smith*, 32 Me., 244. The rule must be applied, we think, in this case.

Appeal sustained.
Bill dismissed.

ANNA W. ORDWAY *vs.* ANDREW W. CLUSKEY.

Penobscot. Opinion March 3, 1930.

NEW TRIAL. EVIDENCE. PERJURY. VERDICTS.

After careful examination of all the evidence bearing on a general motion, such a motion must be overruled where no error is discovered which would warrant the Court in disturbing a verdict.

Where a special motion for new trial on the ground of alleged perjury of the plaintiff is filed, the weight of authority appears to be that where there is no reason to suspect certain testimony to be perjured, and no laches shown, the courts will generally grant a new trial, if, after the trial, satisfactory evidence of its perjured character is discovered, and it is as to a material issue, or the verdict is based principally on such testimony.

Perjured testimony offered at the trial is not a ground for a new trial when it is known at the time to be false but no effort is made to meet it, nor time requested, but the case is submitted with the false testimony at the risk of the judgment.

One who has paid a claim sued on and knows that a judgment can be obtained only on false testimony, which he is able to rebut, but fails to produce the evidence, is not entitled to a new trial.

The Court should not set aside a verdict and vacate its judgment because it is subsequently shown that false testimony was given at the trial or even that the party in whose favor the verdict was given testified falsely. Something more than that must appear. It must be shown that the winning party wilfully gave false testimony, or wilfully made use of false evidence to obtain the verdict, and the Court must be reasonably satisfied that the verdict was thereby obtained.

In the case at bar a careful examination of the evidence disclosed no error which would warrant setting the verdict aside on general motion.

As to the special motion the issue in the case under consideration on which the verdict was rendered, was clean cut. When the defendant went to trial he

knew what that issue was. He was not taken by surprise. The evidence was sufficient to convince the Court that by use of reasonable diligence he could have had in court at the time of the trial, the witnesses on whose testimony he relied for the direction of a new trial on the ground of perjury.

On the evidence submitted the Court could not be "reasonably satisfied" that such perjury was committed.

On general motion for new trial by defendant and special motion for new trial on the ground of alleged perjury of the plaintiff. An action on the case to recover the remainder of the consideration for the signing of a release in discharge of a judgment previously obtained by plaintiff against defendant. The jury found for the plaintiff, assessing damages in the sum of $3,060.00. A general motion for new trial was thereupon filed by defendant and subsequently a special motion for new trial on the ground of alleged perjury by plaintiff. General and special motions overruled.

The case fully appears in the opinion.

Benjamin W. Blanchard, for plaintiff.

Joseph E. F. Connolly, for defendant.

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

FARRINGTON, J. The case comes up on general motion after verdict for the plaintiff, and also on special motion for a new trial on the ground of alleged perjury of the plaintiff.

The plaintiff in a suit previously brought had recovered a judgment against the defendant for the sum of thirty-nine hundred sixty-seven dollars and fifty cents ($3,967.50). That case was carried to the Law Court on defendant's motion, and, while it was there pending, the parties arranged a settlement. The plaintiff's claim and testimony was that the defendant agreed to give her three thousand dollars ($3,000.00) and an automobile; that on June 1, 1928, in reliance on his promise that he would keep his agreement, she signed and delivered to him a release "from all debts, demands and causes of action" which she had against him; and that she had never received anything except the automobile.

The defendant admitted an arrangement for settlement but

testified that he agreed to give the plaintiff three thousand dollars ($3,000.00), denying any promise of an automobile, although he admitted buying the car and turning it over to the plaintiff and paying for registration and license in her name. That she used the car as her own and later turned it in toward the purchase price of another car is undisputed. He further testified that he had given her two thousand dollars ($2,000.00) at the time of the signing and delivery to him of the release and that at the same time he gave to the plaintiff a note payable on December 1, 1928, for one thousand dollars ($1,000.00), this being the balance of the amount promised, and that the note had been paid in full and returned to him.

The plaintiff sued on the agreement, with the usual money counts, and recovered a judgment of three thousand sixty dollars ($3,060.00).

In presenting her case, a daughter was the only witness beside the plaintiff herself, the latter testifying that she had received a Pontiac car costing eight hundred fifty dollars ($850.00), but that she had received no part of the three thousand dollars ($3,000.00).

The daughter testified that after the purchase of the Pontiac car, on July 6, 1928, she heard the defendant say that he would pay the plaintiff the three thousand dollars ($3,000.00) later on, and that, since June 1, 1928, she had several times heard the defendant and her mother talk about this settlement. She also testified that she had never seen nor heard of any note, and that at one time, when her mother asked the defendant for money, the defendant said she would never get a cent as she had nothing to show that he owed her anything. She testified that this was about December 17, 1928, and that this was the last time she heard financial matters discussed between the two.

The defendant had five witnesses besides himself, four of whom gave no testimony as to any payments of money by the defendant to the plaintiff. One witness testified that just before Christmas, 1928, she was present when the defendant said to the plaintiff, "I am going to pay you to-night,"; that the defendant "had quite a lot of money in his pocket; he laid it down on the table and got a

receipt or some kind of paper," and that then he said, "they was all settled."

The defendant argues the improbability of the plaintiff's testimony, and that the jury must have been influenced in her favor by sympathy for her or by prejudice against the defendant.

It is a truth, so fundamental and well recognized as to need no further comment, that the testimony of many witnesses may, in the judgment of the jury as the trier of fact, be outweighed by that of one or a few.

After a most careful examination of all the evidence in the printed case bearing on the general motion, we are unable to see any error that would warrant this Court in disturbing the verdict, and the general motion must, therefore, be overruled.

The case in question was tried at the May Term, 1929, of the Penobscot County Superior Court, the verdict being rendered on the ninth day of the Term.

The defendant filed no motion for further continuance of the case, but, in addition to the general motion which has been considered, on the twentieth day of the Term, he filed a special motion for a new trial on the ground that at the trial the plaintiff, with wilful intent to deceive court and jury, was guilty of perjury in giving testimony material to the issue.

This was marked "Law" under the statutory provisions relating thereto. All due notices to parties were ordered on the motion, and the evidence was taken on December 12, 1929, before a duly appointed commissioner. No question is raised as to the supporting affidavits required, and there is no contention that the motion is not properly before this court.

In approaching its consideration, it is important to note that at the March Term, 1929, the term of entry of the writ in the instant case, the defendant pleaded the general issue with a brief statement alleging full payment on his part. The plaintiff was allowed to amend the writ and at the same, March, Term, the defendant filed a motion for continuance, chiefly on the ground that the necessary evidence in proof of the defendant's plea was in persons living in distant parts of the county who could not, with due diligence, be produced at the March Term, but that those

persons with others possessing "corroborating" evidence would be available at the time to which the case might be continued.

This motion, sworn to March 12, 1929, was filed on the seventh day of the March Term and the case, on the payment of costs, was continued to the May Term and was then duly tried.

One of the witnesses, Katherine Bragg, whose testimony was taken on the motion now under consideration, was in Bangor in March, 1928, when the case was originally assigned for hearing and before it was continued, and talked about her testimony with the defendant's attorneys. A careful reading of that testimony, and of the other testimony on the special motion, convinces the Court that she not only could have been found and could have testified at the trial of the case in May, but also that all four of the witnesses relied on could have been produced and that their testimony could have been made available at the trial.

Roderick L. Phenney testified minutely as to what he saw and heard at the Gregory House, but on cross examination stated that some time in August, 1929, the defendant came to his home in Dexter and asked him if he remembered anything about the time he asked him to take defendant to Millinocket, referring to the time he was at the Gregory House, and Phenney said that he replied, "I told him, yes, that I remembered it *faintly*."

Mrs. Phenney (who testified that she was quite deaf and that she acquired her deafness in "War time," and who admitted that the attorney, who stood within a few feet of her in cross examination at the trial when she had reason to be alert as to what was being said, was obliged to speak "quite" loud in order for her to hear), testified in detail as to the conversation between the plaintiff and the defendant which took place more than a year previously.

Because of numerous decisions in this state which need not be cited, the defendant can not on his special motion rely on the evidence as newly discovered, as the printed record of the case fails to show that it was discovered since the trial, but, on the other hand, clearly indicates that it must have been known at the time of trial and that it could then have been produced by the exercise of due diligence.

In the special motion it is claimed that the plaintiff committed wilful perjury, and the defendant, having made no effort to effect a continuance, comes directly to this court asking for a new trial, not in terms on the ground of newly discovered evidence, but bringing new evidence, which cumulative in its nature, he presents with the hope that it will impress the court as indicative, if not conclusive, of perjury.

The weight of authority appears to be that where there is no reason to suspect certain testimony to be perjured, and no laches is shown, the courts will generally grant a new trial, if, after the trial, satisfactory evidence of its perjured character is discovered, and it is as to a material issue, or the verdict is based principally on such testimony (20 R. C. L., Sec. 80, p. 299, and cases cited). The underlying principal in most if not in all of this class of cases will be found to be that of newly discovered evidence which may tend to establish the perjury.

Perjured testimony offered at the trial is not a ground for new trial when it is known at the time to be false but no effort is made to meet it, nor time requested, but the case is submitted with the false testimony at the risk of the judgment. *Pepin et al* v. *Lautman*, 28 Ind. App., 74, 62 N. E., 60; *Thiele* v. *Citizens' R. Co.*, 140 Mo., 319, 41 S. W., 800, citing *Bragg* v. *Moberly*, 17 Mo. App., 221.

One who has paid a claim sued on and knows that a judgment can be obtained only on false testimony, which he is able to rebut, but fails to produce the evidence, is not entitled to a new trial. *Heathcoate* v. *Haskins et al*, 74 Iowa, 566, 38 N. W., 417.

In this case the Court says, "That the production upon the trial of false testimony to establish a cause of action or defense would in many cases amount to such a fraud as would entitle the adverse party to a new trial, or the vacation of the judgment, is certainly true. This would be so if the fact of its falsity or the evidence by which the fact could be established was not discovered until after the trial or the rendition of judgment. But it would be trifling with the law to permit a party who, being advised in advance that testimony of that character would be resorted to on the trial, and who knew also of the existence of evidence by which the false testimony could be rebutted, but who neglected to either produce that

evidence or assert his defense, to afterwards question the judgment because it was founded on that testimony; for, while it is the policy of the law to afford the parties to litigation the fullest opportunity for the establishment of their rights, it is equally its policy to maintain and enforce the judgments pronounced by the courts after these opportunities have been enjoyed by the parties, and it appears to us that this is the position in which plaintiff is placed by the averments of his petition."

The issue in the case on which the verdict was rendered was clean cut. Either the three thousand dollars ($3,000.00) had been paid or it had not been paid. When the defendant went to trial he knew what that issue was. He knew that the plaintiff, in order to recover a verdict, must necessarily testify that she had never received any part of the money; that her claim, if false, could be supported in no other way than by perjured testimony. He knew that if her testimony were false he must meet it by proof of the full payment which he had pleaded. He was not taken by surprise. The evidence is convincing that by the use of reasonable diligence he could have had in court at the trial in May, 1929, the four witnesses on whose testimony he now relies for the direction of a new trial. For these reasons the Court is of the opinion that the motion should not be sustained.

But we will for the moment leave this phase of the case out of consideration and come directly to the claim of perjury as such.

In *Hill* v. *Libby*, 110 Me., at p. 157, the Court says, "If a party to an action, being himself a witness, commits wilful perjury, or makes use of false testimony which he knows to be false, and thereby obtains a verdict in his favor, the Court in its discretion might, and perhaps it should, set aside the verdict so obtained.

"But the Court should not set aside a verdict and vacate its judgment because it was subsequently shown that false testimony was given at the trial or even that the party in whose favor the verdict was given testified falsely. Something more than that must appear. It must be shown that the winning party wilfully gave false testimony, or wilfully made use of false evidence to obtain the verdict, and the Court must be reasonably satisfied that the verdict was thereby obtained."

If the plaintiff in this case did commit perjury, it must have been wilful under the simple issue of fact presented. But we are not "reasonably satisfied" that such perjury was committed.

Inquiry presents itself as to why either Roderick L. Phenney or his wife, Maxine Phenney, whose testimony has been referred to on this motion, was not asked to witness the release which they would have the court believe was the paper handed to the defendant at the time they testified to seeing money handed to the plaintiff at the Gregory House.

There is no evidence from the defendant at the trial that these two witnesses were present in the room at the hotel, a fact so important, if true, that it could hardly have escaped the defendant's memory so that he would have failed to have had them present to testify in his behalf.

We are also confronted by the query as to why the defendant, when he came from Millinocket to Bangor to arrange the settlement, did not have both the note and the release prepared in Bangor. He testified that the note was prepared for him in Millinocket by one Williamson, who was not produced as a witness, but that the release was made for him in Bangor, on the day the settlement was effected, at the office of Mr. O'Leary, whose name appears on the docket as one of the attorneys for the defendant.

Finding nothing in the case which satisfactorily disposes of these questions, and from careful consideration of the entire case, we are far from being "reasonably satisfied" that wilful perjury was in fact committed by the plaintiff, and consequently the entry must be,

General and Special Motions overruled.

ANNIE L. LOBLEY *vs.* PENOBSCOT VALLEY MOTORS.

Penobscot. Opinion March 7, 1930.

MOTOR VEHICLES. NEGLIGENCE.

For the negligence of his agent in demonstrating an automobile, to the injury of a prospective purchaser, an automobile dealer may be held liable.

In the case at bar the evidence failed to show that the accident occasioning the injuries to the plaintiff, occurred through the imputable negligence of the demonstrator, or that there was actionable negligence on the part of anybody.

On exceptions and general motion for new trial by defendant. An action on the case to recover for personal injuries which the plaintiff sustained while riding in an automobile which then belonged to the defendant. The jury found for the plaintiff assessing damages in the sum of $750.00. To the refusal of the presiding judge to give certain requested instructions, defendant seasonably excepted and after verdict had been rendered for the plaintiff, filed a general motion for new trial. Motion sustained. Verdict set aside. New trial granted.

The case fully appears in the opinion.

Clinton C. Stevens,
Benjamin W. Blanchard, for plaintiff.
George E. Thompson,
Abraham M. Rudman, for defendant.

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

DUNN, J. While driving an automobile, at the suggestion of an employee of the defendant, who had been sent to demonstrate the quality of the car, not to plaintiff, but to her husband, as a prospective purchaser, the plaintiff was injured.

That the employee, an automobile salesman, in allowing the plaintiff to drive, was within the scope of his employment, and in furtherance thereof, the record amply establishes.

Whether the verdict for seven hundred and fifty dollars, recovered by the plaintiff in the action of case against the owner of the car, counting on the imputability of the negligence of the employee, is against the evidence, and the weight thereof, is raised by general motion for a new trial.

On plaintiff's version, she had driven her own automobile, of similar mechanism, in the two years immediately preceding, more than 14,000 miles; before this, for two years, she had operated an automobile of different mechanism.

The De Soto automobile of the defendant, plaintiff had inspected and moved on the salesroom floor; moreover, she had driven the automobile, on the day before that of the injury, without mishap, on the streets of Bangor, her home city.

Snow, which had fallen through the night, covered ground that had been bare, when, on the afternoon of January 10, 1929, the car was sent to the house where plaintiff and her husband lived.

In the house, plaintiff commented to the salesman, that the road looked slippery, and inquired if it were not icy. "No," the salesman is testified to have replied, "It's merely slush."

Approaching the automobile, plaintiff remarked the road was icy, and that chains were not on the tires. But, as she testifies, being reassured by the salesman that the car and the road were fit, she entered the automobile, whereupon the salesman asked her, her husband acquiescing, to take the wheel, which she did; the salesman sitting beside her. Plaintiff's husband sat on the rear seat.

On the way from Bangor to Hampden, the car skidded; at this, the plaintiff's husband said, so testimony is, that, on any recurrence, he would get out; nevertheless, plaintiff kept on driving, "taking the chance," so the record is.

"Keep your steering wheel steady," plaintiff testifies the salesman said to her, as they came to an icy place at the foot of a hill; "Now step on the gas, just a little easy so we can make the hill." "When I did," plaintiff continues, "the car slewed right around and we went down over"; despite the efforts of the salesman to prevent the car leaving the road and going down the bank.

On proof of the negligence of his agent, in demonstrating an automobile, to the injury of a prospective purchaser, the automo-

bile dealer has been held liable. *Martin* v. *Maxwell-Brisco, etc., Co.*, 138 S. W., 65 (Mo.).

But it is not plain that this accident occurred through the imputable negligence of the demonstrator, or, for that matter, that there had been actionable negligence on the part of anybody.

Had the salesman allowed the plaintiff to operate the car, as the representative of her husband, as a part of the demonstration, when in a locality where the salesman knew, or, exercising ordinary care, ought to have known that, even with her experience, the woman was inexpert, the triers of fact might have found the salesman negligent.

This, however, is not plaintiff's contention.

Plaintiff's contention is, that, at the foot of the hill, the demonstrating salesman advised her wrongly, and that, in consequence of following the advice, being unfamiliar with the operation of the automobile, the accident occurred.

Her testimony, to emphasize it by repetition, is, that she had had experience in driving automobiles, through four years, and for thousands of miles; that she had operated the particular automobile the day before; on this day, the animadversion of her husband in mind and actually aware of the condition of the road, she was driving the automobile again.

Wherein the advice, on the icy place, the hill ahead, to hold the steering wheel steady, and to let on gas easily, could have been found actionably faulty, nothing in the evidence, or in the inferences to which it is susceptible, permits the court to know.

The motion must be sustained.

In view of this conclusion, it is unnecessary to consider the exception.

Motion sustained.
Verdict set aside.
New trial granted.

ROBERT J. WHITEHOUSE *vs.* EDWINA M. K. WHITEHOUSE.

Cumberland. Opinion March 7, 1930.

MARRIAGE. ANNULMENT. EQUITY.

Marriage in the legal sense, is a personal relation arising out of a civil contract, to which the consent of parties capable of making that contract is necessary.

It is an institution founded upon mutual consent. That consent is a contract, but it is one sui generis. *It supersedes all other contracts between the parties, and with certain exceptions it is inconsistent with the power to make any new ones. It may be entered into by persons under the age of lawful majority. It can be neither cancelled nor altered at the will of the parties upon any new consideration. The public will and policy controls their will.*

In the absence of any statute on the effect of cohabitation after discovery of the practised fraud, recourse may be had to the rules of equity, for annulment is a proceeding in equity on the theory that the marriage was void ab initio.

A marriage procured through fraud may be good at the election of the injured party, who, on being set free from the influence of the fraud or duress, may then give a voluntary consent — may ratify and confirm the contract.

A husband who was guilty of illicit sexual relations with a woman before marriage, can not, after marriage and more than four months' cohabitation with her, in equity and good conscience put her from him by annulment, even if she induced the marriage through fraud.

In the case at bar it was further found by the Justice below that when the libelee stated to the libelant that she was pregnant, she believed the statement to be true and had reason so to believe. The testimony as to the pregnancy of the libelee was not sufficient to establish the fact that she made a false statement.

A careful study of the evidence fails to show any error below.

A petition for annulment of marriage, on the ground that fraudulent representations were made to induce the execution of the contract. Decree below affirmed.

The case sufficiently appears in the opinion.

Frank H. Purington, for petitioner.

Hinckley, Hinckley & Shesong, for respondent.

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

BARNES, J. This action is on a libel filed for the annulment of marriage, brought under authorization of Sec. 15, Chap. 65, R. S. of Me.

The allegation is in brief that on November 2, 1928, libelant entered into the contract of marriage, on representation by libelee that she was then pregnant by him, and that this representation was false and fraudulent.

At the time of marriage libelant was about eighteen years of age and libelee about seventeen.

The libelant having had sexual intercourse with libelee prior to her representation of pregnancy, we may conclude that he believed her condition to be what she said it was.

Sixteen days after marriage he observed what the libelee considered the usual menstrual discharge or the result of a miscarriage, and continued to cohabit with her until April tenth, when, after a quarrel, he left her; the next week filing this libel to have the marriage contract decreed null and void *ab initio* because of fraud in its procurement on the part of the libelee.

It is not true that every kind and degree of fraud which would be sufficient to annul an ordinary contract would also be sufficient to annul a marriage. *Franke* v. *Franke* (Cal.), 31 Pac., 371; *Lyon* v. *Lyon*, 230 Ill., 366, 82 N. E., 850; *Browning* v. *Browning*, 89 Kan., 98, 130 Pac., 852.

Marriage in the legal sense, is a personal relation arising out of a civil contract, to which the consent of parties capable of making that contract is necessary.

It is "an institution founded upon mutual consent. That consent is a contract, but it is one *sui generis*. Its peculiarities are very marked. It supersedes all other contracts between the parties, and with certain exceptions it is inconsistent with the power to make any new ones. It may be entered into by persons under the age of lawful majority. It can be neither cancelled nor altered at the will of the parties upon any new consideration.

"The public will and policy controls their will. . . . Perhaps the only element of a contract, in the ordinary acceptation of the

term, that exists is that the consent of the parties is necessary to create the relation. It is the most important transaction of life. The happiness of those who assume its ties usually depends upon it more than upon anything else.

"An eminent writer has said, 'it is the basis of the entire fabric of all civilized society.'" *Ransall* v. *Kreiger*, 23 Wall., 137, 147.

"Marriage is a civil contract, But immediately upon its consummation it automatically takes a status or relation which carries duties and responsibility over which the parties have no control, and concerning which the state is interested." *Robertson* v. *Roth* (Minn.), 204 N. W., 329, 39 A. L. R., 1342.

In some states provision is made by statute for annulment of marriage, with the exception of cases where the complaining spouse, with full knowledge of the facts constituting fraud, freely cohabited with the other as husband and wife.

In the absence of any statute on the effect of cohabitation after discovery of the practised fraud, we have recourse to the rules of equity, for annulment is a proceeding in equity on the theory that the marriage was void *ab initio*. 9 R. C. L., 267, Sec. 26.

In such consideration we have the assistance of courts which have maturely considered the point in issue.

"If either party to a marriage contract (were disqualified at the time of making the contract) then the contract would be void *ab initio*. So if the marriage were effected by fraud or duress, and was *never afterwards ratified voluntarily*, by a mind having the proper capacity, and also free at the time of ratification to act without fraud or force, then the same results might follow.

"But the authorities are numerous and uniform and entirely conclusive upon the point, that such marriages may be good at the election of the injured party, who, on being set free from the influence of the fraud or duress, may then give a voluntary consent — may ratify and confirm the contract.

"The injured party may, if he choose, waive the objection, and thereby render the marriage good. And it has been held that a voluntary cohabitation, after full knowledge of the fraud, and after the force, or the cause of fear is removed, will cure the defect." *Hampstead* v. *Plaistow*, 49 N. H., 84, 98.

Where a man was constrained to marry because of fear of bodily harm, and consummated the marriage by cohabitation until the morning of the second day, there was found to be ratification of the marriage and annulment was refused. *Boutterie* v. *Demarest*, 126 La., 278, 52 So., 492.

"Undoubtedly a voluntary consummation is usually such a ratification as cures the defect of lack of consent in the original contract.

"When the effect of the fraud, error or duress has been removed from the mind enthralled, the party has the election to affirm or not, the marriage.

"It is affirmed, for example, by a voluntary continuance of the cohabitation with full knowledge of the invalidating facts. Where the mind is overcome by fraud, by error, or by duress, so that in fact, it does not consent to an apparent marriage, the law will deem it no marriage, though if, after the thrall is broken, it then fully consents, no repetition of the ceremony is required to make it good." *Avakian* v. *Avakian*, 69 N. J. Eq., 89, 60 Atl., 521.

When the consent of either party was obtained by force, the marriage may not be annulled, where such party afterwards freely cohabits with the other as husband and wife. (In this case not over four days.) *Linebaugh* v. *Linebaugh*, 137 Calif., 26, 65 Pac., 616.

A man was arrested on a charge of having seduced a woman under promise of marriage, and in company with the officer went to the county seat, procured a marriage license, and in the presence of her brother's family, some of their neighbors and the arresting officer, married the woman. Their child was then three days old.

About a month after the marriage, and after having carefully nursed his wife back to health, the husband permanently abandoned wife and child. His conduct was held to support a finding that he ratified the marriage, though the same was entered into under duress. *Merrill et al* v. *Moore et al*, 47 Tex. Civ. App., 200, 104 S. W., 514.

"But the husband will not be entitled to an annulment of the marriage on grounds of antenuptial pregnancy by another man, if after the discovery of this condition, he has condoned it by continuing to cohabit with her." *Lenoir* v. *Lenoir*, 24 App. D. C., 160, 13 L. R. A. (N. S.), 997.

"It is settled, also, that the husband will not be entitled to a decree for the annulment of the marriage on the ground of fraud in concealing pregnancy, if, after its discovery by him, he condones it by continuing to cohabit with his wife." Ann. Cas., 1914C Note, P. 1294. *Alexander* v. *Alexander*, 36 App. Cas. (D. C.), 78; *Steele* v. *Steele*, 96 Ky., 382, 29 S. W., 17; *Montgomery* v. *Montgomery*, 3 Barb. (Ch.), N. Y., 132; *Shrady* v. *Logan*, 17 Misc. (N. Y.), 329; 40 N. Y. S., 1010; *Bryant* v. *Bryant*, 171 N. C., 746, 88 S. E., 147, L. R. A., 1916E, 648.

With the rulings of the courts cited we find ourselves in accord, and hold that a husband who was guilty of illicit sexual relations with a woman before marriage, can not, after marriage and more than four months' cohabitation with her, in equity and good conscience put her from him by annulment, even if she induced the marriage through fraud.

In the case at bar it was further found by the Justice below "that when the libelee stated to the libellant that she was pregnant, she believed the statement to be true and had reason so to believe. The testimony as to the pregnancy of the libelee is not sufficient to establish the fact that she made a false statement, and I therefore find that she did not make a false statement."

A careful study of the evidence fails to convince us of any error below.

Decree confirmed.

STATE OF MAINE *v.* ENO HAAPANEN.

Penobscot. Opinion March 7, 1930.

CRIMINAL LAW. PLEADING AND PRACTICE. EXCEPTIONS.

A motion to quash is addressed to the sound discretion of the court. On refusal to quash, the accused may be put to plea or demurrer, or left to motion in arrest of judgment. If abuse of authority is not evident, the refusal of a motion to quash is no ground for exception.

It is the duty of a complainant, in his complaint, to inform the accused of the specific criminal wrong of which he stands charged. The Declaration of Rights, entitles the accused to this.

But the constitutional provisions for the protection of an accused person exact only such particularity of allegation as may enable the accused to understand the charge against him and to prepare his defense.

A person, against whom is laid the commission of an offense, may apply for a particular of the charge.

In charging a sale of intoxicating liquor, the information need not give the purchaser's name. It is, however, better practice to name the buyer or allege that his name is to the complainant unknown.

In matters of form, it has been permissible to amend criminal process, at any stage before final judgment. Chapter 133, *Laws of* 1927, *permits amending complaints in matters of substance, if thereby the nature of the charge is not changed.*

In the case at bar there was no abuse of authority in denying the motion to quash, and whether the amendment was purely formal, or went to the substance, it was of the character embraced in the spirit and letter of the statute, and within the authority of the court to allow.

On exceptions. Respondent charged on a complaint alleging sale of intoxicating liquors, was tried in the Municipal Court in Newport, pleaded not guilty, was found guilty, sentenced, and filed an appeal. At the hearing in the Superior Court the respondent filed a motion to quash the complaint and warrant on the ground that the same were defective in that they neither named the purchaser or alleged that his name was unknown. To the denial of this motion to quash, respondent excepted, and to a ruling allowing the State to amend the warrant, respondent also seasonably excepted. Exceptions overruled.

The case fully appears in the opinion.

Albert G. Averill, County Attorney, for State.

B. W. Lenfest,

D. I. Gould, for respondent.

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

DUNN, J. A statute denounces selling intoxicating liquor, makes the overt act a misdemeanor, and confers on municipal and other magistrate courts, jurisdiction to try and punish offenders. R. S., Chap. 127, Sec. 40. On the part of the person convicted, an appeal lies, to meet the constitutional guaranty of trial by jury. R. S., supra; Con. of Maine, Art. 1, Sec. 6.

In magistrate courts, liquor prosecutions are begun by complaint. R. S., supra. Where criminal prosecutions originate, under a statute, on complaint, one under oath or affirmation is implied. *Campbell* v. *Thompson*, 16 Me., 117. On appeal, in usual course, the plea entered below stands, and trial is anew.

The statute sets out a form of complaint for a single sale of intoxicating liquor. R. S., Chap. 127, Sec. 54. The form of complaint has blank spaces to allege the quantity of liquor sold, to whom sold, if known, or if the name is unknown, the allegation of such fact. The form is declared by the statute to be sufficient. It is not, however, inclusive. *State* v. *Jones*, 115 Me., 200.

The complaint in this case, as made to a municipal court, charged the respondent with the sale of intoxicating liquor, but neither named the purchaser nor alleged his name unknown. The respondent pleaded not guilty. He was tried, found guilty, and sentenced. He took an appeal.

In the Superior Court, in Penobscot county, without withdrawal of the plea of not guilty, or leave to move to quash without withdrawing the plea, counsel for the respondent moved to quash the complaint, on the ground that, in the absence of allegation of the name of the purchaser, or its equivalent, the complaint was not what it ought to be as a criminal pleading, in that it failed to inform the accused of the nature and cause of the accusation, as required by the first article of the Declaration of Rights in the Constitution of Maine.

The court denied the motion. An exception was allowed, "if allowable." Inquiry regarding this exception need not be a long one. After plea in the municipal court, the motion to quash came too late. *State* v. *Thomas*, 90 Me., 223. But, had the motion been made in the municipal court at the proper time, or had there been leave in the Superior Court, before the motion, to withdraw the

plea, or to move to quash without the withdrawal of the plea, there would be no merit in the exception.

A motion to quash is addressed to the sound discretion of the court. On refusal to quash, the accused may be put to plea or demurrer, or left to motion in arrest of judgment. If abuse of authority is not evident, the refusal of a motion to quash is no ground for exception. *State* v. *Smith*, 54 Me., 33; *Com.* v. *Eastman*, 1 Cush., 189; *State* v. *Louanis*, 79 Vt., 463. That this is the rule, counsel for the respondent apparently recognizes. After summarizing the record, his brief says that, "counsel does not care to further argue."

The county attorney, subsequent to the filing of the motion to quash, and before the denial of the motion, moved to amend the complaint by inserting the name of the purchaser of the liquor. The motion was granted, over objection and exception, and the amendment made.

In support of the exception, counsel argues that the effect of the allowance of the amendment was to charge and identify a particular offense, which the original complaint, as it had been verified by the oath of the complainant, did not do.

The counsel does not claim the improper exercise of discretion, nor that his client was in fact prejudiced by the amendment, but that as matter of law the Superior Court had no power to allow the amendment.

It is the duty of a complainant, in his complaint, to inform the accused of the specific criminal wrong of which he stands charged. The Declaration of Rights, as has been noted elsewhere, entitles the accused to this.

But constitutional provisions for the protection of an accused person exact only such particularity of allegation as may enable the accused to understand the charge against him and to prepare his defense. *Com.* v. *Robertson*, 162 Mass., 90.

A person, against whom is laid the commission of an offense, may apply for a particular of the charge. *Rex* v. *Hodgson*, 3 Cas. & P., 422.

It often is necessary, in criminal as well as civil cases, when the fact becomes material in defense, to resort to parol evidence to

show what case was the subject of a former trial. *Com.* v. *Conant*, 6 Gray, 482.

On the question, novel here, of the necessity of naming the purchaser of the liquor, there is confusion in the reported cases. The confusion has been characterized as hopeless. Woollen and Thornton, Law of Intoxicating Liquors, Vol. 2, Sec. 877. Another text writer defines the general rule to be that an allegation of the name of the purchaser is not essential. Joyce, Intoxicating Liquors, Sec. 643. Ruling Case Law, in cometary sweep, compasses a number of cases that hold it unnecessary to allege the name. 15 R. C. L., p. 387. The great weight of authority, remarks the court in South Dakota, is that, in charging a sale of intoxicating liquor, the information need not give the purchaser's name. *State* v. *Hoven*, 195 N. W., 838, 839. Missouri holds that the indictment need not say to whom sold, or that such person was to the grand jurors unknown. *State* v. *Wingfield*, 37 A. St. R., 406, 413.

The gravamen of the offense of selling intoxicating liquor is in selling it. The fact of the sale implies that there was a purchaser. The violation of the individual rights of the purchaser does not enter into the essence of the offense. *State* v. *Munger*, 15 Vt., 290.

However, it is better practice to name the buyer, or allege that his name is to the complainant unknown. The form of complaint, which the statute prescribes, while it does not so require, certainly so intends.

In matters of form, from an early time, it has been permissible to amend criminal process, at any stage before final judgment. R. S., Chap. 133, Sec. 13. *State* v. *Hall*, 78 Me., 37. An amendatory statute, of comparatively recent enactment, provides for amending complaints in matters of substance, if thereby the nature of the charge is not changed. 1927 Laws, Chap. 133.

Let it be kept in mind, that a single sale of intoxicating liquor is a misdemeanor, and that the respondent was being prosecuted on complaint.

The Superior Court, when appeal had brought the case there, had every power which the municipal court first had. The amendment, in following statutory form, narrowed the complaint to a

specified purchaser, but the nature of the charge remained the same, that of the sale of intoxicating liquor.

Whether the amendment was purely formal, or went to the substance, it was of the character embraced in the spirit and letter of the statute, and within the authority of the court to allow.

Exceptions overruled.

ALCIDE MASSE *vs.* LEONARD H. WING ET AL.

Androscoggin. Opinion March 7, 1930.

EVIDENCE. EXCEPTIONS. NEW TRIALS.

Whether evidence offered by a witness is too remote is within the discretion of the presiding Judge.

An excepting party, to have his exception sustained, must show himself aggrieved.

In the cases at bar a careful review of the evidence justifies the conclusion that, as "excessive" is defined by the cases, the verdicts were not so enormous as to show improper influence or the effect of passion or prejudice. As to the testimony to which exception was taken, even if its admission and the refusal to strike it from the record were technically erroneous, yet in any reasonable view of the record, prejudice was not worked and defendants were not aggrieved.

On exceptions and general motions for new trial by defendants. Two actions for personal injuries sustained by plaintiff as a result of the alleged negligent operation of defendant's automobile by defendant's agent. The two cases were tried together at an October term of the Superior Court for the County of Androscoggin, and a verdict returned for the plaintiff in each case for the sum of $5,000. To the admission of certain testimony defendants seasonably excepted, and after the verdicts, filed a general motion for new trial in each case. Motions overruled. Exceptions overruled.

The cases fully appear in the opinion.
Clifford & Clifford, for plaintiff.
William B. Mahoney,
John B. Thomes,
Fred H. Lancaster, for defendants.

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

DUNN, J. While plaintiff was wiping water and ice from the windshield of an automobile which, as he alleged, had been stopped on its own side of a public way in Androscoggin county, on January 2, 1929, a motor truck, owned by the defendant, Wing, and operated by the other defendant, collided with the automobile, to the injury of the plaintiff.

Alleging the owner of the truck answerable for the negligence of his servant or agent, plaintiff sued the owner for damages. Plaintiff also sued the truck driver, counting on his personal responsibility.

The cases were jointly tried. On sharply conflicting evidence, the jury found for the plaintiff; each verdict is for five thousand dollars.

There are general motions for new trials.

Appreciating that, in the event of judgments on the verdicts, satisfaction of either would bar collection of the other, counsel for the defendants, arguing the two motions as one, concedes the finding of liability to be sustained by the evidence.

On the motions, then, controversy narrows to whether the verdicts are excessive, within the legal meaning of that term.

The jury could have found, from the evidence, that the plaintiff, who was twenty-seven years old, and in good physical condition, sustained multiple contusions of the face and body; torn ligaments and muscles in the chest area; a lateral fracture of the middle inner bone of the nose, obstructing the left passage; perhaps a greenstick fracture of one or two ribs; slight injury to the coccyx; and sacroiliac strain. Doctors attested that the strain was likely to be more or less permanent. The trial was nine months after the accident. Plaintiff testified that he still suffered from backaches, head-

aches, and hemorrhages. There was evidence of subjective symptoms of traumatic neurosis. Plaintiff's earning capacity, as an automotive mechanic, it was in testimony, had been impaired, his wages being but one-half what they had been before; this, because of his inability to do heavy lifting, or undergo muscular strain, with any sense of security. For hospital and medical charges, there is no dispute, he had incurred the expense of three hundred and twenty-five dollars; the value of the time lost, was nine hundred and eighty dollars.

The elements of expense, compensation for lost time, impaired earning power, pain and suffering — past, present, and future — as the proof reasonably showed, find reflection in the verdicts.

Our review of the evidence leads us to the conclusion that, as "excessive" is defined by the cases, the verdicts may not be said to be so enormous as to show improper influence, or the effect of passion or prejudice.

Defendants took three exceptions.

To prove that plaintiff was standing on the left running-board of the automobile, removing freezing mist from the windshield, when the truck struck him, and carried him for a distance of seventy-five feet, plaintiff gave his own testimony, which another witness corroborated.

One Price, whose arrival at the scene of the accident had been within an hour after its occurrence, testified, against exception, that he had discerned, from marks in the snow and broken glass on the road where the automobile had had position, "where the truck had come up," and "where it had dragged the man about fifty feet." Second exception goes to the refusal to strike out the testimony. The third exception concerns testimony by this same witness, who had not seen the truck, as to where the truck had been stopped.

In behalf of the exceptions, it is said that the objected testimony is supposed, inferential and argumentative.

Witnesses testify, every day, in their own way of speaking, to jurors who have quick ears for such speech, of that which the witnesses have observed or noted.

Even if, in the instant cases, the admission of the testimony and the refusal to strike out the testimony, were technically erroneous,

yet in any reasonable view of the record, prejudice was not worked.

Two eyewitnesses for the plaintiff attested how the accident happened, and the manner in which the plaintiff had been injured. The objected witness stated, in his own way, that he had observed where, when one automobile had been stopped on the roadside, another motor vehicle, crossing the road, had come to the same place, and where "a man," that is, where somebody or something had been dragged, and how far beyond where dragging ceased, the truck, as the witness determined, had gone. His testimony coincides in substantial essentials, not only with the testimony of the witnesses before mentioned, but with the testimony given by one of the defendants.

Whether the evidence of the witness was too remote, was within the discretion of the presiding judge. *Ferron* v. *King*, 210 Mass., 75. Discretion does not appear to have been exercised wrongly. An excepting party, to have his exceptions sustained, must show himself aggrieved. *Davis* v. *Alexander*, 99 Me., 40. That, these exceptors do not show.

Motions overruled.
Exceptions overruled.

JOSEPH M. GOODWIN, EXECUTOR, ESTATE OF HARRY E. GUSTIN

vs.

CABOT AMUSEMENT COMPANY.

Cumberland. Opinion March 15, 1930.

CONTRACTS. PLEADING AND PRACTICE. RES ADJUDICATA.

While the law is well settled that a second action following a judgment on a prior action for a breach of the same entire contract is barred, and while the cases hold generally that in an action for such breach recovery may be had for future as well as for present damages, yet if one contracts to do several things, at several times, an action of assumpsit will lie on each default, for although

the agreement is entire, the performance is several and the contract is divisible in its nature.

Where an agreement provides for the payment of installments of money, suit may be brought for successive installments, if they are not paid as they become due, during the continuance of the agreement, and a judgment recovered in the first suit is no bar to the second suit if the second suit covers only subsequent installments.

In the case at bar the mutual obligations assumed by the parties at the time of the making of the additional agreement of June 9, 1926, which modified the agreement of June 13, 1917, constituted sufficient legal consideration. The agreement being under seal consideration is presumed.

A claim of failure of consideration is no more potent than a claim of no consideration in removing the effect of the presence of the seals on the additional agreement, and the two together constituted one valid agreement.

The agreement in this case was divisible in its terms, susceptible of successive breaches on failure to pay installments when due, and each successive failure to pay under the agreement constituted a fresh cause of action of which the plaintiff could avail himself if he chose.

On report on an agreed statement. An action brought to recover payments due on the first of each month from April 1, 1928, to and including December 1, 1928, under a contract of defendant with Harry E. Gustin. A previous action between the same parties heard in the Supreme Judicial Court for the County of Androscoggin for prior installments due and unpaid under the same contract, resulted in a judgment for the plaintiff, who is the plaintiff in the present suit. After the evidence was taken out the cause was by agreement of the parties reported to the Law Court. Judgment for the plaintiff for $3,216.24, with interest from the date of the writ.

The case fully appears in the opinion.

Ellis L. Aldrich, for plaintiff.

Benjamin L. Berman,

David V. Berman,

Jacob H. Berman,

Edward J. Berman, for defendant.

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

FARRINGTON, J. The case comes up on report. The declaration is in covenant. The facts are as follows:

The defendant corporation was in control under lease of two theaters at Brunswick, Maine, known as the Pastime Theater and Cumberland Theater. On June 13, 1917, it entered into a written agreement under seal with one Andrew P. Bibber under the terms of which Bibber was to manage and operate the theaters for and during the remainder of the time mentioned in the respective leases, and for compensation he was to receive one-half the net profits, and was also to share one-half the net losses. The profit, or loss, was to be paid on the first day of each month.

On June 10, 1918, Bibber, having in the meantime managed the theaters as provided in the agreement, and having been paid according to the terms thereof, assigned, under seal, with the consent and approval of the defendant, his rights in the agreement to one Maxcy Hill, who in turn assigned, under seal, his rights in the agreement to Harry E. Gustin, the decedent, whose estate brings this action. The assignment to Gustin was also made with the consent and approval of the defendant. Gustin thereafter managed the two theaters in accordance with the provisions of the agreement of June 13, 1917, from June 2, 1919, until November 22, 1926, when he died. From June 2, 1919, to November 22, 1926, the defendant paid Gustin on or about the first of each month one-half of the net profits under the agreement of June 13, 1917.

Prior to his death, Gustin, on May 18, 1926, took in his own name a lease of the Pastime Theater heretofore mentioned, the lease giving consent that the lessee might assign or sublet to Cabot Amusement Company, or Maine and New Hampshire Theaters Company. Under its terms this lease, dated May 18, 1926, was for a term of ten years *from May* 1, 1927.

On June 9, 1926, what is styled an "Additional Agreement to the agreement of June 13, 1927 . . . " was entered into, under seal, between Gustin and the defendant, under the terms of which the agreement of June 13, 1917, was "confirmed in the terms thereof," subject to the following modifications or additions:

"The said Harry E. Gustin is to manage, for a period of ten years from May 1, 1927, the theatres mentioned in the said agree-

ment above referred to, or any other theater or theaters which the party of the first part, its successors or assigns, may build, lease or operate during said period, in Brunswick, upon the same terms and conditions, as to compensation and method of paying the same, and under the general direction of William P. Gray, representing the party of the first part, as set forth in the said agreement of June 13, 1917, herein mentioned.

"In the event that the party of the second part should die before the expiration of the period herein provided for, it is agreed by the parties hereto that the estate of the party of the second part shall receive from the party of the first part a sum equal to twenty-five per cent (25%) of the profits from said theaters for each month from the date of the death of the said party of the second part to the date of the expiration of the period covered by this agreement.

"If the party of the second part should, during the term of this agreement, become incapacitated, he shall receive the same payment as is provided for above in the event of his death.

"Any manager who may be employed by the party of the first part to take charge of the theaters herein mentioned, in the event of the death of the party of the second part or of his becoming incapacitated, shall not receive a salary in excess of Fifty Dollars ($50) per week without the consent of both of the parties hereto or their representatives."

On June 12, 1926, Gustin assigned, under seal, the lease of May 18, 1926, to Cabot Amusement Company.

Gustin died November 22, 1926, and his will was admitted to Probate on January 4, 1927, and letters testamentary were duly issued at the February Term of the Probate Court for Cumberland County to Joseph M. Goodwin, Executor named therein, and plaintiff in this case.

From December 1, 1926, to November 1, 1927, on or about the first of each month Goodwin, as executor of the estate of Harry E. Gustin, received twenty-five per cent of the monthly net profits of the two theaters.

Following November 1, 1927, payment was not made by the defendant to the Gustin estate of the twenty-five per cent of the net profits earned in the two theaters for November, 1927, December,

1927, January and February, 1928, and suit was brought by the executor, declaring in covenant, to recover the payments due for those months. By agreement of parties the hearing was before a single Justice without jury at the September 1928 Term of the Supreme Judicial Court in Androscoggin County. The only question raised was that of alleged over-payments sufficient to more than cover the sum claimed in the writ. The net profits for the four months sued for, November, December, January and February, were $7,436.17, of which one-quarter, or $1,859.04, was claimed to be due the estate. The sitting Justice in his finding said, "No evidence controverting any of these matters of fact was offered by the defendant who agreed that, for the purposes of this case only, the validity of the contracts set up by the plaintiff and their binding effect on defendant, might be assumed. In view of this stipulation and in the light of the evidence offered, I find the plaintiff is entitled to judgment for the amount claimed with interest from the date of his writ."

The judgment was paid to Goodwin as executor of the Gustin estate and was fully satisfied. This covered everything up to March 1, 1928.

Following March 1, 1928, the defendant although continuing to operate the theaters and although receiving profits and although sending to the Gustin estate monthly reports of the business and earnings of the two theaters from the date of Gustin's death to the time of the hearing on the first case in September, 1928, made no further payments of one-fourth of the net profits to the Gustin estate, on the first day of each month or at any other time, and by writ dated December 5, 1928, the present suit declaring in covenant was brought to recover payments claimed to be due from the defendant to the Gustin estate for the months of March, April, May, June, July, August, September, October and November, 1928. The writ was returnable in Cumberland County and by agreement the case comes up on report.

As a part of the stipulations it is agreed that the total net profits for the monthly periods covered by the writ were $12,864.96, one-quarter of which, $3,216.24, being the amount for which plaintiff is entitled to judgment, if recovery can be had under this action.

The defendant maintains, in effect, that the plaintiff can not recover for any breach (1) because the additional agreement between Gustin and the defendant was without sufficient legal consideration; (2) that if there were sufficient consideration at the time of the execution of the additional agreement, the defendant is relieved from liability because of a total failure of consideration; and (3) that the plaintiff, having brought an action prior to the present suit, and having recovered a judgment which has been fully satisfied, is now barred from further recovery because the matter is *res adjudicata.*

Taking in order the claims of the defendant, the Court is of the opinion as to (1) that the mutual obligations assumed by the parties at the time of the making of the additional agreement on June 9, 1926, which modified the agreement of June 13, 1917, constituted sufficient legal consideration. *Oscar Schlegel Mfg. Co.* v. *Peter Cooper's Glue Factory* (N. Y.), 132 N. E., 148. It must also be borne in mind that the agreement was under seal and therefore consideration is presumed. *Tucker* v. *Smith*, 4 Me., 419; *Neil* v. *Tenney*, 42 Me., 324; *Wing* v. *Chase*, 35 Me., 265; *Augusta Bank* v. *Hamblet*, 35 Me., p. 495; *Roth* v. *Adams*, 185 Mass., 341; *Fletcher* v. *Fletcher*, 191 Mass., 211; *Childs* v. *Barnum*, 11 Barb., 14; *Barrett* v. *Carden*, 65 Vt., 431.

In absence of any evidence or of any attempt to produce evidence to overcome this presumption, it seems unnecessary to give further consideration to this point. The fact that it was under seal leaves nothing further to be said.

Point (2) as claimed by defendant is that if there were sufficient consideration at the time of the execution of the additional agreement of June 9, 1926, the defendant is relieved of liability because of a total failure of consideration due to the death of Harry E. Gustin, which occurred before Gustin was to begin, on May 1, 1927, the time the new lease came into force, his duties under the additional agreement.

At this point again it must be remembered that the agreement was under seal. A claim of failure of consideration is no more potent than a claim of no consideration in removing the legal effect

of the presence of the seals on the agreement. We therefore find that the two agreements constituted one valid agreement.

No question is raised in this case, nor could there be, but that two parties can make a valid contract or agreement like the one before this court. The presence of the seal makes unnecessary any inquiry into what may have been the impelling reason or consideration which resulted in a contract providing for payments of money at stated intervals, to his estate, even after Gustin was dead.

There can be no question but that the parties to the agreement understood its meaning and significance, so plainly and clearly expressed as to make impossible misunderstanding of its purpose and intention, that, when and if death rendered Gustin's services no longer available, his estate should still receive the monthly payments as provided. Plaintiff's exhibit No. 9, a letter to Gustin from William P. Gray, President of the defendant Corporation and who directed its affairs until his death, in 1927, was offered under objection on the ground that it was immaterial and irrelevant and also on the ground that it was offered for the purpose of showing a consideration for what we have called the additional agreement in opposition to the rule that parol evidence can not be introduced to vary or enlarge the terms of a written contract. The presiding Justice admitted it "in so far as its contents may be regarded as admissible or material to any issue in the case." In view of the findings of this court that, the so-called new agreement being under seal, there is no occasion to go further into the question of consideration, as far as that aspect is concerned, no attention or weight need be given or is given to the letter on the ground of the second objection to its admission. This letter, plaintiff's Exhibit No. 9, does not in any way tend to vary, contradict, enlarge or qualify the terms of the sealed agreement, but it does show something of the situation, conditions and circumstances surrounding the parties, and for that purpose is admissible. *Wilbur* v. *Stoepel et al*, 46 N. W., 724 (Mich.); *Threlkeld* v. *Steward et al*, 103 Pac., 630 (Okl.); *Fire Insurance Ass'n, Ltd.* v. *Wickham*, 141 U. S., 564; *Sawyer* v. *Eaton*, 293 Fed., 898; 10 R. C. L., Sec. 235.

The original and additional agreements must be regarded as one. By its very terms, clearly expressed, the so-called new agreement,

provided for a future in which on account of sickness or death Gustin might not be able to render service. Instead of the fifty per cent of the net profits which would have come to Gustin, had he lived, twenty-five per cent was to go to his estate. As has been stated, the two agreements are to be considered as one. The original written contract under seal, clear in its terms, was modified and changed by the so-called additional agreement under seal, equally clear in its terms, but the result is one contract still clear as to its terms, and with purpose and intention also clear.

The letter of William P. Gray, to which reference has been made above, clearly discloses the fact that there had been discussion of possible arrangements for Gustin's future. Without giving the letter in full, we do quote, as bearing on the circumstances surrounding the parties and leading up to the making of the new agreement, the following:

"On the other hand if you prefer to have an agreement whereby in case anything happened to you, the money would be turned over to your heirs after we took out the salary for a Manager, it would be perfectly alright with me. Either of these two arrangements would be all right — it is just a question of which you would prefer. This takes care of you in most any way that you wish to be taken care of."

This letter was written on June 2, 1926. On June 9, 1926, there was executed the so-called additional agreement carrying out the idea suggested in the letter and showing beyond question or doubt that the provision for payments to the Gustin estate was embodied in the agreement as a result of due conference between parties. Gustin's possible fears as to what the future might hold for those who would be left behind in the event of his death may well have been dispelled by the additional agreement which manifestly did not depend upon the assumption or consideration that Gustin would continue to render services in connection with the lease of May 18, 1926, and which was to begin May 1, 1927. It would be interesting to know, but we can not and need not inquire, what was the compelling consideration which resulted in the unilateral agreement to make monthly payments to Gustin's estate. The presence of the seal takes care of the question raised as to want of or failure

of consideration and the Court, being of the opinion that the original agreement as changed and modified by the additional agreement constitutes one obligation, and that there was sufficient consideration and that there has been no failure of consideration, and so finding, comes to contention (3) of the defendant that the plaintiff is barred from recovery in this action by reason of the principle of *res adjudicata.*

The defendant takes the position that the agreement in the case under consideration is an entire and indivisible contract, and not severable, and susceptible of only one breach and that one recovery only can be had which must include all future damages. The assumption and claim is made, and the defendant's argument as to *res adjudicata* is based on that assumption and claim, that the first suit on which judgment was recovered, and satisfied, was a suit for breach of the entire contract. The declaration in the first suit shows, on the contrary, that it was a suit to recover the installments of net profits then due, on the basis of monthly payments, and the same is true as to the declaration in the present action.

We are unable to agree with the defendant that the additional agreement "expressly" omitted to set any date on which the profits were to be paid. That agreement expressly provides for payment of "a sum equal to twenty-five per cent (25%) of the profits from said theaters for *each month* . . . " and, taken in conjunction with the provisions as to time of payment contained in the original agreement, we find that it calls for payment of the percentage of profits at the same time, on the first of each month.

The defendant also contends that it was the intention of the parties that the undertaking was not to pay on the basis of a percentage of the profits on the first of each month, but was a promise to pay a sum equivalent to twenty-five per cent of the profits to be computed on the month's business during the ten-year period. With this contention we are also unable to agree. Taking into consideration all of the facts of the case, the new agreement together with the old agreement, always to be regarded as one, we find that it was the intention of parties that the payments should be made on the first of each month.

The cases relied on by the defendant are cases where the action was for a breach of the entire contract. The law appears to be well settled that a second action following a judgment on a prior action for a breach of the same entire contract is barred.

The cases also appear to hold generally that in an action for such breach recovery may be had for future as well as for present damages.

In the case of *Pierce* v. *Tennessee Coal, Iron and R. R. Co.*, 173 U. S., 1, involving monthly wages, under written contract, cited by the defendant, the objection was made that future damages could not be recovered but the case held to the contrary. Justice Gray, p. 16 says, "The defendant committed an absolute breach of the contract, at a time when the plaintiff was entitled to require performance. The plaintiff was not bound to wait to see, if the defendant would change its decision, and take him back into its service; or to resort to successive actions for damages from time to time; or to leave the whole of his damages to be recovered by his personal representative, but he had the right to elect to treat the contract as absolutely and finally broken by the defendant." The Court does not say that the plaintiff could not bring suit for installments as they became due. On the contrary, the inference is clear that successive actions for installments might have been maintained and that it was within the plaintiff's right to have chosen to proceed either on the basis of a total breach and in that action recover all damages, present and future, or to sue for the separate installments due at the time suit might be brought. The case holds that a plaintiff can make his election to sue for damages on the basis of a total breach of the contract and recover damages for that total breach, but it did not decide that the plaintiff is *obliged* to adopt that course. The same comment is true as to *Wakeman* v. *Wheeler*, 101 N. Y., 205; *Schell* v. *Plumb et al*, 55 N. Y., 592; *Ogden-Howard Co.* v. *Brand*, 108 Atl., 277. Other cases cited by the defendant, while concerned more with the question of whether future as well as present damages can be recovered, are all cases where suit is brought on the election to consider the breach as total.

In the case of *Pakas* v. *Hollingshead et al*, 184 N. Y., 211, 77

N. E., 40, cited by defendant, the Court said, "There can be no doubt that the contract is entire," and a breach of an entire contract was assumed. The case stands in the language of the court for this proposition that "there can be but one action for damages for a *total breach* of an entire contract to deliver goods, and the fact that they were to be delivered by installments from time to time does not change the general rule."

In this last case Cullen, C. J., in a well reasoned opinion, strongly dissented on the ground that a plaintiff should have the right to elect whether to treat the default as a complete breach and thus maintain his suit for all his damages or to treat the contract as in force and recover damages for each default as it occurred.

In the case of *Alie* v. *Nadeau*, 93 Me., 282, cited by the defendant, the right to sue for weekly wages as payment was successively breached, as long as the employment continued, was recognized but in that case the discharge from employment stopped the services and suit for wages as such was no longer possible and the action was necessarily brought on the breach of the contract. In the instant case the contract contemplated the death of Gustin and in the event of his decease specifically provided for a continuation of the monthly payments to his estate.

"If one contracts to do several things, at several times, an action of assumpsit will lie on each default; for although the agreement is entire, the performance is several and the contract divisible in its nature." *Knight* v. *New England Worsted Co.*, 2 Cushing, 271, cited with approval in *Denny* v. *Williams*, 5 Allen, 1; *Kreb Hop Co.* v. *Livesley et al* (Ore.), 114 Pac., 944; *Perry* v. *Harrington et al*, 2 Metcalf, 368, at p. 370; *Badger* v. *Titcomb*, 15 Pick., 409; to the same effect *Burnham* v. *Brown*, 23 Me., 400; *Secor* v. *Sturgis et als*, 16 N. Y., 548.

Where an agreement provides for the payment of installments of money, suit may be brought for successive installments, if they are not paid as they become due, during the continuance of the agreement, and a judgment recovered in the first suit is no bar to the second suit if the second suit covers only subsequent installments. *Lorillard* v. *Clyde*, 122 N. Y., 41, 25 N. E., 291; *Colwell* v. *Fulton*, 117 Fed., 931, and cases cited; *Deweese* v. *Smith et als*,

106 Fed., 438 (Circuit Ct.); *Peurrung* v. *Carter-Crume Co.* (Ohio), 110 Fed., 107; *Beach* v. *Crain*, 2 N. Y., 86, 49 Am. Dec., 369, and note; *Weiler et als* v. *Henarie* (Ore.), 13 Pac., 614; approved in *Racke* v. *Anheuser-Busch Brewing Co.* (Tex.), 42 S. W., 774; *Whitaker* v. *Hawley* (Kan.), 1 Pac., 508; *Fay* v. *Guynon*, 131 Mass., 31; *Cross* v. *United States*, 14 Wallace, 479; *Marshall* v. *John Grosse Clothing Co.* (Ill.), 56 N. E., 807; *Ahl* v. *Ahl*, 60 Md., 207; Williston on Contracts, Vol. III, p. 2337, Sec. 1292.

In view of the evident intent of the parties to the two agreements, which we have designated as the one agreement, a clear intent to give to the Gustin estate the benefit of definite and regular payments of money at agreed periods, we find that the agreement is divisible in its terms, susceptible of successive breaches on failure to pay installments when due, and that each successive failure to pay under the agreement constitutes a fresh cause of action of which the plaintiff can avail himself if he chooses.

Having already expressed our finding that the former suit was brought, not on a breach of the entire contract, but on the election to collect installments due under it, we further hold that the former judgment, not having been recovered on a suit for an entire breach, and not having been recovered on the same cause of action as in the present case, is not a bar to the present suit. It is true that the cause of action in the first suit and the cause of action in the present suit arose out of the same single agreement, but they are different and separate causes of action under it.

Recognizing as generally accepted law that all installments due at the time suit is brought should be included in that suit, we have but to say that all such installments were so included in this case.

The fact that the cause of action in the former case and that in the present case are not the same is fatal to the claim of defendant, who relies upon the doctrine of *res adjudicata*, and judgment must be awarded to the plaintiff.

In accordance with the agreement of the parties contained in the stipulations in the case, the entry will be,

Judgment for the plaintiff for $3,216.24, *with interest from the date of the writ.*

JAMES H. KERR ET AL

vs.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY.

Cumberland. Opinion March 20, 1930.

BAILMENT. EVIDENCE. DAMAGES.

A bailee of personal property destroyed by fire caused by negligence of defendant may, in his own name, recover damages for the loss thus sustained.

It is within the discretion of the presiding Justice to limit within reasonable bounds the scope of cross examination designed to test the memory or credibility of witnesses.

In the case at bar there was evidence from which the jury were justified in finding the partnership bailee, if not owner, of the property for the loss of which damages were assessed. The charge of the presiding Justice covered the situation fully, fairly and correctly, and defendant's exceptions presented no ground for just complaint.

On exceptions and general motion for new trial by defendant. An action of tort to recover damages for the alleged negligent operation by defendant, of a large open incinerator from which fire was transmitted to plaintiffs' property destroying the same. Trial was had at the October 1929 Term of the Supreme Judicial Court for the County of Cumberland. The jury found for the plaintiffs assessing damages in the sum of $14,636.36. To the admission and exclusion of certain testimony and the refusal of requested instructions the defendant seasonably excepted, and after the jury verdict filed a general motion for new trial. Motion overruled. Exceptions overruled.

The case fully appears in the opinion.

Frank P. Preti, for plaintiffs.

Hinckley, Hinckley & Shesong, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, JJ. MORRILL, A. R. J.

PATTANGALL, C. J. On exceptions and motion. Action in tort to recover damages alleged to have been caused by negligence of defendant, resulting in the destruction by fire of certain property of plaintiffs. Verdict for plaintiffs. Damages assessed at $14,636.36, which amount by special finding of the jury "includes all claims for machinery and all other property in dispute."

Plaintiffs were partners doing a general contracting business and occupying a large storehouse in which was kept their equipment, including a very substantial quantity of machinery and tools.

Defendant occupied two buildings in close proximity to plaintiffs' storehouse, which were used as storerooms for crates, boxes, barrels and paper. Between its buildings and that of plaintiffs, defendant maintained a large metal cylindrical incinerator in which it burned such rubbish as accumulated from the storehouses mentioned and from its branch stores. This incinerator was in operation on July 8, 1929, during a period of protracted heat and drouth, on a day when a high westerly wind prevailed.

Plaintiffs' property was on that day destroyed by fire under circumstances which led them to conclude that sparks from the incinerator, negligently operated as they claimed, caused the damage. Suit was brought, trial was had, and a jury agreed with that conclusion. There was evidence sufficient to warrant such a finding.

In support of its motion, defendant relies upon the fact that the jury included in its estimate of damages the value of certain property in plaintiffs' possession and in use by them at the time of the fire, which it claimed was not the property of the partnership but belonged personally to one of the partners.

This property was valued at $6,700 and defendant argues that the inclusion wrongfully of so large an amount in the computation made by the jury ought not to be corrected by a remittitur but should be sufficient evidence of prejudice to warrant setting aside the entire verdict and ordering a new trial.

That argument might be entitled to weight if the $6,700 had in

fact been wrongfully included in the verdict. But the right of plaintiffs to recover on the items making up that amount did not rest, as defendant apparently assumes, upon the question of whether or not the partnership had title to the property enumerated in this schedule. It would be entitled to the same amount in damages if it held the property as bailee as though it had been owner. *Little* v. *Fossett*, 34 Me., 545; *Vining* v. *Baker*, 53 Me., 544; *B. & M. R. R. Co.* v. *Warrior Mower Co.*, 76 Me., 251. There was evidence from which the jury would have been justified in finding the partnership bailee if not owner, and both propositions were submitted to it.

The exceptions, fourteen in number, relate to the admission and exclusion of certain testimony and to the refusal to instruct the jury as requested.

The first three exceptions concern testimony offered by Percy H. Richardson, an engineer, who explained a plan of the locus, including the position of the incinerator. His observation of the premises occurred some three weeks after the fire. The condition of the incinerator at the time of the fire was in issue. Its condition three weeks afterward was immaterial, unless it could be shown that it had remained unchanged. No such evidence had been offered at the time this witness testified. The jury had, however, viewed the premises and had seen the incinerator. The court very properly limited the testimony of the witness with these considerations in view.

The fourth exception was to permitting a witness, who testified that there was a pile of rubbish back of the defendant's building and adjacent to plaintiffs' building which he considered in dangerous proximity to the incinerator, to state that he had called the attention of one of defendant's employees to the fact. Witness had already testified, under cross examination, that he had not mentioned the matter to anyone in authority in the defendant corporation. He was then asked in redirect if he gave anyone warning. This was objected to. The question could and should have been answered by "yes" or "no," and so answered would have been harmless. Witness unresponsively answered, "Yes, I did. It was to Mr. Moody." Undoubtedly the latter part of the answer would have been stricken out on motion unless Mr. Moody had been shown to

be an agent of defendant. No such motion was made.

Exception five is apparently to the remark of the court that the jury would be instructed that the question of whether or not the incinerator was protected by a top on days other than the day of the fire was immaterial. Such an instruction would have been a proper one.

Exceptions six, seven, eight and nine are taken to the court limiting the scope of cross-examination designed to test the memory and credibility of certain witnesses, matters within the discretion of the court, and in these instances the discretion was not abused.

Exceptions ten and eleven are to permitting one of the plaintiffs to testify to the value of a portion of the destroyed property. Defendant admits the general rule that an owner may give his opinion as to the value of his property, but avers that in this instance the witness was not sufficiently familiar with the particular property to be able to fairly judge its value. The objection goes to the weight of the evidence, not to its admissibility.

Exceptions twelve, thirteen and fourteen involve the following requested instructions to the jury which were refused:

> "1. If you find from the evidence that Mr. Kerr, one of the co-partners, owned any of the property in the storehouse, I instruct you that the plaintiffs under the evidence in this case cannot recover for that property.
>
> "2. If you find that Mr. Kerr left or stored any of his own property in that storehouse and that this property was not used by the partnership, then the plaintiffs cannot recover for those articles.
>
> "3. There is no evidence from which you could find that the five articles heretofore enumerated, over which there is a controversy as to ownership, were held by the plaintiff as bailee."

The first and second negative the right of plaintiffs to recover as bailees and would have been error. The third was not justified by the evidence. The charge of the presiding Justice covered the situation fully, fairly, and correctly. Defendant's exceptions present no ground for just complaint.

Motion overruled.
Exceptions overruled

MARION L. BROOKS-BISCHOFFBERGER

vs.

EDWARD J. BISCHOFFBERGER.

Cumberland. Opinion March 20, 1930.

MARRIAGE. ANNULMENT OF MARRIAGE.

To test the validity of a marriage a libel for annulment or affirmance is the appropriate procedure.

Ordinarily the motives behind the appearance of a consent which was clearly manifest will not be examined.

While the statute forbids the issuance of a license to a male minor having no consenting parents in this state, a marriage in violation thereof is not void.

Marriage is a status wherein public policy rises superior to mere sympathy.

In the case at bar the evidence and fair inference from the evidence amply sustained the findings of the lower court that the parties resolved to marry, and that they are husband and wife.

On exceptions by petitioner. An action for the annulment or affirmance of a marriage. Hearing was had before the presiding Judge of the Superior Court for the County of Cumberland, who found as a fact and ruled as a conclusion of law that the parties with full realization of their doings and of the import of the same entered into a marriage and that the marriage was legal and valid. To these rulings petitioner excepted. Exceptions overruled.

The case fully appears in the opinion.

Joseph E. F. Connolly, for petitioner.

Bernard A. Bove, for respondent.

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

DUNN, J. If one doubts the validity of his marriage, he may file a libel for annulment or affirmance, according to the proof.

R. S., Chap. 65, Sec. 15. Jurisdiction is restricted to the legislation on the subject.

In the case at bar, the statute was followed with appropriate libel and process. The libelee appeared by counsel, and filed an answer.

The answer did not supersede the necessity of proofs, nor in any degree lighten the burden of the libelant in establishing her allegations. On her side, there was full hearing. No evidence was offered by the libelee.

The marriage was affirmed. The libelant reserved exceptions.

The exceptions, three in all, recognize that the form of marriage had been observed, but assert that evidence of mutual agreement to be husband and wife, is wanting.

Libelant witnessed that her married sister, twelve years her senior, dared libelant and libelee to marry, and that they took the dare. After notice, requisite by statute, of their intended marriage, a ceremony was performed.

Libelant was twenty years of age. She lived with her mother in Naples, in Cumberland county. The libelee was nineteen years and six months old. His home was with his parents in the State of Pennsylvania. Acquaintance between libelant and libelee began in Naples; they kept company there, beginning in June of 1927.

An analysis of the course of events, as gathered from the record, shows that they went to Fryeburg, in Oxford county, and filed intentions of marriage. This, on September 7, 1927.

There were recitals, in the intentions, that the libelant resided in Massachusetts, and that the age of the libelee was twenty-one years.

If the parties really planned to go through a marriage ceremony, in reaction to a dare, without reality of consent, the idea must have existed for five days; that time elapsed from filing notice of intentions to issuance of the certificate, or license.

A magistrate solemnized the marriage in the town of Brownfield. The sister was present.

"I was willing to be married — believed I was actually married," testified the libelant.

Supper was had with the sister, in Naples; then libelant went to

the home of her mother; libelee went to that of his brother, who, too, lived in Naples.

Next morning, libelant left for Boston.

A week later, libelee came there. The single day of his stay was spent with libelant and her mother. In the evening, they took him to his train. Libelant has not since seen him.

The marriage was not consummated. Consummation by coition is unnecessary in the case of a ceremonial marriage. *Franklin* v. *Franklin*, 154 Mass., 515.

The parties corresponded. At first, a letter came to libelant every day; then, less frequently, and still less frequently; eventually, no letter came. The letters were affectionate and recognized the marriage.

Two months passed before the mother was told of the ceremony of September 12, 1927.

The libel bears date January 2, 1929.

The evidence, and fair inference from the evidence, which is as truly evidence as is the principal fact from which the evidence flows, amply sustain the finding of marriage.

Two young persons, one in school, the other ambitious for college, resolve to marry. Ordinarily, the motives behind the appearance of a consent which was clearly manifested will not be examined. 38 C. J., 1300.

For two years and a half, for the purpose of consenting to marriage, the libelant had been adult. The man in the case was eighteen months under age.

On statements, deliberately false as to the residence of one party and the age of the other, a marriage license had been obtained; then, the journey to the magistrate, and the ceremony.

As has been seen, the libelant was above the age of statutory consent, and the libelee, while more than fourteen years, the common-law age of marriage competency, was not twenty-one years old. True, the statute forbids the issuance of a license to a male minor having no consenting parents in the state, but no statute declares that the marriage shall be void. *Inhabitants of Hiram* v. *Pierce*, 45 Me., 367.

Secrecy, while on its face unfavorable to, does not necessarily

negative, marriage. Secrecy is an explainable circumstance, frequently existing from politic reasons and valid incentives. 18 R. C. L., 392.

That secrecy should weigh for this libelant, loses the whole basis for argument, for publicity is just what it was wished to avoid.

Libelee wished to enter the University of Michigan, but did not.

Libelant then wrote him to look for work. His reply was he could get nothing to do, and "couldn't see his way clear to have me."

With great insistence, and with great apparent sincerity, counsel for libelant urges sympathetic consideration for his client.

Objection to this is that, for all civil purposes, the libelant and libelee are husband and wife.

Marriage is a status. *Gregory* v. *Gregory*, 78 Me., 187.

It is a status wherein public policy rises superior to mere sympathy.

Exceptions overruled.

EDWARD D. SPEAR ET AL *vs.* MARY C. STANLEY ET AL.

Knox. Opinion March 22, 1930.

WILLS. EQUITY. PRESUMPTIONS. R. S., CHAP. 79, SEC. 5.

While it may be said that there is a presumption that when one has made his will he did not intend to die intestate as to any part of his property, this is merely a presumption, and such a presumption against partial intestacy neither requires nor authorizes the court to make for the testator a new will or to include in the will made by him, property not comprehended in its terms.

A will is to be construed as of the date of its execution, even though it does not become operative until the death of the maker.

A devise or gift by implication must be founded on some expression in the will from which an intention to make such devise or gift may be inferred.

By Chap. 79, Sec. 5, R. S., it is provided that, "Real estate owned by the testator, the title to which was acquired after the will was executed, will pass by it when such appears to have been his intention."

In the case at bar, however, definite provision was made for any residue of personal estate, and particular provision was made for all other real estate of the testator. There was nothing in the will itself, or outside of the will, as disclosed in the record which was before the court, to indicate any intention on the part of the testator to dispose of any property not specifically included in the will itself.

Under the statute of descents the undivided one-third interest in the Spofford Block acquired by the testator subsequent to the date of his will passed to his heirs-at-law as intestate property, free from any trust.

On report. A Bill in Equity asking for the construction of the will of Charles S. Coombs.

The case fully appears in the opinion.

Frank H. Ingraham, for plaintiffs.
Archie K. Coombs, pro se,
Nellie Roswell Coombs, pro se,
Everett Walls, pro se,
Alan L. Bird,
Edward C. Payson,
Gilford B. Butler,
Frank B. Miller,
C. S. Roberts,
Jacob H. Berman,
George R. Fuller,
Harry R. Coolidge, for other defendants.

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

FARRINGTON, J. The case comes up on report which includes an agreed statement of facts, the bill in equity asking for construction of the will in question, answers, replication, docket entries, oral evidence and exhibits.

Charles S. Coombs, the testator, on September 11, 1909, made a will in which it was provided that the sum of Six Hundred Dollars ($600.00) should be expended in a certain designated manner on the family burial lot; that certain books should be given to the Thomaston Public Library; that the house and lot where testator resided and the furniture and chattels therein should be sold by his executors and trustees and that the proceeds of such sales, to-

gether with the rest of his personal property, should be distributed in specific amounts as provided, and the remaining portion of his personal property was to go to Julia S. Spear if living. Julia S. Spear owed certain sums of money to the testator, who provided that, if she died before he did and if the result of collecting what was due from her estate should increase the residuary portion of his personal estate to an amount in excess of the specific bequests, that excess should go to Edward D. Spear and Mary C. Stanley, to the latter of whom he had specifically bequeathed the sum of Two Thousand Dollars ($2,000.00).

It will be noted that full and complete provision is made for all personal property belonging to the testator at his decease.

The fourth item of the will which contains the real issue in the case and on which parties have asked for a construction by the court, is as follows:

> "Fourth — Of that portion of my Estate consisting of my undivided interest in the Spofford Block so called, at the corner of Main and School Streets in Rockland; it is my will that the same shall remain held in trust by my Executors hereinafter to be appointed, and the income thereof applied if it should be so needed to carry out the duties and fulfill the bequests herein made; which when done. I hereby give, bequeath and devise unto my cousin Charles S. Crockett one undivided one-third *of such interest held by me in said Spofford Block* to be his and his heirs forever; and to my cousin Julia S. Spear should she outlive me, as long as she lives, the income of *one-third of my said interest in said* Spofford Block; and to my cousin Julia A. Conway and Mary C. Stanley to be equally divided between them as long as either of them shall live, the income of the *remaining one-third of my interest in said Block.* The *above stated two-thirds of my interest* in said Spofford Block, subject to the bequest therein stated, I hereby give, bequeath and devise to Edward D. Spear to be his and his heirs forever. I have not forgotten to mention the names of any of my other relatives deeming this disposition of my Estate the best for all concerned."*

* The italics are the Court's.

When this will was made the testator owned only the undivided two-thirds interest in the Spofford Block. On May 22, 1911, Julia S. Spear, mentioned by the testator in the provisions of the will as to his personal estate, as "interested with me as owner of real estate," conveyed to the testator the other undivided one-third interest in consideration of his agreement to discharge certain notes which he held against her and also to pay certain of her personal obligations to others, and, further, to pay certain charges on the property provided in her Aunt Sophia Spofford's will under which she acquired title.

The testator died September 20, 1913, at that time owning the entire block, but his will of September 11, 1909, remained as then written. There had been no new will, and no codicil had been added to the original will.

Both Julia S. Spear and Julia A. Conway died before there was any net income to be distributed and Mary C. Stanley, until her death, received one-half of the fractional payment of income which under the will was to go to her and Julia A. Conway together.

The bill in equity was filed on March 14, 1929, and on April 16, 1929, Mary C. Stanley died and the trust was thereby terminated, the other beneficiaries having previously deceased.

The bill in equity, which includes many questions which under the situation existing at Mary C. Stanley's death need not be answered by this court, is primarily a prayer for construction of the will of Charles S. Coombs on the point as to whether or not the undivided one-third interest acquired after the will was made passed under the will and under the same provisions disposing of the other undivided two-thirds.

At common law a testator could devise only such lands as he owned when his will was executed, and any after-acquired real estate could not pass by will unless, after its acquisition, there was a republication of the will. Statutes have generally made possible the passing of subsequently acquired real estate, and, as would be expected, there is some difference in the language employed. Some statutes provide that the after-acquired real estate shall pass, "If such shall clearly and manifestly appear by the will to have been the intention of the testator." Others provide it shall pass "unless

the contrary intention manifestly appears by the will to have been the intention of the testator." Into these two classes, with the varying words qualifying the word "appear," most of the statutory provisions fall.

The Revised Statutes of Maine, Chap. 79, Sec. 5, provide as follows: "Real estate owned by the testator, the title to which was acquired after the will was executed, will pass by it, *when* such appears to have been his intention."

In the instant case, as in all cases under our statute, the question involved becomes one of construction, and the intent of the testator must be sought.

The will under consideration in the present case makes no reference whatever to after-acquired real estate. There is no general residuary clause which, under the weight of authority, would have included the one undivided third interest. Definite provision was made for any possible residue of personal estate, and particular provision was made for all other real estate of the testator. Clear and detailed disposition is expressed as to the two-thirds undivided interest in the Spofford Block. There is nothing in the will itself, or outside the will, as disclosed in the record which is before the court, to indicate any intention on the part of the testator to dispose of any property not specifically included in the will itself. We can see no clause or language in the will by which the undivided one-third interest in the block could pass, or was intended to pass, under the will.

While it may be said that there is a presumption that when one has made his will he did not intend to die intestate as to any part of his property, this is merely a presumption, and such a presumption against partial intestacy neither requires nor authorizes the court to make for the testator a new will or to include in the will made by him property not comprehended in its terms, nor can it justify the court in this case to include the interest in the Spofford Block acquired by the testator subsequently to the date of his will unless "such appears to have been his intention." *Blaisdell* v. *Hight*, 69 Me., 306; *Torrey* v. *Peabody*, 97 Me., 104; *Wright* v. *Master*, 81 Ohio, State, 304, 135 A. S. R., 790 and note; *Smith et als* v. *Edrington*, 8 Cranch, 66, 3 U. S., 27; *Flynn* v. *Holman*, 119

Iowa, 731, 94 N. W., 447; *Bedell* v. *Fradenbrugh et al*, 65 Minn., 361, 68 N. W., 41.

In the case of *Young* v. *Quimby*, 98 Me., 167, the testator, when he made his will, owned fifteen acres of land on the east side of "Bennoch road." To his wife he devised the eastern five acres for life and to his son the "residue" of his land on the east side of "Bennoch Road." The will contained no residuary clause and made no provision as to the disposition of the five acres after the death of his wife and it was held that on her death it became intestate property. Referring to the contention that the intention of the testator under "residue" was to give the five acres to the son after his mother's death, Emery, J. said, "If he did really so intend he has not made it sufficiently apparent. It may be, and indeed it seems probable, that he had no intention at all in the matter, that he did not think of it. If that be so, the statute of descents and not the Court must supply the omission."

This statement may well be applied to the present case. There is nothing in the record to indicate that, after acquiring the undivided one-third from Julia S. Spear, the testator was advised that his will as then written covered the entire interest in the block; but even if he had been so advised, he took his chance in failing to make a new will, or a codicil, to cover the after-acquired interest.

A will is to be construed as of the date of its execution, even though it does not become operative until the death of the maker. *Cook* v. *Stevens*, 125 Me., 380; *Torrey* v. *Peabody*, supra.

The question as to a possible devise by implication has been raised. The facts and circumstances, however, upon which such a devise might have been based are entirely lacking in the case. There is no expression in the will from which any such intention could be inferred and a gift by implication must be founded on some such expression. *Nickerson* v. *Bowly*, 8 Metc., 424.

We have examined with care cases cited by counsel and after careful consideration of those cases and after the closest scrutiny of the will and the entire record in the case, we unhesitatingly conclude that it was not the intention of the testator to include in his will the undivided one-third interest in the Spofford Block acquired by him from Julia S. Spear, and that under the statute of

descents it passed at his death to his heirs at law as intestate property, free from any trust — and the Court so finds.

Having thus found and determined and the trust having been terminated by the death of Mary C. Stanley, it becomes unnecessary for this Court to further answer the items of the plaintiff's prayer in the bill, designated "first" to "fourteenth" inclusive. Determination of questions involved in the items referred to, as far as they relate to the administration of the estate of the testator, must be made, in the first instance at least, by the Probate Court of Knox County; and as to the other questions not directly connected with the administration of the estate, it is not necessary to give answer.

Decree in accordance with the opinion.

MARY NELSON ET ALS *vs.* CHARLES J. MEADE, ADM'R, ET ALS.

York. Opinion March 26, 1930.

WILLS. REMAINDERS. EQUITY.

The death of a life tenant prior to that of the testator may accelerate the taking effect of the remainder.

The extinction of the first interest carved out of the estate accelerates the right of the second taker.

The application of the doctrine does not depend upon whether or not the remainder is vested.

It is immaterial whether the remainder is vested or contingent if the time for distribution has in fact arrived, as in such case the contingency is determined and the donee ascertained.

In the case at bar the testator, by the paragraph of his will under discussion, created a life estate with power of disposal in favor of his wife, remainder over to the plaintiffs. Her death, prior to his, accelerated the estate of the remaindermen who took in fee to the exclusion of the residuary legatees.

On report, on an agreed statement of facts. A bill in equity brought for the construction of the will of James M. Meade. Bill sustained. Decree in accordance with opinion.

The case fully appears in the opinion.

Waterhouse, Titcomb & Siddall, for plaintiffs.

Harold H. Bourne, for defendants.

SITTING: PATTANGALL, C. J., DEASY, STURGIS, BARNES, FARRINGTON, JJ. MORRILL, A. R. J.

PATTANGALL, C. J. On report. Bill in equity for construction of will of James M. Meade.

James M. Meade died without issue January 18, 1929. His will was duly probated March 25, 1929. Charles J. Meade was appointed Administrator with the will annexed. Addie L. Meade, wife of James M. Meade, died on January 16, 1929, two days prior to the death of James M. Meade leaving no lineal descendants. The assets of James M. Meade in the hands of the Administrator will be sufficient to pay all indebtedness, expenses of administration, and legacies mentioned in his will.

The question here is as to the disposition of the sum of five thousand dollars ($5,000) bequeathed under the first clause of the will, which reads as follows:

> "First. I give and bequeath to my wife Addie L. Meade the sum of Five Thousand Dollars to be held in Trust during the lifetime of my said wife, the full income therefrom to be devoted to the sole use and benefit of my said wife, and I further direct that my said wife shall and may use any part or the whole of said Five Thousand Dollars whenever in her judgment and discretion it may be necessary for her proper use and enjoyment. On the death of my said wife, said legacy of Five Thousand Dollars shall be equally divided, share and share alike or the unexpended part of said legacy, between Mary Nelson, Lillian Nelson, Thomas Nelson, Florence Nelson, James Nelson, Charles Nelson, children of Charles J. Nelson of Lion Mountain, New York, or so many of them as may

be alive at the time of the decease of my said wife to have and to hold to them, their heirs and assigns forever in fee."

Plaintiffs claim as remaindermen under this clause, while defendants contend that the legacy mentioned therein lapsed because the life tenant deceased prior to the death of the testator and that the property bequeathed falls to the residuary legatees named in another clause of the will.

Omitting from present consideration the words "in trust," the paragraph above quoted sets out the familiar proposition of a life estate in Addie L. Meade, with power of disposal, and a contingent remainder in the named children of Charles J. Nelson.

The general rule is that a legacy or devise will lapse when the legatee or devisee dies before the testator. The application of this rule is narrowed by the provisions of Sec. 10, Chap. 79, R. S. 1916, but that statute is not applicable here. The wife is not a relative of the testator within its meaning, *Keniston* v. *Adams*, 80 Me., 290; nor did she leave lineal descendants, *Morse* v. *Hayden*, 82 Me., 227.

But plaintiffs invoke the doctrine of acceleration. The death of a life tenant prior to that of the testator may accelerate the taking effect of the remainder. *Farnsworth* v. *Whiting*, 102 Me., 302; *Prescott, Adm'r* v. *Prescott*, 7 Metcalf, 141; *Bates et al, Adm'rs* v. *Dewson et als*, 128 Mass., 334; *Thompson* v. *Thornton*, 197 Mass., 273; *Howard* v. *Trustees* (Md.), 41 Atl., 160; *Huber et al, Ex'r* v. *Mohn*, 37 N. J. Eq., 432; *Taylor* v. *Wendell*, 4 Bradf. Surr. (N. Y.), 324.

The principle has also been very generally applied where a widow or widower renounced the provisions of a will wherein a life estate with remainder over had been devised and in cases in which a conditional life estate was forfeited by re-marriage.

The extinction of the first interest carved out of the estate accelerates the right of the second taker. *Fox* v. *Rumery*, 68 Me., 129; *Adams* v. *Legroo*, 111 Me., 307; *Yeaton* v. *Roberts et al*, 28 N. H., 459; *Marvin* v. *Ledwith*, 111 Ill., 144; *Duncan* v. *Liddle* (Ark.), 184 S. W., 413; *Fletcher* v. *Hoblitzell* (Pa.), 58 Atl., 672.

There is an apparent conflict of authority as to whether or not contingent remainders may be accelerated. But the conflict is more apparent than real. A study of the cases discloses a clearly

defined and logical line of demarcation between those in which the court has refused to accelerate contingent remainders and those in which acceleration has been permitted.

The application of the doctrine is not dependent upon the circumstance that the remainder is or is not vested. *American National Bank* v. *C. C. Chapin, Trustee* (Va.), 107 S. E., 636. The fact that a remainder is contingent is not conclusive of the right of acceleration and the rule will not be applied where it will defeat the testator's intention. *Keeton* v. *Tipton* (Ky.), 212 S. W., 909. The principle of acceleration in the vesting of a remainder by the premature termination of the preceding life estate being based on the presumed intention of the testator, there need be no distinction made between vested and contingent remainders in its application. *Roe* v. *Doe* (Del.), 93 Atl., 373. It is immaterial whether the remainder is vested or contingent if the time for distribution has in fact arrived, as in such case the contingency is determined and the donees ascertained. *Blatchford* v. *Newberry*, 99 Ill., 11.

A contingent remainder will not be accelerated if there still remain undetermined contingencies so that it is impossible to identify the remaindermen or if there is evidence of an intention to postpone the taking effect of the remainder. *Brandenburg* v. *Thorndike*, 139 Mass., 102; *In re Lawrence*, 76 N. Y., Supp., 653; *Wilson* v. *Hall*, 6 Ohio, C. C., 570. But when no such intention appears and no such uncertainties prevent so that the contingency is determined and the donees ascertained, the doctrine applies as well to a contingent as to a vested remainder. The instant case falls within this rule.

Apart from the question of acceleration, it is argued that the testator in this paragraph of his will created a trust by the use of the words "in trust," that Addie L. Meade was made trustee for herself and the remaindermen, that a trust will not be allowed to fail merely for want of a trustee, and that the named children of Charles J. Nelson take as beneficiaries under the trust.

The words "trust" and "trustee" are not essential in order to create a trust. On the other hand, if the words "trust" or "trustee" are employed, they do not necessarily show an intention to create or declare a trust. Pomeroy's Equity Jurisprudence, Third Ed.,

Vol. 3, Sec. 1009. The use of the words "in trust" in the instant case neither diminishes nor enlarges the estate of the life tenant or the remaindermen nor does it affect in the slightest degree the duties and obligations of the one to the others or alter their respective relations.

With these words inserted the estate created in favor of Addie L. Meade is that of a life tenant with limited power of disposal, remainder over to the Nelsons. If the words were omitted, the estate would be exactly that, nothing more and nothing less.

The relation of a life tenant to the remainderman is usually termed that of a trustee or quasi trustee. *Hardy* v. *Mayhew* (Cal.), 110 Pac., 113; *Smith* v. *Cross* (Tenn.), 140 S. W., 1606. He differs, however, from the trustee of a pure trust in that he may use the property for his exclusive benefit and take all of the income and profits. *Cook* v. *Collier* (Tenn.), 62 S. W., 658; *Gibson* v. *Brown* (Ind.), 110 N. E., 716.

It is no objection to the validity of a trust that the trustee named is one of the beneficiaries, *Burbach* v. *Burbach* (Ill.), 75 N. E., 579; *Summers* v. *Higley* (Ill.), 60 N. E., 969, but it is inconsistent with and repugnant to the general theory of trusts that the trustee who is also a beneficiary should be given the right to expend the entire trust fund in accordance with her own judgment and discretion and for her own use and enjoyment.

The insertion of the words "in trust" afforded no added protection to the remaindermen and imposed no new restriction upon the life tenant. Their use, however, emphasizes the intention of the testatory that in any event, on the death of his wife, the fee to the estate of which she was life tenant should pass to the living children of Charles J. Nelson. That intention seems plain and is "so expressed in the will that it can be effectuated." *Barry* v. *Austin*, 118 Me., 53.

The testator, by the paragraph of his will which is under discussion here, created a life estate with power of disposal in favor of his wife, remainder over to certain named persons. Her death, prior to his, accelerated the estate of the remaindermen who take in fee.

Decree accordingly.

HARLEY J. GILMAN *vs.* ANTONIO FORGIONE ET AL.

Cumberland. Opinion April 2, 1930.

MORTGAGES. COVENANTS RUNNING WITH THE LAND.

In construing a clause of partial release in a mortgage when the provision renders the release demandable by the grantor of the mortgage or his assigns, *the burden is on the grantee to release, and the benefit runs with the land.*

But when the covenant is that the grantee will release to the grantor, with no mention of his assigns, the better rule seems to be that, in the absence of clear intention to the contrary, the covenant is personal and does not run with the land.

In the case at bar the language showed that the covenant in the second mortgage was personal and did not run with the land.

On appeal by complainant. A bill in equity, wherein complainant demanded of a prior mortgagee the benefit of a covenant to release a lot of land from mortgage conveying said lot with other land.

Covenant held not to run with the land. Appeal dismissed. Decree below affirmed.

The case fully appears in the opinion.

Gerry L. Brooks, for complainant.

Israel Bernstein, for respondents.

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

BARNES, J. Bill in equity to relieve certain real estate of encumbrance by way of mortgage, by virtue of a clause of partial release incorporated in the mortgage.

Complainant is a mortgagee of a grantee of the grantor of the mortgage which contains the clause of partial release.

The real estate is known as Lot 19.

Forgione, one of the respondents, on November 20, 1923, mort-

gaged to the Gorham Savings Bank a large tract of land, divided into lots of which Lot 19 was one, to secure the payment of $11,000.00, payable on demand, in which mortgage was the following provision: "It is hereby made a matter of agreement that the mortgagee, its successors and assigns, will release to the mortgagor, his heirs, executors, administrators or assigns from the operation of this mortgage, such portions of the above described premises as he or they may request, upon the payment by him or them of five cents per square foot of land of the premises so released."

In December following Forgione conveyed the same tract, subject to the Gorham Savings Bank mortgage, to the Cape Elizabeth Land Company together with certain other parcels of land and took from the Land Company a purchase-money mortgage, to secure the payment of $11,141.68, payable in full in two years.

This mortgage was foreclosed, but later cancelled and another, which we call the second mortgage, was given.

In the second mortgage is found this provision, which was also a part of the second mortgage first given: "Provided also that it shall be lawful for the grantor herein (Cape Elizabeth Land Company), to sell any part or parts of said premises from time to time, and this conveyance is especially made on the condition that as and when any part or parts of said premises herein conveyed are so sold and a release is given by the first mortgagee under the terms of said first mortgage, the grantee will furnish a release of said part or parts from this second mortgage."

Later, the land involved in these proceedings was sold by the Land Company to one Foster subject to the above mortgages.

Foster gave back a purchase-money mortgage to the Land Company; and the latter assigned the Foster mortgage to the complainant.

On March 29, 1928, principal and interest of the second mortgage being then long overdue and unpaid, Forgione began foreclosure proceedings, and on March 18, 1929, complainant, to protect his third mortgage on the land here involved, paid to the Savings Bank the amount necessary to release its claim on the land described in the Foster mortgage, and obtained a release from the Bank.

He then demanded a release from Forgione under the provision of the second mortgage above quoted.

Release was refused, and by this bill complainant asks that Forgione and a bank to which the latter had assigned the second mortgage grant him a release therefrom.

Provisions for partial release, similar in general purport to that in the second mortgage, have called for opinions of many courts.

When the provision renders the release demandable by the grantor of the mortgage *or his assigns*, the burden is on the grantee to release, and the benefit runs with the land.

But when covenants that the grantee will release to the grantor, with no mention of his assigns, as is the case here, are construed, courts differ.

Construction of a provision of the latter sort has never been announced by this court.

It should be borne in mind that the provision here construed specifies, "that it shall be lawful for the grantor herein" to dispose of any part of the premises described, and that "as and when" any part is "so sold," and release from the first mortgage is had, "the grantee of the second mortgage will furnish a release etc."

We hold that "even though a covenant is one which touches the land it is a question of intention in each case to be determined on the construction of the particular instrument with due regard to the nature of the covenant and the surrounding circumstances whether its benefit or burden does in fact run with the land at law." 15 C. J., 1241.

Or, as elsewhere stated by the same authority, "the extent of the right to partial release depends upon the construction of the intent of the release clause in each particular case." 41 C. J., 827.

Cases which hold that an agreement between the mortgagee and mortgagor to release certain portions of the mortgaged property upon the payment of certain sums, not professing to run to the mortgagor and assigns, must be regarded as a personal agreement for his benefit, and not for the benefit of anyone claiming through or under him, are, *Clark* v. *Cowan*, 206 Mass., 252; *Rugg* v. *Record*, 255 Mass., 247; *Pierce* v. *Kneeland et al*, 16 Wis., 706; *Squier, Adm'r* v. *Shepard*, 38 N. J. Eq., 331.

Of the other view are Iowa, Mich. and Minn.

We agree with the reasoning of the cases above. As stated in *Pierce* v. *Kneeland et al*, supra, "A person might be very willing to enter into an agreement with his immediate grantee to release a part of the property on being paid a portion of the mortgage debt, without being willing to make a similar stipulation with anyone who might subsequently purchase the property."

Further, in interpreting the provision that grantor may sell a part and that release is to be given on that part, *as and when so sold*, the language may be naturally construed as providing, that when lots are sold *by the mortgagor* release shall be given.

As found by the learned Justice below, "If the parties to this mortgage had intended that this covenant should run with the land and inure to a mortgagor's assigns, it would have been easy to say so; the words 'as and when sold' have little meaning unless intended to impose the condition that the mortgagor only was entitled to have a partial release, and that when it sold and conveyed a lot."

If it be said that this construction imposes a hardship on complainant; the record shows that the mortgage to Forgione was recorded, and purchasers from his mortgagee had constructive notice of the terms of the prior mortgages when they took conveyances.

On the question whether or no release is demandable after default in payment by the mortgagor according to the terms of the notes secured by the mortgage there is also conflict among the states.

That it is not, has been held in, *Reed* v. *Jones*, 133 Mass., 116; *Clarke* v. *Cowan*, supra; *Avon-by-the-Sea Land and Improvement Co.* v. *Finn*, 56 N. J. Eq., 805; *Gillies* v. *Dyer*, 93 N. J. Eq., 348; *Fulton* v. *Jones*, 153 N. Y. Supp., 87.

But, as to whether release is demandable at any time before completion of foreclosure, as in this case, it is not necessary to decide, since we hold the covenant does not run with the land.

Appeal dismissed.
Decree below affirmed.

LOUIS POKROISKY *vs.* HARRY POTTER.

Cumberland. Opinion April 4, 1930.

MORTGAGES. BILLS AND NOTES. WAIVER.

In an action on three notes signed by trustees in their trust capacity and signed on the back by each of the trustees individually for accommodation, wherein without knowledge of the defendant, when the notes came due, the time for payment of each was extended by the plaintiff at the request of one of the trustees and subsequently the mortgages securing the notes were foreclosed, the plaintiff bidding in the property at the mortgage sale and crediting upon the notes the proceeds of the sale and rents and profits collected.

HELD:

The notes were made and extended in Massachusetts, but without proof of the law of that Commonwealth, the common law as interpreted in this state governs the rights and liabilities of the parties. The Negotiable Instruments Act has no application.

At common law, the defendant is liable to the plaintiff upon the notes as an original promisor or maker.

It being satisfactorily proven, however, that the plaintiff took the notes with knowledge that the defendant was in fact a surety or accommodation maker and extended the times of payment of the several notes without the defendant's knowledge, the defendant is discharged from his personal liability upon the paper unless his assent to the extensions is established.

Without knowledge, there can be neither assent nor waiver.

Upon the evidence, the jury were not warranted in finding that the defendant knew of the extension granted by the holder of the notes or assented thereto. The verdict below was manifestly wrong.

On general motion for new trial by defendant. An action on the case brought against the defendant as an endorser of three notes secured by mortgages of real estate in Boston, Massachusetts, upon a balance due after the sale of such property under foreclosure. The jury found for the plaintiff assessing damages in the sum of $7,251.56. A general motion for new trial was thereupon filed by the defendant. Motion granted. New trial ordered.

The case fully appears in the opinion.

Francis W. Sullivan, for plaintiff.
Maurice E. Rosen, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. MORRILL, A. R. J.

STURGIS, J. General motion for a new trial in an action against the defendant to obtain a deficiency judgment for the balance due on three notes secured by mortgages now foreclosed.

Omitting a recital of unimportant facts it appears that the Trustees of The Summit Realty Trust, a Massachusetts real estate trust, gave the plaintiff three promissory notes, one dated January 10, 1927, for $7,500, payable November 13, 1927, with an installment provision, the second of the same date but in the amount of $7,975, payable September 19, 1927, also in installments, and the third dated April 25, 1927, for $7,675, payable in one year in installments. Each note was signed by the three Trustees, of which the defendant was one, and also, before delivery, signed on the back by the Trustees, as individuals and for accommodation. Each note was secured by a real estate mortgage.

The management and operation of the Trust was intrusted to a Mr. Rich, one of the Trustees. Mr. Potter, the defendant, acquiesced in the arrangement but participated little if at all in the business affairs of the Trust. The loan, for which the notes were given, was negotiated by Mr. Rich, who also made the notes, sent them to the defendant for signing, and finally delivered them to the plaintiff.

When the notes came due, none were paid, but, having been reduced by partial payments, the plaintiff, at the request of Mr. Rich and without the knowledge of the defendant, in consideration of a bonus of four and one-half per cent additional interest on balances due, extended the time for payment of the notes for a period of one year. A further extension was given the next year on the same terms.

August 21, 1929, taxes and payments due on the notes being in arrears, the plaintiff began foreclosure, and on September 29, 1929, bid the property in at the mortgage sale. The proceeds of this sale, together with rents and profits collected, was applied upon

the notes, and the verdict below for $7,251.56 fairly represents the unpaid balance now due.

Without proof of the law of Massachusetts, where the notes in question were made and extended the common law as interpreted in this state governs the rights and liabilities of the parties. *Emerson* v. *Proctor*, 97 Me., 360; *Carpenter* v. *Railway Co.*, 72 Me., 390; *Mackenzie* v. *Wardwell*, 61 Me., 139. The Negotiable Instruments Act, either of Maine or of Massachusetts, has, here, no application.

At common law, the defendant is liable to the plaintiff upon this paper as an original promisor or maker. *Banking Co.* v. *Jones*, 95 Me., 335; *Bradford* v. *Prescott*, 85 Me., 482; *Rice* v. *Cook*, 71 Me., 559. It is satisfactorily proven, however, that the holder took the notes with knowledge that the defendant in fact was a surety or accommodation maker. It is equally clear that the holder extended the times of payment of the several notes without the defendant's knowledge. Upon these facts, the defendant is discharged from his personal liability, unless his assent to the extensions is established. *Lime Rock Bank* v. *Mallett*, 42 Me., 349; *Andrews* v. *Marrett*, 58 Me., 539; *Banking Co.* v. *Jones*, supra, p. 338; 13 Ann. Cas., 999 n.; 3 R. C. L., 1275, et seq; 8 C. J., 277 n.

The defendant was a stranger to the plaintiff until after the extensions were made. All negotiations for, payments on, and extensions of the notes were made by Mr. Rich, the defendant's co-trustee and accommodation comaker. His denials that the defendant had knowledge of or assented to the extensions is convincing and supports the defendant's assertion. The only time the defendant met the plaintiff was in April, 1929. At that time, the three Trustees arranged a waiver of a foreclosure then begun, and a reduction in monthly installments on the notes, but extensions already made were not considered or discussed.

Without knowledge, there can be neither assent nor waiver. *Jewell* v. *Jewell*, 84 Me., 304, 307. We are convinced that the jury were not warranted, upon the evidence before them, in finding either that the defendant knew of the extension granted by the holder of the notes in suit, or assented thereto with or without knowledge.

The defense of discharge having been well pleaded and supported by the evidence, the verdict below for the plaintiff was manifestly wrong.

Motion granted.
New trial ordered.

STATE OF MAINE *vs.* WINFIELD S. LAMONT.

Cumberland. Opinion April 4, 1930.

CRIMINAL LAW. EVIDENCE. INTOXICATING LIQUORS.

Where there is sufficient evidence to justify a jury in finding that in a trial on a charge of illegal possession of intoxicating liquor, admittance was denied to deputies until they attempted to force a door, that upon entry they saw respondent coming out of a toilet, alcohol having been poured into the toilet bowl, the kitchen itself smelling of alcohol, a milk bottle in the sink having a small quantity of alcoholic liquid in the bottom and two quarts of alcohol in a gallon can in a stairway leading to the tenement above, to which respondent and his family alone had proper access, the conclusion was properly reached by the jury that the respondent had intoxicating liquor in his possession intended for sale.

On exceptions. Respondent was tried upon a complaint for the unlawful possession of intoxicating liquors. To the refusal of the presiding Judge, on motion of the respondent, to instruct the jury to return a verdict of "not guilty" respondent excepted. Exceptions overruled. Judgment for the State.

The case sufficiently appears in the opinion.

Ralph M. Ingalls, County Attorney,
Walter M. Tapley, Assistant County Attorney, for the State.
John J. Clancey,
David E. Knapp, for respondent.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. MORRILL, A. R. J.

STURGIS, J. Exception to denial of motion for directed verdict in the trial of the respondent for illegal possession of intoxicating liquor.

Upon the evidence, the jury were warranted in finding that, when deputy sheriffs searched the respondent's premises on August 3, 1929, admittance was denied them until they attempted to force the door. Upon entering the kitchen, they saw the respondent coming out of the toilet, alcohol had been poured into the toilet bowl, the kitchen itself smelled of alcohol, and a milk bottle in the sink had a small quantity of alcoholic liquid in the bottom. Two quarts of alcohol in a gallon can were found in a hide in a stairway leading up from the tenement above, to which, except for trespassers, the respondent and his family alone had access.

From these facts, the jury could have properly reached the conclusion that the respondent had intoxicating liquor in his possession, intended for sale. *State* v. *Baranski*, 127 Me., 488. There was no error in the refusal of the presiding Justice to direct a verdict.

Exceptions overruled.
Judgment for the State.

CORINNE HOWARD EDWARDS *vs.* AMIDA H. PACKARD ET ALS.

Knox. Opinion April 4, 1930.

EQUITY. WILLS. TRUSTS. R. S., CHAP. 76, SEC. 1.

In the construction of a will the intention of the testator must be collected from the language of the whole instrument interpreted with reference to the avowed or manifest object with each part of the will construed with relation to the language used in all others.

Technical language is unnecessary in the creation of a trust. If an expressed equitable obligation rests on the donee by reason of the confidence imposed in her by the donor of the trust, to apply and deal with the property for the benefit of herself and others according to the terms of the will expressing this confidence there is a trust.

The estate of a trustee is measured not by words of inheritance or otherwise, but by the object and extent of the trusts upon which the estate is given. To

effect the intention of the testator, the Court will imply an estate in the trustee sufficient for the purposes of the trust, though in words, no estate is given.

A sale of real estate of the deceased by an executor or administrator under a license of the Probate Court can only be lawfully made under the provisions of R. S., Chap. 76, Sec. 1.

In the case at bar it clearly appears from the will of the testatrix that her predominating intention was to eventually establish a memorial to perpetuate her memory and that of her father by making her homestead a Home for Children and Old Men, with her store property charged with the maintenance of the Home.

Corinne Howard, the devisee, took all the estate for life in trust upon the uses and trusts specified.

The sale of the homestead effected a failure of the trust as to the Home contemplated by the will. The *cy pres* doctrine could not apply.

The trust continues during the life of Corinne Howard and until all uses and trusts, other than the establishment of the Home, have been executed.

When the purposes of the trust created by the will, other than the establishment of the Home, have been accomplished, the store property and any accumulated surplus of rentals must pass to the next of kin as intestate property.

On report. A bill in equity brought for the construction of the will of Liller J. Small Foudray, late of Rockland.

The case fully appears in the opinion.

Frank H. Ingraham, for plaintiff.

Edward K. Gould,

Frank A. Tirrell, Jr.,

Clifford A. Kingsley, for defendants.

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

STURGIS, J. Bill in Equity to construe and interpret the will of Liller J. Small Foudray, late of Rockland, deceased. The case comes forward on Report to be finally decided on so much of the evidence as is legally admissible.

The provisions of the will necessary to be construed, numbered as they are paragraphed, are as follows:

(1) First — I wish my property inherited from my dear Father Capt. Andrew Jackson Small, deposed of in such a way that it need never be sold. I wish the rents to be collected

by Corine Howard, and if I or not have any children Corine Howard is to use 30.00 per month as long as she lives for them and her support and no one else. And should she die before I do one of the Tipton girls from Hillsboro Oregon is to take her place and have the same as she (Corine Howard) if she takes it. Failing thos fist two Madora Kenderson takes their place. Second — I wish Corine Howard to give Madora Kenderson $50.00 per year for 5 years and it is be put in the Rockland Trust Co. for her or her heirs until ten years have passed then she can draw it out with interest, but should such a thing happen that she should need it before the ten years are up, she is to have it with Corine Howard's concent or . . . Tiptons (Whichever the case may be).

(2) If I die before my Uncle Capt L L. Whitten, he is to have a home in my house in the room he has always occupied and is to be bought all he needs to eat and clothing to keep him warm, as long as he lives.

(3) $50.00 per year is to go to Corine Howard if she servives me, as long as she shall live. No other relation has any claim on me or my property after my Uncles death. L. L. Whitten. And no one has any right to interfere.

(5) At the end of 10 years the City is to have One hundred dollars to take care of my lot at Achorn cemetary, and at the end of 20 years they are to have 175.00 for perpetual care and a marble or granite slab is to be put on the lot to that effect, this will be paid in installments in as much as Corine Howard sees fit to spare.

(7) . . . Corine Howard is to live in my house and use it as if it were her own and bring up my children if I have any, and should they marry she is to let them live in one part of it and she in the other as long as they shall live. And likewise . . . if Corine should die first.

(8) But the property is always to remain in my name Taxes and repairs to be paid by Corine Howard as long as she lives and all rents that can be got out of the property that she has, above the sums named are to be used for repairs to keep the building up and well painted. . . .

(9) . . . And when all are dead that are mentioned in this will, the House will be used for an old man and childrens house or home and be called the Liller J. Small Foudray Home for Children and Old Men. and the property on Main street is to pay for keeping it and if any of the children of these people mentioned in this will live they are to take charge of the home if they so desire.

(10) The land is never to be sold and always be known as mine, if the property on Main St. burns down and the land can be leased for enough to support the home it will be still called Small Foudray Land.

(Codicel)

(11) In any event event the land can never be sold if money can be hired to build a brick block on the front in memory of my Father must be put Property one owned by Capt. Andrew Jackson Small decending to his onld child.

Liller J. Small Foundray this property is in memory of both.

The testatrix at her decease owned two parcels of real estate, a homestead at the corner of Crescent and Pacific Streets and a store property numbered 340 and 342 on Main Street, both in the city of Rockland. The homestead is the house repeatedly referred to in the will and eventually to be used as a Home as provided in the ninth paragraph. The property on Main Street is that referred to as inherited from the testatrix's father, Capt. Andrew Jackson Small.

The Court is asked to determine what estate the plaintiff, the "Corine Howard" of the will, has in the Main Street property left by the testatrix. If in trust, upon what uses and trusts? If not in trust, what estate is created?

It is needless to say that the will is unskillfully drawn and lacks the clarity and consistency of expression desirable in so important a writing. The right remains to all persons, however, to make their own wills and select their own scriveners. If doubt and ambiguity result, the discovery of intention may be more difficult, but ascertained, if no rule of law or public policy be violated, it must be given effect. *Belding* v. *Coward*, 125 Me., 305; *Church* v. *Fairbanks*, 124 Me., 187. This intention must be collected from the

language of the whole instrument interpreted with reference to the avowed or manifest object of the testatrix, with each part of the will construed with relation to the language used in all others. *Bodfish* v. *Bodfish*, 105 Me., 166; *Wentworth* v. *Fernald*, 92 Me., 282.

Looking thus to the four corners of this will, it seems clear that the predominating intention of this testatrix, underlying all her testamentary provisions, was, with an incidental charitable, and benevolent purpose, to perpetuate her own memory and that of her father, eventually establishing permanent memorials in the Home for Children and Old Men at her homestead, and in her Main Street property, the latter to be known as the "Small Foudray Land" if without buildings, but, if rebuilt, appropriately inscribed as provided in the eleventh paragraph.

This predominating intention, however, was not to be carried into effect immediately. The establishment of the Home was postponed. It is only "when all are dead that are mentioned in this will" that the house was to be used for a Home and "the property on Main street is to pay for keeping it."

Until then "Corine Howard," as the plaintiff in this Bill is called in the will, if she survives the testatrix (which she did) is charged with the care of these properties to be dealt with for the benefit of herself and others. To Miss Howard is committed the care of the testatrix's children, if she had any, with use of the house for that purpose and her own benefit, and $30 a month for her own and the children's support. An uncle, Capt. L. L. Whitten, is given the use of the room already occupied by him in the house, and is to be furnished with food and clothing as long as he lives. We have no doubt the duty of furnishing this bounty is also imposed upon Miss Howard.

It was the testatrix's wish that Miss Howard give Madora Kenderson $50 a year for five years, depositing the money in the Rockland Trust Co., not to be withdrawn for ten years unless, Miss Howard consenting, the beneficiary's need made it necessary. At the end of ten years the city of Rockland is to have $100 for the care of the cemetery lot and at the end of twenty years $175 more for perpetual care and a monument. These moneys are to be

paid in "installments in as much as Corine Howard sees fit to spare." To Miss Howard herself is to go $50 per year as long as she lives, this being in addition to the $30 each month given to her in the first paragraph of the will for her support and for the children of the testatrix.

The Main Street property is not in terms devised to Miss Howard and yet the will permits only of the interpretation that it was intended that she should have possession of it, with sole control and responsibility for its upkeep and management. There was no personal property with which to pay bequests. Rentals from the store property are the only moneys available for that purpose. These were to be collected by Miss Howard, and the implication is clear that, as "the property on Main street is to pay for keeping" the Home when that is established, until that time, from the rentals of the store property, Miss Howard is to pay bequests.

We are unable to find within the length and breadth of the will language or fair implication indicating an intention on the part of the testatrix to confer any beneficial interest in the Main Street property upon Miss Howard except as it is the source of funds from which provisions for her benefit are to be paid. It is our conclusion that she takes this property in trust. It is unimportant that the word "trust" does not appear. Technical language is unnecessary. Nor is it necessary that the testatrix should have had in her mind the idea of a trust *eo nomine.* It is sufficient if she intended that her will should follow her property after her death and control or limit its use. *Clifford* v. *Stewart*, 95 Me., 47. An expressed equitable obligation rests upon Miss Howard by reason of the confidence imposed in her by Mrs. Foudray to apply and deal with the property in question for the benefit of herself and others according to the terms of the will expressing this confidence. This constitutes a Trust as defined in 8 Words and Phrases (First Series), 7119 et seq; 27 Am. & Eng. Encyc. 1st Ed., 3; 1 Perry on Trusts, 2; *McCreary* v. *Gewinner*, 103 Ga., 528. It is not defeated by precatory words.

Nor is the estate of Miss Howard other than that of a trustee for failure of an express devise. The estate of a trustee is measured, not by words of inheritance or otherwise, but by the object and

extent of the trusts upon which the estate is given. To effect the intention of the testatrix, the Court will imply an estate in the trustee sufficient for the purposes of the trust though, in words, no estate is given. *Deering* v. *Adams*, 37 Me., 264, 274; *Slade* v. *Patten*, 68 Me., 380; *Hersey* v. *Purinton*, 96 Me., 171; 1 Perry on Trusts, Sec. 313, et seq.

As the will was executed, the uses and trusts to be executed are clearly defined and require no interpretation. Uncertainty arises from changes in conditions not contemplated by the donor. No children survived the testatrix, and her uncle, Capt. L. L. Whitten, died before she did. The trustee has no duty as to them. But the house eventually to be a Home by the terms of the will, has been sold by the Administrator c. t. a. under license of the Probate Court. When and for what purpose the sale was made does not appear. It must be assumed to have been made under R. S., Chap. 76, Sec. 1, for only under this statute can a decree licensing an Executor or Administrator to sell real estate of the deceased be justified. *Snow, Appellant*, 96 Me., 570, 573.

The present and immediate effect of the sale of the house is to remove the burden of its support from the Main Street property, permitting an application of all net rentals to the payment of bequests not yet satisfied and to the maintenance of the store property itself. And it appearing that it has been necessary for the trustee to borrow money to pay for taxes and repairs, rentals, not needed for bequests and current maintenance of the store property, may be used in the future as in the past to repay such loans. If money from rentals not needed for the foregoing purposes accumulate, they must be held by the trustee in manner and form as a Court of Equity or the Probate Court, having jurisdiction of the estate, shall direct, subject as necessary to the uses already specified.

So far as this record discloses, the Trust must continue and be thus executed during the life of the plaintiff, "Corine Howard." No reason appears in the case submitted for its earlier termination. On the death of Miss Howard, however, if any bequest, other than to her, remain unsatisfied, a new trustee must be appointed.

We think the trust must fail, however, as to the Home for

Children and Old Men. We are unable to discover evidence of a general charitable intent on the part of this testatrix. Her charitable purpose was limited to the house which constituted the primary subject of her bounty. It was linked with a predominating purpose to make that house and the business property on Main Street a memorial. A general provision for children and old men seems quite beyond her contemplation. When the purposes of the trust created by this will, other than the establishment of the Home, have been accomplished, the property here in controversy, will pass to the next of kin as intestate property. The opinion of this court in *Gilman* v. *Burnett*, 116 Me., 382, supports this conclusion.

A decree below will be entered in accordance with this opinion.

So ordered.

BAR HARBOR AND UNION RIVER POWER COMPANY

vs.

THE FOUNDATION COMPANY.

Penobscot. Opinion April 4, 1930.

CONTRACTS. EVIDENCE.

In construing written contracts the intention of the parties as deduced from the language of the instrument with reference to the situation of the parties at the time the contract was made, must prevail.

While oral evidence is not admissible to contradict or vary that which a writing expresses, if, in the writing, there is ambiguity, oral evidence is admissible to discover what the contracting parties had in view. Oral evidence, in such a case, does not usurp the authority of the written instrument; it is the instrument which operates; the oral evidence does no more than assist its operation.

Every instrument in writing, although it can not be varied or controlled by extrinsic evidence, must be read in the light of the circumstance surrounding its execution to effectuate its main end.

When the language of the instrument, in its literal sense, or as applied to the facts, shows the real nature of the agreement, that language governs.

In the case at bar, a fair preponderance of the evidence did not establish a violation of any contractual duty owed plaintiff by defendant, which proximately resulted in the failure of the dam, damages for which were asked by plaintiff.

On report. An action on the case for alleged negligence in the performance of a contract to build a dam. The cause was reported, with certain stipulations which appear in the opinion, by the trial Judge for final decision by the Law Court. Judgment for the defendant.

The case fully appears in the opinion.

Sherman N. Shumway,
Daniel E. Hurley,
Ryder & Simpson,
Cook, Hutchinson, Pierce & Connell,
Clark, Clark, McCarthy & Wagner, for plaintiff.
W. B. & H. N. Skelton,
George F. Eaton,
Harry L. Crabtree,
Vermont Hatch, for defendant.

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

DUNN, J. The trial judge reported this case, plaintiff and defendant consenting, for final decision by the full court. By the report, it is understood that the parties waive all matters of form and process, and desire this court to rule the law and decide the facts, on consideration of the legally admissible and relevant evidence. R. S., Chap. 82, Sec. 46; *Pillsbury* v. *Brown*, 82 Me., 450; *Dansky* v. *Kotimaki*, 125 Me., 72.

The suit is for the failure of a storage reservoir dam. The dam had been across the Union river, above Ellsworth. Primary inquiry is whether the facts give rise to action. If yes, there must be assessment of direct or general damages; remote or indirect damages, stipulation reserves for referees. On negative decision of the main problem, judgment will go for the defendant.

In 1922, an hydraulic engineer, on plaintiff's office staff, made plans and specifications, and selected a site, for the dam, expecting

to supervise its erection. But, on the engineer's accepting employment elsewhere, plaintiff chose to have the dam built by contract.

After examining and approving the plans, defendant bid. Its bid was accepted. Defendant brought to Bangor a draft of written agreement already signed in its behalf, which plaintiff's president executed. One Phifer Smith, an employee of the plaintiff corporation, "attested," or witnessed, execution of the document. Mr. Smith signed his name above the typewritten word, "Engineer."

Defendant's contractual obligation was to construct the dam, as agent of the plaintiff, on a designated site, conformably to the plans and specifications, for the fee or reward, net to it, of seventeen thousand dollars. Defendant agreed to render "engineering services"; supply the necessary plant; employ and discharge forces; organize and direct the work; submit estimates, and, on previous authorization, to buy materials. Opportunity should be afforded plaintiff's representatives, the contract expressly provided, to inspect both materials and work, and to verify accounts and charges.

Corresponding counter obligation bound plaintiff to pay defendant's fee, and to furnish and bear the cost of all materials, wages, transportation, salaries, and the like, apart from any within the inclusion of the fee. Besides, plaintiff promised, for extra or incidental work which it might require defendant to perform, the payment of an additional fee, proportionate to the labor charged.

Upon the "Engineer," the contract imposed high duties. Bog must be removed to his satisfaction; he should determine, preliminarily to founding the dam, that excavation had extended to and exposed ledge; he should see to the proportioning and mixing of cement. Additional decisions, too, were to be by him.

Other provisions of the contract are not of present moment.

The plans outlined a concrete spillway, ninety feet long, with three twenty-foot gates for discharging water. There were two log sluices at the east end of the spillway, each eight feet wide. Under one sluice was a drainage sluice. Concrete abutments supported the spillway section. A concrete core tied to each abutment extended, through a bank of earth to high ground. Downstream, for some forty-two feet, was an apron. The plan showed

the whole dam on ledge or bedrock, at slightly varying elevations.

On July 5, 1922, defendant began work.

In August, at lower than plan level, there was no ledge. The dam was founded on that kind of soil known as hardpan. Ninety-two per cent. of the dam had been built, when, on March 15, 1923, invoking contract power, plaintiff forbade completion of the work by defendant; the reason assigned being want of diligence in performance. After this, plaintiff did the work.

In April, while snow was yet on the ground, the impounding of water was begun. Late in the month heavy rain fell. At normal elevation, the pond had an area of eighteen square miles, and capacity for six billion cubic feet of water. The pond filled to overflowing. Efforts to avert danger by opening the gates in the dam, and attempting to regulate the flow of the ponded water, proved unavailing. On May 2, the dam blew out. The loosed waters, raging to the sea, did much damage.

Plaintiff contends that defendant, in disregard of its contract, and of the duty which the contract cast, erected a dam, not reasonably efficient, but structurally weak; wherefore the dam was lost.

Evidence points in such direction, but it does not point so far. Concrete may not have been properly mixed; laitance, that pulpy gelatinous fluid which exudes from cement, may not always have been sufficiently cleared away; there may have been, to use an engineering term, improper bondings. But vital defect is not shown to have been in the dam itself.

Plaintiff contends further that the failure to extend sheet steel piling alongside the dam, upstream, to the east abutment, and into the east core wall, permitted seepage or percolation beneath the structure, to its immediate loss. Also, that, a concrete floor, which, insistence is, the plan delineates in a sluice, not having been laid, this omission became, in natural and continuous sequence, the cause of the disaster.

Defendant denies responsibility for not driving the piling; denies call in the plan for a concrete floor in the sluice; and insists that, to the time of its dismissal from the job, it had substantially performed its contract under the direction and to the approval of the "Engineer."

The meaning of the contract phrase, "engineering services," is the subject of much argument.

Plaintiff argues that the contract meant such services in designing the dam and in constructing it as well. Objection is made that, within the reasonable scope of the contract, defendant's undertaking was to erect a dam, agreeably to the plans plaintiff had made, or such modifications thereof as, under the reserved power to require defendant to do incidental work, plaintiff might make; erection to be on the site plaintiff had selected.

It is fundamental, in construing written contracts, that valid intention, as deduced from the language of the whole instrument, interpreted with reference to the situation of the parties at the time the contract was made, must prevail. *Bell* v. *Jordan*, 102 Me., 67. Such intention, which has been called the polestar of construction, must be gathered from the writing, construed in respect to the subject-matter, the motive and purpose of making the agreement, and the object to be consummated. *Roberts* v. *McIntire*, 84 Me., 362.

Oral evidence is not admissible to contradict or vary that which a writing expresses. If, in the writing, there be ambiguity, oral evidence is admissible to discover what the contracting parties had in view. Oral evidence, in such a case, does not usurp the authority of the written instrument; it is the instrument which operates; the oral evidence does no more than assist its operation. *Farwell* v. *Tillson*, 76 Me., 227, 242. The distinction between varying a written contract by oral evidence, and resorting to such evidence in aid of its construction, when not kept in mind, often leads to error.

Every instrument in writing, although it can not be varied or controlled by extrinsic evidence, must be read in the light of the circumstances surrounding its execution to effectuate its main end. *Eustace* v. *Dickey*, 240 Mass., 55, 72.

An ambiguous contract will be construed most strongly against him who used the words concerning which doubt arises. 13 C. J., 544.

Canonical principles lead, through obscurity and doubtfulness, to true meaning. But no extrinsic evidence rule, however seeming its equity, may supersede the other rule that, when the language of

the instrument, in its literal sense, or as applied to the facts, shows the real nature of the agreement, that language governs. *Martin* v. *Smith*, 102 Me., 27. Intention, when apparent, must control. *Abbott* v. *Abbott*, 51 Me., 575, 581.

Plaintiff's own engineer had located the site for the dam, and had designed the dam. Plaintiff, then, had no occasion to contract for the services of an engineer to locate a site, or to design a dam. The dominant note of the contract is the erection of an already designed dam on a given site; plaintiff reserving power to require the performance of incidental work.

The "Engineer," in whom the actual contract vested authority, supervisory and other, was not he who had made the designs and specifications. That this engineer was leaving his employment, and leaving the vicinity, was, as has been seen, motivation for contracting. It would be unusual, but not without parallel, to leave it to a contractor to supervise performance of his own contract. This contract did not do that. It left supervision to the "Engineer." Smith, the attester of the contract, over the word, "Engineer," is found to have been first to act under the contract as "Engineer." From the marking out of the lines for the dam till he went from plaintiff's employment, he was frequently at the dam site laying out work, directing, noting progress. Interpretation indicated by acts of parties is justly entitled to weight. *Lewiston, etc., Company* v. *The Grand Trunk, etc., Company*, 97 Me., 261.

Defendant, in contracting, was justified in assuming that ledge had been located. When, where the plan showed ledge to be, ledge had not been struck, and there was no clue to the whereabouts of ledge, decisive consideration became necessary.

One day an engineer from away came to the site. Professional interest only may have attracted him there, in deviation from his journey to another water power; but without following out how he happened to be there, or whether Smith had authority to consult him in the exigency of the absence of ledge, that Smith did consult him tends to contradict Smith's testimony that he had not been engineer. So does testimony by the newspaper man that Smith announced himself as engineer; likewise, testimony that Smith, leaving the job, introduced his successor as engineer.

Mr. Smith consulted with defendant's representatives, who advised defendant's New York office that ledge had not been encountered.

Defendant, its opinion asked, advised. It advised, if earth were substituted for ledge foundation, redesigning the dam, and that there be adequate protection against seepage, and against scour.

Whether the advice was given gratuitously, or within the contract, no fraud is shown. There is no evidence of such gross mistake as would imply bad faith; no evidence of the exercise of other than honest judgment; no evidence that defendant did not use the average skill of its business. There is evidence that the advice was not followed.

Without change in design, the dam was rested on hardpan. Engineer Smith knew it was being so rested. His successor came with knowledge that it had been thus founded. Every engineer about the site, from the laying of the sill to the collapse of the dam, knew that the structure had been built on earth. One can not resist the conclusion, from the evidence, that the founding of the dam had been by direction of the plaintiff, or what, on the record, is the same thing, by the direction of the "Engineer," with the approval of the plaintiff.

It is said in behalf of defendant's denial of fault contributory to the loss of the dam that, not only was the dam built on hardpan, by plaintiff's direction, but that plaintiff, though its attention had been called thereto, never provided adequate protection against downstream scour.

Water flowing over a dam will eat away the earth it impacts; a current of water through a dam will erode the earth over which it flows; the scouring action of water will undermine a dam if it work back to a foundation which, though virtually impervious to water, is susceptible to scour.

Defendant's theory, respecting the failure of the dam, is that water discharged through the dam worked back, under the insufficient apron, and under certain piers, and scoured the foundation. The dam, resistance thereby lowered, fractured. The fracture let the water through, and the dam was pushed out. This theory maybe ingenious, maybe convincing, is not without support in evidence.

Plaintiff, however, has the burden of proof in this action, *ex delicto* as sued, and *ex delicto* as tried, for the alleged violation of contractual obligation or duty. *Milford* v. *Bangor, etc., Company*, 104 Me., 233.

Plaintiff places the immediate cause of the loss of the dam upon percolation or seepage originating above and passing underneath the structure, this possible, contention is, because the sheet steel piling, which the plan had not indicated, but the driving of which had been begun, had not been driven far enough eastward.

The proof falls short of sustaining such contention. A fair preponderance of the evidence does not establish the violation of any contractual duty owed plaintiff by defendant which proximately resulted in the failure of the dam.

Judgment for defendant.

LENA MORRISON *vs.* UNION PARK ASSOCIATION.

York. Opinion April 7, 1930.

NEGLIGENCE. INVITED GUESTS. EXHIBITIONS.

The proprietor of a public exhibition or fair is charged with the duty of using reasonable care to see that the fair or exhibition grounds, in all their parts, are in reasonably safe condition for the use of invited guests and are so kept, and if races, games or exhibitions are of a character to jeopardize the safety of the guests, the duty is cast upon the proprietor to take due precautions to guard guests from injury.

The measure of the duty of a Fair Association is the same whether the horses racing upon its track are managed by it or its officers, or with their permission, by licensees, independent contractors, or lessees or invitees.

It is the duty of the Association to take due precautions against dangers which it should reasonably foresee or anticipate as well as those of which it has actual knowledge.

Ignorance of dangers which could have been discovered or anticipated in the exercise of reasonable care does not excuse it. Negligent ignorance in law is the equivalent of actual knowledge.

Horse races are of necessity attended with some risks and dangers and those which are well known, or ought to be, must be anticipated by those who conduct races and reasonable care taken that no injury result to invited guests.

Proprietors of a fair are not insurers of the safety of their guests.

They are not required to exclude from their grounds all sports or exhibitions which involve risks of injury to their guests.

The general rule seems to be that if such risks or dangers are safeguarded by such location, stands, barriers, or guards and warnings as the situation reasonably demands, the duty of the proprietors is performed.

In the case at bar the question as to whether or not the defendant took precautions reasonably necessary under the circumstances to perform the full duty to the plaintiff, other than by barring the horse from the track was not in issue.

The plaintiff elected to rest her case upon the specific averment of negligence on the part of the defendant in permitting the horse on the track with knowledge of its habits.

No negligence appears in this respect on the part of the defendant.

On exceptions and general motion for new trial by defendant. An action on the case to recover damages for personal injuries sustained by the plaintiff by being struck by a race horse racing on the track of the defendant at Acton, Maine. Plaintiff's declaration contained two counts, but she elected to rely only upon her second count, alleging that defendant had knowledge or by reasonable diligence should have known that a certain race horse then racing on its track was a vicious, ugly horse, and was not a suitable or proper animal to be racing on its track and that through the negligence of the defendant in so permitting the horse to race she was seriously injured. Trial was had at the May Term of the Supreme Judicial Court for the County of York and at the close of all the testimony a motion for a directed verdict in its behalf was filed by defendant. To the denial of this motion by the presiding Justice, and to certain of his rulings, defendant seasonably excepted, and after the jury had returned a verdict for the plaintiff in the sum of $2,016.67 filed a general motion for new trial. Motion sustained. New trial ordered.

The case fully appears in the opinion.
Cecil J. Siddall,
Edward S. Titcomb, for plaintiff.
William E. Rogers,
Willard & Ford, for defendant.

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

STURGIS, J. Review on general motion and exceptions of action of negligence to recover damages for injuries received by the plaintiff at the annual fair and agriculture exhibition conducted at Acton, Maine, by the defendant Association.

On the afternoon of October 5, 1927, the plaintiff, a patron of the fair, attracted by the races then in progress, approached the fence shutting off the track from the main fair grounds and joined a group of spectators standing near but outside of the gate provided for the entrance and exit of the race horses. Just as she reached the gate, a running horse, finishing its race, jumped the gate and, in landing, hit the plaintiff. She was painfully and seriously injured.

The declaration inserted in the writ contains two counts. At the conclusion of the evidence, however, the plaintiff elected to rely only on her second count, and the case was submitted to the jury on the following allegation of negligence:

> "The Plaintiff avers that she was then in the exercise of due care in relation to her conduct and safety but that notwithstanding her due care as aforesaid and solely on account of the negligence of the Defendant in that said Defendant had knowledge or by reasonable diligence should have known that a certain horse then racing on said track was a vicious and ugly horse and not suited or a proper animal to race on said track in that said horse had previously, unknown to said Plaintiff, jumped through or over said fence or gate guarding said track, and the Plaintiff avers that said horse, although unsuitable to race on said track, as aforesaid, was permitted to race thereon and, while so racing, jumped through or over said gate or fence and upon said Plaintiff whereby she was seriously injured, etc."

The defendant Association was the proprietor of a public exhibition. The plaintiff, having admittedly paid admission, became its invitee, and it was charged with the duty of using reasonable care to see that the fair in all its parts was in a reasonably safe condition for the use of its guests and was so kept and, if the races were of a character to jeopardize the safety of the plaintiff, the duty was cast upon the Association to take due precautions to guard her from injury. *Easler* v. *Amusement Co.*, 125 Me., 334; *Hoyt* v. *The Fair Association*, 121 Me., 461; *Thornton* v. *Agri. Soc.*, 97 Me., 108. This was the measure of the duty of the Association whether the horses were managed by it or its officers, or, with their permission, by licensees, independent contractors, or lessees. *Thornton* v. *Agri. Soc.*, supra. No less so, we think, when the horse is managed by the exhibitor, who is in law an invitee. *Hoyt* v. *Fair Association*, supra.

The duty of the Association to guard the safety of its guests includes but does not end with taking precautions against dangers of which it has actual knowledge. Its duty extends also to dangers which it should reasonably foresee or anticipate. *Thornton* v. *Agri. Soc.*, supra; *Redmond* v. *The Horse Show Association*, 138 N. Y. S., 364. Nor does ignorance of dangers which could have been discovered or anticipated in the exercise of reasonable care excuse it. Negligent ignorance in law is the equivalent of actual knowledge. *Easler v. The Amusement Co.*, supra; *Stedman* v. *O'Neil*, 82 Conn., 199; 45 Corpus Juris, 653.

Horse races are of necessity attended with some risks and dangers not only to the drivers and riders but to those who are present as spectators. A broken harness or saddle may make a runaway or a fall may throw a horse or rider off the track. Race horses sometimes "bolt" or jump the track. These and other incident risks are well known or ought to be, must be anticipated by those who conduct races and reasonable care taken that no injury result to invited spectators.

The proprietors of a fair are not, however, insurers of the safety of their guests. In the exercise of the reasonable care demanded of them, they are not required to exclude from their grounds all sports or exhibitions which involve risk of injury to

their guests. The horse and cattle show and the races, the ball game and balloon ascension or aeroplane flight, with fireworks in the evening, incidents, in part at least, of all fairs, are each attended by dangers to spectators, known or reasonably to be anticipated by those charged with the conduct of the exhibition. And it is generally held that, if such risks or dangers are safeguarded by such location, stands, barriers, or guards and warnings as the situation reasonably demands, the duty of the proprietors is performed. *Crane* v. *Exhibition Co.*, 106 Mo. App., 301; *Hallyburton* v. *Fair Association*, 119 N. C., 526; *Reisman* v. *Public Service Corporation*, 82 N. J. L., 464; *Roper* v. *Agri. Soc.*, 120 N. Y. S., 644; *Redmond* v. *The Horse Show Association*, supra.

The opinion of this court in *Easler* v. *Amusement Co.*, supra, goes no further. It is there said, "If games and sports of a character to jeopardize the safety of those who were present at the defendant's invitation were permitted, the duty rested upon the latter to take due precaution to guard against injury to the spectators. Its duty was not merely a passive one of refraining from authorizing such games and sports. It had an active duty to use reasonable care to prevent the same or see to it that due precautions were taken."

Exhibitions may, of course, be of such a character or so conducted that, the only due precaution against injury from them to spectators, would be to bar them from the grounds or prohibit the uses and agencies from which the danger arises. Of this class is the firing of heavy charges in rifles. Permitting the discharge of heavy ammunition at public exhibitions has been held negligence in itself. *Thornton* v. *Agri. Soc.*, supra; *Dietze* v. *Riverview Park Co.*, 181 Ill., App. 357.

A careful examination of the evidence does not, however, take this case out of the general rule. The horse in previous workouts had attempted to leave the track when it came to the gate where it had come in. In the hands of a skillful reinsman, it was turned back. Driven by another rider, it went through or over the gate as it did in the race. In all other respects the horse was kind, gentle and tractable, but nervous on the track. It was a saddle horse and unused to racing.

The plaintiff's contention is that the officials of the fair knew or ought to have known of the habit of the horse to try to leave the track when it reached the gate and, possessed of that actual or constructive knowledge, could only take due precautions for her safety by keeping the horse off the track. Assuming that this knowledge existed, and there is some evidence tending to prove it, we are not convinced that permitting the horse on the track was in itself negligence. It does not appear that barriers would not have kept the plaintiff away from the gate or that officers, by warnings, could not have accomplished the same result. It may be that the gate, built or located differently, would have prevented the accident or that other suitable and sufficient precautions might have been adopted so that a reasonably safe place would have been furnished and maintained from which the plaintiff could have viewed the race and the part this horse played in it. By taking such of these precautions as might have been found reasonably necessary under the circumstances, the defendant could have performed its full duty to the plaintiff. It was not necessary to bar the horse from the track.

The plaintiff has elected, however, to rest her case upon her specific averment of negligence on the part of the defendant in permitting the horse on the track with knowledge of its habits. The case was tried and submitted to the jury on this single issue and recovery is limited accordingly. If there were negligence on the part of the defendant, it lies in acts or omissions not here in issue. The motion must be sustained.

The common law liability of the owner or keeper of a domestic animal, known to be vicious, is not here involved. Except to note that instructions under that rule of law were foreign to the issue and not prejudicial, a consideration of the Exceptions is unnecessary.

Motion sustained.
New trial ordered.

ELLEN M. BRICKLEY

vs.

CHRISTOPHER W. LEONARD, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF FENWICK T. LEONARD.

Cumberland. Opinion April 9, 1930.

EQUITY. WILLS. TRUSTS. R. S., CHAP. 92, SEC. 14.

Evidence to sustain an oral promise to make a will must be conclusive, definite and certain and the contract must be established beyond all reasonable doubt.

The decision, as to matters of fact, of a single Justice sitting in a case in equity should not be reversed, unless it clearly appears that such decision was erroneous. The burden to show the error falls upon the appellant.

As the law permits a man to dispose of his own property at his pleasure, he may make a valid agreement for its disposition by will to a particular person or for a particular purpose. Such an agreement, where, in reliance upon it, the promisee has changed his condition and relation so that a refusal to complete would be a fraud upon him, and where the courts of law afford no adequate remedy, may be enforced in equity, if not within the statute of frauds, or if oral and by part or full performance removed from its operation, if there is present no inadequacy of consideration and there are no circumstances or conditions rendering the claim inequitable. In such cases the court does not act on the ground that it has the power to compel the actual execution of a will carrying out an agreement to make a bequest, or a devise, as this can be done only in the lifetime of, and by him, who makes such an agreement, and no breach can be assumed as long as he lives. The theory on which the court proceeds is to construe the agreement as binding the property of the testator or intestate so as to fasten or impress a trust on it in favor of the promisee.

In the case at bar the doctrine of impressed trust controls the rights of the parties. The claim was not against the estate of the deceased, but was against and for certain property, real and personal, which, impressed with a trust in favor of the plaintiff, did not form any part of the estate. For that reason it was not necessary to file the notice required by Sec. 14, Chap. 92, R. S., where the claim is against the estate.

On appeal. A bill in equity brought to enforce a constructive

trust for the benefit of the plaintiff upon certain specific property owned in his lifetime by Fenwick T. Leonard. At the hearing the sitting Justice found for the plaintiff and decreed certain real estate and in addition thereto the sum of $10,000 on deposit in banking institutions to be charged with a trust in favor of the plaintiff and that defendant within thirty days from the decree convey said land and buildings and pay to said plaintiff the sum of $10.000 with costs. Appeal was thereupon taken by defendant. Appeal dismissed. Decree below affirmed.

The case fully appears in the opinion.

Arthur D. Welch, for complainant.

Sherman I. Gould,

Frank H. Haskell, for respondent.

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

FARRINGTON, J. This is a bill in equity, in the nature of one asking for specific performance, praying that the defendant, brother and sole heir of the deceased, be adjudged and decreed a trustee for the plaintiff of certain real estate situated on the Easterly side of Roberts Street in Portland, Maine, as described in the bill, and that he be ordered to convey said real estate to the plaintiff; that the defendant, as administrator, and also as the sole heir at law, be adjudged and decreed trustee for the plaintiff of certain personal property contained in the house on Roberts Street and of savings deposit funds to the amount of ten thousand dollars ($10,000.00); and that the defendant, as said administrator and as sole heir at law, be ordered to convey to the plaintiff full title to the said personal property, and to pay over to the plaintiff the sum of ten thousand dollars ($10,000.00).

The facts as found by the sitting Justice and as disclosed by the record are briefly as follows: The plaintiff was a niece of the wife of Fenwick T. Leonard, Annie L. Leonard, who resided in said Portland, and died there on April 21, 1923. The plaintiff, who was living in St. John, New Brunswick, came to her aunt's funeral and remained there with Fenwick T. Leonard until June 29, 1923, when she returned to her home in St. John, where she was living with her sisters and a brother. The parents were dead and the

plaintiff was the acknowledged head of the family. The evidence all tends to show that they were living happily and comfortably, among congenial friends and acquaintances and under circumstances in every way pleasant, agreeable and satisfactory.

After her return, the deceased asked her to come back to his home and stay with him. He also asked one Mrs. Griffin, a friend, to write the plaintiff urging her to come, and directing her to tell the plaintiff he would give her the home where he lived. Mrs. Griffin wrote as requested and it appears that the deceased himself wrote the plaintiff.

On August 14, 1923, the plaintiff came to Portland. Her sister, Julia, testified that the plaintiff, when she came, did not intend to remain in Portland. It is clear that something happened to change her plans for, after being there a short time, she wrote to St. John and arrangements were then made by her sister to break up the home and for all to come to Portland. At that time there were, beside the plaintiff, two sisters and one brother living together in St. John. When they came to Portland they found that changes in the house had been made by the deceased to make comfortable living accommodations. Until the death of Fenwick T. Leonard on April 19, 1929, they all lived together at 71 Roberts Street, Portland. The evidence shows that the plaintiff was at the head of the household. She received no wages. Her services consisted of more than general housework. She gave careful and watchful attention to the personal needs and comfort of the deceased and worked inside and outside of the house to beautify it and the grounds, as one would with his own property. The sitting Justice says, "I find that she occupied the position of friend, relative and housekeeper combined, a position of service going beyond that of a mere employee, beyond that of a servant, beyond that of a housekeeper, services which, altogether, could not be expected of any servant and which could not be compensated for by any going wage."

The sitting Justice also found as a fact that the plaintiff after arriving in Portland on August 15, 1923, entered into an oral agreement or contract with Fenwick T. Leonard, the deceased, "whereby he agreed that if she would come to Portland and look after his home until he died, break up her home in St. John, sell

out everything there, bring her brother and sisters with her he would 'make a will' or 'leave her' at his death the property, a two tenement house at 71 Roberts Street and $10,000 in money. I am convinced beyond any reasonable doubt that such a contract was made at that time, in every essential as stated."

He further states, "I have no doubt that his intentions to so dispose of his property grew out of the arrangements made with Nellie Brickley, were pursuant to the contract which they entered into orally and would have been carried out if his sudden demise had not prevented his full performance of his contract.

"The plaintiff, Nellie, upon the evidence in this case, I am convinced, fully performed her contract with fidelity and more."

The plaintiff, by reason of the excluding rule of evidence, did not testify.

Evidence to sustain an oral promise to make a will must be conclusive, definite, certain, and the contract must be established beyond all reasonable doubt. *McCullough* v. *McCullough*, Infra, at p. 71.

To support a decree to carry out the provisions of an oral contract to convey land the evidence must be "full, clear and convincing." *Wilbur* v. *Toothaker*, 105 Me., 490.

The decision, as to matters of fact, of a single Justice sitting in a case in equity should not be reversed, unless it clearly appears that such decision is erroneous. The burden to show the error falls upon the appellant. *Young* v. *Witham*, 75 Me., p. 536; *Sposedo* v. *Merriman*, 111 Me., 538; *Gilman* v. *Haviland et al*, 114 Me., 307; *Wilson* v. *Littlefield*, 119 Me., 145; *Hahnel Bros.* v. *Hanson et al*, 119 Me., 307; *Getchell* v. *Getchell et al*, 127 Me., 330.

Not to go further into a recital of the evidentiary facts as disclosed by the testimony of the various witnesses, the court after careful consideration of the case is of the opinion that the evidence disclosed is sufficiently full, clear, convincing, and free from reasonable doubt to fully justify the above findings of fact made by the sitting Justice.

In accordance with those findings, the decree was that the land and buildings on Roberts Street, and the furniture and chattels therein, with the exception of certain articles inherited by the de-

ceased from his father and mother, and in addition thereto the sum of ten thousand dollars ($10,000.00) on deposit in banking institutions and trust companies, in equity belonged to the plaintiff and were charged with a trust in favor of the plaintiff as and from the date of the death of said Fenwick T. Leonard on April 19, 1929, and that the defendant within thirty days from the date of the decree (August 20, 1929) should convey to the plaintiff the said land and buildings; also that he should give the plaintiff full possession of all the aforesaid goods and chattels, and that, individually and as administrator, the defendant should be perpetually enjoined from interfering with the enjoyment and possession thereof by the plaintiff; and also that he should pay to the plaintiff, from the funds received by him as administrator of the deceased's estate, the sum of ten thousand dollars ($10,000.00); and that the plaintiff recover costs of suit.

The case comes to this court on appeal from this decree.

As the law permits a man to dispose of his own property at his pleasure, he may make a valid agreement for its disposition by will to a particular person or for a particular purpose. Such an agreement, where, in reliance upon it, the promisee has changed his condition and relation so that a refusal to complete would be a fraud upon him, and where the courts of law afford no adequate remedy, may be enforced in equity, if not within the statute of frauds, or if oral and by part or full performance removed from its operation, if there is present no inadequacy of consideration and there are no circumstances or conditions rendering the claim inequitable. In such cases the court does not act on the ground that it has the power to compel the actual execution of a will carrying out an agreement to make a bequest, or a devise, as this can be done only in the lifetime of, and by him, who makes such an agreement, and no breach can be assumed as long as he lives. The theory on which the court proceeds is to construe the agreement as binding the property of the testator or intestate so as to fasten or impress a trust on it in favor of the promisee. 25 R. C. L., Sec. 120, p. 306; 25 R. C. L., Sec. 125, p. 311, and cases cited; Pomeroy on Specific Performance of Contracts, Third Ed., Sec. 191 (2), p. 490, note, and cases cited, and cases, Sec. 191 (a); Lawrence on Equity

Jurisprudence, Vol. 2, p. 877, Sec. 787; *McCullough* v. *McCullough* (Wash.), 280 Pac., 70; *Lawton et ux.* v. *Thurston et al* (R. I.), 128 Atl., 199, citing an earlier case of *Spencer et al* v. *Spencer et al* (R. I.), 55 Atl., 637, and cases cited; *Best* v. *Grolapp et al*, 69 Neb., 811, 96 N. W., 641; *Burdine* v. *Burdine, exr., et al*, 98 Va., 515, 36 S. E., 992; note 399, Ann Cases, 1914 A; *Wolf* v. *Donahue et al* (Cal.), 273 Pac., 547; *Staples* v. *Hawthorne et al* (Cal.), 277 Pac., 1107; to same effect *Crawford et al* v. *Wilson*, 139 Ga., 654, 78 S. E., 30; *Berg* v. *Moreau* (Mo.), 97 S. W., 901; *Signaigo* v. *Signaigo et al* (Mo.), 205 S. W., 23; to same effect *Johnson* v. *Hubbel*, 10 N. J. Eq., 332; *In re Brill's Estate* (Wis.), 197 N. W., 802; *Dillon et al* v. *Gray et al* (Kan.), 123 Pac., 878; *Oles* v. *Wilson et al* (Col.), 141 Pac., 489; *Traver* v. *Naylor et al* (Ore.), 268 Pac., 75; to same effect *Bolman et al* v. *Overall et al*, 80 Ala., 451, 60 Am. Rep., 107; recognizing the same principle, *Dicken* v. *McKinlay et al*, 163 Ill., 318, 45 N. E., 134.

This court in enforcing against a devisee a parol agreement to convey land where there has been sufficient part performance to take the case out of the statute of frauds, has recognized and acted upon this same doctrine of an impressed trust. In the case of *Woodbury* v. *Gardner*, 77 Me., at p. 75, the Court said, "When a contract is made for the sale of an estate, equity considers the vendor as the trustee of the vendee, holding the vendee's legal estate on a naked trust." (Citing *Linscott* v. *Buck*, 33 Me., 530.) And, "The equitable title changes when the contract is completed. The consequences of this doctrine follow. As the vendee's legal estate is held on a naked trust by the vendor, this trust, impressed upon the land, follows it in the hands of his heirs and devisees, and his grantees with notice."

In the case of *McCullough* v. *McCullough*, supra, there was an oral contract to make a will by which the plaintiff was to receive "the Eldridge Avenue home" and the sum of $50,000.00. The decree awarded the plaintiff the real estate and the money. On appeal the decree was affirmed, the Court saying, "an oral contract to make a will, which has been fully performed by the person seeking to enforce it, may be enforced in equity as against the heirs, devisees, or personal representatives of the deceased. The courts of

equity will compel specific performance of such an agreement by requiring those upon whom the legal title has descended to convey or deliver the property in accordance with the terms of the agreement upon the ground that it is charged with a trust in the hands of the heir at law, devisee, personal representative, or purchaser, with notice of an agreement, as the case may be."

We are unable in any way to distinguish the present case from the case above referred to, and we are of the opinion that the doctrine of an impressed trust controls the rights of the parties in the case at bar and that the decree below should be sustained.

The defendant contends that the provisions of Chap. 92, Sec. 14, Revised Statutes of Maine, as amended, apply to the instant case, and that a compliance with them is a condition precedent to the right to maintain this action and that the plaintiff, having failed to comply with those provisions, relative to presentation and filing of her claim, has no standing in this court.

The answer to this contention is that this is not a claim against the estate of Fenwick T. Leonard, but a claim against and for certain property, real and personal, which, impressed with a trust in favor of the plaintiff, does not and can not be said to form any part of the estate of the deceased.

In re Soden's Estate (N. J.), 148 Atl., 12, is illuminating on this point. In that case the decedent in his lifetime agreed to leave his entire estate by will to M but instead gave it by will to others. On a bill in equity against the executor, devisees and legatees the final decree, reciting that the complainant had duly established the agreement, decided that the executor be deemed to hold all the personal property, subject to the payment of decedent's debts and to administration expenses, in trust for the complainant, and that he turn over the net estate to the complainant, and that the devisees convey the real estate to the defendant. This decree was carried out and the case came up on a question of whether an inheritance tax could be assessed against M. In holding that such a tax could not be assessed the Court said, "Suits against the subsequent grantees or devisees from a promisor are often called suits for specific performance, but it is obvious that in fact they are not; they are essentially suits to establish and enforce a trust."

In cases such as the one now under consideration it is not necessary to file the statutory notice of a claim required where the demand is against the estate. *Oles* v. *Wilson et al* (Col.), 141 Pac., 489; *McCullough* v. *McCullough* (Wash.), 280 Pac., 70; *Noble* v. *Noble* (Cal.), 243 Pac., 439; *Connecticut Trust and Safe Deposit Co., Admr.* v. *Security Co., Admr.*, 67 Conn., at p. 443; *Bramell et al* v. *Adams et al* (Mo.), 47 S. W., 931, see also *Ohlendiek* v. *Schuler et al*, 299 Fed. at p. 186.

We are, therefore, of the opinion that the requirements of Chap. 92, Sec. 14, supra, have no application to this case.

Appeal dismissed.
Decree below affirmed.

NATHANIEL P. GOULD ET ALS *vs.* ARTHUR C. LEADBETTER ET AL.

Androscoggin. Opinion April 17, 1930.

WILLS. REMAINDERS, VESTED AND CONTINGENT. WORDS AND PHRASES.

The following clause in a will — "I give and bequeath to my grandson, my homestead farm after myself and wife decease, and if he don't leave any children at his decease, my wish is that my heirs shall have two-thirds of the above property." — creates, by fair implication, a life estate in the widow, subject to which the grandson took one-third in fee and two-thirds in fee tail in remainder, which became an estate tail in possession at her death, with remainder over to the heirs of the testator.

The word "children" has never been held to be equivalent to the word "heirs" in a conveyance, but has frequently been so regarded when appearing in a will.

A devise to one and his children, he having no children at the time, is equivalent to a devise to him and his issue, and creates an estate tail.

The remainder to the heirs of the testator, being limited upon an estate tail, is a vested remainder, subject to being devested by a surviving child of the tenant in tail.

Such a remainder may be effectively conveyed by quitclaim deeds and grantors and their heirs are estopped from setting up any claim to the property thereafter, even though the tenant in tail die without issue.

In the case at bar Adelia Gould and Zipporah L. Francis took vested remainders subject to be devested by a surviving child of Ulmer P. Francis. They were not so devested and their interests were conveyed to Francis by their quitclaim deeds, so that all of the real estate in question, except that inherited by Augusta P. Foss, became the property of Nellie A. Francis under the devise from her husband. She died intestate and the defendants, her heirs at law, are now the owners of the property, with the exception of two-ninths interest therein belonging to the plaintiffs, S. P. Strickland and Arthur C. Foss, in accordance with the finding of the court below.

On appeal by plaintiffs. A bill in equity praying for partition of certain real estate formerly owned by one Ulmer Perley. Hearing was had before a single Justice who filed a decree dismissing the bill except as to S. P. Strickland and Arthur C. Foss, and sustaining the bill as to them and determining their title to be respectively four twenty-sevenths and two twenty-sevenths of the farm in question in common with the defendants who had title to seven-ninths. Petition to sever was filed by the other plaintiffs and granted. An appeal was thereupon filed by them. Appeal dismissed. Decree below affirmed.

The case fully appears in the opinion.

Pulsifer & Ludden, for plaintiffs.

Clifford E. McGlauflin, for defendants.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

PATTANGALL, C. J. On appeal. Bill in equity praying for partition of certain real estate formerly the property of Ulmer Perley and disposed of in his will under a clause reading: "I give and bequeath to my grandson, Ulmer P. Francis, my homestead farm after myself and wife decease, and if he don't leave any children at his decease, my wish is that my heirs shall have two-thirds of the above property."

The testator died August 19, 1887, leaving a widow who died in 1899 and three daughters, Adelia Gould who died in 1892, Zipporah L. Francis who died in 1903, and Augusta P. Foss who died in 1909. On September 25, 1888, Adelia Gould and Zipporah L. Francis deeded by quitclaim to Ulmer P. Francis all of their

right, title and interest in the property in question, their husbands joining in the deed.

Ulmer P. Francis died testate in April, 1928, leaving no children and devising this real estate to his wife, Nellie A. Francis, who died a year later leaving no will. The defendants are her sole heirs at law. Plaintiffs S. P. Strickland and Arthur C. Foss are heirs of Augusta P. Foss, who never conveyed her interest in the property. The remaining plaintiffs are heirs of Adelia Gould and Zipporah L. Francis.

By fair implication, under the quoted clause in Ulmer Perley's will, his widow took a life interest in the property. Subject to her life estate, Ulmer P. Francis took one-third in fee simple and the other two-thirds in fee tail in remainder, which became an estate tail in possession upon the death of the widow, with remainder over to the heirs of the testator. *Fisk* v. *Keene*, 35 Me., 349; *Richardson* v. *Richardson*, 80 Me., 592; *Hall* v. *Cressey*, 92 Me., 514; *Skolfield* v. *Litchfield*, 116 Me., 440; *In re Reeves* (Del.), 92 Atl., 247; 2 Jarman on Wills (5th Am. Ed.), 136.

A distinction is noted between an estate tail created by conveyance and such an estate created by devise. An estate tail by conveyance is not created if the limitation over is not postponed until an indefinite failure of issue but on failure of children only. *Outland* v. *Bower* (Ind.), 7 A. S. R., 420, 10 R. C. L., 659. "It is otherwise where the estate is created by devise. The word 'children' has never been held to be equivalent to the word 'heirs' in a deed, but has frequently been so regarded when appearing in a will." *Adams* v. *Ross*, 30 N. J. L., 512. "A devise to one and his children, he having no children at the time, is equivalent to a devise to him and his issue and creates an estate tail." *Nightingale* v. *Burrill*, 15 Pick., 114.

The court below ordered the bill dismissed as to all plaintiffs excepting S. P. Strickland and Arthur C. Foss, to whom the interest of Augusta P. Foss had descended, holding that the phrase "my heirs" in the clause under consideration referred to those who were such at the time of the testator's decease, and that the quitclaim deeds from Adelia Gould and Zipporah L. Francis conveyed to Ulmer P. Francis four-ninths of the property in question. This

conclusion is unquestionably correct, provided that the remainder over to the heirs of the testator vested at the time of his death. *Carver* v. *Wright*, 119 Me., 185. Otherwise not. If the remainder over to the heirs of the testator was contingent, the phrase would apply to those who were such when the contingency terminated.

A contingent remainder may be alienated, 2 Washburn Real Property (2nd Ed.), 239, but not by quitclaim deed. When the contingent remainderman, prior to the decease of the tenant for life, conveyed the estate by deed of general warranty, the title which vested when the contingency ceased enured to the benefit of the grantee and the grantor is estopped by his deed. But if, under like circumstances, the conveyance is by quitclaim deed, the only covenant being that he will "warrant and defend the premises to the grantee, his heirs and assigns forever, against the lawful claims of all persons claiming by, through or under" the grantor, the remainder vesting at the decease of the tenant for life will not enure to the benefit of the grantee nor will the grantor or his heirs be estopped from maintaining a real action thereon. *Read* v. *Fogg and Whittemore*, 60 Me., 479.

"A deed of release, when the releasor or grantor has no title, passes nothing and will not carry an after-acquired title, unless it contains covenants of warranty. The covenant of non-claim relates only to the future." *Pike* v. *Galvin*, 29 Me., 183; *Harriman* v. *Gray*, 49 Me., 537. In the present case, the deeds of Adelia Gould and Zipporah L. Francis, being quitclaim deeds, conveyed no title unless the remainder vested prior to the time of conveyance. The important issue here, therefore, is the determination of the nature of the remainders to these grantors.

The distinction between vested and contingent remainders is thoroughly discussed in a series of opinions by this court, including *Woodman* v. *Hall*, 89 Me., 128; *Robinson* v. *Palmer*, 90 Me., 246; *Webber* v. *Jones*, 94 Me., 429; *Storrs* v. *Burgess*, 101 Me., 26; *Giddings* v. *Gillingham*, 108 Me., 516; *Trott* v. *Kendall*, 125 Me., 85. None of these cases is exactly on all fours with the instant case, but they illuminate the general principle involved and are in accord with the well established doctrine of the early text writers, accepted by modern authority.

"A remainder is said to be vested where a present interest passes to a party to be enjoyed in the future so that the estate is invariably fixed in a determinate person after a particular estate terminates, while a contingent remainder is one limited to take effect either to a dubious or uncertain person or upon a dubious or uncertain event. 2 Bla. Com., 168. This definition is adopted in substance by all text writers and is sufficiently accurate. But it does not necessarily follow that every estate in remainder which is subject to a contingency or condition is a contingent remainder. The condition may be precedent or subsequent. If the former, the remainder can not vest until that which is contingent has happened and thereby becomes certain. If the latter, the estate vests immediately, subject to be devested by the happening of the conditions." *Haward* v. *Peavy* (Ill.), 15 A. S. R., 125.

"A remainder limited upon an estate tail is held to be vested though it may be uncertain whether it will ever take place. The lines of distinction between vested and contingent remainders are so nicely drawn that they are sometimes difficult to be traced and in some instances a vested remainder would seem to possess the essential qualities of a contingent estate. The struggle with the courts has been for that construction which tends to support the remainder by giving it a vested character." 4 Kent's Commentaries (1st Ed.), 195.

"A remainder limited upon an estate tail is held to be vested." *Ives* v. *Legge*, 100 Eng. Reprint, 693 (note); *Badger* v. *Lloyd*, 91 Eng. Reprint, 206, 1249; *Smith and Dormer* v. *Packhurst et al*, 3 Atkyns Rep., 134, 18 Viner's Abr., 413.

"A devise over after an estate tail on a definite failure of issue is not an executory devise but a remainder. This remainder has been authoritatively settled to be vested." *Taylor* v. *Taylor* (Pa.), 3 Am. Rep., 569.

"It is the present right of future enjoyment whenever the possession becomes vacant and not the certainty that the possession will become vacant before the estate limited in remainder determines that distinguishes a vested from a contingent remainder." *Kennard* v. *Kennard*, 63 N. H., 303.

"When a remainder is subject to contingencies or conditions

precedent, it is contingent; but when subject to contingencies or conditions subsequent, it is vested subject to be devested by the happening of the subsequent event." *Golladay* v. *Knock* (Ill.), 85 N. E., 649.

"When a future estate is limited to certain persons in being subject to a prior gift to others unborn or unascertained, the estate so given is vested subject to be devested." *In re Packer's Estate* (Pa.), 92 Atl., 70.

It may be concluded, therefore, that Adelia Gould and Zipporah L. Francis took vested remainders subject to be devested by a surviving child of Ulmer P. Francis. They were not so devested and their interests were conveyed to Francis by their quitclaim deeds, so that all of the real estate in question, except that inherited by Augusta P. Foss, became the property of Nellie A. Francis under the devise from her husband. She died intestate and the defendants, her heirs at law, are now the owners of the property, with the exception of two-ninths interest therein belonging to the plaintiffs, S. P. Strickland and Arthur C. Foss, in accordance with the finding of the court below.

Appeal dismissed.
Decree below affirmed.

LOUIS LEVINE *vs.* FRED HAMLIN.

Kennebec. Opinion April 21, 1930.

EVIDENCE. JURY.

Where the only issue is one of fact, credibility of witnesses is to be appraised by the jury who observe them as they testify.

In the absence of evidence of bias, prejudice or improper motive, findings of a jury will not be disturbed.

In the case at bar there was a mass of contradictory testimony and abundance of evidence on which the jury could have properly founded its verdict.

On motion for new trial by plaintiff. An action of assumpsit for a balance claimed as result of a contract of barter.

Verdict was for the defendant. Plaintiff filed a general motion for a new trial.

Motion overruled. The case is sufficiently stated in the opinion.

L. L. Levine,

F. H. Dubord, for plaintiff.

C. A. Blackington, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. MORRILL, A. R. J.

BARNES, J. Suit in assumpsit was brought by a dealer in live stock against a farmer, for balance alleged to be due and arising in a contract of barter wherein the dealer exchanged two cows for a bull, a boar, and a sum of money that has not been paid.

The value of the cows is claimed to be more than that of the two animals taken in exchange. Plaintiff contends that the difference amounts to forty-eight dollars.

By his brief statement, filed with the general issue, defendant sets up as his defense that one of the cows was not what he bought; that plaintiff warranted the cow to be sound and valuable and well worth seventy-five dollars, and that the plaintiff when he made this representation well knew her to be old, infirm and unsound.

Defendant testified that plaintiff assured him the cow was, "all right in every way, . . . she is a good cow, . . . giving a good mess of milk, . . . I know that cow is all right and will be all right, . . . extra nice, . . . giving eight quarts of milk."

Defendant's wife testified that she heard plaintiff state to her husband that the cows he offered in barter were "two good cows, straight and right every way."

Plaintiff denies any warranty of quality or condition of the cows.

There is much testimony of complaint on the part of defendant, and promise by plaintiff to substitute a good animal in place of the one complained of.

There is much testimony of the worthlessness of the cow complained of. It is said she gave no more than a quart of milk; that

her milk was not fit for use; that she was diseased and that for a time she was doctored but did not improve.

About ten months after purchase she was sold for a trifling sum.

The jury was probably made up of practical persons, well qualified to determine the facts, and their verdict for the defendant may well be based on findings that representations were made that the cow complained of was in health and giving several quarts of milk a day; that plaintiff knew some of his representations were false; that the defendant relied on the representations found to have been made, and that he was hurt thereby, to an amount at least equal to the balance claimed.

The case is before us on a general motion for a new trial.

We find no evidence of bias, prejudice or improper motive.

We find a mass of contradictory evidence, and abundance of evidence on which the jury may properly have founded its verdict.

The only issue is of fact. Credibility of witnesses is to be appraised by the jury, who observe them as they testify.

It is not for us to say the verdict in this case is wrong.

Motion overruled.

ALBION F. HOLT *vs.* THE AMERICAN WOOLEN COMPANY.

Somerset. Opinion May 1, 1930.

ASSIGNMENT OF WAGES. CONTRACTS. PLEADING AND PRACTICE. MONEY HAD AND RECEIVED.

At common law, the mere expectation of earning money can not, in the absence of any contract upon which to found any such expectation, be assigned. But future wages to be earned under a present existing contract, imparting to them a potential existence, may be assigned.

In equity, if an assignment of wages to be earned in the future, but not under an existing contract of employment, specifies the time during which such wages are to be earned and the employment from which they are expected to arise, if

no rule of public policy is contravened and no equities are violated, it will be upheld.

An action for money had and received is governed by equitable principles.

Under R. S., Chap. 114, *Sec.* 9, *at law as between assignees of wages, the first assignment recorded will prevail.*

One of the objects of the statute is to prevent the mischief of double assignments.

In equity, under the statute, qui prior est tempore, potior est jure *applies unless a superior equity in the assignment of later record may require a variance in the rule.*

The assignment to the plaintiff in the case at bar effected an equitable lien upon the employee's wages entitling the plaintiff to recover in this action against the employer moneys justly due from the employee.

The due record of the prior assignment to the plaintiff of the employee's wages was constructive notice to the Town of Hartland of a prior equitable lien on the same wages, subordinating subsequent assignments to that equity.

No superior equity in favor of the second assignment of record is shown.

The Town of Hartland, not being a party of record on this Report, it can not be determined whether it will be concluded by a judgment herein.

As against the defendant, the plaintiff is here entitled to judgment for $253.56.

On report. At the hearing in the Supreme Judicial Court for the County of Somerset, the cause was referred to an auditor to make report to the court. The cause was thereafterward reported to the Law Court with the auditor's report in evidence. Judgment for the plaintiff for $253.56 with costs of court to be taxed by the Clerk below.

The case fully appears in the opinion.

Harry B. Coolidge, for plaintiff.

Harold E. Weeks, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

STURGIS, J. Reported Case. The action is general assumpsit for money had and received, based upon an assignment of wages by one John Ginty, an employee of the defendant Corporation. The case was submitted to an Auditor, whose findings as reported include and disclose the following facts:

December 7, 1927, one John Ginty, by written assignment duly recorded, assigned to the plaintiff all wages to be earned by him thereafter until January 1, 1929, while employed as a spinner by the defendant. January 1, 1928, the employee was discharged but again hired in March following under a new contract. May 10, 1928, the employee assigned all wages to be earned by him in the employ of the defendant until January 1, 1929, to the Town of Hartland. This assignment was also recorded. The defendant holds, as wages earned by Ginty under his new employment, $159.77, earned prior to May 10, 1928, the date of the assignment to Hartland, and $367.55 earned thereafter but before January 1, 1929. The plaintiff's claim against Ginty is for supplies, etc., furnished him and his family, and amounts to $253.56. The nature or amount of the claim of the Town of Hartland does not appear. Hartland is not a party to this action.

At common law, the mere expectation of earning money can not, in the absence of any contract upon which to found any such expectation, be assigned. But future wages to be earned under a present existing contract, imparting to them a potential existence, may be assigned. *Wade* v. *Bessey*, 76 Me., 413.

The plaintiff's action for money had and received, however, is governed by equitable principles. If, upon a proper prayer, in equity he would be entitled to a decree for the money here in question, he may recover it in this action for money had and received. *Eldridge* v. *May*, 129 Me., 112; *Bither* v. *Packard*, 115 Me., 306.

In equity, if an assignment of wages to be earned in the future, but not under an existing contract of employment, specifies the time during which such wages are to be earned and the employment from which they are expected to arise, if not rule of public policy is contravened and no equities are violated, it will be upheld. *Shaw* v. *Gilmore*, 81 Me., 396.

Accordingly, in *Edwards* v. *Peterson*, 80 Me., 367, where an employee, having assigned his wages to be earned in that employment from the date of the assignment to April 1, following, was discharged and later rehired under a new contract of employment, it is held that the assignment is valid. And the court states the rule generally followed by Chancery Courts to be that whenever parties

by their contract intended to create a positive lien or charge upon property, whether then owned by the assignor or not, or if personal property, whether then in esse or not, the lien or charge attaches in equity to the particular property as soon as the assignor or contractor acquires a title thereto valid as against the assignor and all persons claiming under him with notice.

The rationale of this rule is well stated by Justice Peters in *Emerson* v. *Railway*, 67 Me., 387, 391. Observing that it is not possible for such a rule to prevail at common law — *nemo dat, quod non habet* — he says, "The reason that it may be different in equity is not that a man conveys in presenti what does not exist, but that which is in form a conveyance operates in equity by way of a present contract merely to take effect and attach to the things assigned as soon as they come in esse; to be regarded before that time as only an agreement to convey, and after that time as a conveyance." The rule receives a like interpretation by Judge Story in the leading case of *Mitchell* v. *Winslow*, 2 Story, 630, 639.

Accepting the doctrine of *Edwards* v. *Peterson* as the rule of this court and no reason appears for holding otherwise, we are of opinion that the assignment to the plaintiff in the case at bar effected an equitable lien upon the employee's wages, entitling him to recover in this action moneys justly due him as found by the Auditor. When the Town of Hartland took its assignment of the employee's wages on May 10, the prior assignment to the plaintiff had been duly recorded. This was constructive notice that the plaintiff held a prior equitable lien on the same wages, subordinating subsequent assignments to that equity. Pomeroy's Eq. Jur., Secs. 591, 655, 729; Story's Eq. Jur., Secs. 534, 535.

The statute, R. S., Chap. 114, Sec. 9, provides that no assignment of wages shall be valid against any other person than the parties thereto unless properly recorded. One of its objects is to prevent the mischief of double assignments. *Wright* v. *Smith*, 74 Me., 495. Under it, at law, as between assignees, the first assignment recorded will prevail. *Whitcomb* v. *Waterville*, 99 Me., 75. Under it in equity, *qui prior est tempore, potior est jure* applies unless a superior equity in the assignment of later record may require a variance in the rule. No superior equity is here shown,

however, and its effect upon a prior recorded assignment need not be determined.

As already noted, the Town of Hartland is not a party of record to this suit. Whether it will be concluded by a judgment herein can not, on this Report, be determined. As against the defendant, the plaintiff is entitled to judgment for $253.56. So ordered.

Judgment for the plaintiff for $253.56 with costs of court to be taxed by the clerk below.

EMMA J. ELDRIDGE, ADMINISTRATRIX *vs.* ANNIE B. MAY.

Penobscot. Opinion May 1, 1930.

PLEADING AND PRACTICE. MONEY HAD AND RECEIVED. EQUITY. FRAUD. UNDUE INFLUENCE. WORDS AND PHRASES.

An action for money had and received is equitable in spirit and purpose. It lies for money obtained through fraud, duress, extortion, imposition, or any other taking of undue advantage of the situation of the plaintiff's intestate.

When one is proved to have in his possession money which in equity and good conscience he ought to refund, the law will conclusively presume that he has promised to do so.

As a general rule, any set of facts which would, in a court of equity, entitle a plaintiff to a decree for money in question, held by a defendant, if that were the specific relief sought, will entitle him to recover it in an action for money had and received.

Fraud in equity includes all willful or intentional acts, omissions, and concealments which involve a breach of either legal or equitable duty, a trust or confidence, and are injurious to another or by which an undue or unconscientious advantage is taken over another.

Undue influence is a species of constructive fraud.

Whenever two persons have come into such a relation that confidence is necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other and this confidence is abused or the influence

is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted in equity to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.

The term "fiduciary or confidential relation" embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. The relations and duties involved in it need not be legal, but may be moral, social, domestic, or merely personal.

Whenever a fiduciary or confidential relation exists between the parties to a deed, gift, contract, or the like, the law implies a condition of superiority held by one of the parties over the other, so that in every transaction between them, by which the superior party obtains a possible benefit, equity raises a presumption of undue influence and casts upon that party the burden of proof to show affirmatively his compliance with equitable requisites and of entire fairness on his part and freedom of the other from undue influence.

The relation of brothers and sisters may be of such reciprocal confidence as to cast upon either the burden of proof to show the exact fairness of a transaction between them by which either is benefited.

In the case at bar from all the evidence, the jury were warranted in finding that the plaintiff's intestate was induced to transfer his moneys and property to the defendant and execute the contract of support of November 6 through the undue influence of the defendant.

Under the equitable principles stated, the plaintiff may recover in this action of general assumpsit the moneys thus obtained from her intestate by the defendant. The verdict below must be sustained.

On general motion for new trial by defendant. An action on the case brought by the Administratrix of the estate of Amos L. Eldridge, for the recovery of certain moneys the deceased had deposited in the savings department of five banks and which during his last days he withdrew and turned over to the defendant; the plaintiff alleging that the deceased was incompetent to manage his affairs by reason of mental and physical infirmities, and that the defendant by undue influence and inducement fraudulently obtained possession of the moneys in question and thereafterward appropriated the same to her own use. Trial was had before the Superior Court for the County of Penobscot at the May 1929 Term. The jury found for the plaintiff and assessed damages in the sum of $9,097.00. A general motion for new trial was thereupon filed by the defendant. Motion overruled.

The case fully appears in the opinion.
Cyrus Small,
Nathaniel Tompkins, for plaintiff.
Adolphus Crawford, Jr.,
Hinckley, Hinckley & Shesong, for defendant.

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

STURGIS, J. General motion for a new trial in action by the plaintiff as Administratrix of the estate of her husband, Amos L. Eldridge, late of Ossipee, N. H., to recover moneys in the possession of his sister, the defendant, claimed to have been paid her by the deceased under an agreement for his support and maintenance.

The declaration is in assumpsit for money had and received, with specifications, filed under Rule XI, setting out as matters to be proved, that the plaintiff's intestate, having $8,537.15 on deposit in the savings departments of five banks, withdrew all of the moneys, and the defendant, by undue influence, wrongfully and fraudulently obtained possession of the moneys and appropriated them to her own use.

The defendant pleaded the general issue with a brief statement denying the plaintiff's allegations of undue influence and fraud, and saying that she is the owner of the moneys withdrawn from the banks under a contract for support and maintenance made with her brother on November 6, 1928.

At the trial below, the case turned on the validity of this contract. The moneys in question admittedly came into the defendant's possession. Her rights under this contract are her only defense to this suit. The contract reads:

> THIS MEORANDUM OF AN AGREEMENT made and entered into this sixth day of November, A. D., 1928, by and between Amos L. Eldridge, formerly of Ossipee in the State of New Hampshire, now of Island Falls in the County of Aroostook in the State of Maine, and Annie B. May of said Island Falls:
>
> WITNESSETH; That whereas the said Eldridge has this day assigned, transferred, granted, set-over, and delivered to the

said May all of his personal estate and chattels, of any and every name and nature, whatsoever, in the State of Maine, including all deposits of money in any banking institution in said States of Maine and New Hampshire belonging to said Eldridge, To HAVE AND TO HOLD to her, the said Annie B. May, her heirs, executors, administrators, and assigns, forever.

NOW, THEREFORE, the said Annie B. May, for and in consideration of the aforesaid grant to her by the said Eldridge, does hereby agree with the said Eldridge, that she and her heirs, executors, administrators, and assigns, will well and truly support and maintain him, the said Eldridge, in some suitable and proper place to be designated by her, for and during the term of his natural life, and him provide with food, drink, lodging, and clothing, suited to his degree and station in life, also with proper medicine, medical attendance, and nursing whenever required; and that she will treat him at all times with courtesy, kindness, and consideration, and at his death cause him to be decently interred in the cemetery at said Ossipee where his father and mother are buried.

This action for money had and received is equitable in spirit and purpose. It lies for money obtained through fraud, duress, extortion, imposition, or any other taking of undue advantage of the situation of the plaintiff's intestate. If the defendant is proved to have in her possession money which in equity and good conscience she ought to refund, the law will conclusively presume that she has promised to do so. *Mayo* v. *Purington*, 113 Me., 452. As a general rule, any set of facts, which would, in a court of equity, entitle the plaintiff to a decree for the money here in question, if that were the specific relief sought, will entitle her to recover it in an action for money had and received. *Bither* v. *Packard*, 115 Me., 306, 313. This action is governed by equitable principles.

Fraud in equity includes all willful or intentional acts, omissions, and concealments which involve a breach of either legal or equitable duty, a trust or confidence, and are injurious to another or by which an undue or unconscientious advantage is taken over another. 2 Pomeroy's Eq. Jur., Third Ed., Sec. 873; 1 Story's Eq. Jur., Sec. 187.

Undue influence is a species of constructive fraud and the doctrine of equity concerning it is very broad. Whenever two persons have come into such a relation that confidence is necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage although the transaction could not have been impeached if no such confidential relation had existed. The principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side and a resulting superiority or influence on the other. Pomeroy's Eq. Jur., Sec. 956.

The term "fiduciary or confidential relation," as used in the law relative to undue influence, is a very broad one. It embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. The relations and duties involved in it need not be legal but may be moral, social, domestic, or merely personal. Pomeroy's Eq. Jur., Sec. 956; 2 Words and Phrases, Second Series, 529.

And the rule seems to be that, whenever a fiduciary or confidential relation exists between the parties to a deed, gift, contract, or the like, the law implies a condition of superiority held by one of the parties over the other, so that in every transaction between them, by which the superior party obtains a possible benefit, equity raises a presumption of undue influence and casts upon that party the burden of proof to show affirmatively his compliance with equitable requisites and of entire fairness on his part and freedom of the other from undue influence. *Burnham* v. *Heselton*, 82 Me., 495; *Connor* v. *Stanley*, 72 Cal., 556; *Todd* v. *Grove*, 33 Md., 188; *Cowee* v. *Cornell*, 75 N. Y., 91; *Gugel* v. *Hiscox*, 122 N. Y. S., 557; Pomeroy's Eq. Jur., Sec. 956; 6 R. C. L., 637.

This rule has been often applied to transactions between brothers and sisters, brothers and brothers, and sisters and sisters. Their relations may be of such reciprocal confidence as to cast upon either the burden of proof to show the exact fairness of a transaction between them by which either is benefited. In such cases where

this burden has not been sustained, equity has set the transaction aside. *Merriman* v. *Jones*, 126 Me., 130; *Million* v. *Taylor*, 38 Ark., 428; *Gillespie* v. *Holland*, 40 Ark., 28; *More* v. *More*, 133 Cal., 489; *Birdsong* v. *Birdsong*, 2 Head, 289, 299; *Todd* v. *Grove*, supra; *Shevlin* v. *Shevlin*, 96 Minn., 398; *Thornton* v. *Ogden*, 32 N. J. Eq., 725; *Watkins* v. *Brant*, 46 Wis., 419.

Even a summary of the evidence must be unduly long. The record is voluminous, and the story of the defendant's relations with her brother must be drawn from a series of events and circumstances covering a somewhat lengthy period. The case comes forward on a motion for a new trial. The single question is whether the jury, upon the evidence presented to them, with an opportunity to measure the credibility of witnesses as they appeared upon the stand, and weigh the conflict of testimony as they heard it, were manifestly wrong in their verdict for the plaintiff. It is only necessary, therefore, to determine whether facts and inferences are disclosed by the evidence which, under the rules of law applicable, justify the verdict. We have read and considered the evidence with care and are of opinion that the jury were warranted in the following conclusions:

Amos L. Eldridge, the plaintiff's husband and intestate, in 1928, lived with her at Ossipee, N. H. He owned his home, but, outside of that, the moneys here in question represented his entire life's savings. He was seventy-three years of age, broken in health and somewhat enfeebled in mind. He had valvular disease of the heart and kidney trouble. Dropsy had set in and his legs had become swollen and ulcerated. He was at times helpless, and at all times in a serious condition. His physician testifies that it was uncertain whether he would live for a day or for months, and says that he had become childish and fretty and there was a degeneration of his mental faculties.

The defendant was a younger sister who formerly had lived with her brother at their old home in Ossipee. In those years she was in her brother's closest confidence, writing his letters, handling his moneys, and making his deposits in the bank. They both had married, she moving to Island Falls, Maine, to live with her husband, Levi H. May, and he staying in Ossipee with his wife in a new home

In August, 1928, Mrs. May visited her brother in Ossipee and, unbeknown to his wife, invited him to come to Maine and live with her, although she was advised by his physician that such a removal was risky and would be detrimental to him. She was then advised as to his condition and the uncertainty of his life.

In October, 1928, Mrs. May secretly arranged a meeting with Mr. Eldridge at the home of an older sister, Julia Wormwood, who lived in Rochester, N. H. Mr. Eldridge was brought to Rochester on October 24 by a neighbor, stating to his wife as he left home that he was going down to his sister Julia's to stay over Sunday, and leaving her uninformed of Mrs. May's arrival in Rochester and his proposed meeting with her.

The next day, Mr. Eldridge was taken home by Mrs. Wormwood's husband. He got a cleaning rod from the garage, said he was going to a rifle shoot that afternoon, and unbeknown to his wife, gathered up all his bank books, and left for Rochester again without waiting for dinner.

The next day, October 26, Mr. Eldridge accompanied Mrs. May to Island Falls, Maine. No one appears, outside of Mrs. May, who admits knowledge that the trip was planned. Mrs. Eldridge did not know that her husband had gone to Maine with Mrs. May until nearly a week had passed, assuming all the time that he was in Rochester with Mrs. Wormwood. Frank A. Eldridge, an older brother who lived in Ossipee and was on most friendly terms with Mr. Eldridge, was apparently also kept in ignorance. What Mrs. Wormwood, the older sister, knew does not appear. Her deposition might have shed valuable light upon the events which took place in her home. We are impressed with the view that Mrs. May's dealings with her brother at Rochester, prior thereto and thereafter, were intended to be secret and were effectually kept so.

When Mr. Eldridge arrived at Island Falls, he was still in a most serious condition. The local physician there, called by Mrs. May as early as November 2, found him in bed still suffering from the complication of diseases already described. This Doctor called again November 5 and again on the 7 and 10. At all times, he says Mr. Eldridge was in bed and in distress. We think the evidence fairly indicates that, from the day of his arrival at Island Falls,

Mr. Eldridge progressively grew weaker and it was evident that he could live but a short time.

As already stated, Mr. Eldridge arrived at Island Falls on Friday, October 26. Examining the testimony of Mrs. May, we find that she admits that on the Sunday following she was talking with him about turning over all his property to her in consideration of an agreement for life support. On the next Monday, she says the bank books were turned over to her, and, at Mr. Eldridge's request, she wrote to the five banks holding deposits for withdrawal of all moneys and remittances in currency rather than by check. These letters were admittedly written by Mrs. May, although signed, by signature or mark, by Mr. Eldridge.

The banks having refused to remit under the letters, October 31, Mrs. May called in a local Notary Public and directed him to make out withdrawal orders payable to herself. The Notary testifies that although he read the orders to Mr. Eldridge, asked him if he wanted to sign them, and received an affirmative answer, Mr. Eldridge himself made no conversation regarding them and was able only to sign by a mark.

The next day the Notary came to the May home again to witness a signature card, and Mr. Eldridge's condition was such that the Notary wrote one of the banks this pertinent report of the man's condition:

> "I was this day called to the home of Mr. & Mrs. L. H. May to witness to the signature of Mrs. May's brother, Mr. Amos L. Eldridge.
>
> "I found that Mr. Eldridge was in a state of Nervous collapse and was unable to sign his name, and, therefore, I witnessed to his mark as stated on the signature card that you mailed him."

On the next day, the same Notary drew up an order authorizing Mrs. May to sign for any mail or express that came to Mr. Eldridge and to endorse checks payable to his order. This paper was signed by a mark. It was sufficient, however, to enable Mrs. May to obtain possession of the moneys which came from the several banks, all in currency as directed. She immediately deposited the money in her own name in a local bank.

The next proceeding is important. Mrs. May's testimony alone describes it. She says that her husband, Levi H. May, arranged with his attorney, Mr. Crawford, then of Houlton, to draw up a written agreement providing for Mr. Eldridge's support by Mrs. May in consideration of the transfer of all his personal property to her. She states that Mr. May went to Mr. Crawford on November 5 and furnished the latter with the information from which the instrument, here in controversy, was drafted. She received it at Island Falls by mail on the 6th and immediately sent again for the Notary.

We turn now to the testimony of the Notary as to the execution of the contract upon which this case turns. He says:

Q. Now Mr. Young, who provided you with that instrument to secure the signature of Mr. Eldridge? A. They had it there at the house.

Q. Do you recall who gave it to you? A. I do not. I should imagine — I don't know whether Mr. or Mrs. May passed it to me.

Q. And to refresh your recollection, what is the date of it at the top? A. Sixth of November.

Q. Sixth of November? A. Yes sir.

Q. Where did you find Mr. Eldridge that day? A. In bed.

Q. Who was in the room when he made his signature by mark to this paper? A. Mrs. May, I think.

Q. And yourself? A. Yes sir.

Q. Did you read this to him? A. I did.

Q. Did he make any comments or talk about it? A. No sir.

Q. Did you hold the pen for him when he made the mark? A. I did.

Q. And where did Mrs. May sign her name to the paper? A. I think she went out to the desk in the other room.

In cross examination the Notary says the paper was read to Mr. Eldridge twice. He was asked if he understood it and wanted to sign it and said he did. And testifying to no further conversation, the Notary asserts that Mr. Eldridge was clear mentally so far as he observed that day.

As bearing upon Mr. Eldridge's condition, however, on the day that he signed the contract and the part Mr. and Mrs. May were playing in this transaction with Mr. Eldridge, the incidents of the next day, November 7, are significant. On that day, Mr. May summoned the Notary again to the May house and there directed him to prepare a deed conveying Mr. Eldridge's real estate to Mrs. May. The description of the property to be used in the deed was furnished by Mr. May with instructions from Mrs. May, all this being done in a room apart from Mr. Eldridge. The testimony of the Notary in regard to an attempt to obtain Mr. Eldridge's signature is:

Q. And after having prepared the deed, did you take it to Mr. Eldridge's bed chamber? A. I did.

Q. And did Mr. Eldridge sign the deed? A. No sir.

Q. Why not? A. He was as a man awaking from sleep — he could not seem to understand what the statement was.

Q. Did you try to talk with him? A. I did a little.

Q. Could you carry on an intelligent conversation? A. Not that day, no sir.

In this connection it is worthy of note that the contract for support did not call for a conveyance of real estate. And further that two or three days after the attempt to obtain Mr. Eldridge's signature, the deed was brought to the Notary by a son of Levi H. May by a former marriage, who took oath that he had seen Mr. Eldridge subscribe a mark which appeared on the paper.

All this time no word had been sent by Mrs. May to Mrs. Eldridge nor does it appear that relatives in New Hampshire had been informed of Mr. Eldridge's condition. No one but the Mays, the attorney in Houlton, and the Notary knew of Mr. Eldridge's attempted contract and conveyance. The transaction was kept secret until Mr. Eldridge died, four days later on November 11. An examination of his effects at Ossipee then disclosed that the bank books were missing. Inquiry at the banks disclosed the withdrawals.

The defendant's claim is that she received the money in suit from her brother in good faith and without fraud on her part. She testified before the jury that Mr. Eldridge came to her home of his own

volition and without her solicitation. She asserts that his home life in Ossipee was unhappy and he was ill treated by his wife. She told the jury that the transfer of his moneys and lands to her were suggested by him and purely voluntary and in no way influenced by her. The jury were not convinced by her story. They did not find in the evidence before them proof of her good faith and fair dealing in this transaction.

The testimony of Mr. Eldridge's family physician and his brother refuted Mrs. May's charges of ill treatment by Mrs. Eldridge. The secrecy surrounding Mr. Eldridge's departure to Maine, his stay with Mrs. May, and the execution of his contract and conveyance was sufficient to arouse suspicion in the minds of fair minded men. Evidently it did not appeal to reason that a man, without causes more cogent than the evidence discloses, would of his own volition and uninfluenced by the defendant strip himself of all earthly possessions, pauperize his wife, and disinherit his other heirs for a consideration so uncertain and in all probability so inadequate. Mrs. May had been advised by her brother's physician in Ossipee that his span of life might be a day or longer, or to use her own words, that he "was liable to pass out any time." She received substantially the same advice from the local physician whom she called at Island Falls. The jury might well have concluded that Mr. Eldridge's early demise was apparent to anyone who saw him, and that even in permitting him, unadvised by impartial and disinterested counsel, to enter into the contract in question, she took an unconscionable and unfair advantage of him which in equity can not be allowed to stand.

We think the jury were justified in going further and, from all of the evidence in the case, drawing the inference that it was through the influence and persuasion of the defendant that Mr. Eldridge was induced to transfer his moneys and property to her and execute the contract of November 6. We are convinced also that a finding that the influence was undue is not error.

Under the equitable principles stated, the plaintiff was entitled to recover the moneys in the possession of the defendant in this action of general assumpsit.

Motion overruled.

FREMONT H. BENNETT ET AL *vs.* DOMINIQUE J. CASAVANT.

Androscoggin. Opinion May 5, 1930.

FORCIBLE ENTRY AND DETAINER. TENANCY AT WILL.

The rights of a vendee, in possession of real estate under an agreement for its conveyance, not of higher dignity than a personal obligation, and conveying no interest in the land, are similar to those of a tenant at will.

In the case at bar the ruling by the trial court, that the lease by the vendor to the plaintiffs put an end to the right of the defendant to occupy the demanded premises, was free from reversible error.

On exceptions by defendant. An action of forcible entry and detainer commenced in the Lewiston Municipal Court and later transferred to the Superior Court for the County of Androscoggin. To the findings and rulings of the presiding Judge, defendant seasonably excepted. Exceptions overruled.

The case sufficiently appears in the opinion.

Berman and Berman, for plaintiffs.

Frank A. Morey, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

DUNN, J. This is an action of forcible entry and detainer against a disseizor who has not acquired any claim by possession and improvement. R. S., Chap. 99, Sec. 1. The action was begun in the Lewiston Municipal Court. Plea, not guilty, with brief statement of title. The case was removed to the Superior Court in Androscoggin county, R. S., Chap. 99, Sec. 6; Laws of 1929, Chap. 141.

In the Superior Court, plaintiffs had judgment, and defendant saved an exception.

A devisee of real estate for life with power of disposal, in disregard of testamentary condition that, on exercising the power, certain persons should have priority to purchase, contracted to

convey the real estate, not to those persons, but to the defendant, who entered into possession of the property.

While defendant was in possession, his vendor leased the realty to the plaintiffs.

Upon that, this defendant, as plaintiff, sued for specific performance, naming the vendor and these plaintiffs, and them only, defendants.

Specific performance was denied.

The decree denying specific performance was on the ground that, for want of parties, rights under the provision of the aforesaid devise could not be determined.

In that suit there was finding that the lease had not been executed in good faith, but was a subterfuge to accomplish the early eviction of the present defendant. That finding became evidence in the trial of the case at bar.

The finding did not annul the lease. As between the lessor and the lessees, the lease remains valid.

It does not appear, in the record certified to this court, that defendant had any contractual right to occupy the premises, enforceable against an alienee with full knowledge. *Handy* v. *Rice*, 98 Me., 504.

The agreement to convey to the defendant, for anything shown to the contrary, was a personal obligation, and conveyed no interest in the land. *Cook* v. *Walker*, 70 Me., 232.

The rights of a vendee, in possession under such an agreement, are similar to those of a tenant at will. *Lapham* v. *Norton*, 71 Me., 83, 88; *Look* v. *Norton*, 94 Me., 547; *Harlow* v. *Pulsifer*, 122 Me., 472, 476.

Defendant had no right of occupancy which the giving of a lease by his vendor would not terminate. *Groustra* v. *Bourges*, 141 Mass., 7.

The ruling by the trial court, that the lease to the plaintiffs put an end to the right of the defendant to occupy the demanded premises, was free from reversible error. See *Seavey* v. *Cloudman*, 90 Me., 536; See too, dictum in *Karahalies* v. *Dukais*, 108 Me., 527.

Exception overruled.

STATE OF MAINE *vs.* ROSE TUTTLE ET AL.

Penobscot. Opinion May 5, 1930.

CRIMINAL LAW. WORDS AND PHRASES.

"Lewd" and "lascivious" have been defined to be synonymous terms. Lewdness signifies the irregular indulgence of lust, whether in public or in private.

The word "cohabit," as used in the statute in connection with the words "lewdly and lasciviously," may be said to mean, generally speaking, to dwell or live together, not merely to visit or see, nor a single act of incontinence.

Habitual acts of illicit intercourse are necessary elements of the crime of lewd and lascivious cohabitation.

In the case at bar the evidence was not sufficient to warrant conviction of that crime.

On appeal from ruling of the presiding Judge denying a motion for new trial after defendants had been found guilty under an indictment for lewd and lascivious cohabitation. Appeal sustained. Motion granted.

The case sufficiently appears in the opinion.

Albert G. Averill, County Attorney, for State.

D. I. Gould, for respondents.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

DUNN, J. Appeal from the overruling of a motion for a new trial on joint conviction of the respondents for lewd and lascivious cohabitation, such crime being a felony. R. S., Chap. 136, Sec. 28.

The indictment is under R. S., Chap. 126, Sec. 5. The statute in question provides that "if any man and woman, one or both being at the time married to another person, lewdly and lasciviously cohabit . . . they shall be punished. . . ."

"Lewd" and "lascivious" have been defined to be synonymous terms. *U. S.* v. *Clarke*, 38 Fed., 732. "Lewdness" signifies the irregular indulgence of lust, whether public or private. *Com.* v.

Lambert, 12 Allen, 177, 179; *Com.* v. *Wardwell*, 128 Mass., 52, 54.

The word "cohabit," as used in the statute in connection with the words, "lewdly and lasciviously," may be said to mean, generally speaking, to dwell or live together, not merely to visit or see, nor a single act of incontinence. *Com.* v. *Calef*, 10 Mass., 153; *Com.* v. *Lucas*, 158 Mass., 81, 84; *Calef* v. *Calef*, 54 Me., 365.

The evidence for the State, taken alone, would have justified the inference that the respondents, the man being married, had been guilty of one act of criminal intercourse. No evidence tended to prove more.

Evidence of a single act of adultery, together with evidence of other facts, may or may not have force in proving lewd and lascivious cohabitation.

The question before the jury was whether the crime charged in the indictment had been made out in proof.

The evidence was not sufficient to warrant conviction for the commission of that crime. *Com.* v. *Calef*, supra; *Morey* v. *Commonwealth*, 108 Mass., 433, 436.

The statute against lewd and lascivious cohabitation is of a wider scope than that directed at the crime of adultery. 36 C. J., 1035.

To support the indictment it was necessary to prove, not only that a man and a woman, "one or both being at the same time married to another person," "cohabited," but that they so cohabited "lewdly and lasciviously." *Com.* v. *Munson*, 127 Mass., 459, 470. Habitual acts of illicit intercourse are necessary elements of the crime of lewd and lascivious cohabitation. 36 C. J., 1036.

Appeal sustained.
Motion granted.

BERNES O. NORTON, ADMINISTRATOR OF THE ESTATE OF ALMA E. BRADBURY

vs.

HENRY SMITH.

Waldo. Opinion May 14, 1930.

EVIDENCE.

Statements of a defendant maker that the payee had destroyed the note in his presence thereby canceling the same are self-serving and wholly inadmissible.

In the case at bar Smith could not have testified in person because the alleged destruction of the note was before the death of Mrs. Bradbury. The result of the admission of the testimony during the questioning of Mr. Bowden was not only to allow a self-serving statement to go to the jury, but its admission was equivalent to putting the defendant on the stand, so far as direct testimony was concerned, without affording any opportunity for cross examination. Exceptions to the admission of this evidence were well taken.

On exceptions and general motion for new trial by plaintiff. An action of assumpsit brought to recover the sum of $13,500 claimed as the balance due from the defendant to the Estate of Alma E. Bradbury. While there were five counts in the plaintiff's writ, by stipulation reliance was had on the last two counts only. Hearing was had at the January Term, 1930, of the Superior Court for the County of Waldo. To the admission of certain testimony and to the refusal of the presiding Judge to give certain requested instructions, and to the charge itself 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.

Clyde R. Chapman,

McLean, Fogg & Southard, for plaintiff.

Buzzell & Thornton,

Hinckley, Hinckley & Shesong, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. MORRILL, A. R. J.

FARRINGTON, J. This was an action of assumpsit. The writ contained five counts with only two of which, the fourth and the fifth (the latter declaring on a lost note), are we concerned.

By agreement and stipulation of record "the note declared on in said counts is due and payable in the sum of thirteen thousand five hundred dollars, fifteen hundred dollars having been paid thereon, unless in the lifetime of the said Alma E. Bradbury she forgave the said defendant said note and discharged the same by intentionally destroying it, and that the only issue is whether or not the said Alma E. Bradbury did during her lifetime forgive said note or discharge said note by intentionally destroying the same." On this issue the case was tried and the jury rendered a verdict for the defendant.

The case is before this court on general motion and on exceptions to the admission of certain evidence, to a refusal by the presiding Justice to charge as requested, and to the charge itself.

The death of Alma E. Bradbury occurred in May, 1926. The defendant was named as executor in the will and was appointed special administrator and as such took charge of the deceased's property, pending the time of his later appointment and qualification as executor.

It appears of record that on June 1, 1925, the defendant gave to the deceased, Alma E. Bradbury, a note for $15,000.00 on which, during her lifetime, he had made a payment of $1,500.00. In his brief statement the defendant sets up as a defense the claim that subsequently to this payment of $1,500.00 "the said Alma E. Bradbury in her lifetime forgave the said defendant said note and discharged said note by intentionally destroying the same," as noted in the stipulation and agreement above mentioned.

Sometime during the last of 1926, or the early part of 1927, there was a hearing on an account filed by the defendant as special administrator. On March 14, 1927, and March 21, 1927, hearings were held on petitions for the discovery of assets and for the removal of the defendant as special administrator and executor and after that there was a hearing on an appeal from the decree of the

Probate Court removing the defendant. At all of these hearings the defendant testified under oath. There was no stenographic record of the first hearing which related to the special administrator's account, but in all the other hearings there was such record.

The present action was brought after these hearings had been held. At the trial of the case the plaintiff, having offered the stipulation and agreement to which reference has been made, rested.

The first witness for the defendant was Ellen Smith, wife of the defendant, who was not permitted by the presiding Justice to testify to any conversation with the deceased in regard "to the forgiving, cancellation or destruction of the note." Then Rosanna B. Odiorne, an old friend of the deceased, testified that the latter told her that "when Henry (*the defendant*) went into business I loaned him some money for which he gave me his note, but before I came away I said to him, 'Child, I will never need that, and we are going to live together (referring to arrangements to live with defendant and his wife), and I want to destroy it.' We did destroy the note and that ended it." After cross examination by the plaintiff's attorney and re-direct by the defendant's attorney, Ellery Bowden, the Judge of Probate before whom the hearings had been held in the matters herein referred to involving the deceased's estate, was called by the plaintiff as a witness in rebuttal and was permitted to testify that, at the first hearing which related to the account of the special administrator and at which no stenographic record was made, the defendant said under oath that "he never gave Alma Bradbury any note." On cross examination this witness was permited by the presiding Justice to answer certain questions, among others, relating to the stenographic record of a hearing held before him on March 14, 1927, as follows, viz:

> Q. "I am now about to examine on pages 25 and 26 of the record of that same hearing. I am reading from page 25 of the record of that same hearing. '*Question:* Do you recall stating in Court here last time, Mr. Smith, that Alma Bradbury never loaned you any money? *Answer:* I don't recall that I did. *Question:* How long after Mr. Bradbury died was it before this note was torn up? *Answer:* I wouldn't dare say. Maybe a week; not much more.' Do you remember that?"

A. "Why, I remember it in a general way."

Q. "'*Question:* Anybody else there when the note was torn up? *Answer:* No, Sir. *Question:* Up to that time do you know whether she had kept it in her safe deposit box? *Answer:* No, Sir. *Question:* You don't know where she kept it? *Answer:* No.' Do you remember those questions and answers?"

A. "Yes, Sir."

Q. "They are correct as he gave them?"

A. "They are correct as he gave them; Yes, Sir."

Q. "I am now referring to page 37 of the same hearing. '*Question:* Now, Mr. Smith, you state that your brother knew about the loan, but never knew about the notes being torn up. Did Mr. Ritchie know about the notes being destroyed? *Answer:* I don't know that I mentioned it until this action came up.' Is that correct?"

A. "I think so."

Q. "I am reading now from same hearing, page 45, as reported: '*Question:* No one but you and Mrs. Bradbury present both times? *Answer:* No.' This is referring to the time when he says the note was destroyed. '*Question:* It was prior to that time, in the lifetime of Alma Bradbury, that you and she tore up the note? *Answer:* I didn't say I did. It was in my presence, and in the presence of no one else.' Do you remember that question and answer?"

A. "Yes, Sir, those were his answers."

Q. "I am referring now to copy of the report of evidence, page 62 of the same hearing, and I ask you if these questions and answers were made and given before you at that hearing. '*Question:* And did she mention that when she gave you the note? *Answer:* Yes. *Question:* At the time she tore up the note what did she do with it? *Answer:* Put it in the kitchen stove. *Question:* Did she at that time remark that she was giving it to you? *Answer:* Exactly. *Question:* Did you accept it as a gift? *Answer:* I certainly did.' Were these questions and answers given before you at that hearing?"

A. "They were."

To the admission of all the testimony above quoted exceptions were seasonably taken, as well as to other similar testimony to which we do not feel it necessary to refer in detail.

What the defendant, Smith, at any time said in regard to borrowing money from the deceased, or the giving of a note, is not an issue. The only question is as to the discharge of a note, admittedly given on which a $1,500.00 payment had been made, and the bight of the matter is whether it was proper to admit any statement made at any time by Smith to the effect that he no longer owed anything because the note had been destroyed by the deceased in his presence. Smith could not have so testified in person on the stand because the destruction claimed was before the death of Mrs. Bradbury. The result of the admission of the testimony during the questioning of Mr. Bowden was not only to allow a self-serving statement to go to the jury, but its admission was equivalent to putting the defendant on the stand, as far as direct testimony was concerned, without affording any opportunity for cross examination. Citation of authority is not needed to establish the proposition that the statements were self-serving and wholly inadmissible.

The usual rule of exclusion in suits involving estates prevented the defendant from testifying as to the incident of the destruction of the note occurring before the death of Mrs. Bradbury. The door had not been opened by the plaintiff and the defendant should not have been permitted to put into the record by indirection and through a self-serving statement, that to which, under the well recognized rule, he could not have testified himself. The testimony was inadmissible. That it was most prejudicial can not be questioned. It gave opportunity for counsel for the defendant to argue to the jury that the story as told by Mrs. Odiorne was corroborated by this testimony which, to all intents and purposes, as far as the jury was concerned, was from lips which should have been sealed under the rule of exclusion.

The exceptions to the admission of this evidence must be sustained.

Further exceptions were seasonably reserved by the plaintiff as to the admission of certain other evidence and also to the refusal

of the presiding Justice to include in his charge a certain request of the plaintiff. There were also exceptions to the charge itself.

In view of our finding that the exceptions should be sustained as to the evidence hereinbefore recited, we do not feel that it is necessary to discuss the case with reference to the points covered by the other exceptions of the plaintiff.

For the same reason it would seem needless for this court to make comment on or reference to the general motion.

Exceptions sustained.

EMMA R. STARRETT, EXECUTRIX

vs.

INHABITANTS OF TOWN OF THOMASTON ET ALS.

Knox. Opinion May 19, 1930.

PLEADING AND PRACTICE. COURTS. SURVIVAL OF ACTIONS.

There is no provision by statute or rule in this state for a rehearing by the Law Court after a decision rendered.

Under certain circumstances, review might lie after such final decision but the Law Court can not reconsider a case on its merits after it has finally acted and review has been denied. Litigation may not be indefinitely prolonged.

The right of appeal from the estimate of damages by municipal officers for land taken for public use is solely a statutory right and does not survive. Proceedings on it may not be carried on by those succeeding to the estate or interest of a deceased person.

But when such an appeal has been fully heard and decided and final award made during the lifetime of the appellant so that nothing is left except the enforcement of the judgment, the right to the amount so awarded has vested and may be recovered by the legal representatives of the appellant who has since deceased.

On exceptions by defendant. An action of debt on a supersedeas bond filed with a petition for a writ of review. Hearing was had befor the Superior Court for the County of Knox, at the February Term, 1930, without a jury. The court ruled *pro forma* that judgment be entered for the plaintiff in the sum of $7,970.67, being the amount due on the bond, together with interest. To this ruling defendant seasonably excepted. Exceptions overruled.

The case sufficiently appears in the opinion.

Charles T. Smalley, for plaintiff.

Ensign Otis, for Town of Thomaston.

Edward C. Payson, for Georges National Bank.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. MORRILL, A. R. J.

PATTANGALL, C. J. On exceptions. Action of debt on review bond. Judgment below for plaintiff.

In 1924, following a petition filed with the State Highway Commission by the selectmen of the defendant town, the construction of a bridge was authorized under the provisions of Chap. 193, P. L., 1923. By the raising of the grade of the highway made necessary by the building of the bridge, plaintiff's testate sustained damage to his property and filed claims for reimbursement therefor with the selectmen of Thomaston and with the Highway Commission. The latter board denied liability; the former awarded him $300. From both decisions, he appealed to the Supreme Judicial Court and in 1926 commissioners were appointed who assessed the damage at $3,150.00, leaving the court to determine whether the municipality or the state was liable.

The cause was then reported to the Law Court, which decided that the town was liable and ordered judgment to issue against it for the amount fixed by the commissioners. *Starrett* v. *Inhabitants of Thomaston*, 126 Me., 205. Execution issued in April, 1927, and plaintiff's testate undertook to collect same by levying on the property of a taxpayer of Thomaston. A bill in equity was filed to prevent the enforcement of the judgment. Defendant demurred. The demurrer was sustained and bill dismissed. *Copeland et als* v. *Starrett*, 127 Me., 18. In November, 1927, Starrett died. In 1928

petition for review was filed, this plaintiff being made defendant. Petition was dismissed at *nisi prius*, and the action of the lower court affirmed by the appellate court. *Inhabitants of Thomaston* v. *Starrett, Executrix*, 128 Me., 328.

The instant case is brought to recover for breach of the bond given in this latter case. In defense to this action, it is urged that this court erred in finding for plaintiff in the original case, *Starrett* v. *Thomaston*, supra. It was on this ground that review was asked. Review was denied. Those matters which might properly have been considered by the court in former proceedings either in the original case or on petition for review are not open to defendants here.

Defendants' pleadings amount to a petition for a rehearing. "In this state there is no provision by statute or rule for a rehearing by the Law Court after a decision rendered." *Booth Bros.* v. *Hurricane Island Granite Co.*, 115 Me., 90. And although in that case and in *Insurance Co.* v. *Tremblay*, 101 Me., 590, it is intimated that under certain circumstances, review might lie, even after such final decision, it has never heretofore been suggested that a cause could be reconsidered on its merits after this court had finally acted and after petition for review had been denied. Litigation may not be prolonged indefinitely.

Defendants raise but one question not covered by previous decisions in this long drawn out controversy. On the authority of *Hayford* v. *City of Bangor*, 103 Me., 434, they contend that on the death of plaintiff's testate, his appeal from the original estimate of damages by the municipal officers of Thomaston abated and that "the present judgment, having been obtained by a party outside the jurisdiction of the court," is invalid and a bond based upon it is without standing.

Hayford v. *Bangor*, supra, decided that the right of appeal f om the est mate of damages by municipal officers for land taken for a public use is solely a statutory right and that as there is no statute providing for the survival of such an appeal, proceedings under it can not be carried on by those succeeding to the estate or interest of a deceased appellant. The sound reasoning of that opinion is beyond criticism.

But it is not applicable here. In the instant case, plaintiff's tes-

tate did not die while his appeal was pending. Final decision by this court, affirming the finding in his favor by commissioners who under the direction of the court heard his appeal and awarded him the damages now claimed by his executrix, was rendered in April, 1927. Starrett died in the following November. That judgment was obtained by him, not by plaintiff. His right to the amount of the award had vested at the time of his death. It may be recovered by his representatives.

Exceptions overruled.

EDITH HOUSE *vs.* GEORGE RYDER.

Knox. Opinion May 20, 1930.

MOTOR VEHICLES. NEGLIGENCE.

If the operator of an automobile is blinded by the lights from another approaching vehicle so that he is unable to distinguish an object in front of him, reasonable care requires that he bring his vehicle to a stop and a failure to do so justifies a charge of negligence. When the driver's vision is temporarily destroyed by a glaring light it is his duty to stop his car.

The care to be exercised by him who drives an automobile upon the public street must be commensurate with the danger to be avoided.

When an automobile approaches a street car in the night time, both having bright headlights, a condition arises which is fraught with danger to pedestrians lawfully upon the street and may be doubly so as to passengers alighting from the street car. The degree of care required by law in such circumstances must be commensurate with the existing danger.

The law requires increased care on the part of the motorist on meeting or passing a street car which has stopped to take on or land passengers. Not only must he expect passengers on the side of the car from which they alight, but he must anticipate that some passengers may pass behind the car to the other side.

If the motorist seeks to avoid the charge of negligence on the ground that, because of the glare of the light on the street car, or for other reasons, he is unable

to know whether the street car has stopped to accommodate passengers, he must not recklessly proceed upon his way under circumstances of doubt, he must know, or failing to know should bring his car to a stop as in other cases where his vision is blinded by a glare.

In the case at bar, taking into account all the testimony in the record, and giving it interpretation most favorable to the defendant, a jury would have been justified in finding, first, that the defendant was blinded by the headlight of the electric car, and, second, that he was driving too near that car when the accident occurred. The injuries sustained by the plaintiff were not permanent in character and the assessment of damages in the sum of $1,250.00 was held to be just compensation.

On report. An action on the case to recover damages for personal injuries sustained by plaintiff, a pedestrian on a public way, who was struck by an automobile driven by the defendant. Hearing was had in the Superior Court for the County of Knox at the February Term, 1930. After the testimony had been taken out, the case was by agreement of the parties reported to the Law Court with the customary stipulations; also the stipulation that the Law Court should assess the damages. Judgment for the plaintiff in the sum of $1,250.00 with taxable costs.

The case fully appears in the opinion.

Oscar H. Emery, for plaintiff.

Charles T. Smalley, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

PHILBROOK, A. R. J. This case is before us on report. The record contains the customary stipulation that questions of law are involved of sufficient importance and doubt to warrant the case being sent forward to the law court on report, and the parties having agreed thereto, the case is reported upon so much of the evidence as is legally admissible, the law court to determine liability and to assess damages if the plaintiff is entitled to a verdict. The case arises from an automobile accident wherein the plaintiff, a pedestrian on a public way, was struck by an automobile driven by the defendant. There are no legal questions involved which have not been fully settled by numerous decisions. For the law court to

assess damages in this class of cases, without seeing and hearing the parties and their witnesses, is a difficult task. It would have been more satisfactory to have had the case submitted to a jury under proper instructions, which the judge presiding at the trial below was amply qualified to give. There are precedents for reporting a case like the one at bar, and we willingly undertake the performance of our task, although it may be properly hoped that in the future such reported cases may gradually become more rare.

On the nineteenth day of November, 1929, soon after eight o'clock in the evening, the plaintiff was a passenger on an electric street car running from Rockland to Thomaston. Near Thomaston is a hospital, operated by Dr. Everett W. Hodgkins, whose wife has been a friend of the plaintiff since their girlhood. The street upon which the electric car is operated passes the hospital. The plaintiff, for the purpose of a social call on Mrs. Hodgkins, took the electric car at Rockland. As the car approached the hospital she signalled the motorman to stop but before that had been accomplished the car had passed a short distance beyond her intended destination. The plaintiff alighted and after the car had started, realizing that she was some distance from the hospital, walked back as the car moved along. Her testimony is: "I stepped in the car tracks and I thought I was perfectly safe, and I looked toward Rockland first and I saw no car in sight, and as I looked toward Thomaston village the lights of a car came up in front of me, and I put my head down, they blinded me so, and apparently it seemed so near, and the thought flashed through my mind that that car was coming quite close to me, but I didn't think it would hit me, and that was the last I knew until I was in Dr. Hodgkin's office." In response to questions proposed by her attorney she insisted that she was standing on the railroad track when she first saw the automobile approaching, that as to being in or out of the track from that time until she was struck by the automobile, her position was the same, in brief that when she came around the rear end of the street car she got on the car track and stayed there. In cross examination she insisted that she was between the rails of the electric car track at the moment of collision, but was nearer the rail toward Dr. Hodgkin's house. No eye witness of the accident was

called to substantiate the testimony of the plaintiff nor does the record disclose the existence of any such.

The defendant's testimony as to the collision is, substantially, that he first saw the trolley car headlight when he was leaving the busy section of Thomaston, that the highway is straight, that he did not know how far down the street the trolley car was located when he first saw its light, that he could not tell at that moment whether it was in motion or had stopped "on account of the glare," that he had passed about two car lengths from the glare before he saw somebody in the road, that his vision was not obstructed after he passed from the glare, that the concrete surface of the street on either side of the trolley track was about twelve feet in width and that he was in the middle of that part of the concrete which was between the trolley track and the Hodgkins hospital. He testified that the plaintiff was "just about one step out on the cement road" when he first saw her, and also testified "as soon as she see me she put her hand up to her head like this (indicating) and stooped right down and struck the front end of my mudguard." The testimony of the defendant, likewise, had no corroboration from an eyewitness. When the defendant had stopped his automobile and gone to the aid of the prostrate plaintiff he found that she was being assisted to rise by a man, who departed as soon as the plaintiff was within the hospital but as to the identity of that man the defendant had no knowledge nor of his whereabouts at the time of the trial. The defendant testified that when plaintiff's hand bag was picked up its contents fell out and, to quote his own words, "They were right in the car track, or not the car track but the auto's track, behind the car."

The officer who served the writ was asked whether, at that time, the defendant made some explanation as to the cause of the accident and where the plaintiff was when she was struck. In answer he said, "The night I served the paper on him he was talking with you (plaintiff's counsel) about the case and said that the lights blinded him on the car, on the electric car, and he never saw the woman until the car hit her; and afterwards in the conversation, I don't remember whether it was a direct question you asked him or not, but he stated that he thought she was about one pace from

the car track, out of the car track, stepped out of the car track."

Taking into account all the testimony in the record, and giving it interpretation most favorable to the defendant, we think a jury would be justified in finding, first, that the defendant was blinded by the headlight of the electric car, and, second, that he was driving too near that car when the accident occurred.

In a case recently decided by this court, *Cole* v. *Wilson*, 127 Me., 316, where an automobile driver, encountering glaring lights of another motor vehicle on a foggy night, struck and injured a pedestrian, it was held that the jury was justified in finding the driver guilty of negligence in not stopping his car. Citing abundant authorities this court held that the driver of an automobile, encountering a heavy fog while on his way home, may proceed at a reasonable speed and is not obliged to stop and wait for the fog to lift in order to escape a charge of negligence. He must, however, exercise a degree of care consistent with the existing conditions, but "if the operator of a machine is blinded by the light from another vehicle so that he is unable to distinguish an object in front, reasonable care requires that he bring his vehicle to a stop; and a failure to do so justifies a charge of negligence."

No man is entitled to operate an automobile through a public street blindfolded. When his vision is temporarily destroyed by a glaring light it is his duty to stop his car. *Hammond* v. *Morrison*, 100 Atl., 154.

The care to be exercised by him who drives an automobile upon the public streets must be commensurate with the danger to be avoided. *Savoy* v. *McLeod*, 111 Me., 235. It is common knowledge that when, in the night time, an automobile approaches a street car, both having bright headlights, a condition arises which is fraught with danger to pedestrians lawfully upon the street and may be doubly so to passengers alighting from the street car. The degree of care required by law in such circumstances must be commensurate with the existing danger.

The law requires increased care on the part of the motorist in meeting or passing a street car which has stopped to take in or land passengers. Not only must he expect passengers on the side of the car from which they alight, but he must anticipate that some

passengers may pass behind the car to the other side. *Day* v. *Cunningham*, 125 Me., 328. If the motorist seeks to avoid the charge of negligence on the ground that he is unable to know whether the street car has stopped to accommodate passengers, because of the glare of the light on the street car, or for other reasons, the reply is that he must not recklessly proceed upon his way under circumstances of doubt, he must know or, failing to know, should bring his car to a stop as in cases where his vision is blinded by a glare.

As already indicated we also think a jury might properly find that the defendant was negligent in driving too near the street car which he was about to meet. According to the plaintiff's testimony she was between the rails when struck; the defendant could only place her "just about one step out on the cement road." The accident could not have happened unless the defendant was driving unnecessarily near the electric car. The twelve foot cement way gave him ample room to meet the electric car at a safe distance therefrom and this he should have done. We hold that the plaintiff has sustained the burden of proving defendant's negligence. The record also clearly shows that no failure of the plaintiff to use due and ordinary care contributed to the accident.

For the purpose of determining the measure of damages the plaintiff offers her own testimony, together with that of a sympathetic husband and daughter, the testimony of Dr. Hodgkins and of Dr. Scarlott, the latter an osteopathic physician, whose professional treatment began December 27 and was continuing at the time of the trial. The defendant offers the testimony of Dr. Neil A. Fogg. An extended discussion of all this evidence would be of interest only to the parties. She, and the members of her family, say that her weight has diminished, that she is unable to work as she did before the accident, that she has suffered mental disturbance, physical pain in her limbs and in the back of her neck, and from disfiguration of her nose and lip.

Dr. Hodgkins, the first one to render professional treatment, testified as to her bruises and abrasions, particularly one which extended from the base of the nose directly through the entire lip, and a severe cut on the bridge of the nose. These conditions re-

ceived proper attention. The wound on nose and lip were sutured, but, said the doctor, this would necessarily leave scar tissue, or a bluish disfiguration. When she was removed from the hospital to her home, on November 25, six days after the accident, the doctor said, "Her physical condition was very good, except her nervous condition and hysteria. Her physical condition was as good as you could expect under a traumatic injury." At the time of the trial, February, 1930, the doctor was requested to examine the plaintiff's upper lip and nose and state whether or not, in his opinion, the marked disfiguration would ever clear itself, to which he replied, "That is a pretty hard question to answer." He also testified that "Scar tissue of course bleaches more or less, but there will always be in her lip here, and in the nose, there will always be scar tissue." In cross examination he said the injuries were not serious, as far as prognosis was concerned, and that as time goes on she would get over her nervousness; that as to the scar tissue disfiguration it will be less noticeable in time but that it would take several years for it to become white. In redirect he said she would always suffer from disfigurement.

Dr. Scarlott testified that he was treating the plaintiff twice a week for an injury to her knee, an injury or strain of the back, and her nervous condition, and that it "will take her some length of time to recover." He thought the scars would be permanent but would bleach out in time and not be so noticeable.

Dr. Fogg, at the request of counsel on each side of the case, examined the plaintiff on December 17, practically one month after the accident occurred. His statement was, "The right side of her forehead was quite prominent and slightly discolored, and in examining that area it was thickened and tender. There was a depressed bluish scar on the nose which seemed to be adhered to the nasal bone, especially in the midline. The upper lip at about the middle point had rather a bad scar which was depressed with thickening on the outside. The line between the true skin at the junction of the lip was irregular and unsightly. The right knee was slightly larger than the left knee, and there was a clicking present when the leg was extended and flexed. The calf was also swollen and

tender and rather hard. There was a recent scar on the inside of the left leg. I think that is all the abnormalities I found."

With reference to the lip he testified that it might be improved by surgery and that in time some of the discoloration would disappear. Taking her injuries as a whole, he did not regard them as severe. In cross examination, answering persistent efforts by plaintiff's counsel to have him state that her injuries were severe, he said at least seven times that her injuries were not severe, from his understanding as to what constituted a severe accident, and that, excepting the scar on her lip and nose, within six months from the date of her injury she would be in as good shape as she was before it occurred. He thought by surgical treatment the scar could be fixed so that there would be only slight traces of it, and that without surgical care time would sufficiently remove the scar tissue so that it would look a lot better than it did at the time of the trial.

From this resumé of the testimony and from a careful study of all the record we think just compensation would warrant an assessment of damages in the sum of twelve hundred fifty dollars ($1,250.00).

The mandate will be, therefore, Judgment for the plaintiff in the sum of $1,250.00, *with taxable costs.*

MARY L. BOWLER

vs.

JOHN B. MERRILL, ADM'R, ESTATE OF LAURA A. MERRILL.

Knox. Opinion May 21, 1930.

EVIDENCE. EXECUTORS AND ADMINISTRATORS. CLAIMS. R. S., CHAP. 87, SEC. 117.

To establish a right of action against one on a promise to pay the debt of another, there must be some memorandum or note in writing signed by the party to be charged therewith, or by some other person thereunto lawfully authorized, and the promise must be for a consideration.

To constitute a legal contract to forebear bringing suit there must be a valid promise to do so, so that for some time the holder of the debt has no right to maintain an action for it.

A statement in a letter, "You have my husband's receipt it will be honored never fear," is not a memorandum of any promise to pay, and not such a memorandum as would justify the acceptance of a plaintiff claimant as a witness under the provisions of Par. IV, Sec. 117, *Chap.* 87, R. S.

In the case at bar, even if the expression in Laura A. Merrill's letter might be construed as a promise, no action could be prosecuted thereon, because no consideration was proven. On the evidence presented the Court was forced to hold that in 1919 there was no debt collectible from the A. J. Merrill estate by the plaintiff. There was therefore no debt of her husband that Mrs. Merrill's letter would bind her to pay.

Whatever right of action plaintiff might have had against the estate of A. J. Merrill was lost because litigation was not commenced within the period provided by the statute.

On exceptions by plaintiff. An action of assumpsit against the estate of a deceased person, on an alleged promise in writing to pay a claim against an estate of which the deceased, in her lifetime, was administratrix. Hearing was had at the September 1929 Term of the Supreme Judicial Court for the County of Knox before the presiding Justice without a jury. To the exclusion of certain testimony offered by the plaintiff and to certain rulings and instruction given by the presiding Justice, plaintiff seasonably excepted and likewise excepted to the judgment for the defendant which was rendered in vacation. Exceptions overruled.

The case is fully stated in the opinion.

Frank H. Ingraham, for plaintiff.

John B. Merrill, for defendant.

SITTING: DUNN, STURGIS, BARNES, FARRINGTON, JJ., PHILBROOK, A. R. J.

BARNES, J. Defendant as administrator of the estate of Laura A. Merrill, is sued in assumpsit on the ground that in her lifetime, and while serving as administratrix of the estate of her husband, Alanson J. Merrill, said Laura A. Merrill made a promise in writing, for a consideration, to pay to plaintiff the sum of one thousand dollars.

After hearing, at the September Term, 1929, without jury, and with right of exceptions reserved, judgment was rendered for the defendant.

Two exceptions were taken to rulings on the admissibility of evidence and an exception to the finding of the justice presiding.

A letter of Laura A. Merrill, under date of February 24, 1919, was offered by plaintiff and admitted.

Thereafterward plaintiff offered an envelope, bearing postmark "Feb. 25, 1923," with the purpose of proving that the date "1919" in the letter admitted was incorrect, and that the letter admitted was written in the year 1923.

Counsel then called the plaintiff "to connect the envelope . . . and the original letter of Laura A. Merrill."

Defendant, who had not testified, and who did not testify in the case, relying on Chap. 87, Sec. 117, R. S., objected to the appearance of plaintiff as a witness. The objection was sustained, and the first exception was noted to this ruling.

This exception raises the issue whether or no a portion of the letter of Laura A. Merrill is her memorandum, so as to give plaintiff the right to testify, under Par. IV of said Sec. 117.

Laura A. Merrill died August 22, 1926. If the letter was written on the date at its head, it was written more than six years before steps were taken to enforce what is claimed to be an actionable promise to pay, and, on the contrary, if it were written the day before the date postmarked on the envelope the statute of limitations would not have run against such promise, if any.

The letter is quoted in full, below, and as to the excerpt, "You have my husband's receipt it will be honored never fear," we hold it to be not a memorandum of any promise to pay, on Laura A. Merrill's part, and not such a memorandum as to justify the acceptance of the plaintiff as a witness.

So the first exception fails. Plaintiff's counsel offered three letters and two envelopes, the letters written and envelopes addressed by John B. Merrill, before the death of Laura A. Merrill. Objection was made to their admission, and they were excluded, perhaps because plainly hearsay testimony. Plaintiff takes nothing by this exception.

The last exception presents the question whether or not rendering judgment for the defendant was error in law.

That a determination of this question may be intelligible, a somewhat extended history of the transactions of plaintiff with the late A. J. Merrill, and of the doings and correspondence of plaintiff and Laura A. Merrill is necessary.

Plaintiff, who is addressed by Laura A. Merrill as "Cousin Mary," in 1906 had $1,000 in the hands of A. J. Merrill, for investment.

A conversation, in writing, but without date, between A. J. Merrill and plaintiff is an exhibit in the case, wherein Mr. Merrill proposed to purchase a $1,000 bond for plaintiff, to be paid for with $500 of her cash in his hands and $500 which she was to draw from her savings bank account. He recommended this purchase because such a bond as he proposed to buy would return a greater sum in interest than savings banks were paying.

Mr. Merrill's receipt for the money is part of the documentary evidence and is as follows:

> "Rockland, Maine, Jan. 25, 1906. This will certify that I have this day received from Mary L. Bowler one thousand dollars for investment for her ($1000) . . . Five hundred dollars of this amount she received from the estate of James Bryant and five hundred dollars she drew from her Savings Bank account. Her full account now stands as follows:
>
> | | |
> |---|---|
> | $1851.11 | Rockland Savings Bank |
> | 1000.00 | Bond deposited in Rockland Savings Bank |
> | 1000.00 | in hands of A. J. Merrill for investment |
> | $3851.11 | |
>
> (Signed) A. J. Merrill."

In 1917 Mr. A. J. Merrill died, and Laura A. Merrill qualified as administratrix of his estate in that year.

The evidence in the record is wholly documentary, and one of the most important exhibits is the letter of Mrs. Merrill to the plaintiff above referred to. It is here set out in full:

18 Jefferson Street
Bangor, Maine.
February 24, 1919.

Dear Cousin Mary

A few days after my husband's death — who died suddenly leaving no word as to his affairs — I opened in the presence of my children his Safety Deposit Box. No one but myself could do so. We did not find there any bond of his own or of yours. In October, 1919, received a letter from you asking for $150. Thinking in the meanwhile the bonds might be returned from some bank having them in keeping a check was sent you for $150 as you asked instead of $50 as you claim in your letter.

My home mortgaged and must be sold within the year as there was no money.

All I am enabled to do for you at present is a check for $100 or until my home is sold.

I am sorry to disappoint you Mary. I am hoping you may find the bonds where your money is in Rockland.

You have my husband's receipt it will be honored, never fear.

When the river opens one of my sons will I think go to Rockland and see you. I am sorry you are changing your beautiful home at Ingraham Hill where property for summer homes is growing in value, for the Highlands where it is not.

Kindly remember me to Albert.

Yours sincerely,

(Signed) Laura A. Merrill.

The record shows that if plaintiff had any claim against A. J. Merrill arising from the transaction in which he gave his receipt in 1906, she could not endorse the same because of the Statute of Limitations. And, from the record again, she did not file in the Probate Court a claim against his estate.

Within the time limited by law for filing of claims against estates of persons deceased, she filed with the Register of Probate what she thought sufficient as a claim against the estate of Laura A. Merrill. If it be a "claim," as recognized in law, it is against one for having promised to pay the debt of another.

Such promises, to establish right of action, or some memorandum or note thereof, must be in writing, must be signed by the party to be charged therewith, or by some person thereunto lawfully authorized, and must be for a consideration. *Davis* v. *French*, 20 Me., 21; *Walker* v. *Patterson*, 36 Me., 273; *Gilbert* v. *Wilbur*, 105 Me., 74.

It is contended that the consideration for a valid promise in this case was forbearance to bring suit against the A. J. Merrill estate. "But a mere forbearance is not sufficient, even though produced by such signing. There must be a distinct and valid contract binding on the plaintiff not to sue." *Lambert* v. *Clewly*, 80 Me., 480.

"To constitute a legal contract to forbear there must be a valid promise to do so, so that for some time, the holder of the debt has no right to maintain an action for it." *Smith* v. *Bibber*, 82 Me., 34.

If therefore the expression in Laura A. Merrill's letter is construed as a promise, no action can be prosecuted thereon, because no consideration is proven. And it fails to meet the tests applied in *Porter* v. *Hill*, 4 Me., 41; *Oakes* v. *Mitchell*, 15 Me., 360; *Stuart* v. *Campbell*, 58 Me., 439, 443; *Gray* v. *Day*, 109 Me., 492, 496; *Shaw* v. *Bubier*, 119 Me., 83.

But this expression may be construed as mere assurance that if the husband's estate can be lawfully called upon to pay, the plaintiff's wish will be complied with. To the Court this seems the reasonable construction to put upon it.

If it were otherwise and the letter be interpreted to contain a promise to pay, it may be successfully argued that the action must fail, because of the Statute of Limitations, pleaded in defense.

Decisions must stand upon evidence, if to stand at all.

This record presents nothing to show that during the eleven years between dates of A. J. Merrill's receipt and his death he paid or did not pay any part of the thousand dollars to plaintiff.

On this showing the court is forced to hold that in 1919 there was no debt collectible from the A. J. Merrill estate by plaintiff.

So there was no debt of her husband that Mrs. Merrill's letter would bind her to pay.

Litigation might have been begun, within the period provided, against the estate of A. J. Merrill.

The right was lost: collection of the debt is effectually stopped

by the statute bar. The reason therefor is well expressed in *Wadleigh* v. *Jordan*, 74 Me., 483, where the court say, "We think it better that a careless creditor who suffers his claim to become thus barred should occasionally suffer a loss than it would be to open so wide a door for the plunder of dead men's estates."

We find no error in the decision of the presiding Justice.

Exceptions overruled.

BLANCHE B. MALLETT *vs.* CHAUNCEY A. HALL.

Kennebec. Opinion May 27, 1930.

WILLS. REMAINDERS. GIFTS. EXECUTORS AND ADMINISTRATORS. FRAUD.

When an executor is also legatee, no formal act is necessary to vest title to the legacy in him as an individual if distribution in fact be otherwise manifested by the circumstances.

Any person of legal age, having a mental capacity to understand the nature of the transaction, may be the donor of property of which he is the legal or equitable owner.

A gift consistent with the law will not be set aside because of the donor or his privy in interest regrets the transaction or the Court may regard the gift improvident or undeserved.

Equity will not set aside a voluntary conveyance except in case of fraud, actual or constructive.

Fraud is never presumed; it must be proved.

In suits to set aside a gift on the ground of fraud, if no confidential relation exists between the donor and donee, the burden is upon the person attacking the gift to show its invalidity.

In the absence of evidence raising suspicion of fraud or undue influence on the part of the donee, the fairness of the gift will be presumed.

If a confidential relation exists between the donor and donee at the time of

the gift, the burden of proof is on the donee to show the absolute fairness and validity of the gift and that it is free from the taint of undue influence or other fraud.

The relation of a life tenant to his remainderman is that of a quasi *trustee.*

The relation is the same if a power of disposal is annexed to the life estate.

The life tenant holds the corpus of the estate in trust in the sense that he must exercise reasonable precautions to preserve the property intact for transmission to the remainderman at the termination of the life estate, and may not injure or dispose of it to his detriment.

No such fiduciary relation exists as to preclude a life tenant from acquiring by gift or purchase from the remainderman his estate in remainder.

The burden of proving the fairness of the gift is not, as a matter of law, upon the tenant for life in a suit to set aside a gift to him from his remainderman. To shift this burden to him, a confidential relation in fact must be established.

In the case at bar the estate of the widow, Cora M. Hall, was a life estate with power of disposal.

Under the power annexed to the life estate, she had a right to the possession of the corpus of the estate and, if and as necessary for her support and maintenance, could lawfully sell it and use the entire proceeds.

Although the life tenant was executrix of her husband's will, at the time of the gift in controversy, she held title to the real estate under her devise and not in her capacity of executrix.

At the death of Everett S. Hall, the title to his personal property vested in his widow in her capacity as executrix with a vested right in her as life tenant to so much of the personal estate as remained after administration.

The facts proven in the case at bar warrant the inference that distribution of the personal estate had been in fact made to the life tenant when she received the gift of the interests of the remainderman, Ida B. Williams.

There appears no reason for rejecting the acceptance by the sitting Justice of the truth of the defendant's assertions that no false or fraudulent representations as to the value of the donor's remainder interest or as to the signing off of the other remainderman were made by the donee or the defendant.

On appeal by plaintiff. A bill in equity to declare a certain deed and assignment null and void and to compel certain conveyances. Hearing was had upon the bill, answer and proof and the Court by final decree dismissed the bill with costs. Appeal was taken by plaintiff. Appeal dismissed. Decree below affirmed with costs.

The case fully appears in the opinion.
Harvey D. Eaton, for plaintiff.
Locke, Perkins & Williamson, for defendant.

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

STURGIS, J. Appeal in equity from decree of single Justice dismissing the Bill with costs.

Everett S. Hall, late of Augusta, Maine, died March 1, 1917, testate, leaving a widow, Cora M. Hall, and, as his sole heirs at law, Emile B. Hall, a brother; Ida B. Williams, a sister; Omar A. Hall, a nephew; and Chauncey A. Hall, the defendant, also a nephew. The estate of the decedent consisted of a house and a lot on Sewall Street in Augusta, a camp and lot in Vassalboro, and personal property of an additional value of $5,497.97. The value of the real estate does not appear.

After the payment of his debts, funeral charges, and expenses of administration, Mr. Hall disposed of his entire estate as follows:

> "I give, bequeath and devise unto my beloved wife Cora M. Hall, all my estate, real, personal or mixed, wherever situated during her life and she is hereby given full power and lawful authority to use so much of said estate and proceeds thereof as is necessary for her support and maintenance whereof she is to be the sole judge and said estate and proceeds thereof shall vest in her absolutely for that purpose but in case there remains any of said estate or proceeds thereof at her death I desire to have the same go to my legal heirs."

The widow, Cora M. Hall, was named executrix in the will, and letters testamentary issued to her on April 9, 1917. She did not settle the estate or file an account of her administration in the Probate Court.

July 15, 1922, Ida B. Williams joined with her brother, Emile B. Hall, in executing and delivering to Cora M. Hall a quitclaim deed of their right, title and interest in the lands in Augusta and Vassalboro owned by Everett S. Hall at his decease, stating in the deed an intention "to release all present or future right, title or interest that we may have in the foregoing described parcels of land

which we may have acquired or might in the future acquire under the will of said Everett S. Hall, late of Augusta, Maine, deceased, or otherwise." On the same day, Mrs. Williams and Emile B. Hall released and assigned to Cora M. Hall all their present and future right, title and interest in the personal property belonging to the estate. Mrs. Williams received no consideration for her execution of the deed of release or the assignment. The transactions were neither more nor less than gifts of her rights in remainder to the holder of the life estate.

Ida B. Williams died May 29, 1925. In her will Blanche B. Mallett, the plaintiff in this action, was made residuary legatee and devisee, and is named executrix.

Cora M. Hall died October 26, 1927, testate, bequeathing and devising all her estate, after payment of debts, funeral charges and expenses of administration, to Chauncey A. Hall, the defendant.

The plaintiff Appellant now brings this Bill to cancel the deed and assignment made by her mother, Ida B. Williams, on July 15, 1922, alleging that the execution of both instruments was procured by fraudulent representations (1) as to the value of the interest of Ida B. Williams in the estate of Everett S. Hall, (2) that other parties interested in remainder had already released their interests under the will to Cora M. Hall, or were about to do so, without consideration, and (3) that the execution of the instruments without consideration was procured by the undue influence of Cora M. Hall and the defendant, Chauncey A. Hall. The defendant, in his Answer, denies all allegations of fraud and undue influence.

Under the will of her husband, Cora M. Hall was devised a life estate with power of disposal. Under the power, she had a right to the possession of the principal of the estate as well as the income, and, if and as necessary for her support and maintenance, could lawfully sell it and use the entire proceeds. *Loud* v. *Poland*, 126 Me., 45; *Young* v. *Hillier*, 103 Me., 17; *McGuire* v. *Gallagher*, 99 Me., 334; *Stuart* v. *Walker*, 72 Me., 145; *Hall* v. *Preble*, 68 Me., 100. Whatever remained of the estate at her death passed to the heirs of the testator who were secondarily entitled by way of remainder. *Stuart* v. *Walker*, supra; *Gorham* v. *Billings*, 77 Me., 386.

When the deed and assignment in controversy were given, Cora M. Hall, the life tenant, had undoubtedly been in possession of the life estate for more than five years. Although she was executrix of her husband's will, she then held title to the real estate under her devise and not in her capacity as executrix. *Connolly* v. *Leonard*, 114 Me., 29, 32; *Burgess* v. *Shepherd*, 97 Me., 522, 526; *Marr* v. *Hobson*, 22 Me., 330. We think this must be held true also as to the personal property. At the death of Everett S. Hall, the title to his personal property vested in his widow in her capacity as executrix with a vested right in her, as life tenant, to so much of the personal estate as remained after administration. *Whiting* v. *Farnsworth*, 108 Me., 384, 388; *Sprowl* v. *Randell*, 108 Me., 350, 352; *Mace* v. *Mace*, 95 Me., 286. But when an executor is also legatee, no formal act is necessary to vest title to the legacy in him as an individual if distribution in fact be otherwise manifested by the circumstances. 2 Schouler on Wills, Sec. 1249; 24 C. J., 471. Although formal receipt or accounting evidencing such a distribution is lacking, we think the facts proven warrant the inference that distribution had been in fact made.

In so far then, as the relations of Cora M. Hall and Ida B. Williams at the time the deed and assignment in question were executed affect the validity of the gifts here in controversy, they must be looked upon as those of life tenant and remainderman, except as the power annexed to the life estate permitted user and consumption of the corpus of the estate. The legal and equitable rights and liabilities of the parties to the gifts and of the parties to this action must be determined accordingly.

It is a general rule that any person of legal age, having a mental capacity to understand the nature of the transaction, may be the donor of property of which he is the legal or equitable owner. The law favors every man's right to dispose of his property as and when he will, and while gifts are always to be closely scrutinized by the courts and must be supported by satisfactory and convincing evidence, they are as fully protected by law as a transfer for a valuable consideration. A gift consistent with the law will not be set aside because the donor or his privy in interest regrets the transaction or the court may regard the gift improvident or un-

deserved. Equity will not set aside a voluntary conveyance except in case of fraud, actual or constructive. *Stover* v. *Poole*, 67 Me., 217.

Fraud is never presumed; it must be proved. And in suits to set aside a gift on the ground of fraud, the rule supported by the weight of authority is that, if no confidential relation exists between the donor and donee, the burden is on the person attacking the gift to show its invalidity. In the absence of evidence raising suspicion of fraud or undue influence on the part of the donee, the fairness of the gift will be presumed. *Towson* v. *Moore*, 173 U. S., 17; *Vandor* v. *Roach*, 73 Cal., 614; *Kimmel* v. *Berresheim*, 173 Ky., 734; *Jenning* v. *Rohde*, 99 Minn., 335, 339; *Wertheimer* v. *Baum*, 111 N. Y. S., 18; *Yeakel* v. *McAtee*, 156 Pa. St., 600.

Where, however, a confidential relation exists between the donor and donee at the time of the gift, the burden of proof is on the donee to show the absolute fairness and validity of the gift, and that it is free from the taint of undue influence or other fraud. Among the numerous cases supporting this rule are, *Hoghton* v. *Hoghton*, 15 Beav., 278; *Kimmel* v. *Berresheim*, supra; *Gibson* v. *Hammang*, 63 Neb., 349; *Sears* v. *Shafer*, 1 Barb. (N. Y.), 408; *Leibert* v. *Hoffman*, 105 N. Y. S., 337; *McConville* v. *Ingham*, 268 Pa. St., 507. See also 12 R. C. L., 972; 28 C. J., 670, and cases cited.

The foregoing rules as to the burden of proof are but a specific application to gifts of the rule stated in *Burnham* v. *Heselton*, 82 Me., 495, 499 *et seq.*, recently affirmed in *Eldridge* v. *May*, 129 Me., 112.

The contention of the Appellant is that the relation of a life tenant to his remainderman is, as a matter of law, a confidential relation which compels a presumption of the invalidity of a gift from the remainderman to the tenant, casting the burden of proof of the validity of the gift upon the donee. We are not convinced that the relation itself effects this result. It is generally accepted that the relation of a life tenant to his remainderman is that of a *quasi* trustee. The relation is the same if a power of disposal is annexed to the life estate. *Pierce* v. *Stidworthy*, 79 Me., 234, 242; *Hardy* v. *Mayhew*, 158 Cal., 104; *Johnson* v. *Johnson*, 51 Ohio St., 446; *Smith* v. *Van Nostrand*, 64 N. Y., 278.

It has been convincingly pointed out, that the life tenant is a

trustee for the remainderman only in a limited sense. The trust is not pure but only *quasi*. 2 Perry on Trusts, Sec. 540. The life tenant is a trustee for the benefit of the remainderman only in the sense that the duty rests upon him merely to have due regard for the rights of those in remainder. *Hardy* v. *Mayhew*, supra. The relation is in the nature of a trust. *Smith* v. *Daniel*, 2 McCord Ch. (S. C.), 143. The life tenant holds the corpus of the estate in trust in the sense that he must exercise reasonable precautions to preserve the property intact for transmission to the remainderman at the termination of the life estate, and may not injure or dispose of it to his detriment. *Gibson* v. *Brown*, 62 Ind. App., 460. And it is held that no such fiduciary relations exist between a life tenant and his remainderman as to make applicable to their transactions the rules of equity which govern trustees and *cestuis que trustent*, and preclude the life tenant from acquiring by gift or purchase from the remainderman his estate in remainder. *Ware* v. *Frank's Admr.*, 18 Ky., Law Rep. 1009; 38 S. W., 1061. The restricted sense of the term trust, as applied to this relation, is also recognized in *Clark* v. *Leaverett*, 159 Ga., 487; *Green* v. *Green*, 50 S. C., 514; Note 137 Am. St. Rep., 653; 17 R. C. L., 626; 21 C. J., 941.

We are of opinion therefore that, to warrant the application of the confidential relation rule as to burden of proof in the case of a gift from a remainderman to the tenant for life, something more than the mere relation itself must be proved. A confidential relation in fact must be established.

The Appellant's testimony, in substance, is that Mrs. Hall, the life tenant, accompanied by the defendant, called on Mrs. Williams a few days before July 15, 1922, and asked her to release her interests in remainder in the estate of Everett S. Hall. As to the value of this remainder, the only statement attributed to the widow is that the power of disposal annexed to the life estate made it probable that little, if any, of the property would be left at the widow's decease. The witness says her mother, at that time, agreed to release her interests in remainder if the others interested in the estate did the same, and a few days later joined in the execution of the deed and assignment in controversy, which had been already signed by Emile B. Hall, a brother and remainderman of equal interest.

The defendant confirms this discussion regarding the consumption of the life estate under the power, but asserts that the only condition attached to the agreement of Mrs. Williams to release to the widow was that the brother, Emile B. Hall, should sign, it being fully understood that the other remaindermen, by reason of minority, could not sign. He says the brother's execution of the deed of release and the assignment was without consideration, and no representations as to the others signing were made. The truth of the statements of the defendant as to these matters was evidently accepted by the Justice hearing the cause. No sufficient reason appears for rejecting it on this review.

Nor is it established that the gifts were procured by the undue influence of the widow or the defendant. The parties to this gift were, so far as the record discloses, women of mature years and in full possession of their faculties. As widow and sister of the testator, their relations were friendly before and after the gifts were made. There is no convincing evidence of superior intellect or will on the part of the one or the other; nor of trust reposed or confidence abused. The widow, for her own benefit and perhaps ultimately for the benefit of the defendant whom she and her husband had reared from infancy, solicited from her sister-in-law a gift of the latter's outstanding interest in remainder. The sister-in-law, on this record equally competent to manage her own affairs and determine the propriety and advisability of surrendering by gift her interests in remainder in the estate in which they were both interested, with ample opportunity for deliberation, made the gifts, continued in friendship with the donee and in her lifetime raised no question as to the fairness or validity of the transaction. The fact that the donor had no legal advice must be carefully considered, but, in the light of the circumstances attending this gift, it does not prove fraud.

Family settlements substantially similar to the transaction here involved are not at all uncommon. The instant one was not questioned nor suspicion cast upon it until the principals in it were dead, and its incidents a matter of doubtful memory and impression. With no confidential relation implied by law or proven in fact, the Justice sitting in equity, upon the evidence before him,

was not clearly wrong in finding that the plaintiff was not entitled to the relief prayed for in her Bill.

The Appeal is dismissed and the Decree below is affirmed with costs.

Appeal dismissed.
Decree below affirmed with costs.

BLAINE PENLEY *vs.* DWIGHT H. EDWARDS.

Androscoggin. Opinion May 27, 1930.

TRUST. ASSUMPSIT. R. S., CHAP. 87, SEC. 127.

In an action of assumpsit by the beneficiary against the trustee to obtain payment of the balance of a trust fund provided in the will of Jonas Edwards as follows: "I give and bequeath to my son, Dwight H. Edwards, in trust, the sum of Ten Thousand (10,000) *Dollars for the benefit of my said daughter's child, Blaine Penley. I direct my said son, as trustee, to use the income from said sum from time to time for the benefit of my said grandson, Blaine Penley, and for his education, and if my said grandson proves worthy, by his conduct, to receive said principal sum. I direct my son to turn the same over to him absolutely on his attaining the age of twenty-five years;" where plaintiff rested after introducing an affidavit under the provisions of Sec.* 127 *of Chap.* 87 *of the Revised Statutes, and where evidence was admitted that on a libel brought by plaintiff's wife less than four years after the marriage a divorce was decreed on the grounds of cruel and abusive treatment:*

Held:

That the contention of the plaintiff that the trust had ceased and terminated and the further claim that there was a contract apart from the trust relationship were not substantiated by the evidence.

The plaintiff, although he had at the time of the suit attained the age of twenty-five years, failed by allegation and proof to establish his worthiness, which was a condition precedent to any right of recovery. Something more than the mere payment of money on the part of the trustee was involved. The plaintiff had resting upon him the burden of establishing the fact of worthiness and this burden was not sustained. The direction of a verdict for the plaintiff on the evidence in this case was error.

Section 127 of Chapter 87 does not cover a case of this kind. It is not applicable to such an action. Being a statute in derogation of common law, it must be strictly construed. It is essentially a statute to facilitate collection of accounts in actions of assumpsit and its terms and plain intent should not be extended by judicial legislation.

On exceptions by defendant. An action of assumpsit upon an account annexed to recover with interest the sum of $4,274.66, claimed to be due to plaintiff as the balance of a trust fund created under the will of plaintiff's grandfather, Jonas Edwards, of which fund the plaintiff was the beneficiary and the defendant trustee. Hearing was had in the Superior Court for the County of Androscoggin at the January Term, 1930. Upon motion of the plaintiff a directed verdict in his behalf was granted by the presiding Judge. The defendant reserved exceptions. Exceptions sustained.

The case fully appears in the opinion.

Berman & Berman, for plaintiff.

Tascus Atwood, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ., MORRILL, A. R. J.

FARRINGTON, J. An action in assumpsit essentially on an account annexed, but containing omnibus counts with specifications and with separate count for money had and received. The account annexed is as follows:

"July 5th, 1928. To amount due this plaintiff from you for so much money had and received belonging to this plaintiff $3,800
To interest on $5,000 from July 27th to March 1, 1929 500
To interest on $3,800 from March 1, 1929, to date of demand, October 24th, 1929 190

4,490"

The plaintiff rested after having introduced the following affidavit, under Sec. 127 of Chap. 87 of the Revised Statutes of the State as amended:

"STATE OF MAINE

ANDROSCOGGIN, ss SUPERIOR COURT

BLAINE PENLEY *vs.* DWIGHT H. EDWARDS.

I, Blaine Penley do on oath depose and say: that I am the plaintiff in an action of assumpsit brought on an itemized account annexed to the writ against Dwight H. Edwards, the defendant: that the account on which said action is brought is a true statement of the indebtedness existing between the said Dwight H. Edwards, defendant, and myself plaintiff, with all proper credits given, and that the items charged therein are just and reasonable.

Blaine E. Penley.

STATE OF MAINE

ANDROSCOGGIN, ss: JANUARY 15TH, 1930.

Personally appeared the above named Blaine Penley and made oath that the above affidavit by him subscribed is true.

Before me, Benjamin S. Berman
Notary Public (Seal)"

The defence introduced, with objection, a copy of the will of Jonas Edwards, the third item of which is as follows:

"I give and bequeath to my son, Dwight H. Edwards, in trust, the sum of Ten Thousand (10,000) Dollars for the benefit of my said daughter's child, Blaine Penley. I direct my said son, as trustee, to use the income from said sum from time to time, for the benefit of said grandson, Blaine Penley, and for his education, and if my said grandson proves worthy, by his conduct, to receive said principal sum, I direct my son to turn the same over to him absolutely on his attaining the age of twenty-five years."

John L. Reade, Clerk of Courts for Androscoggin County, then testified that the records showed that on a libel brought by Olive E. Penley against the plaintiff less than four years after the marriage a divorce was decreed on the ground of cruel and abusive treatment.

At this point, the defendant having offered no further evidence, the plaintiff was permitted to introduce the following:

EXHIBIT No. 2

"To Dwight H. Edwards Auburn, Maine July 23, 1925

Whereas by the terms of the will of Jonas Edwards you have a trust fund of ten thousand dollars to which I shall be entitled at the age of twenty-five years, this is to acknowledge that you have paid for the property conveyed to me by May H. Griffith, namely the house and land on the South side of Gamage Avenue in Auburn, Maine, and that you have advanced monies to me, so that you have now by said purchase and the advancement of other monies given me the benefit of five thousand dollars ($5,000.00) and when I shall have attained the age of twenty-five years I will give you a receipt in full of all liability as trustee of the said ten thousand dollars on payment to me of five thousand dollars ($5,000.00) and from this date I will hold you accountable only for four per cent interest on five thousand dollars until I shall have attained the age of twenty-five years when you will then turn over to me the five thousand dollars above referred to.

Blaine E. Penley."

Also EXHIBIT No. 3

the essential part of which is:

"July 27, 1929 We have this day paid Blaine E. Penley his two year's interest on $5,000.00 which we hold in trust amounting to $400.00, and have deducted his note which we hold against him dated December 11, 1925. Blaine E. Penley."

By agreement of parties these two exhibits were "to become a part of the plaintiff's case, and being documents 2 and 3 produced under an order to produce served on the defendant by the plaintiff."

The defendant then moved for a non-suit and the motion was overruled. The plaintiff reserved an exception.

It was agreed that, if the action was maintainable, the amount would be for $3,800.00 and interest on $5,000.00 from July 27, 1927, to March 1, 1929, at 4 per cent, and interest on $3,800.00 at 4 per cent from March 1, 1929, to date of the writ.

It was also agreed that the defendant, on March 1, 1929, paid the plaintiff $1,200.00, which had been credited by plaintiff to the account of the defendant upon the five thousand dollars mentioned in exhibit 2.

The defendant then rested. Motion for a directed verdict for the plaintiff was made, and the motion was granted, the amount of the verdict being $4,274.66. The defendant reserved exceptions.

On July 5, 1928, the plaintiff became twenty-five years of age.

The writ in the case is dated October 25, 1929, demand, as stated in the account annexed, having been made October 24, 1929.

The defendant's contention is that the plaintiff can not, in any event, recover at law against him as trustee, and that his only remedy is in equity.

The plaintiff contends that, although a trust was originally created under the will of Jonas Edwards, that trust had ceased and terminated. With this contention we are unable to agree, as the evidence not only fails to show any such termination but clearly indicates that the trust is still in force.

It is also claimed by the plaintiff that the suit may be maintained as on a legal contract made between the plaintiff and the defendant apart from any trust relationship. In our opinion, however, the evidence in the case does not substantiate any such claim.

The real contention of the plaintiff is that, even if the trust had not terminated, an action for money had and received would lie on the ground that the trust consisted only of money and that nothing remained to be done under the trust except to pay that money to the plaintiff as beneficiary.

Of the greatest importance, in our opinion, as bearing upon the exceptions to the direction of the verdict for the plaintiff, is the language of the third section of the will above quoted, where it provides "and if my said grand-son proves worthy, by his conduct, to receive said principal sum, I direct my son to turn the same over to him absolutely on his attaining the age of twenty-five years."

The only evidence offered by the plaintiff is his affidavit as to the account annexed and exhibits 2 and 3 as noted *supra*. There is no allegation that he has by his conduct proved himself worthy to receive the sum for which he sues, nor is there proof of such worthiness. The burden is upon him to establish this fact before he can be entitled to a recovery, either at law or in equity. We do not now undertake to decide whether or not under a proper writ he could recover at law in an action for money had and received. It is sufficient for the purposes of this case to note that he has failed by allegation and proof to establish his worthiness, which we regard as a condition precedent to any right of recovery. Something more than the paying over of money on the part of the trustee must be considered. The plaintiff has resting upon him the burden of establishing the fact of worthiness and this burden he has not sustained. For this reason alone it was, in our opinion, error to have directed a verdict for the plaintiff under the evidence.

It is not altogether clear from the remarks of the presiding Justice as to whether, in directing a verdict for the plaintiff, he based his decision on the ground that there was a personal contract between the plaintiff and the defendant apart from the trust, or whether the trust had ceased, or on the ground that an action for money had and received would lie because it was simply a matter of paying. If his direction of the verdict is based on the ground that there was a personal contract between the parties, we feel that such a conclusion is not warranted by the evidence in the case; and if the decision is based upon the view that there was a right to maintain an action for money had and received, the only act remaining to be performed being that of payment, we feel that there was error in the direction of the verdict, because of failure to allege or prove worthiness.

Moreover, in our opinion, Sec. 127 of Chap. 87 of the Revised Statutes was never intended to cover a case of this kind. The Court in *Hamilton-Brown Shoe Company* v. *McCurdy*, 124 Me., at page 112, says, "This statute is in derogation of the common law and should be strictly construed. There should be no attempt to extend its term or plain intent by judicial legislation. It applies only to actions brought on an itemized account. It relates to a state-

ment of indebtedness existing between the parties to the suit. It may be appropriately called a statute to facilitate procedure in collection of accounts in actions of assumpsit." See also a later case, *Sawyer* v. *Hillgrove*, 128 Me., at page 233.

The statute is not applicable to such an action and we disapprove the attempt to use it in ways and for purposes never, in our opinion, contemplated or intended by the Legislature which passed it.

For the reasons given the exceptions to the direction of a verdict for the plaintiff should be sustained.

The exceptions to the refusal to order a non-suit need not be considered. They were not even argued, but they could not be sustained in any event, as such a refusal is not subject to exceptions.

Exceptions sustained.

ANNIE K. FRANK *vs.* FRANK S. WORTH.

Cumberland. Opinion May 28, 1930.

PLEADING AND PRACTICE. MONEY HAD AND RECEIVED. DAMAGES. EVIDENCE.

In an action to recover money paid by plaintiff as the purchase price of certain real estate, under a written contract between the plaintiff and the defendant, which defendant has failed to fulfill in that the deed tendered by defendant did not conform to the terms of the contract as to the stipulated encumbrances, the plaintiff having refused to accept the deed so tendered, evidence of the market value of the premises on the day when the parties met to complete the transaction, offered on the question of damages, was rightly excluded.

In such an action the plaintiff is entitled to recover the full amount of her money in the defendant's possession, with interest.

On exceptions by defendant. An action of assumpsit for money had and received. The issue involved a written contract for the sale of real estate, the terms of which were not fully met by defendant (the seller), after plaintiff had paid him the full purchase price. To the exclusion of certain evidence offered by the defendant as to the market value of the premises on the day the parties met

to transfer title, as bearing on the question of damages, defendant seasonably excepted. Verdict was for the plaintiff in the sum of $4,369.91. Exceptions overruled. Judgment on the verdict.

The case fully appears in the opinion.

Bradley, Linnell & Jones, for plaintiff.

Francis W. Sullivan, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ., MORRILL, A. R. J.

MORRILL, A. R. J. This cause is before the Court upon defendant's exception to the exclusion of certain testimony offered upon the question of damages.

The parties entered into a written contract whereby the plaintiff agreed to purchase and the defendant agreed to sell certain real estate; the property was to be conveyed "upon good and sufficient title by warranty deed, free and clear of all encumbrances" except an outstanding mortgage which the plaintiff agreed to assume and to pay as part of the consideration, and an outstanding lease. The plaintiff paid $500 upon the execution of the contract, and agreed to pay $3,750 additional when the papers were passed.

On September 4, 1929, within the period fixed by the contract, the parties met to complete the transaction. The defendant produced and offered for the inspection of plaintiff's attorney a deed which purported to convey the property in question subject to certain building restrictions not mentioned in the written contract of sale. The plaintiff, at the suggestion of her attorney, declined to accept the deed then, saying in substance that she wished to consider the matter further.

During the interview a banker's check for $3,750, payable to Mrs. Frank and by her indorsed in blank, was produced and laid upon the desk at which the parties and their attorneys were seated; upon producing the deed for the inspection of plaintiff's attorney, or shortly after, the defendant took the check from the desk, retained, and later cashed it. When informed that the plaintiff declined to accept the deed then and wished to consider the matter, the defendant replied, "I considered the matter closed," and de-

clined to surrender the check or to receive the deed. Later, and within the time fixed by the contract for closing the transaction, the plaintiff definitely refused to accept the deed, tendered it to the defendant, and demanded repayment of the money which he had received from her and the return of the check. The defendant refused to accept the deed, or to repay the money and return the check, and thereupon this action was commenced to recover the sum of $4,250 and interest.

The defendant sought to introduce in evidence upon the question of damages the opinion of a real estate dealer, whose qualifications were admitted, as to the value of the property in question on said September 4, 1929. The evidence was excluded, and the correctness of that ruling is the only point involved in the case.

It is not questioned that the plaintiff was entitled to the benefit of her contract, to receive a warranty deed in accordance therewith. The deed offered by the defendant failed to meet the contract. Upon instructions, to which no exceptions have been taken, the jury has found that the plaintiff did not waive her right to object to the encumbrances in question, and did not accept the deed in total or partial performance of the contract, as the defendant contended upon proper pleadings.

The defendant, therefore, has in his possession $4,250 belonging to the plaintiff to which he is not entitled; and in this action for money had and received the measure of damages is not, as defendant's counsel contended before the presiding Justice, the "difference between what Mrs. Frank should have got and what she did get if she accepted the deed"; but the plaintiff is entitled to recover the full amount of her money in defendant's possession, with interest.

Exceptions overruled.
Judgment on the verdict.

HAMLIN *vs.* N. H. BRAGG & SONS (TWO CASES).

Penobscot. Opinion June 19, 1930.

EVIDENCE. JURY FINDINGS. DAMAGES.

A jury, in awarding damages for an injury, may not be allowed to guess what caused it, but a cause may be inferred by the jury from proven facts.

For pain and suffering there is no fixed rule of damages. The amount is to be determined by the circumstances of each case, in the sound and advised discretion of the jury.

In the case at bar, there was believable evidence of facts, from which the jury, aided by the surgeon's opinion evidence, could have drawn the inference that the accident was the proximate cause of the hernia.

Whether the particular accident was the actual cause of the hernia was not for the trial court to rule, but was a question for the jury.

On exceptions and general motion for new trial. Two tort actions, one by a father and one by a minor son, to recover damages for personal injuries resulting from the alleged negligent operation of an automobile by defendant's servant. At the trial a verdict was directed for the defendant in each case, which was set aside by the Law Court upon the finding of liability and the cases remanded on the question of damages only. The jury rendered a verdict in the sum of $1,391.60 for the father and $5,000.00 for the minor son. To the refusal to strike out certain evidence defendants excepted, and, after verdicts, filed a general motion for new trial in each case. In the action Charles M. Hamlin, Jr., by next friend, exception overruled. If remittitur of $1,500.00 within thirty days from mandate, motion overruled. Otherwise motion sustained, new trial granted. In other action exception overruled. On filing within thirty days, of remittitur of $500, motion overruled, otherwise motion sustained, new trial granted. The cases fully appear in the opinion.

A. M. Rudman,
George E. Thompson, for plaintiffs.
Fellows & Fellows, for defendants.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

DUNN, J. Two tort actions. Liability having been previously determined (128 Me., 358), the cases were submitted together to the jury, touching damages. A single bill of exceptions, and two motions of similar tenor, bring the cases forward. There is but one exception. It goes to the refusal to strike out evidence. Both motions are on the ground of excessive damages.

The case of Charles M. Hamlin, the junior of that name, will have consideration first.

On July 22, 1927, the automotor of the defendant struck and injured this plaintiff, a boy five years old, while he was walking across a highway in Orono. He was thrown in the air, and fell back upon concrete pavement. He sustained, there is no dispute in the record, a complete simple transverse fracture of the middle of his left femur or thigh bone; also, concussion of his brain, and bruises about his head and arms. For a year afterward, he had headaches.

Amended declaration alleges as a further resultant injury, permanent unless relieved by operation, a left inguinal hernia.

Plaintiff has a verdict, based solely on pain and suffering, for $5,000.

After reduction of the fracture, it was necessary to use weights on the limb, plaintiff lying on his back, in the hospital, for approximately eight and one-half weeks, the leg extended at an angle of ninety degrees.

His leg was in a cast for four weeks. After this, he was in a chair for one week, next crawled, then used a crutch, and later a cane.

At the trial, at the January, 1930, term of the Superior Court in Penobscot county, witnesses were in agreement that recovery had been good.

Less than a year from the accident, or when plaintiff had been on his feet for five or six months, the hernia was noticed for the first time.

On this branch of the case, defendant moved the trial court to strike the evidence from the record, urging that causal connection between the accident and the hernia could not be inferred with

reasonable certainty. The evidence was not stricken. To the refusal to strike, exception was saved.

A jury, in awarding damages for an injury, may not be allowed to guess what caused it, but a cause may be inferred by the jury from proven facts.

The opinion evidence was meager. A surgeon, who, on the day before, had examined plaintiff for the hernia, was called to the witness stand. The surgeon was asked these questions and made these answers, on direct examination:

"Q. In your opinion could such a hernia as you found yesterday have been produced by trauma?

"A. It is possible for such a hernia to be produced by an injury.

"Q. What do you mean by trauma, Doctor?

"A. Trauma is infliction of injury. Any means by which a person is hurt or injured, the general term is trauma."

The questions asked or the answers made did not, in any way, specify whether, in the opinion of the witness, the hernia was caused by the accident, or the injury was sufficient to cause the condition, or might have caused it. The testimony was merely that such a hernia as the plaintiff had could have been produced by an injury.

This opinion evidence was not the only evidence. There was believable evidence of facts, from which the jury, aided by the opinion evidence, could have drawn the inference that the accident was the proximate cause of the hernia.

The other evidence described the plaintiff without preëxisting ailment, not examined at the hospital for hernia, free from other accident, closely with his parents after the accident until the trial, and, in the interim, examined by different physicians.

Whether the particular accident was the actual cause of the hernia was not for the trial court to rule, but a question for the jury. *Walsh* v. *Chicago, etc., Co.*, 135 N. E., 709.

Than the accident, no other cause for hernia was suggested. Cross-examination elicited nothing more than that hernia is common in children without regard to accident, and sometimes congenital.

The exception must be overruled.

The next question, to come now to the motion, is whether the amount of the award is within or without reasonable bounds.

For pain and suffering, there is no fixed rule of damages. The amount is to be determined by the circumstances of each case, in the sound and advised discretion of the jury.

The burden of proof was on the plaintiff to establish the quantum of his hurt. As to the fractured femur, the bruises, the concussion of the brain, and the headaches, there was definite evidence. The size of the verdict indicates that the violence of the accident was found to have been an efficient cause of the hernia. The evidence, however, would not sustain a finding of other than a simple, reducible hernia, which a truss subjects to compression, and surgical operation would correct.

The amount of damages, in the opinion of the majority of the members of the court, is excessive in the amount of fifteen hundred dollars, and calls for the exercise of control. If plaintiff, within thirty days from the filing of mandate, remits the excessive amount and thus cures error, the motion will be overruled; otherwise, the motion will be sustained, and the case remanded for another trial.

So much for the case wherein Charles M. Hamlin, Jr., is plaintiff.

What has been said in that case, in respect to the exception, applies to the case in which Charles M. Hamlin, the senior, is plaintiff.

Mr. Hamlin, as parent of the other plaintiff, was entitled to recover for the expenses which he had reasonably incurred, and is likely to incur, in consequence of the accident, for medical and surgical care, and nursing.

His verdict is $1,391.60.

The court considers the damages as returned by the jury to be excessive to the extent of five hundred dollars. Unless the plaintiff, within thirty days from the filing of mandate, files a remittitur of that amount, the motion will be sustained, and a new trial granted. If, however, such a remittitur be duly entered, the motion will be overruled.

The mandates will be:

In the action wherein Charles M. Hamlin, Jr., by next friend, is plaintiff, exception overruled. If remittitur of fifteen hundred

dollars, within thirty days of mandate, motion overruled; otherwise, motion sustained, new trial granted.

In the other action, that by Charles M. Hamlin, Sr., exception overruled. On filing, within thirty days, of remittitur of five hundred dollars, motion overruled; otherwise, motion sustained, new trial granted.

So ordered.

STATE OF MAINE *vs.* ERNEST C. BROWN ET AL.

Cumberland. Opinion June 19, 1930.

CRIMINAL LAW. CHAP. 87, SEC. 109, R. S. 1916. SHERIFFS AND DEPUTIES.

Chap. 87, Sec. 109, R. S., in providing that, "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 case, any treat or gratuity," the verdict may be set aside and a new trial ordered, should be construed to mean that where a treat or gratuity had had, or might have had, an effect unfavorable to the opposing party, the verdict, whether right or not, should be set aside.

The State, as party to a prosecution, can act only through officers or agents.

Deputy sheriffs are public officers. They owe to the aggregate public, and not alone to a single member of the body of the people, the impartial performance of official duties.

The act of a deputy sheriff, in getting evidence in a criminal cause, must be regarded as that of a party adverse to the respondents.

In the case at bar the giving of each ride by the deputy sheriff to the juror, whether with ulterior motive, in mere courtesy or civility, or in thoughtless indiscretion, was improper conduct.

The appearance of evil should as much be avoided as evil itself. Too much care and precaution can not be used to keep jury trials pure.

On exceptions by respondents. Respondents were tried on an indictment for adultery and found guilty. After verdict respondents filed a special motion for new trial, alleging violation by a deputy sheriff connected with the case of the provisions of R. S.,

Chap. 87, Sec. 109. The motion was denied by the presiding Judge and exceptions and appeal thereupon taken by respondents. Appeal sustained. Verdicts set aside. New trial granted. The case fully appears in the opinion.

Ralph M. Ingalls, County Attorney.

Walter M. Tapley, Assistant County Attorney, for State.

Harry E. Nixon, for respondents.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. MORRILL, A. R. J.

DUNN, J. Having been convicted, on trial by jury, of the felony of adultery, the respondents jointly moved the presiding justice that, as to each of them, the verdict be set aside, and a new trial granted.

The motion alleged that the misconduct of a deputy sheriff, active in the prosecution, in extending free transportation to a juror, vitiated the verdicts.

The motion was overruled, and this appeal made. R. S., chap. 136, sec. 28.

Whether, in the evidence, there had been room to find the respondents guilty, is not of concern.

"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.

Statutory intention is that, where treat or gratuity has had, or might have had, an effect unfavorable to the opposing party, the verdict, whether right or not, should be set aside. *York* v. *Wyman*, 115 Maine, 353.

A deputy sheriff, who had been detailed to investigate the actions of the respondents, got the evidence which led to their indictment.

The deputy did more than attend to his detail. For twenty dollars, paid by the husband of the afterward indicted woman, the deputy sheriff "worked for (the) interest" of the husband.

This deputy, during the sitting of the trial court, the Superior Court for Cumberland county, at Portland, was a jury officer.

The deputy did not live in Portland, but in an outlying town, from which he came to court each day, in an automobile which he himself drove, accompanied, from their several homes, by another deputy sheriff, one of the jurors, and a supernumerary. The juror paid nothing for riding.

When the case against the respondents came on for trial, the juror served on the panel. The deputy sheriff, relieved temporarily as jury custodian, witnessed for the prosecution.

The State, as party to a prosecution, can act only through officers or agents.

Deputy sheriffs are public officers. They owe to the aggregate public, and not alone to a single member of the body of the people, the impartial performance of official duties.

The act of the deputy sheriff, in getting evidence, must be regarded as that of a party adverse to the respondents. *Lavalley* v. *State* (Wis.), 205 N. W., 412.

The giving of each ride, whether with ulterior motive, in mere courtesy or civility, or in thoughtless indiscretion, was improper conduct. *Bean* v. *Camden, etc., Co.*, 125 Maine, 260. The extension of favors arouses either conscious or unconscious gratitude in normal persons.

Better that there should be the disturbance of a verdict, the case in which it is returned to stand for trial anew — better, even, that a guilty person should escape punishment — than that there should be countenance of a verdict not free from improper influence, or the suspicion thereof. The appearance of evil should as much be avoided as evil itself. *Bradbury* v. *Cony*, 62 Maine, 223, 225. Too much care and precaution cannot be used to keep jury trials pure. *Knight* v. *Inhabitants of Freeport*, 13 Mass., 218, 220; *Drake* v. *Newton*, 23 N. J. L., 111.

Appeal sustained.
Verdicts set aside.
New trial granted.

ALMON L. ROBINSON *vs.* MERTON WARREN.

Androscoggin. Opinion June 20, 1930.

NEGLIGENCE. MOTOR VEHICLES. BAILOR AND BAILEE.

Mere parental or filial relation between the owner and the borrower of an automobile is not sufficient to bar the owner from recovery of damages from a negligent third party.

In this state the "family purpose rule" is not applied to heads of families who own automobiles and allow the use of them by members of their families, who are licensed to drive such cars.

In bailments other than for carriage the contributory negligence of the bailee is not imputable to the bailor where the subject of bailment is damaged by a third party. The bailor under the ordinary contract of bailment may recover, despite the occurrence of contributory negligence on the part of the bailee.

In the case at bar the relation of master and servant did not exist. The car was loaned to be used solely for the son's pleasure. The relation was that of bailor and bailee. The contributory negligence of the gratuitous bailee was not imputable to the bailor.

On exceptions by plaintiff. An action on the case brought against defendant for the negligent operation of his automobile which caused damage to the automobile of plaintiff. To certain instructions given by the presiding Judge, plaintiff seasonably excepted. Exceptions sustained. The case fully appears in the opinion.

Peter A. Isaacson,
Louis J. Brann, for plaintiff.
Fred H. Lancaster,
Clifford & Clifford, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. MORRILL, A. R. J.

BARNES, J. This case comes up on plaintiff's exceptions to instructions in the charge of the Court.

Plaintiff was the owner of an automobile in collision on an Auburn highway with an automobile owned by the defendant.

Suit was brought for damage to the automobile and verdict was for defendant.

It is stipulated by counsel that the testimony given at the trial showed the following facts: On the twentieth day of August, 1929, plaintiff loaned his car for the evening to his son for the son's pleasure. The latter filled the car with his friends and took an extended evening drive.

While returning toward Auburn he allowed Francis W. Kimball, one of the parties whom he had invited to ride with him, to drive the automobile, and as the car, so driven, entered the intersection of Minot and Western Avenues, in the city of Auburn, the automobile of defendant, traveling along Minot Avenue, collided with plaintiff's automobile and caused it to be severely damaged.

It is further stipulated that plaintiff had no control of his car after he loaned it to his son.

It appears that two women and their husbands were in plaintiff's car at the time of collision; that the two women suffered physical injury; that suits were brought by each of the women and by the husbands, and that these four suits were tried with the suit in the case at bar.

The justice instructed the jury that in each of the several cases they must be satisfied by a fair preponderance of the evidence that the defendant was guilty of negligence in the operation of his car at the time of collision, or that there could be no verdict for any plaintiff.

Then, as governing their consideration of the case at bar, he proceeded: "Now we come to the question of whether or not Almon Robinson, the owner of the car, who was not driving the car and had no control or management of it at the time, can recover from this defendant simply by showing that the defendant was guilty of negligence, and regardless of the question of whether Francis Kimball who was driving the car was guilty of contributory negligence.

"It is true that there appears to be no case decided by the Court of Maine bearing directly upon that legal proposition. It is true

that different states have adopted different rules. And in the absence of finding a rule which has been adopted as the rule of this state, it is my duty to give you the rule as I believe it to be, the best considered and the most logical and reasonable rule in my opinion. You are to take it as the law. If I am mistaken about it the parties will have the opportunity to have it corrected, but so far as you are concerned you are to accept this rule as I give it.

"And the rule as I give it to you is that if Robinson had been the driver of the car himself, he could not recover if he were guilty of negligence which contributed to the accident; and that when he permits someone else to use it for the purpose, the very purpose that he loans it, he is bound by the same rule. That is, it is stated in some of the cases in this way, and I will give you the technical rule and then explain it. That where a bailee . . . that is the son, Tobey Robinson, who passed it over to Kimball, uses property for the very purpose for which it was bailed, there is the same privity of contract, in all essential features, as in engagements between principal and agent and between master and servant, and that consequently the bailor and bailee must recover, if at all, on the same facts and under the same circumstances. The reasoning pursued is that whatever entitles to a recovery entitles either the bailor or the bailee to such recovery; *e converso*, whatever forbids a recovery to the bailee will also defeat the bailor's action.

"So that, so far as this case is concerned, I give you the rule that it is exactly the same as if Almon Robinson was driving the car, that he can not recover unless Francis Kimball was in the exercise of due care, and unless Francis Kimball did not by such want of care contribute to the accident."

As the learned Justice observed, no case has heretofore been brought to this court for decision, involving the precise point in the present case, that is, to determine whether or not an owner of property loaned, as was the car in this case, after negligent injury by a third party while the property was in the possession of the one to whom it was loaned, may recover of the third party for that injury even if negligence is proven on the part of the borrower of the car.

The relation existing between his father, the owner of the auto-

mobile, and the son during the pleasure ride is first to be established.

The mere parental and filial relation between the owner and borrower is not sufficient to bar the owner from recovery.

And the relation of master and servant does not exist, because by stipulation we find that the car was loaned, to be used solely for the son's pleasure and not upon his father's business.

The law has been so stated recently by this court in *Farnum* v. *Clifford*, 118 Me., 145; *Pratt* v. *Cloutier*, 119 Me., 203.

Nor does the doctrine of principal and agent apply, for in this state the "family purpose rule" is not applied to heads of families who own automobiles and allow the use of them by members of their families, who are licensed to drive such cars. *Farnum* v. *Clifford*, supra.

The relation, in law, between the owner and borrower of the Robinson car on the evening of the collision was that of bailor and bailee, and we are concerned with the ruling instructing the jury, in effect, that contributory negligence of the bailee, in this case, would prevent recovery on the part of the bailor.

There is not uniformity of view in the courts of our land upon this point.

Except in carrier cases the majority of the decisions of years ago held that contributory negligence of a bailee was imputable to his bailor when the latter brought suit for negligent injury to his property in the bailee's hands.

But, within the last generation, and particularly during the twentieth century, there has been a change in the weight of authority on this question.

For the position taken by the presiding Justice we find this statement: "Why the contributory negligence of a gratuitous bailee, while using the property for the very purpose for which it was loaned, should not be imputed to the bailor who intrusted it to the bailee to be thus used, we are unable to see. There is the same privity of contract, in all essential features, as in bailment for hire and as in engagements between principal and agent and between master and servant. This view is re-enforced by the consideration of another question, viz., Could a gratuitous bailee, who was guilty

of contributory negligence, recover in his own name against a stranger for injury to property loaned? Certainly not, for the defense to his complaint would be upon the service. But the bailor and the bailee must recover, if at all, on the same facts, and under the same circumstances. We have held that the bailee may, in a proper case, recover in his own name. Whatever entitles to a recovery entitles either bailor or bailee to such recovery; *e converso*, whatever forbids a recovery to the bailee will also defeat the bailor's action." *Illinois Central Railroad Company* v. *Sims*, 77 Miss., 325, 49 L. R. A., 322.

Cases sometimes cited in support of the above are, *Smith* v. *Smith* (1824), 2 Pick., 621, 13 Am. Dec., 464. *Puterbaugh* v. *Reasor* (1859), 9 Ohio State, 484; *Forks Township* v. *King* (1877), 84 Pa., 230; *Texas & P. R. Co.* v. *Tankersley* (1885), 63 Tex., 57; *Welty* v. *Indianapolis* v. *V. R. Co.*, (1885), 105 Ind., 55, 4 N. E., 410.

But in all these cases, except the Texas case, the courts have abandoned the positions they are charged with having advanced. See, *Nash* v. *Lang* (1929), Mass., 167 N. E., 762; *Gfell* v. *Jefferson Hardware Co.* (1917), 31 Ohio C. A., 214; *Gibson* v. *Bessemer, etc., R. R. Co.* (1900), 226 Pa., 198, 75 Atl., 194. And in *Welty* v. *Railroad Co.* where a borrower of a horse, while drunk, rode on a railroad track which was unfenced, in violation of the statute, it was held that while mere contributory negligence would have been no defense, under the statute there was a trespass, and the borrower stood in the position of the owner, who could not recover. And this case is apparently overruled in *Lee* v. *Layton* (1929), Ind., 167 N. E., 540.

In the Texas case, where it is held that the contributory negligence of a bailee of cotton, whereby it was consumed by fire from a railway engine, is imputable to the bailor, the court does not discuss the question, but merely announces the common law rule prevalent in earlier times that the negligence of the bailee was imputable to the bailor. The court, however, seems to have thought the relation of principal and agent also existed between bailor and bailee, for in immediate connection with its announcement of the above

rule, it says (63 Tex., 61), "the negligence of the agent in such case is imputable to the principal."

Perhaps the leading case for what is now accepted as law in a very great majority of cases, and a decision of exceeding value, is *N. J. Elec. Railway Co.* v. *N. Y. L. E. & W. R. Co.* (1897), 61 N. J. L., 287, 43 L. R. A., 849. Similarly, *Morgan Co.* v. *Payne* (1922), 207 Ala., 674, 93 So., 628; *Currie* v. *Consolidated Ry. Co.* (1908), 81 Conn., 383, 71 Atl., 356; *Tobin* v. *Syfrit* (1923), Del., 122 Atl., 244; *Kellar* v. *Shippee* (1892), 45 Ill. App., 377; *Spelman* v. *Delano* (1913), 177 Mo. App., 28, 163 S. W., 300; *Oster* v. *C. & A. R. Co.* (1923), Mo. App., 256, S. W., 826; *Cain* v. *Wickens* (1923), 81 N. H., 99, 122 Atl., 800; *Fischer* v. *Int. R. Co.* (1920), 122 Misc., 212, 182 N. Y. Supp., 313; *Hunt-Berlin Coal Co.* v. *McDonald Coal Co.* (1923), 148 Tenn., 507, 256 S. W., 248; *Aldrich* v. *B. & M. R.* (1916), 91 Vt., 379, 100 Atl., 765; *Lloyd* v. *N. P. Ry. Co.* (1919), 107 Wash., 57, 181 Pac., 29, and *Sea Ins. Co.* v. *Vicksburg, S. & P. Ry. Co.* (1908), 159 Fed., 676, hold that in bailments other than for carriage the contributory negligence is not imputable to the bailor where the subject of bailment is damaged by a third person. The bailor, under the ordinary contract of bailment may recover, despite the occurrence of contributory negligence on the part of the bailee.

Additional citations may be found in *Lee* v. *Layton*, supra, and *Nash* v. *Lang*, supra, and the cogent reasoning of all the courts referred to herein is so full and convincing that its restatement here would add nothing to its effect.

We find ourselves in accord with this view. Hence the plaintiff was rightly aggrieved at the instructions given and excepted to.

Exceptions sustained.

LUCY M. ESTABROOK

DEPENDENT WIDOW OF WILLIAM J. ESTABROOK

vs.

STEWARD READ COMPANY AND AETNA LIFE INSURANCE COMPANY.

Kennebec. Opinion June 24, 1930.

WORKMEN'S COMPENSATION ACT. SECTIONS 12, 14, 16, CONSTRUED.

Under the provisions of Sec. 14 *of the Workmen's Compensation Act in force October* 14, 1924, *a widow may maintain her petition for permanent impairment after the death of her husband, the injured employee, who had been paid, under an open end agreement, compensation for total disability from the date of injury to the date of his death.*

An employee's right to compensation for total incapacity under Sec. 14, *Chap.* 238, *R. S., is a different and distinct right from that given under Section* 16 *for compensation for permanent impairment to the usefulness of his legs.*

A natural and reasonable construction of Section 14, *in connection with the other correlated Sections of the Act, leads to the conclusion that the clear intent was to give to the dependent the right, which a living employee would have had, to petition for determination of permanent impairment.*

A denial by the Commission of a dependent widow's petition for compensation, brought under Section 12 *of the Act, will not take away or affect her right to bring her petition for determination of the extent of permanent impairment under Section* 16, *a right distinct and separate from the right to petition under Section* 12.

Where it is found that the total permanent impairment was attributable to the injury by way of acceleration or aggravation of a pre-existing condition, the Commission has the right to order payment by the employer or insurance carrier of compensation for permanent impairment for a specified period without a determination by the Commission of the extent to which the preëxisting condition and injury each contributed to the total percentage of the permanent impairment.

In interpreting statutes the first consideration is to ascertain and give effect to the intention of the legislature, but when the language is plain and unam-

biguous and conveys a clear and definite meaning, there is no occasion to resort to the rules of statutory interpretation or construction, and the statute must be given its plain and obvious meaning.

There is practically an agreement of authority to the effect that the provisions of the Workmen's Compensation Laws, which are remedial statutes, should be liberally construed in order that they carry out the general humanitarian purpose for which they were enacted.

In the case at bar the injury to which the petition related was defined not in Section 14, but in Section 16, and related to the permanent impairment of the usefulness of a member or physical functions thereof as therein defined.

The case disclosed no evidence supporting the claim that petition was barred by laches.

The Commission having found that the percentage of impairment to the usefulness of each leg was 95%, the petitioning dependent widow was entitled to 95% of "two thirds the average weekly wages" during 300 weeks less the 211 weeks during which compensation at the maximum rate had been paid. Inasmuch as the weekly wage in this case was $33.00, and inasmuch as 95% of that amount was in excess of the maximum to which the petitioner was entitled, the decree should have ordered the payment of $16.00 a week for the entire period of 300 weeks less the 211 weeks, instead of for a period of 285 weeks less the 211 weeks.

A Workmen's Compensation case. Appeal from decree of a single Justice affirming a decree of the Industrial Accident Commission, awarding compensation to the dependent widow of William J. Estabrook. Appeal sustained, decree in accordance with the opinion. The case fully appears in the opinion.

Arthur L. Thayer, for petitioner.

William B. Mahoney,

Charles J. McGraw, for appellants.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

FARRINGTON, J. The case comes up on appeal from a decree of a Justice of the Superior Court on a decision of the Industrial Accident Commission.

The essential facts are as follows: William J. Estabrook in the course of his employment as a roofer for Steward Read Company received personal injury resulting from a thirty-five foot fall. The

accident occurred on October 14, 1924. On November 4, 1924, an agreement as to compensation, duly approved, was entered into between the injured employee, the employer and the insurance carrier providing for the payment of $16.00 per week "during present disability" beginning October 21, 1924, the nature of the injury and disability being described as "severe shock as result of a fall. Bruises to body." Compensation under this agreement was paid to October 14, 1928, when William J. Estabrook died.

On December 1, 1928, Lucy M. Estabrook filed with the Industrial Accident Commission a petition for the award of compensation to herself as dependent widow. On March 20, 1929, a hearing was held on this petition before the Chairman of the Commission, and on May 28, 1929, a decree was filed denying compensation, the Chairman finding that death was not caused by the injury but that the deceased died of heart failure due to aneurism. No appeal from the decree was prosecuted.

On June 18, 1929, the widow filed with the Commission a petition to determine the extent of permanent impairment and for the award of compensation on that basis, alleging that the injuries received by William J. Estabrook on October 14, 1924, resulted in permanent impairment to the usefulness of both legs.

On August 30, 1929, a hearing was had with further hearing on December 6, 1929. On December 20, 1929, a decree was filed by the Commission signed by the Chairman, and Commissioner of Labor, in which it was found "that the percentage of permanent impairment to each leg is 95%. It is also found that such impairment is attributable to the injury itself, at least by way of acceleration or aggravation of a preëxisting condition, rather than as contended by respondents to a systemic condition inferable from the aneurism of the aorta which precipitated his death."

The employer, or the insurance carrier was ordered to pay "to Lucy M. Estabrook, dependent widow aforesaid, compensation for presumed total incapacity beginning October 21, 1924, on account of said permanent impairment for the specific period of 285 weeks, less the number of weeks, — according to the Commission records, 211 weeks — during which compensation was paid to employee before his death and to petitioner thereafter."

The Commissioner of Insurance dissented on the ground that there was "failure to bring the case before the Commission at a time when plenary evidence was obtainable and justice could have been done both parties."

The first issue raised by the appellants is: Whether a petition to determine extent of permanent impairment may be maintained by a dependent after death of an injured employee who has been paid compensation for total disability from the date of injury to the date of death under an approved open end agreement.

The agreement of November 4, 1924, to which reference has been made, was as follows: "It is agreed that compensation shall be paid at the rate of Sixteen and no/100 dollars per week during present disability beginning October 21, 1924 and that compensation shall be paid in addition thereto for any subsequent incapacity, either total or partial, due to the same injury, according to the provisions of Sections 12 to 16 inclusive of Chapter 238 of the Laws of Maine 1919, and any amendments thereto."

Section 14 of the Workmen's Compensation Act in effect at the date of the injury, after certain provisions as to compensation and as to period covered in cases of total incapacity, contains this language: "And if the employee shall die before having received compensation to which he is entitled or which he is receiving as provided in this act, the same shall be payable to the dependents of the said employee for the specified period and the said dependents shall have the same rights and powers under this act as the said employee would have if he had lived."

The provisions of Section 14 quoted above are plain and the language of the Act used therein, in our opinion, clearly empowers the widow, whose dependency is unquestioned in this case, to exercise the same right as the deceased could have exercised, had he lived, to ask, under the provisions of Section 16, for a determination of compensation for permanent impairment to the usefulness of the legs.

It is not necessary to enter a discussion as to the vesting of rights on the death of the employee, as, we believe, the right of the dependent widow is established by that part of Section 14 above quoted. The deceased employee's right to compensation for total incapac-

ity under that section was a different and distinct right from that given under Section 16 for compensation for permanent impairment to the usefulness of his legs, but both rights were his under the Act.

The fact that the employee up to the time of his death had been receiving, under the approved agreement, compensation equal in amount of weekly payments to that which he might receive under Section 16, dispensed with necessity or reason for proceeding under the latter section, but the right to so proceed nevertheless existed and, under what we believe is the plain meaning of Section 14, was not lost to the dependent widow at the death of the employee. Either the employee, if there had been refusal to pay compensation, or the insurance carrier, if it had felt that the amount it was paying was excessive, could, despite the agreement, have asked for a determination of permanent impairment. The carrier refused payment to the widow, and Section 14 gives to dependents "the same rights and powers under this Act as the said employee would have if he had lived."

We fail to see the application of *Ripley's Case*, 126 Me., 173, cited by the appellants.

In interpreting and construing statutes the first consideration is to ascertain and give effect to the intention of the Legislature, but when the language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion to resort 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; *Pease* v. *Foulkes*, 128 Me., 293; 21 R. C. L., Sec. 217, at p. 962; *State Accident Fund* v. *Goldsborough*, 24 A. L. R., at p. 440.

The natural and reasonable construction of Section 14, in connection with the other correlated Sections of the Act, leads to the conclusion that the clear intent was to give to a dependent the right, which the living employee would have had, to petition for determination of permanent impairment.

There is practically an agreement of authority to the effect that the provision of the Workmen's Compensation Laws, which are remedial statutes, should be liberally construed in order that they

may carry out the general humanitarian purpose for which they were enacted. So numerous are the decisions of the courts on this point that we refrain from citation of cases, especially since the Maine Act provides that in "interpreting this act it (the Commission) shall construe it liberally and with a view to carrying out its general purpose. The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act."

In *Nickerson's Case*, 125 Me., 285, at page 288, referring to the above quoted portion of Section 14, the Court says, "We think the passage quoted refers to cases of presumed total incapacity to work, and that the words 'specified period' refer to the period of total disability conclusively presumed to be permanent in cases specified in the following sentence, viz.: 500 weeks, and to the periods of presumed total disability fixed in Section 16."

Section 16 of the Act provides, "In cases included in the following schedule the disability in each such case shall be deemed to be total for the period specified and after such specified period, if there be a total or partial incapacity for work resulting from the injury specified, the employee shall receive compensation while such total or partial incapacity continues under the provisions of sections fourteen and fifteen respectively, but in no case shall compensation continue more than three hundred weeks after the injury. The compensation to be paid for the injuries hereinafter specified shall be as follows, to wit.: (among other injuries) "For the loss of a leg, or any part at or above the ankle, two thirds the average weekly wages during one hundred fifty weeks."

Section 16 closes with this clause, "In all cases in this class where the usefulness of a member or any physical function thereof is permanently impaired, the compensation shall bear such relation to the amount stated in the above schedule as the incapacity shall bear to the injuries named in this Schedule and the Commission shall determine the extent of the incapacity."

In our opinion this last quoted portion of Section 16, applying, as it clearly does, to "all cases in this class" as defined in Section 16, brings the dependent widow within the provisions of the above quoted portion of Section 14, as it is interpreted by *Nickerson's*

Case, supra, and that she had the right to bring her petition to determine the extent of permanent impairment.

On the point under consideration we have to do only with the provisions of Section 14 in effect at the date of the injury. With any changes due to later amendments we are not concerned at this time. It is our conclusion, and we so find, that under the provisions of Section 14 the dependent widow in this case was entitled to maintain her petition for permanent impairment after the death of her husband, the injured employee, who was paid under an approved open end agreement compensation for total disability from the date of injury to the date of his death.

The second issue raised is whether a petition for determination of extent of permanent impairment of the usefulness of the legs resulting from an injury to the spine may be maintained under the provisions of the Workmen's Compensation Act.

The appellants contend that the provisions of Section 16 relating to permanent impairment can not be extended to cover the injuries enumerated in Section 14, in which latter section is included injury to the spine resulting in permanent and complete paralysis of the legs.

The answer to this contention is that the injury to which the petition relates is defined, not in Section 14, but in Section 16, and relates to the permanent impairment of the usefulness of members or physical functions thereof as therein defined.

The third issue raised is that the decision of the Commission denying the award of compensation to the widow on her petition under Section 12 bars the present petition.

It is sufficient to say that the denial of the former petition, on the ground that death was not due to the injury, does not take away or affect the other right of the dependent widow to bring the petition under consideration, a right distinct and separate from the right to petition under Section 12.

The fourth issue raised is that an award for permanent impairment can not be made after death.

Under the Act in force at the time of the accident and controlling the rights of parties in the present case the Commission unquestionably had the right to make an award on the basis of per-

manent impairment. The degree of impairment, if any, was a question of fact to be decided from the evidence presented.

The fifth issue raised by appellants is that the petition is barred by laches.

We find nothing in the case supporting such a claim. The first petition filed within six weeks after the death of the petitioner's husband having been denied, the present petition was, within three weeks thereafter, filed and within six weeks the first hearing was held. Then followed a request by the appellants for further hearing with a resultant ensuing delay of three months. Within a month after this second hearing the decree in issue was filed. There was no unreasonable delay, and for whatever delay there may have been the petitioner was in no way responsible.

The sixth issue raised by the appellants is whether the Industrial Accident Commission may order payment by the employer or insurance carrier of compensation for a specified period for permanent impairment, where it is found that the total permanent impairment is attributable to the injury by way of acceleration or aggravation of a preëxisting condition, without a determination by the Commission of the extent to which the preëxisting condition, and the injury, each contribute to the total percentage of the permanent impairment.

We can not concur in the view of the appellants that the doctrine to be applied to such a case as the one under consideration is one of degree of contribution to the impairment. There is no provision for the application of such a doctrine in the Workmen's Compensation Act of this State and decisions refusing to recognize it are, *Indiana Abattoir* v. *Coleman et al* (Ind.), 117 N. E., 502; *In re Madden*, 222 Mass., 487; *Hills* v. *Oval, etc., Co.*, 191 Mich., 411, 158 N. W., 214; to same effect *Hanson* v. *Dickinson* (Iowa), 176 N. W., 823.

We see no reason to disagree with the findings of the Commission, as far as they relate to the fact and degree of impairment and as far as they relate to the findings that such impairment was attributable to the injury itself. As to the amount of the award, however, we can not agree. The decree ordered the Steward Read Company or its insurance carrier to pay to the petitioning dependent

widow compensation for a period of 285 weeks, less 211 weeks, during which compensation had been paid to the employee before his death and to the petitioner thereafter. We can see no reason why this period should not be 300 weeks, less the 211 weeks, because Chapter 238 of the Public Laws of 1919, which added the last paragraph to Section 16, obviously affected only the amount of compensation and did not change the period previously fixed, namely, 300 weeks, during which the compensation was to be paid. Prior to the 1919 Act the loss of a member was construed to mean an actual loss by severance and not a loss which might be attributed to incapacity, but this 1919 Act provided in terms for compensation for permanent impairment of the usefulness of a member or any physical function thereof. In the case before us, the Commission found that the percentage of impairment of each leg was 95% and under the Act applicable to the instant case the petitioning dependent widow was entitled, as we construe the statute, to 95% of "two-thirds the average weekly wages" during 300 weeks. The average weekly wage of the deceased, Mr. Estabrook, according to the record in this case, was $33.00. 95% of that amount would be in excess of $16.00 a week, which was prior to the 1919 Act and is now the maximum limitation. Section 16, to repeat, states that "in all cases in this class where the usefulness of a member or any physical function thereof is permanently impaired, the compensation shall bear such relation *to the amount stated in the above schedule* as the incapacity shall bear to the injuries named in this schedule and the Commission shall determine the extent of the incapacity." "The above schedule," in our opinion, clearly refers not to the maximum and minimum limitation, but to the preceding schedule, which includes the provision for the loss of a leg. Having in mind that the average weekly wage in the instant case was $33.00, our interpretation of Section 16 is that the percentage of impairment should be applied to "two-thirds of the average weekly wages" and not to the maximum limitation of $16.00 a week. Inasmuch as two-thirds of the average weekly wage is in excess of $16.00, the amount payable can not exceed the $16.00 provided by the statute.

It is not clear from the record just what weekly amount was

ordered, but we assume that it was $16.00 a week, which amount, we believe, should be applied in this case, not to 285 weeks less 211 weeks, but to the entire period of 300 weeks, less 211 weeks.

Appeal sustained.
Decree in accordance with this opinion.

PHILIP BLUMENTHAL *vs.* LOUIS SEROTA.

Cumberland. Opinion July 7, 1930.

MORTGAGES. SURETYSHIP AND GUARANTY. DEEDS. RECORD. NOTICE.

The mere fact that mortgaged property was conveyed to one who assumed payment of the mortgage debt would not, of itself and apart from the effect of subsequent dealings between the original mortgagee and the grantee of the mortgagor, in any way affect the liability of such mortgagor, even if the mortgagee knew of the arrangement, unless he assented to it.

If, however, a mortgagee with knowledge of the conveyance and assumption by the grantee of the mortgage debt extends the time of payment by a valid agreement between him and the grantee, such extension operates to discharge the original mortgagor unless assented to by him or unless the rights of the mortgagee in this respect are expressly reserved.

It is an essential condition to the discharge of the original mortgagor from liability that there be a valid agreement for the extension, supported by a sufficient consideration.

The relation of principal and surety, so far as the mortgagor and his grantees are concerned, may be created and exist without necessarily disturbing the original contractual relations existing between mortgagor and mortgagee. In order to relieve his debtor from primary liability, it is necessary that the creditor should know of the arrangement and assent to it.

The mere record of a conveyance by a mortgagor, containing a clause that the grantee has assumed the payment of the mortgage, is not constructive notice of the transaction to the mortgagee. The registry of a deed is constructive notice only to after-purchasers under the same grantor.

In the case at bar the ruling of the Court that the record was sufficient proof of plaintiff's knowledge of the assumption of the debt by the grantee was error in law.

On exceptions and motion for new trial by plaintiff. An action of assumpsit on a promissory note in the sum of three thousand dollars, secured by a second mortgage on real estate.

The issue involved the legal effect of the assumption by subsequent grantees of the mortgagor of the payment of the mortgage debt, whether or not known by the mortgagee, and new arrangements for payment assented to by him.

To the admission of certain testimony offered by the defendant and to certain rulings of the presiding Judge, plaintiff seasonably excepted, and after the jury had rendered a verdict for the defendant, filed a motion for a new trial. Exceptions sustained. The case fully appears in the opinion.

Abraham Breitbard,
Harry Judelshon, for plaintiff.
Israel Bernstein, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. MORRILL, A. R. J.

PATTANGALL, C. J. On exceptions. Verdict for defendant. The subject matter of this suit was a promissory note for $3,000 dated August 1, 1926, bearing interest at seven per cent, due two years after date, payable to plaintiff, signed by defendant and secured by mortgage on real estate.

Shortly after executing the mortgage, defendant conveyed the real estate to another who assumed the payment of the mortgage debt. Through a series of conveyances, in each of which the debt was assumed, the title finally on January 5, 1928 rested in Cavanaugh and Fahey, co-partners. Cavanaugh died and for some time prior to the bringing of the suit, Fahey acted for himself and the Cavanaugh heirs.

In February 1928, he paid plaintiff the six months' interest then due, as he also did in the following August. Prior to the latter payment, plaintiff notified him that the principal was about to become

due but nothing more was said about the matter until February 1929, when Fahey called on plaintiff for the purpose of paying another six months' interest.

Plaintiff then informed Fahey that he must have a higher rate of interest and finally Fahey paid him for the six months which had passed at the rate of ten per cent and agreed to pay at that rate for the next six months and for an indefinite period thereafter. No further payment was made by Fahey and shortly after the next interest date, this suit was brought.

Admitting his original liability on the note, defendant claimed that he was released therefrom because his grantees had assumed its payment, of which fact plaintiff had notice; that plaintiff's course of dealings with Fahey indicated his acceptance of Fahey as principal debtor; and that defendant's liability then became that of a surety only, from which liability the extension of time to Fahey operated as a discharge.

Plaintiff denied these claims. He admitted that the agreement between defendant and his grantees created the relation of principal and surety so far as they were concerned but denied that it in any way affected his rights. He did not admit knowledge of the conditions under which the property was transferred, certainly not that he had assented to the arrangement or that he had accepted Fahey as his principal debtor or that he had in any way released defendant from his original liability.

The issues were clearly drawn. Plaintiff made out a *prima facie* case by the introduction of the note in evidence. Defendant, through Fahey, proved the assumption of the mortgage debt by him and Cavanaugh and there was no controversy but that a like condition appeared in the various deeds of their predecessors in title back to the first deed given by defendant. The various payments of interest by Fahey to plaintiff, including the payment of the additional interest in February 1928 as consideration for a further extension of the note, and the understanding that so long as interest at ten per cent was paid, payment of the principal might be extended indefinitely, were undisputed. Fahey did not testify that the fact that he and his partner had assumed the payment of the mortgage was known to plaintiff. He assumed that the plaintiff

knew it, but the matter never was mentioned between them and so far as his testimony went, plaintiff may have believed that Fahey had purchased the property subject to the mortgage rather than that he had expressly contracted to pay the debt.

To prove knowledge on the part of plaintiff of the actual contract between defendant and his grantees, defendant then offered the record of the various conveyances to which reference has been made. This evidence was admitted under objection and subject to exception. No other evidence was offered and the case was submitted to the jury with the result stated.

This court has never passed upon the precise questions involved in this case. Upon some of them, there is a variance of opinion in the courts of other states, but there is practical, if not complete, unanimity in the decisions and among the text-writers concerning certain fundamental matters upon which it is possible to base a finding here.

It is well settled that the mere fact that defendant conveyed the mortgaged property to another, who assumed payment of the mortgage debt, would not of itself and apart from the effect of subsequent dealings between plaintiff and the grantee affect in any way defendant's liability, even if plaintiff knew of the arrangement, unless he assented to it. *Waters* v. *Hubbard*, 44 Conn., 348; *Boardman* v. *Larrabee*, 51 Conn., 39; *Rice* v. *Saunders*, 152 Mass., 108; *Palmer* v. *White* (N. J.), 46 Atl., 706; *Stephany* v. *More* (N. J.), 82 Atl., 731. Such a transaction would create the relation of principal and surety as far as the mortgagor and his grantee are concerned, but would not primarily disturb the original contractual relations existing between mortgagor and mortgagee. *Merriam* v. *Miles*, 69 Am. St. Rep., 731; *Hazle* v. *Bondy* (Ill.), 50 N. E., 671; *Peters* v. *Lindley* (Okla.), 211 Pac., 409; *Stove Co.* v. *Caswell* (Kans.), 16 L. R. A. (N. S.), 85; *City Institutions* v. *Kelil*, 262 Mass., 302.

If, however, a mortgagee with knowledge of the conveyance and assumption by the grantee of the mortgage debt extends the time of payment by a valid agreement between him and the grantee, such extension operates to discharge the original mortgagor unless assented to by him or unless the rights of the mortgagee, in this

respect, are expressly reserved. *North End Savings Bank* v. *Snow*, 197 Mass., 339; *Franklin Savings Bank* v. *Cochrane*, 182 Mass., 586; *Codman* v. *Deland*, 231 Mass., 344.

The assumption produces its most important effect, by the operation of equitable principles, upon the relations subsisting between the mortgagor, the grantee and the mortgagee. As between the mortgagor and the grantee, the grantee becomes the principal debtor primarily liable for the debt, and the mortgagor surety with all the consequences flowing from the relation of suretyship. The mortgagee, after receiving notice of the assumption, is bound to recognize the conditions of suretyship and to respect the rights of the surety in all of his subsequent dealings with them. His valid extension of the time of payment to the grantee, without the mortgagor's consent, would operate to discharge the mortgagor. 3 Pom. Eq. Jur. (3rd Ed.), 2409.

The rule rests upon the sound reason that a binding extension given by a creditor to a principal debtor without the consent of the surety releases the latter, because a surety is entitled to subrogation on payment of a debt. But by subrogation he only gets the rights the creditor actually has; therefore, where the creditor has postponed the debt, the surety on paying it can not sue the principal until the extension expires, but the surety, by the only contract to which he has consented, has a right to pay and sue the principal at any day after the debt matures. Hence the extension deprives him of his right, and from that fact the law conclusively presumes an injury to him and releases him from liability. *Travers* v. *Dorr* (Minn.), 62 N. W., 269. It is immaterial that no injury in fact to the original mortgagor be shown. *George* v. *Andrews* (Md.), 45 Am. Rep., 706. The courts will not enquire whether the mortgagor has been actually injured by the extension. *Merrill* v. *Reiners*, 36 N. Y. Supp., 634.

It is an essential condition to the discharge of the original mortgagor from liability that there be a valid agreement for extension supported by a sufficient consideration. *Met. Life Ins. Co.* v. *Stimpson*, 51 N. Y. Supp., 226.

But it being also essential that the creditor should assent to the arrangement between his debtor and the debtor's grantee in order

to relieve his debtor from primary liability, it is of course necessary that the creditor should know of the arrangement. One can not well assent to that of which one is ignorant. "If the extension of time of payment is to release the mortgagor, the creditor must know that the one to whom he granted the extension was a principal and the other a surety." 2 Washburn Real Property (4th Ed.), 218. Upon well settled principles, notice must be brought home to the holder of the mortgage before he can be charged with having violated the right of the maker of the note as a surety by extending the time of payment.

"When one of two obligors in a bond claims relief against the holder of the bond on the ground that he is surety for his co-obligor and that the creditor has given time to the principal debtor without consent of the surety, the surety, to entitle himself to exemption from liability, must show that the fact of the suretyship was communicated to the creditor. The privilege of the surety is a mere equity and can only be binding on those who have notice of its existence." *Kaighn et als* v. *Fuller et als*, 14 N. J. Eq., 419; *Wilson* v. *Foot*, 11 Metc., 287.

"A surety who sets up in his defense an extension without his consent must allege and prove that the holder of the obligation had notice of the suretyship. If the creditor does not know of it when he grants the extension, the surety is not thereby discharged." 1 Brandt Suretyship and Guaranty (3rd Ed.), Sec. 412; *Nichols* v. *Parsons*, 6 N. H., 30.

The necessity of proof of knowledge of the contract between mortgagor and grantee becomes readily apparent when it is remembered that a mere conveyance of the equity does not create the relation of principal and surety even as between the parties to the transaction. Unless the purchaser expressly assumes the payment of the mortgage debt, no such relation exists. *Heim* v. *Vogel*, 69 Mo., 535.

There is no direct evidence that the plaintiff knew that Fahey had assumed the payment of the mortgage debt. Against plaintiff's objection and subject to exception, defendant introduced the record of the deeds from defendant to his immediate grantee and from succeeding grantees down to and including the deed to Cav-

anaugh and Fahey, in each of which appeared the agreement to assume the mortgage debt. This evidence was offered and admitted as tending to prove knowledge on the part of plaintiff of the contract between the grantees and defendant. It was not admissible for this purpose. The registry of a deed is constructive notice only to after purchasers under the same grantor. *Roberts* v. *Richards*, 84 Me., 9; *Spoffard* v. *Weston*, 29 Me., 145; *Roberts* v. *Bourne*, 23 Me., 169; *Bates* v. *Norcross*, 14 Pick., 224.

This is affirmed in *Wolfe* v. *Murphy*, 47 App. D. C., 296, and in *Newby* v. *Harbison* (Tex.), 185 S. W., 642. These cases hold that the mortgagee was not charged with knowledge of the contract between the mortgagor and his grantee merely by reason of the fact that it was embodied in the recorded deed from the grantor to the grantee because the mortgagee was not bound to take notice of any document affecting the title to the land which was filed subsequently to the time when he acquired an interest in the property.

"The mere record of a subsequent conveyance by the mortgagor is not constructive notice of it to him (the mortgagee). It would not be reasonable to subject the mortgagee to the constant necessity of investigating transactions between the mortgagor and third persons subsequent to the mortgage. The record is constructive notice only to subsequent purchasers or those claiming under the same grantor." 1 Jones on Mortgages, 560.

Whether or not the jury might have been justified in inferring such knowledge on the part of Blumenthal from the course of his dealings with Fahey, was not submitted to them. The only reference in the charge of the presiding Justice to this matter is contained in the following paragraph:

> "Sometimes when property is sold, it is recited in the deed that the buyer assumes that mortgage on the property and agrees to pay it. That is just the situation in this case. The buyer of this property, the new owner, agreed when he bought it to assume and pay this mortgage which was given in security of this note. In such a case, the maker of the note is not discharged from liability to pay that note but his obligation is to some extent changed. In a way, the buyer of the prop-

erty who has agreed to pay that mortgage stands in the role of principal debtor and the maker of the note, the man who has signed the note, is somewhat in the nature of a surety. We will refer to them for the purposes of this case as the principal debtor and the surety; that is, I will call the buyer of the property or the new owner the principal debtor and the original maker of the note the surety."

This either assumes that the record was sufficient proof of plaintiff's knowledge of the assumption of the debt by the grantee or that the fact of knowledge was immaterial. We assume the former, although the latter would be equally erroneous. No direct exception was taken to the instruction, but exception had been taken to the evidence upon which it was apparently based and in view of the charge, the error admitting the evidence was plainly prejudicial.

In view of this finding, it becomes unnecessary to consider the remaining exceptions.

Exceptions sustained.

SHERBURNE H. SLEEPER, APPL'T

AND

EBEN F. LITTLEFIELD, APPL'T

FROM DECREE OF JUDGE OF PROBATE.

Waldo. Opinion July 9, 1930.

WILLS — LOOSE LEAF. INCORPORATION BY REFERENCE. EVIDENCE.

Documents or papers not directly made a part of a will can only be incorporated by reference in the will when the papers or documents sought to be incorporated are complete, are in existence at the time of the drafting of the will and are clearly described in the will.

Loose leaf wills may be admitted to probate and sustained as valid when one of at least three essential conditions has been met — either the various sheets are physically attached, or connected by their internal sense by coherence or adaptation of parts, or identified by admissible oral evidence as being present at the time of execution.

Parol evidence of contemporaneous facts and circumstances may be received to show the connection between separate papers and that they constituted one instrument.

In the case at bar the majority opinion holds that the sufficiency of the evidence was for the presiding Justice below to determine. If there was any such evidence its sufficiency was a question of fact upon which the finding of the Court below was conclusive and not to be reversed by the Law Court. The majority opinion holds such to be the condition in this case.

On exceptions. A document of twenty-eight sheets purporting to be the will of Maud Gammans, of Belfast together with a book to be incorporated by reference as a part of the will was presented for allowance before the Judge of Probate of Waldo County. The will was allowed but the book rejected as a part thereof. Appeal was had before the Supreme Court of Probate and hearing held at the January Term, 1929. The will was there again sustained but the book rejected as not being properly incorporated by reference. Exception to this decree was seasonably taken by each of the appellants. Exceptions overruled.

The case fully appears in the opinion.

Francis W. Sullivan, for Sherburne H. Sleeper, Appl't.

Hugh D. McClellan,

Dunton & Morse, City National Bank, Exr.

Buzzell & Thornton, City of Belfast.

John F. A. Merrill, St. Margaret's Chapel & Protestant Episcopal Bishop of Maine.

Locke, Perkins & Williamson, Eben F. Littlefield, Appl't.

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

WILSON, C. J. On June 8th or 9th, 1926, Maud Gammans, a resident of Belfast, and an elderly lady, came to the banking rooms of the City National Bank of Belfast and entered the coupon room which is connected with the safety deposit vaults conducted by the

bank. She called in the cashier of the bank, who found her there with her safety deposit box open on the table furnished for the convenience of the bank's customers and lying on the table in front of her a package containing a number of sheets of paper of the size ordinarily used by ladies for social correspondence.

She then indicated to the cashier that the papers before her contained her will and requested him to call in two others to act with him as witnesses, which he did, calling in two women employed by the bank, who it appears were on very friendly terms with Miss Gammans and familiar with her handwriting. After the two young ladies entered the coupon room, Miss Gammans handed one or more of the sheets of the papers lying before her on the table to the cashier, and asked him to examine the sheet of paper on top, which contained only the usual clause of execution and of attestation to see if it was all right or in proper form, which he did, and pronounced it in correct form. The papers were then placed on the shelf in front of her with the page containing the clause of execution and attestation on top. She again declared it to be her will, signed her name and the witnesses all signed in the proper place, observing the usual formalities to conform to the statutes of this state. They then departed, leaving her there alone with her papers.

No one of the witnesses, so far as the evidence discloses, examined with any care any other of the sheets of paper than the one on which they signed, or could tell how many there were, although one of the witnesses testified that the last page was, at the time of the execution, numbered "28," but all testified that the sheets of paper lying on the coupon shelf which she declared to contain her will looked like those presented for probate as her will.

Miss Gammans died July 10, 1928. There was found in her desk a sealed envelope which was brought to the bank, and when opened was found to contain another unsealed envelope on which had been typewritten: "Will of Maud Gammans," and in which were twenty-eight sheets of paper, such as are ordinarily used by ladies for their social correspondence, and on each of which was printed at the top, "Miss Maud Gammans, 6 Church Street, Belfast, Maine"; and which, though not fastened together, were folded lengthwise and numbered in the upper right hand corner in consecutive order

from one to twenty-eight. The last sheet, numbered twenty-eight, was the one executed by her in the presence of the cashier and the two witnesses on June 8 or 9, 1926, and the remainder from one to twenty-seven, inclusive, provided for the disposition of her entire estate.

In the same envelope was also a small book marked "A" on the inside of the cover, and contained directions as to the disposal of certain articles of personal property. Among the provisions in the papers offered as her will, on page numbered twenty-six, was a direction to her executor to distribute among her friends and carry out the directions "as will be found in a little book marked A on inside cover, which will be found with my will."

The City National Bank as the executor named on one of the pages petitioned for the probate of the twenty-eight sheets of paper as the last will and testament of Maud Gammans, but did not include in its petition any reference to the little book "marked A."

The probate of these papers as a will was opposed by two or more of the heirs of Miss Gammans, on the ground that it was not proven that they were all part of the instrument executed by her on June 8 or 9, 1926, and lacked such coherence and adaptation of parts necessary to warrant a finding that they were all part of one instrument. It was also contended that if the will was allowed the little book marked "A" should also be allowed as part of the will, the effect of which would have been to destroy the will, as the two young ladies who acted as witnesses were named as beneficiaries in the little book marked "A."

The Judge of Probate after hearing allowed the twenty-eight sheets of paper as her will, but rejected the book as a part of the will. From his finding, the appellants, Sleeper and Littlefield, appealed, alleging as reasons of appeal: (1) that at the time of the execution of said alleged will, the said Maud Gammans was not of sound mind or of sufficient mental capacity to execute said alleged will; (2) that said alleged will if executed by said Maud Gammans was executed by her through undue influence, and is not the will of said Maud Gammans; (3) that said alleged will was not signed by the said Maud Gammans or by some person for her at her request

and in her presence; (4) that said alleged will was not subscribed in the presence of Maud Gammans by three credible witnesses not beneficially interested under said will; (5) that the said instrument purporting to be the last will and testament of said Maud Gammans was not legally executed and is not the same instrument alleged to have been executed by the said Maud Gammans and alleged to have been subscribed in her presence by the alleged witnesses thereto; (6) that by the terms of the alleged will there is incorporated therein and made a part thereof by said Maud Gammans a little book marked "A" on the inside cover; that two of the witnesses to said alleged will to wit: Alberta W. Farnham and Edna D. Crawford were at the time of the execution of said alleged will beneficially interested under said will; (7) that the said instrument is not the instrument executed by said Maud Gammans on June 8 or 9, 1926.

The appeal was heard in the Supreme Court of Probate at the January Term, 1929. At the hearing, the first, second and third reasons of appeal were abandoned. Counsel relied on the 4th, 5th, 6th and 7th, in substance claiming that it was not proven that the twenty-eight sheets of paper presented to and admitted to probate by the Probate Court as the last will and testament of Maud Gammans were the same papers that were in the coupon room when page numbered twenty-eight was executed and witnessed on June 8 or 9, 1926, or contained such internal evidence of coherence to entitle loose sheets of paper to be probated as a will, and, if so, that the little book marked "A" was properly a part of the will; and, therefore, the execution of the will was not witnessed, as required by the statutes, by three persons not beneficially interested therein.

The Justice presiding, however, ordered and decreed: (1) that the twenty-eight sheets of paper numbered from one to twenty-eight consecutively be allowed as the last will and testament of Maud Gammans; (2) that the book marked "A" was not a part of said will under the rules of law relating to the incorporation in a will by reference of a paper, document or memorandum, and thereupon dismissed the appeal, and remanded the case to the Probate Court for further proceedings.

The case comes to this court on exceptions to this decree by each of the appellants from the decree of the Judge of Probate and to the admission of certain testimony to the effect that the disposition of her estate as contained in the twenty-eight sheets of paper was all in the handwriting of the testatrix.

We think there is no merit in the exceptions to the admission of the testimony. There is nothing in the decree to show that the Justice presiding based his decree upon this evidence, and if, as alleged by counsel, it was immaterial, it did no harm; but we think it had sufficient bearing to render it admissible on the question of whether, if properly executed, it was her will, which the proponents were obliged to prove anew in the Supreme Court of Probate, and, at least, as tending in some degree to show that it was a connected and complete instrument.

Likewise there is no merit to the exception based on the ground that the rejection of the "little book marked A" as a part of the will by the judge below was error. If we were to lay down the rule in this state that papers or memoranda may be incorporated in a will by reference, the evidence in this case comes short of proving that the book "marked A" was in existence and compiled at the time the will was executed. *Fitzsimmons* v. *Harmon*, 108 Me., 456, 458. In fact there is internal evidence in the book itself that it was not. Where such incorporation by reference is permitted, compliance with the statute of wills requires that the paper or document sought to be incorporated by reference must be complete and in existence at the time and clearly described in the will. *Bryan's Appeal*, 77 Conn., 240; *Newton* v. *Seaman's Friend Soc.*, 130 Mass., 91; *Bemis* v. *Fletcher*, 251 Mass., 178; Est. of Young, 123 Cal., 339; 68 L. R. A., Anno. 354. This Court, therefore, can not say that the Court below erred as a matter of law in finding that the necessary conditions did not exist for incorporating this book into the will by reference.

The remaining grounds of exception can be stated as a single proposition, viz., that there was no evidence of certain essential requisites on which to base a finding that the twenty-eight sheets of paper offered for probate as the last will and testament of Maud Gammans were all present at the time of the signing of page num-

bered twenty-eight on June 8 or 9, 1926, and were executed by her as one instrument as and for her will.

It is well settled law that it is not essential to the validity of a will that the several sheets of paper on which it is written be fastened together in any manner. *Ela* v. *Edwards*, 16 Gray, 91; *Palmer* v. *Owen*, 229 Ill., 115; *Woodruff* v. *Hundley*, 127 Ala., 640; *Barnewall* v. *Murrell*, 108 Ala., 366; In re Taylor, 126 Cal., 97; *Sellards* v. *Kirby*, 82 Kan., 291; Re Johnson, 80 N. J. Eq., 525; Re Swaim, 162 N. C., 213; *Dearing* v. *Dearing*, 132 Va., 178; *Gass* v. *Gass*, 3 Humph. (Tenn.), 278; *Bond* v. *Seawell*, 3 Burr. R. 1773; Wikoff's App., 15 Pa., St. 281; 30 A. L. R., 424.

That such a practice is unwise, furnishes opportunity for fraud through substitution, and renders proof of execution difficult goes without saying, and requires careful scrutiny by the tribunal before which the issue of *devisavit vel non* is tried; yet as the cases cited, which by no means include all the decisions, disclose, wills are frequently allowed written on several sheets of paper, which through neglect or ignorance were never fastened together in any of the conventional methods.

In nearly all the decided cases, however, it is true, there was some internal evidence of relation between the several pages, and the courts have frequently used the expression: "It is sufficient if the several pages are connected by their internal sense, by coherence or adaptation of parts." Some courts have laid down the rule that the evidence of inter-relation or coherence between the several loose sheets of paper must be contained in the papers themselves, Seiter's Est., 265 Pa., 202; that they can not be shown to be part of one instrument by extrinsic evidence or circumstances.

The weight of authority, however, does not seem to favor such an extreme rule. Other courts hold that while coherence and adaptation of parts may alone be sufficient to satisfy the court that loose sheets of paper constitute one instrument, identification by oral testimony of the several pages as being present at the time of execution and accompanying circumstances may also be controlling factors in satisfying the court of the identity of several sheets of paper as the instrument executed by one as his last will and testament, when found together in the possession of the deceased

at his death, no evidence of fraud being offered, or any claim made that any fraud or substitution had been perpetrated. *Bond* v. *Seawell*, supra; *Palmer* v. *Owen*, supra; *Dearing* v. *Dearing*, supra; *Gass* v. *Gass*, supra; *Ela* v. *Edwards*, supra; *Jones* v. *Habersham*, 63 Ga., 146; In re Swaim's Will, supra; *Johnson's Case*, supra; *Harp* v. *Parr*, 168 Ill., 459; *Barnehall* v. *Murrell*, supra.

A rule laid down in many of the cited cases seems to cover the essential requirements, viz., that it is sufficient if it appears that all the sheets of paper offered as a will were in the room at the time of the execution by the testator and that the testator intended to execute them as one instrument and as his will. *Palmer* v. *Owen*, supra; *Harp* v. *Parr*, supra; *Ela* v. *Edwards*, supra; *Gass* v. *Gass*, supra; 1 Williams Ex'rs, 130; *Barnewall* v. *Murrell*, supra.

Fastening them together is, of course, the conventional method and is seldom questioned, but identification of each sheet or of a part, accompanied by circumstances from which it can fairly be inferred that all the sheets of paper were present at the time of execution, as well as internal evidence disclosing coherence or adaptation of parts, have also been held to be sufficient in cases where the pages of a will when found were not fastened together. *Bond* v. *Seawell*, supra; *Gass* v. *Gass*, supra; *Palmer* v. *Owen*, supra.

This court can not sustain the exceptions in this case simply because of the opportunity that such a will offers for fraud and a violation of the Statute of Wills, none being shown or claimed.

It must not be lost sight of that the case is not before this court for consideration *de novo*. It is here on exceptions, and the question raised by the exceptions to the decree below is not whether the evidence was sufficient to warrant the decree, but whether there was any evidence of the necessary requisites to establish the twenty-eight sheets of paper as the duly executed will of Maud Gammans. *Hazen* v. *Jones*, 68 Me., 343. Its sufficiency was for the Justice presiding below. "If there was any such evidence its sufficiency was a question of fact upon which the finding of the Court is conclusive, not to be reversed by the Law Court." *Eacott Appl't*, 95 Me., 522, 526; *Hazen* v. *Jones*, 68 Me., 343; *Brooks* v. *Libby*, 89 Me., 151; *Small* v. *Thompson*, 92 Me., 545; *Gower Appl't*, 113 Me., 156;

Cotting v. *Tilton*, 118 Me., 91, 94; *Packard App't*, 120 Me., 556; *McKenzie* v. *Farnham*, 123 Me., 152.

The evidence discloses that twenty-eight sheets of the testatrix's personal correspondence paper, containing a complete testamentary disposition of all her property, were found after her death in an envelope on which was typewritten the words "Will of Maud Gammans," which envelope was enclosed in a larger sealed envelope. The pages were all in her handwriting. Each page when found was signed by her and consecutively numbered from one to twenty-eight. The first page contained the usual introductory clause and the customary provisions for the payment of her funeral charges, debts, expenses of administration, and then follows the declaration: "I hereby dispose of my estate as follows in these sheets of paper." This page was followed by twenty-six pages containing an intelligent and discriminating disposition of all her estate, the twenty-eighth page containing only the clauses of execution and attestation. While the several pages, excepting the numbering at the upper right-hand corner of each page, may not all have been done at the same time, as some were apparently written in ink of different appearance from the others, and while the bequests on each page were complete in themselves, and no bequest occupied more than a single page, and no reference was made on any page to any other page, a considerable number of the pages related to the same subject matter, or contained in logical order provisions for the same general purpose.

The witnesses called to attest her will, while they examined none of the pages except the last, all testified that the pile of papers lying on the coupon shelf at the time of signing looked "just like" or "exactly like" the twenty-eight sheets presented for probate, and one of the witnesses testified that the pages were all numbered at the time of execution. This, however, may have been a matter of inference from the fact that the last page was numbered "28"; as he did not examine any other page than the one they signed, nor could he or the other witnesses tell from their examination at the time the number of pages that were present. The Court, however, may have been satisfied from the testimony, and from an examination of the several sheets of paper, that the last page was num-

bered "28" at the time of execution, and from the circumstances shown and internal evidence, that the other pages also at the time of execution had already been numbered in consecutive order and by Miss Gammans.

If the presiding Justice was satisfied from the evidence that the page on which the witnesses signed was at the time of execution numbered "28," a declaration by the testatrix at that time that the pile of papers before her was her last will — it being also so stated in her handwriting in the attesting clause — is tantamount to saying that her will which she was then executing consisted of twenty-eight pages.

An examination of the twenty-eight sheets of paper discloses that the ink with which the first page is numbered bears no resemblance to the ink in which the body of the first page is written, but has the same appearance as the ink used in numbering all the other pages and in writing the words, "Will of Maud Gammans" at the top of the last page and also the date of the execution and attestation, which in the ordinary course of events would be the last thing done after the will was completed to her satisfaction. There is, therefore, some internal evidence from which in the light of all the circumstances the judge below may have found that the pages had been all numbered prior to its execution on June 8 or 9, 1926; and if there is any evidence that the pages had been consecutively numbered in the hand of the testatrix prior to the time of the execution, it can not be said there is no internal evidence of coherence in the several pages. Its sufficiency is not open to the appellants to question before this court on exceptions to his decree. Slight difference in appearance of the numbers on any of the pages may have been accounted for by the amount of ink on or in the pen, or the manner in which the pen happened to be held at the time.

While no presumption of due execution of a will follows from merely producing an instrument purporting to be a last will and testament, proof that satisfied the Justice below that an instrument was duly executed by a testatrix, that it contained twenty-eight pages, that one was found in her possession at her death which contained twenty-eight pages and consecutively numbered from one to twenty-eight, inclusive, that at the time of execution she had

before her a pile of papers that looked "exactly like" the papers so found and submitted for probate, that the last page was numbered twenty-eight at the time of execution may be sufficient to warrant the court in drawing the inference that all the pages were present when the last page was signed and that it was then in its final form, and especially so if the court was satisfied from the papers themselves and attendant circumstances that the pages were prior to the execution numbered consecutively from one to twenty-eight, and no evidence was offered of any fraud or substitutions. *Gass* v. *Gass*, supra; *Bond* v. *Seawell*, supra; In re Wikoff Est. 15, Pa. St., 281.

While the Statute of Wills of this state, if not a direct heir, is at least a first cousin to the Statute of Frauds in respect that it requires all transfers of property by will to be in writing, and thus, perhaps, warrants by analogy, at least, an application of the rule that in case of separate sheets of paper to satisfy the statute there must be some internal evidence to connect them together to show that they relate to the same subject matter and to be complete in themselves, the Justice below may have found there was sufficient evidence in the case at bar to satisfy the rule even if it be applicable in its broadest requirements to wills written on several disconnected sheets of paper. Nor is the general rule always strictly enforced even under the Statute of Frauds. There are cases in which parol evidence of contemporaneous facts and of the circumstances in which the parties were, when certain papers were executed, has been received to show the connection between separate papers. *Jenkins* v. *Harrison*, 66 Ala., 345, 360; *Thayer* v. *Luce*, 22 Ohio St., 62; *Beckwith* v. *Talbot*, 95 U. S., 289; Browne on the Statute of Frauds, Sec. 350.

Every page of this will was signed by Miss Gammans. Every page was numbered consecutively and in such a manner that the Court may have found on what he deemed sufficient evidence that it was done prior to the time of the execution; the pages contained a coherent, intelligent, discriminating disposition of her entire estate. With some internal evidence of a completed and unified instrument any parol evidence of the facts and circumstances attendant upon its execution tending to show its due execution as a

single instrument was properly considered by the Court below. *Jenkins* v. *Harrison*, supra.

Again, as the Court observed in *Rees* v. *Rees*, L. R., 3 P. & D., 84, an English case, with reference to the presumption arising from the plight and condition in which a testamentary paper is found after the death of the testator "If any theory consistent with the validity of the will can be suggested which appears to the court as probable as the theory on which the argument for the invalidity is based, the will as found must be maintained." This is but an application to testamentary papers of the general principle applicable to contracts; presumptions are indulged to support not to defeat them. *Barnewall* v. *Murrell*, 108 Ala., 366, 379. It is a well-known policy of the courts to uphold wills and not destroy them. Certainly all the known facts in this case are as consistent with a valid execution of the twenty-eight pages found in Miss Gammans' possession at her death and in an envelope labelled "Will of Maud Gammans" as they are with the theory that the will was only partly completed at the time of execution or that substitutions have since been made therein in case it was complete and all pages present at the time of execution.

The attack upon this will is chiefly based on the contentions that none of the witnesses saw or could identify any of the pages except the last and there was no internal evidence of coherence of adaptation of part and that to permit loose sheets of paper to be probated as a will would promote fraud and affords an opportunity to violate the Statute of Wills by the substitution of pages after execution; but there is no evidence or even claim by the contestants that any fraud or substitution was practiced; nor is it essential that the witnesses should see and examine all the pages of a will at the time of execution, if the Court is satisfied from other evidence or the circumstances surrounding the execution, that all the sheets of paper offered for probate were present at the time of execution. Few wills are executed consisting of more than one page, where the witnesses can testify as to the number of pages or their contents, or actually identify them as the ones present at the time of execution. Such arguments were appropriately addressed to the Court below, but are not pertinent to the issues raised here on exceptions,

if there is any evidence on which the decree may rest, *Palmer* v. *Owen*, supra.

It is also urged that the fact that the pages were so written that one could be withdrawn and another substituted indicated an intent on the part of the testatrix to thus circumvent the Statute of Wills by making changes after its execution without again formally executing it, and this should militate against the allowance of these papers as her will. But it does not appear by any positive evidence that she had such a purpose in mind, or, if she did, that she ever carried it out. It was a very simple matter for her to again execute a will. She was her own scrivener. Witnesses were always available at her bank. So far as it appears, she had no reason to make any change surreptitiously. Again, such a purpose on her part is not to be presumed, but the contrary.

Upon the issue raised by the bill of exceptions we think it can not be said there was no evidence in support of the necessary findings of fact involved in the decree sustaining the will by the Supreme Court of Probate. The presiding Justice found it was sufficient to warrant his findings. Upon these questions his conclusions are not reviewable by this Court on exceptions.

In the cases cited by the appellants from other jurisdictions, the questions came before the Appellate Court on appeal or motion where a different question was presented and the evidence reviewed as to its sufficiency.

The mandate, however, in this case must be

Exceptions overruled.

PATTANGALL, C. J. — Dissenting.

I do not concur in the opinion of the majority of the court. A long and careful study of this case convinces me that the instrument purporting to be the last will and testament of Maud Gammans can not properly be admitted to probate under the laws of this state; and notwithstanding the high respect in which I hold the author of the opinion and those of my associates who have concurred with him, I regard it my duty not only to file my dissent but to discuss somewhat in detail the reasons which compel me to view the matter from an entirely different standpoint.

This case is of great importance. Not only is a very substantial fortune at stake, but two questions of law are involved, one of which has never been before this court, the other never directly passed upon. We are called upon to decide for the first time under what conditions a loose leaf will may be given effect. We are also to determine the requirements which permit incorporating by reference documents not directly made a part of a will. These are questions not to be lightly passed over. Upon the decision may depend the future distribution of estates in which property rights more extensive than those in issue in a hundred ordinary lawsuits are to be adjusted. Such a situation compels the exercise of meticulous care.

It is, of course, the purpose of courts of probate to give effect to the expressed desires of those who attempt to make testamentary disposition of their property, whenever it is possible to do so without transgressing legal limitations. At the outset of this case, the court is confronted with the proposition that there is no way in which this testatrix's apparent and definitely expressed plan for the disposal of her property can be carried out. Courts may be justified in straining the law when the result reached is that effect is given to the wishes of a deceased person, but there is no excuse for doing so when that result can not possibly be reached.

The documents presented here, and in which Miss Gammans undertook to dispose of her property, consisted of twenty-eight unattached sheets of note paper and a memorandum book. The bulk of her property is described in the loose sheets and a reference therein was intended to make the memorandum book a part thereof. This book was referred to in this language: "I direct my executors to distribute among my friends or carry out such directions as will be found in a little book marked A- on the inside cover which will be found with my will" (signed) Maud Gammans.

A little book marked on the inside cover A- was found with the loose sheets, after her death, in an unsealed envelope which in turn was enclosed in a sealed envelope. The book contained bequests to twenty-nine persons, among whom were two of the attesting witnesses to the alleged will. If the book could properly be incorporated in the will, probate must therefore be refused.

The opinion rejects the book and I agree with the conclusion of the majority of the court in that respect. I do not find, however, any "internal evidence" in the book indicating that it was compiled after the execution of the will; nor is that necessary. The evidence clearly indicates that the book was in existence at that time. The burden was on those who sought its consideration as a part of the will to satisfy the court not only that it then existed but that its contents also then existed. They fail to sustain this burden. There are certain entries in the book from which such a conclusion might be drawn; there are also entries from which the opposite might be argued, but nothing which really aids materially in deciding the question. All that one can say is that the burden of proof is not sustained. The book goes out of the case on that point.

The sole remaining issue is whether or not there was presented to the court below sufficient evidence of certain essential requisites on which to base a finding that the twenty-eight sheets of paper offered for probate as the last will and testament of Miss Gammans were all present at the time of the signing of the page marked 28, in the form in which they now appear, and were executed by her as one instrument as and for her will.

On that proposition the burden of proof rests on the proponents of the will. There is no presumption of law or of fact in their favor. They must prove their case.

Loose leaf wills may be admitted to probate even in jurisdictions where statutes similar to those in this state safeguard the execution of wills; but after an exhaustive examination of the authorities, we find no case in which such a will has been sustained unless one, at least, of three conditions has been met — either the various sheets were physically attached, or connected by their internal sense by coherence or adaptation of parts, or identified by oral evidence as being present at the time of execution.

These conclusions of law are in accord with the majority opinion. It is also agreed that the sheets were not physically attached. The discussion therefore narrows to two simple propositions — (1) Are the sheets connected by their internal sense, by coherence or adaptation of parts? (2) Are they identified by oral evidence as

being present at the time of execution? The burden is on the proponents to establish one or both of these propositions.

There is absolutely no evidence of identification. The witnesses were agreed that aside from the sheet which bore the attestation clause, it was impossible to identify a single sheet. They saw a "pile of papers"; the papers "look like" or "looked exactly like" those offered for probate. In other words, they resembled the ordinary note paper in common use in every home in Maine.

Whether or not there was anything written on the sheets which they saw at the bank, they did not know. Whether those sheets were numbered or not, they did not know. Whether the sheets which Miss Gammans had in her possession in June, 1926, were or not the sheets which were found in the envelope after her death, they did not know and frankly said so.

There is left, then, nothing for the proponents excepting connection by the internal sense, by coherence or adaptation of parts, upon which to base the right to probate of the collection of loose leaves which they claim constitute the last will and testament of Maud Gammans.

So far as contents are concerned, the sheets are entirely disconnected. Each stands alone, sufficient unto itself, wholly unrelated to the remaining sheets. Each is signed at the bottom "Maud Gammans." The only variance in this respect is that one of the sheets is also so signed in the middle of the page, two disconnected paragraphs appearing thereon.

Any sheet, or, in fact, all of them excepting those numbered one and twenty-eight, could be withdrawn, destroyed and substitutes inserted without affecting in any way the sense of continuity of the assembled document. The only possible evidence of connection is that the sheets are numbered one to twenty-eight.

The case of the proponents as set forth in the majority opinion rests on the proposition that the court below "may have been satisfied from the testimony and from an examination of the several sheets of paper, that the last page was numbered 28 at the time of execution and from the circumstances shown and internal evidence, that the other pages also at the time of execution had already been numbered in consecutive order and by Miss Gammans."

But there was no evidence that the last sheet was numbered twenty-eight at the time of execution and no evidence, external or internal, which could possibly aid the court in determining when the remaining sheets were numbered. Nor is there any intimation in the findings of fact by the trial judge that such a course of reasoning was followed.

An examination of the loose sheets indicates plainly that they were not all filled out at one time; nor were they all signed at one time; nor were the various sheets signed as they were filled out. In one instance the writing overrides the signature, showing very plainly that the sheet was signed and afterwards filled out. In brief, the alleged will is a piece of patchwork.

The mere fact that the instrument was not compiled at one time is not, of itself, important but it emphasizes the burden which the proponents must sustain of proving that it was all written previous to the time of execution. The case is absolutely bare of evidence on this point. There is nothing from which one would be justified in forming a serious opinion as to whether or not any single sheet excepting that marked with the number twenty-eight was in existence when that sheet was signed. So far as evidence goes, the first twenty-seven sheets may all have been signed and filled out at any time during the two years that elapsed between the date of the signing and the date of Miss Gammans' death.

The case stands then, unique in the history of loose leaf wills admitted to probate in jurisdictions where a statute such as ours governs, no physical connection of the parts, no coherence or continuity of thought to join together the separated portions and no pretense even of identifying a single sheet save that which bore upon it the attestation clause alone. To permit the probate of such a will, to even entitle this collection of disjointed, disconnected fragments, a will, is to do violence to all precedent and to open wide the door of opportunity to fraud.

The majority opinion stresses the proposition that the presiding Justice below found for the proponents and reiterates the statement frequently appearing in our reports in connection with equity appeals and cases coming to this court on exceptions from the

Supreme Court of Probate that if there is "any" evidence in support of the court's finding, it must stand.

The impression is given that when a judge becomes a trier of fact, his decision stands on a higher plane than that of a jury exercising like authority. I do not regard this as the correct view. It has neither logical nor historical basis. Findings of fact by triers of fact should only be set aside when they are unsupported by evidence or are founded on a misconstruction of evidence or on a plain misapprehension of its effect and probative force.

The word "any" is misleading. The scintilla rule is not in force in this state. Whatever may be said of the decision below and, in fairness, it should be remembered that in the hurry and confusion of a *nisi prius* term, the presiding Justice was called upon to rule on questions never before submitted in this jurisdiction and rarely coming within the experience of any member of the Bar or Bench of the country, there seems no excuse here, after mature deliberation, to reach a result inconsistent with precedent and to base the reasoning which leads to that result upon one or two isolated bits of testimony which a careful reading of the record shows were entirely inconsistent with the evidence as a whole and inconsistent with the remaining statements of the witness from whose testimony these fragments are culled.

The proponents utterly failed to sustain the burden of proof on either of the propositions, one at least of which they were obliged to prove in order to entitle the documents presented to be admitted to probate as a will. Exceptions should be sustained.

FARRINGTON, J. concurs in the above dissenting opinion.

INEZ K. ADAMS, ET ALS

vs.

ABBIE C. KETCHUM AND ABBIE C. KETCHUM, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF GEORGE R. KETCHUM.

Aroostook. Opinion July 11, 1930.

EQUITY. TRUSTS. EVIDENCE.

Suspicion, surmise and supposition can not take the place of evidence and should not be permitted to determine and control the rights of parties, nor do they constitute sufficient grounds upon which plaintiffs in a bill in equity seeking to establish the existence of a trust can base the right to a decree in their favor. They must prove their case by the usual rule as to the weight of evidence under the allegations in the bill.

The findings of a single Justice in equity upon questions of fact necessarily involved are not to be reversed upon appeal unless they are clearly wrong. The burden is always on the appellant to satisfy the Court that such is the fact.

Otherwise the decree appealed from must be affirmed.

In the case at bar a thorough examination of the bill and answer and consideration of all the testimony and the entire record together with the exhibits and the facts therein disclosed with all inferences that may be properly drawn from the facts, disclosed clearly that the plaintiffs failed to establish their case at the hearing before the sitting Justice by that degree of evidence that it was their duty to have produced. There was no error of the sitting Justice in dismissing the bill.

On appeal by plaintiffs. A bill in equity seeking to establish that the defendant held certain real estate and government bonds in trust for the plaintiffs and asking that the real estate be conveyed and the bonds transferred to them. To the decree of the presiding Justice dismissing the bill plaintiffs filed appeal. Appeal dismissed. Decree below affirmed.

The case fully appears in the opinion.

H. T. Powers, for plaintiffs.

Carl A. Weick,

Cook, Hutchinson, Pierce & Connell, for defendant.

SITTING: DUNN, STURGIS, BARNES, FARRINGTON, JJ.
PHILBROOK, A. R. J.

FARRINGTON, J. This was a bill in equity asking that the defendant be decreed to hold certain real estate and government bonds in trust for the plaintiffs and that she be ordered by the Court to convey the real estate and to transfer and deliver the bonds to the plaintiffs.

The case came to this court on appeal from a decree dismissing the bill.

It will be helpful to review the admitted facts, as they appear in chronological order, covering a long period of time, as well as a concise summary of the testimony of witnesses pertinent to the main issue in the case.

On January 16, 1883, Charles W. Clayton, the father of Inez A. Ketchum, Sarah E. Clayton, his wife, and Charles F. Clayton, a son, and a brother of Inez A. Ketchum, severally named as grantors in the deed and whose source of title does not appear in the printed record of this case, gave a mortgage for $4,000.00, with a one year foreclosure clause, to the Houlton Savings Bank, covering certain real estate located in the Town of Ashland in Aroostook County, and other real estate in the Town of Masardis in the same county.

On February 10, 1890, Charles W. Clayton conveyed to George R. Ketchum, subject to the Houlton Savings Bank mortgage, one undivided half part of certain described land which from the examination of the description contained in the deed apparently embraces the bulk, if not all, of the property mortgaged as above indicated, and referred to it as "property deeded to myself (Charles W. Clayton) by Sarah E. Clayton by her deed dated 29 December 1883." The deed clearly covers the property described in the bill.

A claim of foreclosure by the Houlton Savings Bank was signed by its attorneys, under date of February 15, 1890, five days after the conveyance of the one-half interest by Charles W. Clayton to George R. Ketchum. The method of foreclosure followed was that of publication, the dates being February 26, March 5, and March 12, 1890, duly recorded in the Registry of Deeds on March 15, 1890.

On December 31, 1890, the Houlton Savings Bank mortgage was assigned to Inez A. Ketchum, special mention being made of the rights acquired under "the foreclosure thereof." There was, at the hearing below, no evidence whatever throwing any light on the circumstances surrounding this transaction, and there is none, at this time, except the fact that the assignment was made out and recorded in her name.

On June 20, 1892, the period of redemption having expired, Inez A. Ketchum by deed in which her husband, George R. Ketchum, joined, mortgaged to the Houlton Savings Bank for the sum of $3,000.00, with one year foreclosure clause, the same parcels of land described in the January 16, 1883, deed of mortgage to the Houlton Savings Bank above referred to and assigned to her. The only difference in the description of the property is that the mortgage to the Houlton Savings Bank given in 1883 covered Lot 58 in connection with Lot 59 in Ashland, and had a total acreage of 624 in the lots first enumerated instead of 464 as in the mortgage from Inez A. Ketchum which did not include Lot 58.

On July 5, 1892, Inez A. Ketchum, in a deed in which also her husband joined, gave another mortgage to the Houlton Savings Bank for the sum of $1,300.00, with a one year foreclosure clause, and in this mortgage the description was the same as in the first mortgage given by her.

The notes secured by the two mortgages were signed by George R. Ketchum as well as by the mortgagor.

Inez A. Ketchum died intestate October 3, 1892, leaving her husband, George R. Ketchum, and, as her only heirs at law, four minor children, Rowena Ketchum, Inez K. Adams, Ralph Ketchum, and Charles C. Ketchum. Rowena died unmarried, so that any interest that she might have had in any real estate left by her mother descended one half to her father and the other half to her sister and brothers. There was no administration on the mother's estate, a fact significant of absence of rights and credits belonging to the deceased, at that time at least.

By intention of foreclosure dated August 4, 1894, the Houlton Savings Bank began foreclosure proceedings on the first mortgage. This foreclosure was by three weekly publications under

dates of August 8, August 15, and August 22, 1894, recorded August 23, 1894.

On the second mortgage given by Inez A. Ketchum foreclosure proceedings were begun by publications covering the same dates as on the first mortgage, the record being also August 23, 1894.

Just before the period of redemption was about to expire the Houlton Savings Bank, on the 7th day of August, 1895, assigned the two mortgages to Albert S. Eustis and Frank Aldrich of Cambridge, Massachusetts.

On August 10, 1897, the period of redemption having expired, Albert S. Eustis and Frank Aldrich, for the sum of $2,000.00, sold a portion of the land to George B. Hayward of Ashland, and by an undated deed in which the acknowledgment is December 14, 1898, they sold another parcel to the same person for $2,500.00.

George R. Ketchum, as an insolvent debtor, on June 14, 1898, returning "a full list of all the real and personal estate in the ownership, possession or enjoyment of, or under the control of said debtor, and all such estate to which he was in any way entitled or interested," disclosed no real estate.

On October 24, 1902, Albert S. Eustis and Isabelle A. Edwards, residuary legatee of Frank Aldrich, sold to George R. Ketchum for the sum of $8,000.00 the unsold balance of the property which came to them by virtue of the aforesaid assignments.

On August 7, 1903, George R. Ketchum conveyed to Charles F. Clayton fifty acres, part of Lot No. 36 in Garfield Plantation, which is described in paragraph one of the plaintiffs' bill.

On August 20, 1903, George R. Ketchum conveyed to the said Clayton one-half part in common and undivided of the timber lands situated in Township 11, Range 6, described in paragraph one of the plaintiffs' bill.

On July 20, 1910, Rowena Ketchum, one of the daughters, died unmarried and intestate.

On July 23, 1910, the deed from Albert S. Eustis and Isabelle A. Edwards to George R. Ketchum was duly recorded.

On April 2, 1917, George R. Ketchum conveyed to Linnie C. Mooers parts of Lots numbered 55 and 56 in Ashland and part of

Lot numbered 36 in Garfield Plantation, said lots being described in paragraph one of the bill.

On January 17, 1919, George R. Ketchum and his three children, Ralph Ketchum, Charles C. Ketchum and Inez K. Adams, conveyed to Louis K. Tilley Lot 58, which was not included in the mortgages of Inez A. Ketchum to the Houlton Savings Bank above referred to. The language in the deed at the end of the description is "meaning and intending especially to convey our rights as heirs of Inez A. Ketchum aforesaid, under the said assignment of said mortgage." (Referring to the assignment to their mother by the Houlton Savings Bank on December 31, 1890.)

On July 10, 1920, George R. Ketchum and Charles F. Clayton conveyed to Garfield Lumber Company for $110,818.00 all the timber lands described in paragraph one of the bill.

Sometime after this sale to Garfield Lumber Company in 1920, George R. Ketchum gave to each of the three children living the sum of $3,000.00. The testimony of the daughter, Inez K. Adams, showed that these gifts were made somewhere near Christmas time of the year in which the sale was made.

George R. Ketchum died March 5, 1927, leaving a will, which has been duly probated, under which his widow, Abbie C. Ketchum, took his entire property.

It was admitted as one of the allegations in the bill that prior to George R. Ketchum's decease he had converted into United States Government bonds with a par value of $37,000.00 the funds received from the sale of the timber lands. These bonds remained at his death a part of his estate.

At the hearing Mr. Ludwig, the Assistant Treasurer of the Houlton Savings Bank, and first witness for the plaintiffs, testified in regard to the first loan made by the Bank to Inez A. Ketchum that there was a cancelled check payable to George R. Ketchum, stating that "On June 20 there was a check issued in the amount of $1500. against a loan made at that time of $3000. The balance presumably being paid to him in cash." The books, according to his testimony, showed that the balance was paid to some one in cash but that there was no record to show to whom it was paid.

His statement that the balance was "presumably" paid to

George R. Ketchum is entitled to no weight, it being at best only an expression of opinion.

With reference to the money loaned on the second mortgage, the same witness testified that "There was a second loan in the amount of $1300., two checks on the date of July 5, 1892, and $1000., two $500. checks were paid George R. Ketchum."

The same witness also testified that the records disclosed that on August 7, 1895, the Bank received "in payment of the loans" the sum of $4300. and that the record "simply shows that it was assigned on that date to Eustis & Aldrich." This clearly referred to the two mortgages.

It is in evidence from exhibits that the $1,500.00 check was endorsed by G. R. Ketchum, payable to E. S. Coe or order, who was a lumber owner and an agent for timber land owners, handling lands in the vicinity of Ashland. It was also in evidence that the two $500.00 checks above referred to on the second loan were endorsed by G. R. Ketchum, payable to E. H. Blake or order, and that Mr. Blake owned land in the vicinity of Ashland. It was also in evidence that George R. Ketchum was engaged in "lumber cutting."

This is the sum total of the evidence in the case bearing on the contention that the mortgages securing the two loans were made at the request and for the benefit of George R. Ketchum, the husband of the mortgagor, and that the proceeds of the mortgages were paid to him and expended by him in his business. There is no evidence that the $1,500.00 balance on the first mortgage was received by Mr. Ketchum and no evidence, other than as above indicated, that any of the money for which checks were issued to him was for his own benefit distinct from that of his wife.

The next witness for the plaintiff was a former member of the firm of Eustis, Aldrich & Co., a partnership formed in 1899. Prior to that, from 1884 to the time of the partnership, the witness was in the employ of the firm of Eustis & Aldrich. The witness stated that "approximately in 1895" he heard "a portion at least" of conversation between Mr. Ketchum and the members of the firm of Eustis & Aldrich, but on being asked to relate what he could recall of what was said, he stated, "I can not recall the conversation."

He stated that Mr. Ketchum "borrowed from Eustis & Aldrich

money to take up this mortgage that was running out, given to the Houlton Savings Bank."

This testimony, given more than thirty years after the occurrence of the event about which he testified, can carry little weight after the lapse of so many years, and especially in view of the fact that it is a statement of the witness's own present conclusion, after time had necessarily dimmed his memory, and in this connection, as well as with reference to all of his testimony, it must be borne in mind that he stated that he did not hear any portion of the conversation in regard to the mortgages.

He stated that Eustis & Aldrich at that time took from Mr. Ketchum notes, the amount of which he could not recall, but that those notes were in their possession when the new firm was organized in 1899; that the books of the old firm of Eustis & Aldrich had been destroyed and that only two books remained, which he had in his possession at the time of the hearing, and when he was giving his testimony; that Mr. Ketchum was in the starch business, as was also the firm of Eustis & Aldrich who "furnished the money"; that these matters were carried on the record as "G. R. Ketchum, loans and indebtedness," or as "notes and indebtedness."

He also stated that, according to inventories of the old firm of Eustis & Aldrich made as of June 1 or May 31 of each year, it was shown that in 1893 Ketchum owed the firm of Eustis & Aldrich $240.00; in 1894, $23.33; in 1895, $7,140.00; that no inventory was made in 1896, but that two years were taken in 1897, when it showed that Ketchum was indebted to the firm in the amount of $13,500.00, and in 1898 the amount was $12,000.00, and in 1899, $10,608.82.

The witness testified that the account was "marked settled" but that the record did not show when it was settled; moreover, the record before this court discloses no evidence showing when it was settled.

After stating that Eustis & Aldrich held title to lands in Garfield, the same witness, in answering a question as to whether he knew what was done after the account was settled, stated, "It was deeded back to G. R. Ketchum." This was also a statement of the witness's conclusion after the same long lapse of time, and should

be regarded as no more than an expression of his own opinion that it was "deeded *back*," words which, of themselves, might suggest the inference that the reconveyance was in furtherance of the design, proof of which was fundamentally necessary to the success of the plaintiffs' claim.

After this witness had testified, counsel for parties involved agreed upon the following statement, which was made to the court, and which is a part of the record of the case:

"It is admitted that in the winter of 1898-1899 there was cut on the lands under plaintiff's bill, under permits issued by Eustis and Aldrich, a total of 4,751,801 feet of lumber, the stumpage on which at current rates was approximately $12,000. In the winter of 1899-1900 lumber was cut on the premises described in plaintiff's bill, the stumpage on which at current rates was approximately $3,300. In 1900-1901 about 1,000,000 were cut on the same premises, the stumpage of which at current rates would be approximately $3,000."

On the foregoing facts, together with the bill and the answer, the sitting Justice, after due hearing, signed the following decree, dated March 28, 1930:

"The evidence in this case discloses no dispute concerning such matters of actual fact as are susceptible of direct proof at this time under the rules of evidence. There is a sharp conflict with regard to the inferences which may properly be drawn from the proven facts.

"Without considering the defense of laches, although by no means dismissing it as unworthy of serious attention, I find that the plaintiffs fail, either by evidence or fair inference, to sustain the burden, which would entitle them to the relief they seek. Decree accordingly."

The plaintiffs claimed that from the facts proved and from the fair inferences from those facts a constructive trust, as alleged in their bill, had been established in their favor as the heirs of their deceased mother, Inez A. Ketchum, and that the trust property consisted of seven-eights in common and undivided of the farm unsold and of $37,000.00 United States Government bonds, proceeds of other real estate sold by their father prior to his death.

The defendant, a sister of the deceased Inez A. Ketchum, claimed title to the real estate and bonds under the will of George R. Ketchum, her deceased husband, and contended that from the facts above stated and from the fair inferences from those facts no trust has been established, making the further contention that if the plaintiffs ever had any rights they had lost them by their own laches.

The plaintiffs claimed that after the death of Inez A. Ketchum, George R. Ketchum and their children as above stated became, as husband and heirs at law respectively, co-tenants of the real estate subject to the mortgages, and that as a co-tenant with his children, George R. Ketchum, when he acquired title under the deed from Eustis and Isabelle A. Edwards in 1902, took it in trust for the benefit of all his co-tenants. We express no opinion upon the question as to whether or not a husband, with right by the courtesy under the statute in force in 1892, can be co-tenant with the heirs at law of a deceased wife. If such co-tenancy did as a matter of law exist at the death of Inez A. Ketchum, when the right of redemption under the foreclosure of the Bank mortgage expired, the legal title vested completely and absolutely in Eustis & Aldrich, assignees of the mortgages, so that any co-tenancy which might have existed prior to that time was no longer in existence, having been wiped out by the expiration of the redemption period which deprived them all of any title they may have had.

It is unnecessary to discuss the contention of the plaintiffs that payment by one of two joint debtors, although it be made by him in the form of a purchase and accompanied by an assignment of the debt, may, or may not, still be a discharge of the debt, because, in our opinion, the plaintiffs have failed to sustain the burden resting on them to connect George R. Ketchum with the payment of the mortgage debt by way of the assignment so as to make him in effect the assignee.

The allegation of the bill that Mr. Ketchum, in his dealings with Eustis & Aldrich, was "contriving and intending to take title to the real estate and deprive plaintiffs, who were then minors, of their interest therein" has, in our opinion, not been sustained by the evidence.

In the deed from Eustis and Isabelle A. Edwards to George R. Ketchum in 1902 the consideration named was $8,000.00. The Ketchum mortgages to the Houlton Savings Bank totalled $4,300.00 face value. Assume that on the notes thus secured no interest whatever had been paid by the mortgagor or her husband, a reckoning of interest on the notes from the date they were given up to October 24, 1902, the date of the conveyance to Ketchum, taking into account as partial payments the $4,500.00 received from the two sales of land to George B. Hayward, discloses the significant result that the $8,000.00 paid by George R. Ketchum is double the amount that would have been due, had the situation existed, as claimed by the plaintiffs, that Ketchum had made an arrangement with Eustis & Aldrich to take over the mortgages and hold the property for his benefit. This result, showing a profit as substantial as one hundred per cent, must be placed in the scales as weighing against the plaintiffs' claims.

Suspicion, surmise and supposition can not take the place of evidence and should not be permitted to determine and control the rights of parties, nor do they constitute sufficient grounds upon which plaintiffs in a case of this kind can base the right to a decree in their favor. They must prove their case by the usual rule as to the weight of evidence under the allegations in the bill.

The Court can not disregard its oft repeated holding that the findings of a single Justice in equity upon questions of fact necessarily involved are not to be reversed upon appeal unless they are clearly wrong and that the burden is always on the appellant to satisfy the Court that such is the fact and that otherwise the decree appealed from must be affirmed. *Young* v. *Witham*, 75 Me., 536; *Gardiner Savings Institution* v. *Emerson et al*, 91 Me., 535; *Sposedo* v. *Merriman et als*, 111 Me., at page 538; *Merriman* v. *Jones*, 126 Me., 131.

After a most thorough examination of the bill and answer and taking into consideration all the testimony and the entire record in the case, together with the exhibits and the facts as therein disclosed, and together with the inferences which may be properly drawn from the facts, we are unable to escape the conclusion that the plaintiffs not only have failed to satisfy this Court of error of

the sitting Justice in dismissing the bill but that they failed to establish their case at the hearing before him by that degree of evidence which it was their duty to have produced.

In view of our previously expressed conclusion, it also becomes unnecessary to discuss the question of laches, which it is stoutly contended by the defendant exists in this case, except to say that in our opinion had there been sufficient facts and inference to warrant a contrary finding on the main issue, the facts disclosed give much weight to that contention.

The entry will therefore be,

Appeal dismissed.
Decree below affirmed.

STATE OF MAINE *vs.* THOMAS RIST.

Penobscot. Opinion July 12, 1930.

CRIMINAL LAW. EVIDENCE.

On appeal in a criminal cause it is the province of the Law Court to review the case as presented in the printed record to see whether or not there is sufficient believable evidence to justify the jury in its finding.

In the case at bar the Court concludes that the jury might well have found beyond a reasonable doubt, that the respondent operated the automobile with the degree of recklessness or carelessness which would prove him guilty of manslaughter.

On appeal. Respondent was tried at the September 1929 term of the Superior Court for the County of Penobscot, on an indictment charging manslaughter. The jury rendered a verdict of guilty. A motion for new trial was filed by respondent, which was refused by the Trial Court. Appeal was thereupon taken. Appeal dismissed. Judgment for the State.

The case fully appears in the opinion.

Albert G. Averill, County Attorney, for the State.
Edward P. Murray, for respondent.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.
PATTANGALL, C. J., FARRINGTON, JJ., NON-CONCURRING.

BARNES, J. After trial before the Superior Court for Penobscot County, in September, 1929, on an indictment charging manslaughter, and after verdict of guilty, respondent moved for a new trial on the usual grounds.

Hearing was had on the motion: it was overruled, and appeal was taken to the Law Court.

No exceptions were taken to the admission of evidence, or to the instructions of the Court.

The greater part of the evidence submitted to the jury is uncontradicted. Lena Young of Bangor was killed when a five-passenger closed car, in which she was riding, came to a stop in a roadside ditch, and fell over on its right side. The accident occurred, on Broadway, about a mile and a half from the Bangor Post Office building, between three and four o'clock on the morning of May 28, 1929.

When the car was righted the head and upper portions of the woman's body were found to have been on the ground, under the right, fore door of the car. Since the door was closed this part of her body must have protruded through the window of the fore door before the car tipped to its side.

Part of her body and her lower limbs were within the car, but she dropped through the window to the ground as the car was lifted, apparently dead. At the Eastern Maine General Hospital, shortly after the occurrence of the accident, she was pronounced dead by a physician who examined her, and who testified that death was caused by internal injuries of the left chest and a fracture at the base of the skull, or by either of such injuries.

The car was owned by the woman. In company with a woman, variously termed, Mrs. Pushard, Miss Pushard and Helen Welch, she met the respondent soon after midnight, on Exchange Street,

in Bangor, where her car was parked, and he drove the woman to a camp, on Pushaw Pond, a distance of seven or eight miles.

Francis Rist, a brother of the respondent, with three or four other men, arrived at the camp very soon after respondent's party; and the testimony is that the two women amused themselves in the music room while the men stayed in the kitchen, until about three o'clock, at which time the brother's party drove away, and the respondent and the two women took the road in the direction of Bangor, respondent again at the wheel. It was past daybreak when the return journey began.

At a point on the Pushaw Pond road, about three and a half miles from the scene of the accident, and about a quarter of a mile from the junction of this road with Broadway, a resident was roused from his bed, as he testified, by "loud talk as though there was an argument going on; a lady was doing most of the talking, and above my house is a rock; the piece of road at that time hadn't been fixed for spring and the cars had to go pretty slow so I got out of my bed and went to the window, the window was up, and looked out through and watched them go by. There was Mr. Rist and the two ladies in the car." He testified that respondent was driving; that it was "all daylight"; there were no lights on the car; and that respondent and both women were in the front seat. It was twenty-five minutes past three, by his clock, when the car passed his house.

When next seen, the car passed the Coffin and Wood houses, on Broadway, about a mile and a half from the city of Bangor.

The road at this point is a cement-surfaced highway, running nearly south; straight, somewhat down grade; with cement surface eighteen feet wide, gravelled margins about two and a half feet wide, and slopes to ditches, that on the east side, below the Wood driveway, termed a deep ditch, and the westerly ditch, a foot or a foot and a half lower than the cement roadway. Southerly from the houses and on the east side stood a mail-box, on a post.

The Wood residence is on the east side of the road. Mrs. Wood testified that she had just been up with the baby, when she heard the "roar of an engine," "heard the car coming and heard it go by the house and immediately heard the crash."

Mr. Coffin and his mother, living nearly opposite the Wood

house, were in their yard, on the south side of their house, quelling a disturbance of their hens by the dog when they heard a roaring noise. Mr. Coffin saw the car as it crossed to the west side of the road and plunged into the ditch.

Mrs. Coffin did not see the car till it was tipped over in the ditch. She testified, "the noise and the crash of the mail-box being struck was instantaneous; it was almost right together, you know, — the noise sounded like brakes being applied; that is what it sounded like, and then right on top of that was the crash of the mail-box being knocked over, and the crash of broken glass — it was all in a minute, in an instant."

The house cut off her view of the car as it approached from the north, but she testified she heard the brakes being applied before the car came down where she could see it.

The respondent went to the Coffin house, and Miss Pushard to the house of Mr. Green, said to be five hundred feet north of the car, for help. Mr. Coffin accompanied the respondent to the car, calling Mr. Wood. Mr. Green came and the car was righted, and as Lena Young's body fell into the ditch, Mr. Green made some examination, pronounced the woman dead, and the party awaited the arrival of officers, summoned by telephone, from the Coffin house.

Sergeant Beck and officer Peterson, of the Bangor police, got notice of the accident at 3.40 A.M., and made a quick run out with the ambulance. Captain Holmes and driver McClay followed, and arrived "just shortly after the Sergeant."

Several of the people above enumerated observed and examined what they call the wheel tracks of the car. Mr. Coffin, who saw the car cross the road from the east side, and who assisted in righting it up, followed its tracks back from the pool of blood and the shattered glass of the two right doors, and found on the cement, where the car ran diagonally from the east side westerly, two black tracks, as "where rubber dragged." Following further, the tracks of wheel or wheels of one side of the car ran southerly down the road, on the gravelled east margin of the road, a distance of about fifty feet from the broken post of a mail-box to where it swerved to the west side of the road. On portions of the easterly margin of the road there was grass. Mr. Coffin testified that where the wheels made

tracks in the grass the tracks were black, "where the brake was dragging, dug up the grass."

He testified the mail-box post was broken off, and the body lay some eighteen feet southerly of the stump of the post. Also that on the left side of the car, about under the riding light, the machine showed a "big dent where it hit the mail-box."

From the mail-box stump tracks were followed northerly to a point about opposite the Coffin house, and, as the car ran, about 115 feet from its stopping place in the ditch.

Chief Crowley, of the Bangor police, was notified of the accident at 8.45 in the morning and at once visited the scene.

He testified to the marks on the roadway, called tracks by Mr. Coffin. He made measurements, and had photographs made. The latter were admitted at the trial but not presented to this Court. Mr. Crowley found the "tracks" still plainly visible, termed the dark tracks "brake tracks," and testified to the mark made by the car wheels on gravel and grass on the east side of the road.

He said, on the grass the grass roots were pulled out.

The photographer, Mr. Barry, went to the scene with Mr. Crowley, and his description of the surface of the road is practically the same as the others.

It is the theory of the State that the respondent was driving the car as it passed the Coffin house, and that the course of the car from the Coffin house to its resting place in the ditch, the evidence of the broken mail-box on the east side of the road, and the evidence of brake application, demonstrate that respondent drove the car with such utter disregard of the rights of his companions that he is guilty of manslaughter.

One of the witnesses who assisted respondent in righting the car testified that respondent's breath had the smell of liquor. Two testified that while awaiting the arrival of the officers whom he had summoned, and after hearing Mr. Green say the woman was dead, respondent cried out that they should get a rope and hang him before the cops arrived, and that he said he had killed Lena. The nurse who received the body at the hospital testified that he there said he had killed Lena, and, "I should have a rope put about my neck. That is what I deserve."

The other woman occupant of the car did not testify.

The respondent took the witness stand and testified that at the time of the accident, and for some miles of the course before the accident, the Young woman drove the car. He told the jury that he drove down the Pushaw Pond road to its junction with Broadway, and turned north, away from Bangor, and continued northerly for "maybe half a mile"; that the Pushard woman was in the back seat; that after driving northerly on Broadway for a half mile, he stopped, turned the car, and drove a little way southerly and then the Young woman wanted to drive.

He said he stopped the car, got out and seated himself on the right of the front seat, and the woman drove from that point continuously to the scene of the accident; said he was tired and drowsy; and that the first untoward happening sensed by him was the hitting of the mail-box.

His testimony in direct is as follows:

Q. "Then what happened?
A. So, she was very nervous, the first she come across me, which my window was open.
Q. Now, you were sitting down and she was sitting down?
A. Yes.
Q. Now, go careful so the jury will understand. After hitting the mail-box, now tell — did the car move?
A. Yes, the car moved, so she came across me.
Q. To your right, over your —?
A. Yes, over me. The window was open, so I tried to reach for the wheel and grab the brake.
Q. Then what happened?
A. The car tipped.
Q. Did you get a hold of the wheel or brake?
A. I got hold of the brake as good as I could.
Q. When she went across you had she lost control?
A. She must. She lost control of the car.
Q. And went across and in the ditch?
A. In the ditch.
Q. Now, what about the speed?

A. The car wasn't going over twenty miles an hour.
Q. Wasn't going over twenty miles an hour?
A. Twenty or twenty-five miles an hour."

In cross examination he said that after hitting the mail-box the car was going only about ten or twelve miles an hour. The record gives no detailed description of the appearance of the car after the accident, but Mr. Coffin describes it as "dented and banged up in general," and he stated that the gutter on the right side, that carries the water which may drip from the roof, "was shaved right off as if it had come against something hard, rocks or something."

Asked about the dead woman's hair, when describing the body, Dr. Milliken said she had brown hair which had been bobbed and was quite long, and that on the left side just sticking into the hair was a black hairpin.

Sergeant Beck found in the car, "in the seam in the roof," a mass of brown hair, on a hairpin. Officer Holmes saw it there, "right over the front door, in the edge of the top of the car."

Chief Crowley said, "right at the top, right door, of the car at exactly in the center there was a hairpin, bent and drove in, with a tuft of brown hair wrapped round it."

The respondent got out of the car through the left front door, and testified that he pulled the Pushard woman from the rear of the car into the front and out through the front door.

Except for the respondent's version the evidence is wholly circumstantial.

It must be assumed that the jury were conscious of the gravity of the indictment, and of the peril in which the respondent stood before them.

It must be that they refused to believe that Rist was not driving the car when his companion was killed.

That he was unnerved by the horrible ending of the pleasure drive was but natural. That when told that his companion was dead he said "I've killed Lena," does not prove his guilt.

But from this expression, coupled with the suggestion that he deserved, or ought, to have a rope around his neck, the jury might well assume that in fact he was driving at the end of the trip, and

that his testimony was an "explanation," and not a true recital of the incidents of the drive.

It must be concluded there is no reasonable doubt that he operated the car with the degree of recklessness or carelessness which proved him guilty of manslaughter.

This Court is not trying the case. It is for us to review the evidence, as presented in the printed record and to say whether or not we find the verdict wrong.

Suffice it to say that we do not find in the record what would justify us in setting aside the verdict.

Appeal dismissed.
Judgment for the State.

STATE OF MAINE *vs.* EARL BEATTIE.

Aroostook. Opinion July 22, 1930.

INDICTMENT. CRIMINAL LAW. BRIBERY. PLEADING AND PRACTICE. R. S., CHAP. 123, SEC. 5.

Motion in arrest of judgment will lie where error appears on the face of the record even though the question might properly have been raised on demurrer.

The essential elements of the crime of bribing or offering to bribe a public officer, include a knowledge on the part of the accused of the official character or capacity of the person to whom the bribe is offered, the fact that the thing offered is of some value and that it was offered with intent to influence his official action.

An indictment for bribery must specifically set forth respondent's knowledge of the official character of him to whom the bribe is offered.

An indictment must contain an allegation of every fact which is legally essential. If the intention with which an act is done be material to constitute the offense charged, such intention must be truly laid in the indictment, and it must be laid positively. The want of a direct allegation of any thing material, in the

description of the substance, nature or manner of the offense, can not be supplied by any intendment or implication whatsoever.

Form of indictment in "Directions and Forms for Criminal Procedure for the State of Maine," Whitehouse and Hill, page 70, applicable to Section 5, Chapter 123, R. S. 1916, is defective.

Respondent tried on an indictment for bribery was found guilty. To denial of his motion in arrest of judgment, on the ground of insufficiency of the indictment, respondent seasonably excepted. Exceptions sustained.

The case fully appears in the opinion.

J. Frederic Burns, County Attorney, for the State.

William R. Roix, for respondent.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

PATTANGALL, C. J. On exceptions. Respondent was tried and found guilty of having offered a bribe to John H. Welch, Sheriff of the County of Aroostook. The indictment, brought under Section 5 of Chapter 124, R. S. 1916, reads as follows:

"The jurors for said State upon their oath present, that Earl Beattie, of Crystal, in said county of Aroostook, at Crystal in said county of Aroostook, on the twenty-fourth day of November in the year of our Lord one thousand nine hundred and twenty-nine feloniously and corruptly did offer to one John H. Welch, the said John H. Welch being then and there an executive officer, to wit; the duly appointed and qualified Sheriff of the County of Aroostook, whose duty it was to enforce the laws of the State of Maine, within said county, including the laws against the sale and keeping for sale of intoxicating liquors, a certain valuable consideration and gratuity, to wit; the sum of One Hundred Dollars, in money, with intent then and there to influence the action of said John H. Welch in a certain matter which might, and did, in fact, come legally before said John H. Welch in his official capacity as Sheriff, to wit; to influence said John H. Welch to refrain

from arresting one Horatio Beattie, and to refrain from making a seizure of a certain quantity of intoxicating liquors, then and there found in the possession of said Horatio Beattie, which said intoxicating liquors were then and there intended for unlawful sale within said State, which seizure and arrest, he, the said John H. Welch, was then and there authorized and in duty bound to make, against the peace of said State, and contrary to the form of the statute in such case made and provided."

The form is taken from "Directions and Forms for Criminal Procedure for the State of Maine" (Whitehouse and Hill), very generally in use by prosecuting officers in this state.

After verdict, a motion in arrest of judgment was made and respondent seasonably excepted to the denial of the motion.

The sole issue here is whether or not the indictment is good, respondent claiming that it is defective in that it contains no allegation that respondent knew that the person to whom the bribe was offered was in fact the Sheriff of Aroostook County.

The question is properly raised under motion in arrest of judgment. Such a motion will lie where error appears on the face of the record, *State* v. *Kopelow*, 126 Me., 388. Even though the question might properly have been raised on demurrer. *State* v. *Berry*, 112 Me., 504.

The essential elements of the crime of bribing or offering to bribe a public officer, as necessarily inferred from the statute, include knowledge on the part of the accused of the official character or capacity of the person to whom the bribe is offered, the fact that the thing offered is of some value, and that it was offered with intent to influence his official action.

From the earliest times, it has been held that an indictment for bribery must set forth the respondent's knowledge of the official character of him to whom the bribe is offered. *State* v. *Howard* (Minn.), 61 Am. St. Rep., 403.

We are aware that this rule has been relaxed in other jurisdictions to the extent of holding that lack of the direct allegation of knowledge may be supplied by implication. *People* v. *Glass* (Cal.),

112 Pac., 281; *State* v. *McDonald* (Ind.), 6 N. E., 607; *Commonwealth* v. *Bailey* (Ky.), 82 S. W., 299; *Cohen* v. *U. S.* (C. C. A.), 294 Fed., 488.

But while the rules of criminal pleading in this state are not unreasonably technical, this court has insisted that indictments should be drawn with care and exactness. "No person can be held to answer to a criminal charge until it is fully, plainly, substantially and formally described to him. Every material fact which serves to constitute the offense must be expressed with reasonable fullness, directness, and precision." *State* v. *Perley*, 86 Me., 431. "The doctrine of the court is identical with that of reason. The indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." 1 Bish. Cr. Prac., Sec. 81.

Approving the statement in *Commonwealth* v. *Shaw*, 7 Met., 57, that "if the intention with which an act is done be material to constitute the offence charged, such intention must be truly laid in the indictment; and it must be laid positively; and the want of a direct allegation of any thing material, in the description of the substance, nature or manner of the offence, cannot be supplied by any intendment or implication whatsoever," our court in *State* v. *Paul*, 69 Me., 215, speaking through Chief Justice Peters, added "All the authorities upon criminal pleading agree that the want of a direct and positive allegation, in the description of the substance, nature or manner of the offense, cannot be supplied by any intendment, argument or implication whatever."

This statement of the law was confirmed in *State* v. *Bushey*, 84 Me., 459; *State* v. *Darling*, 89 Me., 403; *State* v. *Soucie*, 109 Me., 254.

The indictment before us contains no express allegation of knowledge or notice on the part of respondent. We may not supply the omission by intendment, argument or implication.

Exceptions sustained.

FEDERAL LAND BANK OF SPRINGFIELD

vs.

ISAAC A. SMITH, EUGENE W. WEEKS AND PITTSFIELD NATIONAL BANK.

Somerset. Opinion July 25, 1930.

EQUITY. MORTGAGES. SUBROGATION.

One, who, at the request and for the benefit of a mortgagor and on his assurance that there are no other liens or incumbrances against the land and that the loan will be secured by a first mortgage, furnishes money to pay off the existing mortgage is not a mere volunteer, the loan having been negotiated for the purpose of paying such mortgage, and he is entitled to subrogation to the rights of the mortgagee whose mortgage is thus paid.

The weight of authority is that in the absence of some prejudice resulting to the junior lienor from the change of owners of the senior lien the record lien will not defeat the right of subrogation even though there was constructive notice from the record.

Subrogation, itself a creature of equity, must be enforced with due regard for the rights, legal or equitable, of others. It should not be invoked so as to work injustice, or defeat a legal right, or to overthrow a superior or perhaps an equal equity, or to displace an intervening right or title, nor can the right of subrogation prevail against bona fide purchasers or those who occupy a like position.

In the case at bar the evidence disclosed that the rights of an innocent third party intervened, which prevented the operation of the doctrine of subrogation. The rights of the Pittsfield National Bank were those of a bona fide purchaser.

On appeal by petitioner from decree dismissing bill. A bill in equity seeking subrogation to the rights of a first mortgage, paid from the proceeds of a mortgage loan made by plaintiff Bank to the mortgagor in both mortgages, there being subsequent to the paid first mortgage, a second mortgage the existence of which was not discovered by the Bank at the time of making its mortgage loan. Appeal dismissed. Decree below affirmed.

The case fully appears in the opinion.
Ames & Ames, for plaintiff.
Fred H. Lancaster,
J. W. Manson, for defendants.

SITTING: DUNN, STURGIS, BARNES, FARRINGTON, JJ.
PHILBROOK, A. R. J.

FARRINGTON, J. This was a bill in equity in which the Federal Land Bank of Springfield, Massachusetts, sought to be subrogated to the rights of a first mortgagee in a mortgage paid, and duly discharged, from the proceeds of a loan made by it to the mortgagor in both mortgages, and to have subordinated to the rank of second mortgage one given by the same mortgagor, and recorded prior to the Bank's mortgage but subsequently to the first mortgage paid by the Bank loan. After full hearing the bill was dismissed. The case came to this court on appeal. At the hearing, by agreement of counsel, no stenographic record of the testimony was made but the following facts appeared from the record forming a part of which is a "statement of fact" which the court assumes is by agreement of parties.

On July 30, 1926, one Isaac A. Smith gave to the Federal Land Bank of Springfield, Massachusetts, a mortgage for $2,400.00 covering real estate in Pittsfield, Maine. The mortgagor at the closing of the loan made a sworn statement that as far as he knew the premises were "free from all mortgages" or "other incumbrances" and that he made the affidavit to induce the Bank to accept a mortgage "knowing that the Bank relies on the truth of the statements herein contained." In his application for a loan he also stated there was no mortgage except the Humphrey mortgage referred to below.

The Bank's attorney in his title certificate, covering a search to July 21, 1926, disclosed as the only undischarged mortgage one from Isaac A. Smith to J. C. Humphrey for $2,000.00, the balance due on which was paid from the proceeds of the Bank loan and of which proper discharge was executed by the executor of the estate of Cora B. Rogers, the assignee of the mortgage. The closing title

certificate, dated July 30, 1926, signed by the attorney, stated that search of the records was continued to time of closing the loan and "all liens, incumbrances and defects have been properly eliminated of record and said mortgage is a valid first lien on the premises therein described."

After the Bank loan had been closed and record made of its mortgage (July 30, 1926), it was discovered that there was, duly recorded at the time of his examination of the records but undiscovered by the Bank's attorney, a mortgage of $1,200.00 given by Isaac A. Smith to one Frank Weeks May 31, 1924, and covering, among other parcels, the land included in the Bank mortgage. In the Weeks mortgage no mention was made of the Humphrey mortgage.

Frank Weeks having died, Eugene W. Weeks, his nephew and sole heir, on September 29, 1926, assigned this mortgage to the Pittsfield National Bank, together with other securities totalling $7,700.00 face value, as collateral for a loan of $3,401.97. It must be assumed from the record that the assignee had no notice of the Federal Land Bank claim and had made no examination of the Registry records, which at that time, as will appear from the statement of the facts, showed nothing ahead of the Weeks mortgage.

The contention of the defendants is that the interests of a third party have intervened and that the Federal Land Bank should not be granted subrogation, while the plaintiff claims that subrogation should be granted and extended to give it the right to take up the entire Pittsfield National Bank loan to Weeks and to receive as trustee for him the collateral pledged to secure the loan, accounting to Weeks for any excess after paying the amount properly due to itself. The defendants also contend that the plaintiff should have no relief in equity by reason of negligence in not informing itself of the true state of the Registry record as to mortgages.

While it is not necessary for the disposition of this case, it is not out of place to consider the legal situation, as if it were merely a question of plaintiff's rights against those of the defendant, Eugene W. Weeks, unaffected by rights of the Pittsfield National Bank.

One who, at the request and for the benefit of a mortgagor and on his assurance that there are no other liens or incumbrances

against the land and that the loan will be secured by a first mortgage, furnishes the money to pay off the existing mortgage is not a mere volunteer, the loan having been negotiated for the purpose of paying such mortgage, and he is entitled to subrogation to the rights of the mortgagee whose mortgage is thus paid. *Hughes et al* v. *Callahan* (Ark.), 27 S. W. (2d.), 509; *Hill* v. *Ritchie et al* (Vt.), 98 Atl., 497; *Fifield* v. *Mayer* (N. H.), 104 Atl., 887; *Jackson Trust Co.* v. *Gilkinson et al* (N. J. Ch.), 147 Atl., 113; *Wolff, Applt.* v. *Walter et al*, 56 Mo., 292 (recognizing the principle); *E. Y. Chambers & Co., Inc.* v. *Little et al* (Tex.), 21 S. W. (2d), 17; *James* v. *Martin et al* (S. C.), 147 S. E., 752; *Shaddix et al* v. *National Surety Co.* (Ala.), 128 So., 220.

With the contention of the defendants that failure to have discovered the record of the Weeks mortgage would, of itself and between it and the defendant, Weeks, destroy plaintiff's right of subrogation, the great weight of authority and sound reasoning does not agree.

The Court in the case of *Fifield* v. *Mayer*, supra, says, "The lien holder's equitable rights are not infringed, impaired or in any respect changed by the mere fact that the other party was negligent of his own rights in not discovering the existence of the lien. . . . Equity does not require that the plaintiff (*junior lienor*) should be enriched in consequence of the misplaced confidence of the sureties in the untrue statement of the debtor, or in consequence of neglect to ascertain by independent research that it was untrue."

In the case of *Hill* v. *Ritchie et al*, supra, the Court says, "The doctrine of constructive notice is not applicable; and we think the findings regarding the record do not constitute a defense. An examination of the records would have disclosed the incumbrance, but the question is whether an examination was required by the rule of diligence applicable to the case. This is not a case where the relief of the plaintiff will cause an actual loss to the defendant. Ritchie has not increased his investment since the payment of the lien note, and a reinstatement of the security will simply leave him in his original position. He will lose nothing but the gain which would otherwise have accrued to him from the plaintiff's mistake. . . . Parties who have paid prior liens at the request of the

debtor in ignorance of the existence of subsequent incumbrances have been held entitled to the remedy of subrogation, notwithstanding a failure to examine the records." (This case cites cases from Minnesota, Iowa, Georgia, Illinois, New Jersey Equity, to the same effect, and the cases all bear directly on the point.) To the same effect are, Lawrence on Equity Jurisprudence, Sec. 651; *Jackson Trust Co.* v. *Gilkinson*, supra; 99 Am. St. Rep., note at page 474, et seq; 25 R. C. L., page 1340, Sec. 24; *Hughes Co. et al* v. *Callahan*, supra; *Shields et al* v. *Pepper* (Ala.), 118 So., 549; *Bormann* v. *Hatfield* (Wash.), 164 Pac., 921; *James* v. *Martin et al* (S. C.), supra; *Louisville Joint Stock Land Bank* v. *Bank of Pembroke* (Ky.), 9 S. W. (2d), 113.

In the last cited case the Court states, "It is the general rule that, where a mortgage has been released or satisfied through accident or mistake, it may be restored in equity and given its original priority as a lien, provided the granting of such relief does not operate to the detriment of intervening rights of third persons who may have relied upon the release and who are not chargeable with notice of the mistake or who will not be prejudiced by reinstatement of the lien."

In this same case, the Court says, "But it is argued that the mortgage of appellee was on record and the appellant, being charged with knowledge thereof, could not by reason of its negligence claim subrogation. We have held, however, that the maxim 'The laws assist those who are vigilant, not those who sleep upon their rights,' does not apply to a case of this kind, as any apparent advantage which appellee may have is the result not of its vigilance, but of a mistake on the part of appellant, and a false statement by the mortgagor." (Citing an earlier case in 79 Ky., 598.) The Court then goes on to say, "The negligence of the abstractor did not injure the appellee. It did nothing or paid nothing in reliance on the mistake. By restoring appellant to the position of the City Bank & Trust Company as first lienor, the appellee is not injured, but still has all that it expected to get when it took the second mortgage."

The weight of authority is that in the absence of some prejudice resulting to the junior lienor from the change of owners of the

senior lien the record lien will not defeat the rights of subrogation even though there was constructive notice from the record, and there is no evidence or claim that the plaintiff in the case now under consideration had any actual knowledge of the Weeks mortgage.

From our examination of the record we are therefore of the opinion that the plaintiff would have been entitled to subrogation as between itself and Frank Weeks, had he lived, or his sole heir, Eugene W. Weeks, and for that reason we have referred to the law relating thereto.

The situation in the instant case, however, is one involving the rights of an innocent third party and prevents the operation of a most beneficent doctrine which, as between the original parties, permits, in equity and justice, the placing of a burden where it ought to rest.

Subrogation, itself a creature of equity, must be enforced with due regard for the rights, legal or equitable, of others. It should not be invoked so as to work injustice, or defeat a legal right, or to overthrow a superior or perhaps an equal equity, or to displace an intervening right or title. *Makeel* v. *Hotchkiss*, 190 Ill., 311, 83 Am. St. Rep., 131; *Rand* v. *Cutler et al*, 155 Mass., 451; see note at page 480, 99 Am. St. Rep.; *Williams* v. *Libby*, 118 Me., at page 83.

Nor can the right of subrogation prevail against bona fide purchasers or those who occupy like position. *Richard* v. *Griffith*, 92 Cal., 493, 27 Am. St. Rep., 156; *Amick* v. *Woodworth et al* (Ohio), 50 N. E., 437; *Gray et al* v. *Jacobsen et al*, 13 Fed. (2d), 959; *Waltham Coöperative Co.* v. *Barry et als*, 231 Mass., 270; *Northwestern Trust Co.* v. *Consolidated Elevator Co.* (Minn.), 171 N. W., 268; *Pabst et al* v. *Wigginton* (Ky.), 281 S. W., 834; *Hargis et al* v. *Robinson et al* (Kan.), 66 Pac., 988.

From the record before us, we find the rights of the Pittsfield National Bank to be those of a bona fide purchaser.

The entry will therefore be,

Appeal dismissed.
Decree below affirmed.

STATE OF MAINE *vs.* N. J. PRESCOTT.

York. Opinion July 26, 1930.

CRIMINAL LAW. STATE DEPARTMENT OF HEALTH. R. S. 1916, CHAP. 19, SEC. 22, SEC. 112. P. L. 1917, CHAP. 197. P. L. 1919, CHAP. 172, SEC. 14.

The Legislature, by the delegation to the State Department of Health of general power to make and publish reasonable rules and regulations for the protection of life and health and the successful operation of the health laws of this state, did not assume to authorize the repeal of general statutes.

In localities having either water or sewerage systems, it is for local ordinance to prescribe plumbing regulations, office of the State Department of Health, in such cases, being to approve plans. Only in localities other than those with water or sewerage systems can rules and regulations of the State Department of Health have force and effect.

When an act is forbidden only in particular localities, the complaint or indictment must allege that the act was committed in such a locality.

In the case at bar the complaint contained no allegation that the act was committed in the particular locality. The indictment was therefore defective and in accordance with stipulations a *nolle prosequi* should be entered.

On report on agreed statement. Respondent, a plumber, was arrested for alleged violation of a rule of the State Department of Health with reference to the weight of soil pipes to be installed. He was convicted in the Sanford Municipal Court and appealed to the Superior Court for the County of York. The agreed statement contained a stipulation that if the complaint made to the municipal court and brought forward on appeal, failed to allege the commission of an offense, a nolle prosequi should be entered. Nolle prosequi to be entered.

The case fully appears in the opinion.

Ralph W. Hawkes, County Attorney,

Clement F. Robinson, Attorney General, for the State.

Waterhouse, Titcomb & Siddall, for respondent.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. MORRILL, A. R. J.

DUNN, J. This criminal case, in grade a misdemeanor only, was reserved in the Superior Court, the government and the defendant consenting, for decision by this Court on an agreed statement. The reservation, or report, stipulates that, if the complaint, made to the municipal court and brought forward on appeal, fails to allege the commission of an offense, a nolle prosequi shall be entered; otherwise, judgment to go for the State, sentence to be imposed below. This practice is not without precedent. R. S., Chap. 136, Sec. 27; *State* v. *Maher*, 49 Me., 569; *State* v. *Bohemier*, 96 Me., 257; *State* v. *Robb*, 100 Me., 180; *State* v. *Hahnel*, 118 Me., 452; *State* v. *Mallett*, 123 Me., 220; *State* v. *Small*, 126 Me., 235.

The defendant, a plumber, formally admits that, on one day in July, 1928, in plumbing a dwelling house in Sanford (the word, "plumbing," being inclusive of pipe for sewage, *State* v. *Hahnel*, supra), he installed other than the extra heavy cast-iron sewer pipe which a rule and regulation of the State Department of Health prescribes. Defendant also concedes, or at least does not question, the constitutional power of the Legislature, in the exercise of reserved power, to regulate plumbing by the agency of a board or department appointed for that purpose, but attacks the record on several grounds, all which converge toward the proposition that the complaint alleges no offense.

In passing, it may be remarked that the prosecution admits that, for the house where the plumbing was done, the sewer pipe was sufficient.

The State Department of Health was created, in succession to the State Board of Health, to have general supervision of the life and health of the citizens of our state; one duty being the preservation of the public health against dangerous diseases. Laws 1917, Chap. 197.

Legislation was enacted in 1919, Chapter 172, in these words:

> "The state department of health shall from time to time make and publish such orders and regulations as they shall think necessary and proper for the protection of life and

health and the successful operation of the health laws of this state, which said orders and regulations shall be published in such manner as said department of health directs. In case of emergency or threatened epidemic of disease which may affect more than one city, town, or plantation, the state department of health, if it shall appear to them necessary and proper for the protection of life and health, may make such further orders and regulations as in their opinion the public exigency may require."

The State Department of Health later adopted and, in a pamphlet showing methods approved by the Department, published certain plumbing rules and regulations, hereinafter sometimes referred to as a regulation, the material provisions of which are as follows:

"ARTICLE I

"6. All plumbing hereafter installed throughout the State shall conform to the basic plumbing principles herein provided."

"ARTICLE IV

"(c) The use of standard pipe is prohibited and only extra heavy pipe shall be used which shall conform to the following minimum requirements:

"Average Weight of Cast Iron Soil Pipe, Pounds Per Length (5′) Sizes 2 in. 3 in. 4 in. 5 in. 6 in. 7 in. 8 in. 10 in. 12 in. 15 in.
Extra Heavy 27½ 47½ 65 85 100 135 170 225 270 375

(Requirement for extra heavy pipe amended to go into effect January 1, 1927.)"

A general statute, subsisting in 1919, when power to make and publish orders and regulations was conferred on the State Department of Health, affects the case at bar.

In 1911, Chap. 169 (R. S., Chap. 19, Sec. 112), the Legislature bestowed on cities and towns, wherein are either water or sewerage systems, authority to adopt ordinances establishing plumbing regulations, the regulations to require drainage of the spent water,

which is called sewage, through pipes conforming to plans of local health boards, or local inspectors.

Local boards of health and local health officers, the 1919 statute providing for the employment of the latter, are expressly subordinate to the State Department of Health. Except for the recovery of incurred penalties, the 1919 statute repealed inconsistent legislation.

The repeal of inconsistent legislation did not annul the authority of cities and towns to adopt plumbing ordinances, nor did the Legislature, by the delegation of general power to enact reasonable rules and regulations, assume to authorize the repeal of general statutes. The Legislature may not constitutionally delegate general legislative authority. *Wyeth* v. *Board of Health*, 200 Mass., 474, 481.

However, since the legislation of 1919, the plans to which the earlier statute refers must have the approval of the State Department of Health.

The complaint alleges in effect that, in plumbing the certain building in Sanford, the defendant used other than extra heavy cast-iron sewer pipe, contrary to the rules and regulations of the State Department of Health.

When an act is forbidden only in particular localities, the complaint or indictment must allege that the act was committed in such a locality. *State* v. *Turnbull*, 78 Me., 392.

In localities having either water or sewerage systems, it is for local ordinance to prescribe plumbing regulations; office of the State Department of Health, in such cases, being to approve plans. Only in localities other than those with water or sewerage systems can rules and regulations of the State Department of Health have force and effect.

According to the terms of the report, the mandate will be:

Nolle prosequi to be entered.

ERNEST W. GILMAN ET AL

vs.

SOMERSET FARMERS CO-OPERATIVE TELEPHONE COMPANY ET AL.

Somerset. Opinion July 26, 1930.

PUBLIC UTILITIES. TELEPHONE AND TELEGRAPH COMPANIES.

The Public Utilities Commission, like the Legislature which created it, may require reasonable connection of public utility telephone lines, essentially for other than local telephonic intercommunication so long as there is no interference with individual ownership and use, save to complement service by the transmission of messages from other lines.

The power to regulate the use and enjoyment of property is widely different from the power to appropriate or take property. Property and property rights are assertible against regulatory power.

Requirement, fair and reasonable, that one public telephone utility connect its lines with those of another, would not amount, in a constitutional sense, to a taking of property. But a connection which unreasonably deprived a telephone company of the right to use its own lines would be tantamount to a taking of property.

The Public Utilities Commission may, to some extent, affect and curtail the property and property rights of public utilities, but the Commission may not, under the guise of supervision, regulation and control, take such property and rights. Property and property rights may not be taken except by eminent domain.

In the case at bar the requirement of physical connection of the lines of the Maine Telephone and Telegraph Company and those of the Somerset Farmers Co-Operative Telephone Company, and that any message originating on the lines of the Maine Company, within territory served by both companies, and designed for the lines of the Somerset Company, be transferred to the latter company at the exchange of the Somerset Company first on the way, would result if put in practice against the Maine Company, in the case of a message originating on the line of that Company, in a locality where both it and the

Somerset Company have exchanges, the message being designed for the Somerset Company, in no transmission of the message by the Maine Company, but in immediate and complete reference of the particular business to the Somerset Company. A message originating on the lines of the Maine Company, in a place where there was no Somerset exchange, and designed for the Somerset lines, would have to be transferred to the Somerset Company, not following transmission by the Maine Company for the distance reasonably possible on its own lines, but at the exchange of the Somerset Company nearest the origin of the message.

The like requirement with reference to messages originating on the Somerset Company lines would not relieve the unfair burden imposed on the Maine Company. The order of the Public Utilities Commission works in affect an unconstitutional taking of property. The Public Utilities Commission transcended its powers.

Appeal on exceptions by respondent, Maine Telephone and Telegraph Company, from decision and order of the Public Utilities Commission. Exceptions sustained.

The case fully appears in the opinion.

Ames & Ames, for complainants and Somerset Farmers Co-Operative Telephone Co.

Cook, Hutchinson, Pierce & Connell,

Locke, Perkins & Williamson,

George R. Grant, for Maine Telephone and Telegraph Co.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. MORRILL, A. R. J.

DUNN, J. Upon complaint and after notice and hearing, the Public Utilities Commission ordered and required a physical connection of the lines of the Maine Telephone and Telegraph Company and those of the Somerset Farmers Co-Operative Telephone Company, in localities where both maintain exchanges, to afford public telephone service, beyond the reach of either line alone, chiefly for other than local conversations.

The Commission also required the transfer of messages from the lines of the Maine Company to those of the Somerset Company, and vice versa, "at the point of connection nearest the origin of the call."

The Maine Company, to abbreviate its name for convenience of expression, noted ten exceptions. By agreement of the parties, the exceptions are here on certification. R. S., Chap. 55, Sec. 55.

The exceptions may be readily grouped into three classes. In the first class is a single exception. This exception attacks the jurisdiction of the Commission on the ground that the Somerset Company is not a public utility. Exceptions in the next class assert findings of fact to be unsupported by any substantial evidence. In the third class, exceptions allege that the requirement, respecting the transfer of messages, exceeds the delegation of regulatory power.

The statute, R. S., Chap. 55, Sec. 41, enacted in 1913, conferring on the Commission jurisdiction over public utilities of this kind, is as follows:

> "Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that a physical connection can reasonably be made between the lines of two or more telephone companies . . . whose lines can be made to form a continuous line of communication, by the construction and maintenance of suitable connections, for the transfer of messages or conversations, and that public convenience and necessity will be subserved thereby, . . . the commission may, by its order, require that such connection be made, except where the purpose of such connection is primarily to secure the transmission of local messages or conversations between points within the same city or town, and that conversations be transmitted and messages transferred over such connection under such rules and regulations as the commission may establish . . ."

The Maine Company, the brief of its counsel concedes, is a public utility.

The Somerset Company, so to refer to it, was incorporated in 1904, under the general incorporation laws of this State, to establish telephone lines on the public highways in the towns of Somerset county.

Without quoting verbatim the wording of the certificate of organization, the principal corporate purpose is to facilitate tele-

phonic communication by and between residents in the farming districts, to whom service shall be at cost.

The corporation owns and operates eleven central offices, or exchanges, through which, in an area comprising twenty-three towns and plantations, flat-rate telephone service, and no other, is, in conformity to a by-law of the corporation, furnished stockholders only.

Each service user provides the facilities from the street to his premises, and together the users pay the company an amount sufficient to cover upkeep and operating expenses. The by-law restricts a user to not more than two telephones. Nine hundred and twenty-five is the approximate number of telephones in use. The stretch of wire is, in round numbers, one thousand miles.

The Somerset Company also operates pay stations, open to the general public, under a schedule of toll rates, filed, as are the other schedules of the company, with the Public Utilities Commission. Of gross annual receipts averaging, it is accurate enough to say, $18,000, approximately one-eighth is from the pay stations.

Is the Somerset Company a public utility?

To the consideration of this question this opinion, after recitals to make the whole outline of the case visible, will return.

In Skowhegan and Madison, the only two Somerset county towns where the Maine competes with the Somerset Company, the former has upwards of fifteen hundred subscribers.

The Maine Company also owns and operates toll lines reaching from town to town within, and even beyond, Somerset county. And, by arrangement with the New England Telephone and Telegraph Company (the New England being of the Bell system), the Maine Company furnishes connection to the telephone world.

In 1926, the Maine and Somerset companies entered into a joint traffic agreement, terminable by either party on notice to the other.

On one day in 1928, the Somerset Company had notification that, eight days later, the Maine Company would cancel the agreement. Not to inconvenience the public, ran the notice, the Maine Company would continue interchanging traffic, but on different terms. Actual severance of the connected lines was by the Somerset Company, on February 10, 1929.

The complaint bears date February 11, 1929.

Many, perhaps all, of the twenty-six complainants, were then users of the Somerset service.

To return to the question whether, within the meaning of the statutes, the Somerset Company is a public utility, the statutes make every person, natural or artificial, owning, conducting, operating, or managing a telephone line for compensation, a telephone company, and every such telephone company, a public utility. R. S., Chap. 55, Sec. 15.

The test, then, as to whether telephone service is being furnished by a public utility, is whether the owner or operator, furnishing the service, has a right to transmit, and is ready to transmit, conversations and messages, not necessarily for the benefit of the whole public, or even a large part thereof, but to all persons similarly situated, without partiality or unreasonable discrimination, in equality of right, to the extent that capacity may admit of use, for compensation.

Whether, in a legal sense, the term, "compensation," of the statute, and the word, "cost," used in the by-law, are in meaning not the same, it is unnecessary to decide, because decision of this case turns on another hinge.

It may, indeed, be that, merely in serving its stockholders "at cost," the Somerset Company is not a public utility.

But, alone, this would not preclude furnishing service as a public utility.

In affording, not in main corporate purpose, but, nevertheless, in corporate purpose, means for telephonic communication from pay stations, and inviting the general public to use such stations, under an established schedule of toll rates, the Somerset Company has impressed its property by a public use, and, in consequence thereof, its business, certainly in such regard, is that of a public utility.

What a telephone company does, not what its by-law says, neither affirmative provision of the corporate charter nor other provision of law prohibiting, is the important thing. *Terminal Taxicab Company* v. *Kutz*, 241 U. S., 252, 60 Law. ed., 984.

Both respondents being public utilities, the Public Utilities Commission had jurisdiction of the complaint, and power to require a physical connection of the lines of the respective systems, on proof that a mechanical connection of the lines, to form a continuous line of communication, for public convenience and necessity, but not "primarily to secure the transmission of local messages or conversations between points in the same city or town," would be reasonably possible.

Questions of fact pertaining to a case are for consideration and decision by the Public Utilities Commission.

If a factual finding, basic of an order of the Commission, is supported by any substantial evidence, that is, by such evidence as, taken alone, would justify the inference of the fact, the finding is final. *Hamilton* v. *Caribou, etc., Company*, 121 Me., 422, 424. Here, as with a jury verdict, a mere difference of opinion between court and commission, in the deductions from the proof, or inferences to be drawn from the testimony, will not authorize the disturbance of a finding.

On the other hand, whether, on the record, any factual finding, underlying order and requirement, is warranted by law, is a question of law, reviewable on exceptions. *Hamilton* v. *Caribou, etc., Company*, supra.

In the case at bar, the evidence, though sharply conflicting, was sufficient to justify finding that physical connection of the lines of the two companies to form a continuous line of communication, that is, a connection of the lines and not of the companies, essentially for other than local telephonic intercommunication, would be reasonably practicable and capable of execution and serve or further public convenience and necessity. Of such cases only is the statute inclusive.

The exercise of sovereign power, lest it become tyrannical, is bound down by constitutional chains.

Section 21, Article 1, of the Constitution of Maine provides:

> "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it."

The Maine Company holds a franchise to own and operate, and is operating, as a public utility, a telephone line or system. The franchise is incorporeal property. The exercise of the franchise necessitates a plant, equipment, and other tangible property.

The Public Utilities Commission, like the Legislature which created it, may require reasonable connection of public utility telephone lines, so long as there is no interference with individual ownership and use, save to complement service by the transmission of messages from other lines. *Blackledge* v. *Farmers', etc., Telephone Co.* (Nebr.), 181 N. W., 709; *Pioneer Telephone, etc., Co.* v. *State* (Okla.), 177 Pac., 580; *State* v. *Skagit River Telephone, etc., Co.* (Wash.), 147 Pac., 885; *Pacific Telephone, etc., Co.* v. *Wright-Dickinson, etc., Co.*, 214 Fed., 666; *City of Milbank* v. *Dakota, etc., Co.* (S. D.), 159 N. W., 99.

The power to regulate the use and enjoyment of property is widely different from the power to appropriate or take property. Property and property rights are assertible against regulatory power. *New England Telephone, etc., Co.* v. *Department Public Utilities*, 262 Mass., 137.

Not only did the Public Utilities Commission require physical connection of the lines of the Maine and Somerset companies, but the Commission required that any message originating on the lines of the Maine Company, within territory served by both companies, and designed for the lines of the Somerset Company, be transferred to the latter company at the nearest "point of connection," i.e., the exchange of the Somerset Company first on the way.

The requirement would result, put in practice against the Maine Company, in the case of a message originating on the lines of that company, in a locality where both it and the Somerset Company have exchanges, the message being designed for the Somerset lines, in no transmission of the message by the Maine Company, but in immediate and complete reference of the particular business to the Somerset Company.

Again, a message originating on the lines of the Maine Company, in a place where there is no Somerset exchange, and designed for the Somerset lines, would have to be transferred to the Somerset Company, not following transmission by the Maine Company for

the distance reasonably possible on its own lines, but at the exchange of the Somerset Company nearest the origin of the message.

That like requirement was defined, theoretically as an equalization feature, with regard to messages originating on the lines of the Somerset Company, does not militate against the exceptions by the Maine Company. The Constitution is not to be satisfied in such manner.

Nor does the provision that all traffic interchanged shall be subject to the toll rates of the Maine Company, and its connecting companies, weigh against the exceptions. It would be unreasonable to interpret the order that, though the lines of the Maine Company are idle, because the Commission forbids their use, yet the Maine Company shall have tolls as though on its lines had been that transmission which, but for the inhibitory order, there might have been.

What that order means is that the rates on the different lines, for like service, shall be uniform, and that the Maine Company shall have recompense for actual transmission only.

The principle of requiring physical connection of telephone lines, for public convenience and in furtherance of public necessity, was first recognized as applied to railroads. *Michigan Central Railroad Company* v. *Michigan Railroad Commission*, 236 U. S., 615, 59 Law ed., 750. As to railroad companies, transportation charges are automatically apportioned between the two carriers, one receiving compensation for that part of the service rendered up to, and the other beyond, the connecting point. Analogy is apparent.

Requirement, fair and reasonable, that one public telephone utility connect its lines with those of another, would not amount, in a constitutional sense, to a taking of property. But, in the words of a witness for the complainants, "a connection unreasonably depriving a telephone company of the right to use its own lines, is an injustice."

The Public Utilities Commission may, to some extent, affect and curtail the property and property rights of public utilities, but the Commission may not, under the guise of supervision, regulation, and control, take such property and rights. Property and

property rights may not be taken, except the taking be by eminent domain. *New England Telephone, etc., Co.* v. *Department of Public Utilities*, supra.

In the instant case the Public Utilities Commission has transcended its powers.

Exceptions sustained.

WENDALL A. BRYANT

vs.

ANNIE B. BRYANT, FLOSSIE M. RUMERY AND FLORENCE BRYANT.

Cumberland. Opinion July 30, 1930.

WILLS. "PERSONAL PROPERTY" CONSTRUED AND DEFINED. EVIDENCE.

The controlling rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator, expressed in his will, shall prevail, provided it is consistent with the rules of law. The entire will should be considered with a view to giving effect, so far as the law allows, to its every provision. The intention, as to any particular item, is often aided and sometimes deduced, from other provisions and from the general scope and trend of the instrument.

The words, "personal property" are susceptible of two meanings; one, the broader, including everything which is the subject of ownership, except lands and interests in lands; the other, more restricted, oftentimes embracing only goods and chattels; and it is in the latter sense that the expression is ordinarily and popularly used.

In ascertaining the real intention of a testator there is a rule, applicable in the construction of wills, that where certain things are enumerated, and a more general description is coupled with the enumeration, that description is commonly understood to cover only things of a like kind (ejusdem generis) *with those enumerated. This is because it is presumed that the testator had only things of that kind in mind.*

Personal property in a "home" is naturally construed to include books, pictures, furnishings, furniture, and all such things as are generally found in and contribute to the enjoyment and utility of one's abode. To extend the meaning of the words "personal property" so as to include rights and credits is neither easy nor natural.

In the construction of a will, parol testimony is frequently of some assistance for the purpose of identifying the beneficiary, or the subject-matter of the devise, or explaining the situation and circumstances surrounding the testator at the time of making the will to be construed, or for the purpose of throwing some light upon the sense in which words of doubtful and ambiguous meaning were used. But the testator's declarations of intention, whether made before or after the making of the will, are alike inadmissible.

The intention of the testator, collected from the whole will, and all the papers which constitute the testamentary act, are to govern; but the intent is to be sought in the will as expressed, and declarations of the testator before or after the will was made can not aid in interpretation.

In the case at bar, considering the care used in drafting the second codicil, as well as the causes which prompted the same, assuming that the testator must have known the extent of his estate, approximately at least, and that he realized the conditions of those to whom his bounty should be extended, there is disclosed within the terms of the will, as expressed, strong evidence of the actual intention of the testator.

The bonds in question should not be included within the meaning of the words "personal property," but constitute a part of the residuary estate.

On report. A bill in equity asking construction and interpretation of certain provisions in a will and codicils thereto. The question raised was whether certain bonds passed to the widow of the testator or to his residuary legatee. Decree ordered in accordance with opinion that the bonds constitute a part of the residuary estate.

The case fully appears in the opinion.

Edward C. Reynolds, for petitioner.

Berman & Berman, for defendant, Annie B. Bryant.

Cook, Hutchinson, Pierce & Connell, for defendant, Florence Bryant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

PHILBROOK, A. R. J. This is a bill in equity praying for construction and interpretation of certain provisions in the will, and codicils thereto, of Charles Bryant who died on the twelfth day of December, 1927. His will was dated September 12, 1912, the first codicil was dated November 23, 1917, and the second codicil was dated June 10, 1925.

The parties, and their relationship to the testator, are as follows:

1. Wendall A. Bryant, son, and executor of the will;
2. Annie B. Bryant, widow;
3. Flossie M. Rumery, daughter;
4. Florence Bryant, daughter-in-law, and widow of Charles F. Bryant, another son of the testator, who died after the date of the first codicil and prior to the date of the second.

In the original will the residuary legatees were the two sons, Wendall and Charles F. By the second codicil the former received the sum of three thousand dollars, as his full share in the estate of the testator, and the provision making him one of the residuary legatees was thereby revoked. In that same second codicil the testator says: "Since my son, Charles F. Bryant, has deceased since the making of my said will and codicil, I revoke so much of said will as made provision for him, the said Charles F. Bryant, and since there survives him his widow, Florence Bryant, for whom no provision is made in said will and codicil, I do now give and bequeath unto the said Florence Bryant all the rest, residue and remainder of my estate, after the provisions heretofore made in said will and codicils are carried out."

In the court below the case was heard upon bill, answers of the testator's widow and of the residuary legatee, and replications of the plaintiff. Florence M. Rumery filed no plea, answer or demurrer. By agreement the case comes to the law court on report. The controversy, therefore, is between the widow of the testator and his residuary legatee, and relates to the ownership of two United States Liberty Loan Bonds, each of the par value of one thousand dollars. The bill alleges, and the answers of the contending parties admit, that these two bonds "were in the house occupied by the said Charles Bryant as a home at the time of his decease."

The record discloses that they were kept "in the front hall" . . . "right in the corner, under the carpet."

The original will contains the following provision for the testator's wife: "First; I give, bequeath and devise unto my wife, Annie B. Bryant, my homestead place in said South Portland, and all of the household furniture and all other personal property belonging to me in the home. Also the sum of five hundred dollars in cash to be paid to her promptly."

The first codicil contains a modification of the pecuniary provision for his wife by increasing the amount to fifteen hundred dollars. The second codicil again modifies the amount of the pecuniary provision by increasing it to three thousand dollars "in addition to the other provisions made for her in my said will."

The further answer of Annie B. Bryant, widow, in paragraph four, says "that the two United States Liberty Loan Bonds for one thousand dollars ($1000.00) each, described in the 'Schedule of Assets,' were payable to bearer and were negotiable by delivering physical possession thereof"; and in paragraph ten says "that it was the intention of the said Charles Bryant, deceased, during his lifetime, that the the two bonds heretofore described were to pass at his death to the said Annie B. Bryant and that he had so expressed himself many times." Therefore she prays that the court may order the said bonds, or the proceeds thereof, turned over to her as her property, and for her costs. The defendant, Florence Bryant, residuary legatee and devisee, contends that the term "personal property," as used in the bequest to Annie B. Bryant, includes only goods and chattels in the house at the time of the testator's decease, and does not include these two bonds.

Subject to objection the widow was allowed to offer testimony regarding oral statements of the testator, made in his lifetime, to prove that it was his then intention that the bonds in question should pass to his widow at his decease.

The issues, therefore, are two in number, viz.:

I. Does the term "personal property," as used in the bequest and devise to the wife, viz.: "my homestead place in said South Portland, and all of the household furniture and all other personal property belonging to me in the home," include bonds, notes, bank

books, or other rights and credits, or choses in action, or is it limited to goods and chattels?

II. Is evidence of the testator's oral declarations admissible to show what he intended the term "personal property," as so used in his will, should include?

The controlling rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator, expressed in his will, shall prevail, provided it is consistent with the rules of law. The entire will should be considered with a view to give effect, so far as the law allows, to its every provision. The intention, as to any particular item, is often aided and sometimes deduced, from other provisions, and from the general scope and trend of the instrument. *McGuire* v. *Gallagher*, 99 Me., 334; *Andrews* v. *Schoppe*, 84 Me., 170.

The case at bar presents elements, peculiarly within this rule. The bonds in question had not been purchased by the testator at the time of making the original will, and obviously he had no then intention that any such securities should pass to his widow by the terms of his will as then expressed. The record does not show the date of the hearing in the court below, but as plaintiff's replications are dated April 8, 1930, it is obvious that the hearing could not have been at a time earlier than that date. According to the record the bonds were purchased eleven or twelve years before the hearing. Taking the longer time as a basis of reckoning the purchase date of the bonds was subsequent to the date of the first codicil. Again it may be confidently stated that at the time of making the first codicil there was no then intention that these bonds should pass to the wife of the testator. As we have already observed, the pecuniary bequest to her was increased.

When the second codicil was executed there had been important changes in the family of the testator. One of the residuary legatees, a son, had died leaving a widow. This led to equally important changes in the will. The pecuniary bequest to the testator's wife was made six times larger than in the original will, to the son Wendall was bequeathed a fixed sum of three thousand dollars, in lieu of a residuary share in the estate, and a new residuary legatee was created. Even then no specific mention was made as to dispo-

sition of the bonds. If the testator intended that so large a share of his estate, in addition to the real estate, should go to his widow, it would have been easy, and perhaps natural, for him to have said so.

Let us now consider the entire amount of the estate. The inventory, included in the record, shows:

Real estate	$ 1,650.00
Goods and chattels	150.00
Rights and credits	10,352.23
Total	$12,152.23

The legacy to the testator's widow, made up of the real estate, goods and chattels, and a cash bequest of three thousand dollars, yields a total of four thousand eight hundred dollars. This amount is slightly less than forty per cent of the entire estate. It may be properly remarked that the testator's widow was his second wife and bore him no children.

From the rights and credits, amounting to $10,352.23, there must be paid:

To Annie B. Bryant, widow	$3,000.00
To Wendall A. Bryant, son	3,000.00
To Flossie M. Rumery, daughter	500.00
For debts, expenses of administration, and executor's commission	1,400.00
Total	$7,900.00

This would leave a residuum of $2,452.23. If the bonds are to become the property of the testator's widow her share in the estate would amount to six thousand eight hundred dollars, and the share remaining for the residuary legatee would be reduced to $452.23. If the bonds are to remain in the residuum and become the property of the residuary legatee then her share in the estate would amount to $2,452.23. This would give the widow of a deceased son a legacy which is $547.77 less than the legacy to the living son. By the terms of the original will, if both sons had lived, they would have shared equally in the residuum. Considering the care used in drafting the second codicil, as well as the causes which prompted the

same, assuming that the testator must have known the extent of his estate, approximately at least, and that he realized the conditions of those to whom his bounty should be extended, we find within the terms of the will, as expressed, strong evidence of the actual intention of the testator. This evidence is more significant when we note that no specific mention of the bonds was made in the codicil, although it is claimed that he had talked with others about his possession of the same. If he had really intended these securities to pass to his widow it would have been easy and natural for him to so provide in his will or codicil.

But there are also certain rules of law which must be considered in solving the problem before us.

As we have already observed, Annie B. Bryant claims that the bonds in question were payable to bearer and were negotiable by delivering physical possession thereof. Just what was intended under this claim is not made clear. If it is claimed that any antemortem delivery of the bonds was made to Annie, by the testator, then the reply must be that such claim is not sustained by the record.

The chief legal contention involved in the case is an answer to this question, viz.: did the testator, by the terms used in the will, legally express an intention that these bonds should pass to his wife Annie by virtue of the words "personal property," as this expression is ordinarily and popularly used in wills.

This Court has held that the words "personal property" are susceptible of two meanings; one, the broader, including everything which is the subject of ownership, except lands, and interest in lands; the other, more restricted, oftentimes embracing only goods and chattels; and it has also been suggested that it is in the latter sense that the expression is ordinarily and popularly used. *Andrews* v. *Schoppe*, supra; *Crosby* v. *Cornforth*, 112 Me., 109. In the former case our Court cited, as authority, *Bills* v. *Putnam*, 64 N. H., 554, where it was stated that it is at least doubtful whether the term "personal property" is generally understood to include money, notes, and choses in action.

The law is also well settled in this state that in ascertaining the real intention of a testator there is a rule, applicable in the con-

struction of wills, that where certain things are enumerated, and a more general description is coupled with the enumeration, that description is commonly understood to cover only things of a like kind (*ejusdem generis*) with those enumerated. This is because it is presumed that the testator had only things of that kind in mind. *Andrews* v. *Schoppe*, supra.

In this will the language is "all of the household furniture and all other personal property belonging to me in the home." When we speak of personal property in a "home" the mind more naturally visualizes books, pictures, furnishings, furniture, and all such things as are generally found in and contribute to the enjoyment and utility of one's abode. To extend the meaning of the words "personal property" so as to include rights and credits is neither easy nor natural.

It has been well said that it is extremely difficult to construe one will by the light of decisions upon other wills framed in different language, and that decisions of the courts interpreting other wills somewhat differently phrased, or surrounded by different conditions, are very unsafe and uncertain guides. The diligence and learning of counsel in the case at bar have led us into excursions over broad fields, from which we return satisfied that the rules enunciated by our own court are of sufficient assistance in reaching our conclusion which is that the will and codicil; expressed as they are in these particular instruments, do not convey the bonds to the widow but they constitute part of the residuum of his estate.

One further point demands our attention, and relates to admission of oral expressions of the testator to demonstrate his intention.

In the construction of a will, parol testimony is frequently of some assistance for the purpose of identifying the beneficiary, or the subject matter of the devise, or explaining the situation and circumstances surrounding the testator at the time of making the will to be construed, or for the purpose of throwing some light upon the sense in which words of doubtful and ambiguous meaning were used. But the testator's declarations of intention, whether made before or after the making of the will, are alike inadmissible. 1 Greenleaf on Evidence, Sec. 230; *Farnsworth* v. *Whiting*, 102 Me., 296. It is familiar law that the intention of the testator, collected

from the whole will, and all the papers which constitute the testamentary act, are to govern; that the intent is to be sought in the will as expressed, and that the declarations of the testator before or after the will was made can not aid the interpretation. *Tibbets* v. *Curtis*, 116 Me., 336.

Applying these well established rules, enunciated by our own court, we unhesitatingly hold that the offered oral testimony upon the question of intention was inadmissible.

Our decision, therefore, is that the bonds in question constitute a part of the residuary estate, and that a decree below should be made in accordance with this opinion.

So ordered.

ANNIE SHAW ET ALS *vs.* FRED L. PHILBRICK.

Aroostook. Opinion August 12, 1930.

CONTRACTS. CONSIDERATION.

To establish a legal contract to forbear, forbearance being a delay in enforcing rights, there must be proof, allegation permitting, of request to forbear, of promise to forbear, followed by forbearance for the time specified, or for a reasonable time when no definite time is named.

In the case at bar there was no promise on the part of the plaintiffs not to redeem, nor was it shown that relying upon the promise of the defendant to pay plaintiffs three thousand dollars on the expiration of the foreclosure they did forbear to redeem. No contract to forbear having been proved the defendant's promise was without consideration.

On exceptions by plaintiffs. An action of assumpsit to recover the sum of three thousand dollars claimed to be due plaintiffs from defendant upon a written contract or agreement signed by the defendant. To the direction of a verdict for defendant, plaintiffs seasonably excepted. Exceptions overruled.

The case fully appears in the opinion.

Earlon K. Guild,

H. T. Powers, for plaintiffs.

Cyrus F. Small, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

DUNN, J. An action of assumpsit on the written promise of the defendant to pay plaintiffs three thousand dollars on the foreclosure of a real estate mortgage. Plea, general issue; brief statement sets up no consideration. Directed verdict for defendant. Case forward on bill of exceptions. Exception overruled.

The mortgagor, Mr. Horace W. Patten, a Limestone man, died in 1925. Two of the plaintiffs, children of the decedent, him surviving, are his heirs at law. One of these plaintiffs is an infant. Minority and the consequent right to avoid, which the brief for the defendant calls to attention, may give a motive for not making a contract with a minor, but the disability of infancy is a personal privilege. *Towle* v. *Dresser*, 73 Me., 252. An infant may sue, though he may not be sued on his contract. There are some exceptions to this general rule, but none of present relation.

The third plaintiff, sole witness on that side of the case (admission supplementing her testimony), testifies that she is grandmother to the other plaintiffs and creditor of the estate of their deceased father. Besides, she identifies, as having been given to her by the defendant, in the presence of the major heir, the writing underlying this action, which instrument this opinion presently recites. Of the writing, she informed the minor plaintiff. Such, briefly told, is what the witness says.

Three years after the death of the mortgagor, the mortgage was assigned to the defendant, who gave newspaper notice of his intention to foreclose the right of redemption. Ten days afterward, that space less than the original one year foreclosure period then remaining, the writing was signed and delivered. It reads:

"Limestone, Maine;
March 3rd, 1928

"I, Fred Philbrick of Fort Fairfield, County of Aroostook and State of Maine, hereby agree to pay the sum of Three Thousand ($3000) dollars to Mrs. Annie Shaw, George Patten and Beecher Patten all of Limestone, in County and State

aforesaid, as soon as the mortgage which I own on the farm in Limestone, known as the Horace Patten farm, said farm is bounded and described as follows; on the east by Boundary Line; on south by highway; on west by land of Fred Philbrick; on north by the south line Caswell Plantation; said mortgage is to be foreclosed by me and this amount of $3000, to be paid as soon as foreclosure expires; providing said foreclosure of mortgage expires in my own name.

"Signed this third day of March, 1928, in presence of Louis A. Cyr." "Fred L. Philbrick

On the expiration of foreclosure, defendant was still assignee of the mortgage.

Counsel for plaintiff argues that, from acceptance of the writing, absence of redemption, and expiration of foreclosure in the name of the defendant, sufficient consideration for his unit promise necessarily ensues.

The words in the document express the meaning convention has attached to them. There is but an offer, or agreement, as defendant himself in testifying puts it, to pay the offerees, now plaintiffs, a certain sum of money, if foreclosure of the mortgage expires in the name of the offeror, he being this defendant. The source of the offeror's inspiration, the writing does not state. Nor does the writing look to mutual interchange of promises.

If one man promise to pay another man a definite amount of money providing he will call for it at a particular time, the contract is binding; because performance of the condition is an inconvenience to the promisee. The doing of the act ipso facto performs the obligation of him to whom the promise is made. *Train* v. *Gold*, 5 Pick., 380, 384. The same may be said of a promise to reward the apprehension of a criminal, where making the arrest, within a reasonable time and before revocation of the offer, merges mere proposal in a contract. *Mitchell* v. *Abbott*, 86 Me., 338.

Citation of the books could be multiplied. But each case so much depends on its own peculiar facts, as to afford little aid in cases of differing facts, beyond supporting the general proposition that,

apart from contracts under seal and contracts of record, every contract, written as well as oral, requires a consideration.

In the judicial reports, running parallel with decisions wherein consideration is based on benefit to the promisor, are decisions that when, on the part of the promisee, who was under no duty to do so, there has been an act, or omission to act, at the request of the promisor and upon the strength of his promise, which act or omission occasioned the promisee disadvantage, trouble, or prejudice, though slight and not actually harmful, there is legal value. In a legal sense, there is detriment. And detriment constitutes a valuable consideration. *Bigelow* v. *Bigelow*, 95 Me., 17.

This does not mean, however, that to establish a legal contract to forbear, forbearance being a delay in enforcing rights, it would meet procudural requirement simply to allege and prove the inducement of postponement by a promise. There must be proof, allegation permitting, of request to forbear, of promise to forbear, followed by forbearance for the time specified, or for a reasonable time when no definite time is named. The doctrine is legal and historical. *Moore* v. *McKenney*, 83 Me., 80; *Hay* v. *Fortier*, 116 Me., 455.

Evidence to prove requests and promises need not be direct. Requests and promises, like other facts, may be inferred from accompanying circumstances. In the instant case, the situation in evidence does not furnish a basis for inferential proof. Deduction there can not justifiably be that, at the request of the defendant, and on the faith of his promise, the plaintiffs, or any of them, agreed not to redeem the mortgage.

"Detriment," as the law defines the term, is not gatherable from the record. In consequence of the writing, none of these plaintiffs stood obliged to speak or to act. Silence does not imply assent to terms, when there are no terms. Oftentimes, inaction is consistent with the rejection of proposals.

Forbearance, at request, is a valid consideration. *King* v. *Upton*, 4 Me., 387. Not so, in the absence of both request and promise to forbear. *Lambert* v. *Clewley*, 80 Me., 480.

True enough, these plaintiffs did not redeem the mortgage, but that the reason therefor was consent to request, in reliance on the

promise of the defendant, is not shown. No promise on the part of plaintiffs ever was barrier to redemption. There was no quid pro quo.

In ordering verdict for defendant, the trial judge ruled, in effect, that, as in *Lambert* v. *Clewley*, supra, a contract to forbear had not been proved.

The exception is not sustainable.

Exception overruled.

GEORGE A. COLLINS *vs.* AUSTIN N. WELLMAN.

Cumberland. Opinion August 12, 1930.

VERDICTS. PROVINCE OF COURT AND JURY.

A verdict should not be ordered by the trial court when, giving the party having the burden of proof the most favorable view of his facts and of every justifiable inference, different conclusions may fairly be drawn from the evidence by different minds.

In the case at bar it was for the jury to determine whether the defendant had been negligent and also whether the plaintiff had been free from any act, or omission, constituting negligence proximately contributing to the injury that ensued. The direction of a verdict for the defendant was error.

On exceptions by plaintiff. An action under subrogation provisions of the Workmen's Compensation Law, to recover for personal injuries caused by an automobile collision. To the direction of a verdict for the defendant, plaintiff seasonably excepted. Exception sustained.

William B. Mahoney,
Richard E. Harvey,
Theodore Gonya, for plaintiff.
Verrill, Hale, Booth & Ives,
Brooks Whitehouse, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

DUNN, J. In this action, under subrogation provisions of the the Workmen's Compensation Law, to recover damages for personal injuries caused by an automobile collision, counsel for the defendant, at the close of evidence for the plaintiff, without offering any evidence for the defendant, rested and moved the direction of verdict for the latter.

The motion was granted, and an exception allowed plaintiff.

A verdict should not be ordered by the trial court when, giving the party having the burden of proof the most favorable view of his facts and of every justifiable inference, different conclusions may fairly be drawn from the evidence by different minds. *Young* v. *Chandler*, 102 Me., 251.

On study of the record, this court concludes that it was for the jury to say whether the defendant had been negligent, and also whether the plaintiff had been free from any act, or omission, constituting negligence proximately contributing to the injury that ensued.

Conclusion results in sustaining the exception. Only one side of the case having as yet been heard, it seems best not to state or discuss the facts.

Exceptions sustained.

PORTLAND TERMINAL COMPANY, APP'T, *vs.* CITY OF PORTLAND.

Cumberland. Opinion August 22, 1930.

TAXATION. RAILROADS. R. S. 1916, CHAP. 10, SECS. 4 & 74.

R. S. 1916, CHAP. 9, SEC. 25.

A railroad company, the real estate of which is taxable under the provisions of Sec. 4, *Chap.* 10, *R. S.* 1916, *has the status of a non-resident taxpayer.*

It is, therefore, not obliged to file a list of its taxable property with the local assessors as a condition precedent to applying for an abatement.

Land within the located right of way of a railroad company is exempted from taxation even though, as in the case at bar, temporarily used for other than railroad purposes.

On exceptions to decree of the Superior Court sustaining appeal for abatement of taxes. Exceptions overruled.

The case fully appears in the opinion.

Edward W. Wheeler, for appellant.

Harry C. Wilbur, for appellee.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

PATTANGALL, C. J. On exceptions. The appellant is a corporation, organized under the laws of Maine, having its principal place of business in Portland, and on April 1, 1929 was operating and has since continued to operate a railroad in this state. It was the owner on April 1, 1929 of certain land and buildings located in Portland and subject to taxation therein under the provisions of Sec. 4, Chap. 10, R. S. 1916, which reads:

> "The buildings of every railroad corporation or association, whether within or without the located right of way, and its lands and fixtures outside of its located right of way, are subject to taxation by the cities and towns in which the same are situated, as other property is taxed therein, and shall be regarded as non-resident land."

The local assessors placed a valuation upon appellant's land and buildings of $1,702,150 and assessed thereon a tax for the year 1929 of $57,192.34 with an additional tax for street sprinkling of $436.29.

Included in the assessment was one parcel of land upon which a filling station had been erected. This land was wholly within the located right of way of the railroad and, hence, exempt from taxation under the provisions of Sec. 25, Chap. 9, R. S. 1916, and Sec. 4, Chap. 10, R. S. 1916. The filling station erected thereon was the

property of one Foley, who occupied under a lease from appellant, which lease ran for ten years from May 1, 1928, unless sooner terminated by sixty days' written notice.

Appellant presented to the local assessors a petition for abatement of so much of the tax as was assessed on the land and filling station, urging that the one was exempt from taxation and that the other was the personal property of Foley and not taxable to it.

Abatement was refused, appeal taken and hearing had before a Justice of the Superior Court, with right of exceptions reserved. The appeal was sustained and exceptions were seasonably taken and allowed.

The right of appellant to be heard on appeal was strenuously resisted by appellee. Appellant had not, in accordance with the provisions of Sec. 74, Chap. 10, R. S. 1916, filed with the assessors a list of its taxable property, as required of resident owners, a condition precedent to an appeal from an assessment, by that class of taxpayers. But appellant asserted that because of the provisions of Sec. 4, Chap. 10, R. S., already quoted, it occupied the position of a non-resident taxpayer, so far as its real estate was concerned, and was not obligated to furnish such a list. The presiding Justice so construed the statute and found that appellant had the right of appeal and that the land being within the located right of way of the railroad was not liable to taxation.

The Court below also allowed the claim of appellant to an abatement of the tax erroneously assessed against it on the buildings owned and occupied by Foley but, no exception having been taken to this finding, it is not before us.

The issues presented here are (1) was appellant required to furnish a list of its property to the assessors as a condition precedent to its right to be heard on a petition for abatement? (2) Did the lease of the land to Foley constitute an alienation so that it ceased to be a part of the located right of way of the railroad and, therefore, taxable?

The answer to the first question depends wholly upon whether or not appellant, in so far as this land is concerned, is to be regarded as a resident or a non-resident owner.

If the former, having failed to file the required list of property,

and not having been excused by the assessors from so doing, it has no right to be heard in abatement and, assuming that the assessors acted in good faith, no other remedy is open to it. If overvaluation appears, having failed to meet the preliminary requirements of the statute, it must suffer the consequences. The law is well settled on that point.

If a resident taxpayer's property is overvalued, his only remedy is by abatement. *Stickney* v. *Bangor*, 30 Me., 404. If property not belonging to him is taxed to him, abatement is still his only remedy. *Hemingway* v. *Machias*, 33 Me., 445. If he is assessed for property lying in another town, abatement is the relief and the sole remedy of which he may avail himself. *Salmond* v. *Hanover*, 13 Allen, 119. All of these propositions are reaffirmed in *Gilpatric* v. *Saco*, 57 Me., 277. If property is taxed to him which does not belong to him it is merely an overvaluation of his property, a hardship which can only be remedied in one way, namely, by abatement. *Bath* v. *Whitmore*, 79 Me., 182. If the assessment is too large for any reason, either from including property that the taxpayer does not own or that is exempt from taxation or that can not lawfully be taxed, it is clearly a case of overvaluation, to be remedied by abatement. *Rockland* v. *Water Co.*, 82 Me., 188. And in default of having complied with the law requiring the filing a list of his property, he has no right to be heard in abatement proceedings. *Freedom* v. *County Commissioners*, 66 Me., 172.

Not so in the case of a non-resident owner. The provisions of Sec. 74, Chap. 10, R. S. 1916, requiring lists of property to be filed with the assessors as a condition precedent to an application for abatement do not apply to him. If his property is overvalued in any sense in which the word is used in the cases above cited he must be heard on petition for abatement and on appeal if assessors act adversely on his petition. Nor is he confined to abatement for relief. Other remedies are open to him. *Ware* v. *Percival*, 61 Me., 391; *McCrillis* v. *Mansfield*, 64 Me., 198.

The land within the located right of way of a railroad corporation is exempt from taxation. Unless the land in question had been alienated by the lease to Foley and hence ceased to be a portion of the railroad right of way, it was improperly and illegally included

in the assessment. But that would not avail appellant, if it is in the position of a resident owner, because no list of its property was filed with the assessors.

Its status in this respect depends entirely upon the meaning of the statutory provision that the real estate of a railroad company "shall be regarded as non-resident land."

Unless the phrase "non-resident land" is entirely meaningless it must be equivalent to "land of a non-resident." So interpreted Sec. 4, Chap. 10, R. S. 1916, would read, "The buildings of every railroad corporation or association, whether within or without the located right of way and its land and fixtures outside of its located right of way are subject to taxation by the cities and towns in which the same are situated, as other property is taxed therein and shall be regarded as land of a non-resident." That is to say shall be subject to the laws which govern the taxation of any non-resident's land.

It is urged that appellant is not a non-resident in that its principal place of business is admittedly in the City of Portland. But the statute provides that, irrespective of location, the land shall be "regarded" as non-resident land or land of a non-resident, thus conferring upon a railroad a non-resident status for the purpose of taxing its real estate.

This was the view of the Court below and we have no hesitation in affirming it.

One other question remains. Had this land ceased to be a part of the right of way by reason of the lease to Foley and therefore taxable regardless of whether it was the property of a resident or a non-resident owner? We think not. There certainly was no abandonment of the portion of the right of way occupied by the filling station. The lease to Foley was determinable at will by appellant, on sixty days' notice.

Appellee urges in its brief that appellant had no right to lease any part of its right of way for a purpose not incident to the operation of a railroad, that its act in this respect was *ultra vires*, that the lease was a nullity, and that "as the lessor could not convey, the lessee took nothing." If this view is correct there certainly was no alienation.

The cases cited and argument made by counsel for appellee are directed to the conclusion that appellant had no right to permit the occupation of any portion of its right of way by Foley or other proprietor of a filling station, such a structure not being necessary to its own use. That question is not before us.

The issue here is whether or not by the lease to Foley the land on which the filling station being temporarily, at least, used for other than railroad purposes may be said to have ceased to be a part of the right of way within the meaning of the tax statute.

Decisions from courts of other states are not helpful in arriving at a conclusion on this point unless they involve a construction of a similar statute. In many instances exemption depends upon whether or not the property in question is "necessarily used in operating a railroad" as in Michigan or "necessary for the exercise of the franchise of a railroad" as in Pennsylvania or "used for railroad purposes" as in New Jersey or "exclusively used in the operation of a railroad" as in Iowa.

Nebraska has a statute very similar to ours as had North Dakota, previous to the adoption of an amendment, designed to cover such a case as the one under consideration.

In *C. B. & Q. R. R. Co.* v. *Hitchcock*, 40 Neb., 781, construing the statute which made locally taxable "all real and personal property outside of the right of way and depot grounds" the court said, "It is contended by plaintiff that the character of the property and the use for which it is designed, not its precise location, is the test which should be applied in determining whether or not it is taxable by the local authorities but we can not so construe the section mentioned without ignoring the plain language of the provision. It would seem to have been the intention of the legislature to provide a fixed and arbitrary rule for the taxation by the state board of the property of railroad companies within their right of way."

Our statute is similarly explicit. Land "outside of its located right of way" is subject to local taxation. Land within the limits of the located right of way is not so taxable. It is stipulated in the record that the land in question "is within the limits of the located right of way of the appellant corporation." The use to which the

land is put is immaterial. The exemption from taxation depends solely upon its location and that is not in dispute.

Exceptions overruled.

HEMON S. BLACKWELL *vs.* SADDLEBACK LUMBER CO.

Franklin. Opinion September 11, 1930.

CONTRACTS. AGENCY. BURDEN OF PROOF.

The ordinary duties of a treasurer or assistant treasurer are to receive, safely keep, and disburse the funds of the company, under the supervision of the directors. He has no authority to incur or pay debts of the company unless by order of the directors or to cancel, compromise or set off claims due from the company by those due to it; any attempt on his part thus to control the business of the company would be to assume powers specifically conferred by the charter upon the directors and all such acts, unless subsequently ratified by the company, would be void.

The relation of agency does not depend solely upon an express appointment and acceptance thereof, but may be and frequently is implied from the words and conduct of the parties and the circumstances of the particular case.

Agency may be implied from a single transaction where the transaction has been ratified by the principal or other factors appear which would thwart justice if the agency should be denied. Such agency is more readily inferable from a series of transactions carried on through such sufficient time as to lead a reasonable man to believe that the agency exists.

The principle of proving implied agency by citing other acts of the alleged agent is that the instances must be numerous enough and have occurred under conditions so similar as to indicate a system, plan or habit of doing that particular thing under similar circumstances, and the only question in administering the rule is whether the instances produced have any real probative value to show such a system, plan or habit.

The burden of proof rests upon the plaintiff to prove implied agency if he relies thereon to recover in a case resting upon this principle.

In the case at bar, the plaintiff failed to prove agency, and according to the terms of the stipulation, the entry was "plaintiff non suit."

On report. An action of assumpsit to recover the sum of $3,815.26 alleged to be due plaintiff from defendant on a contract to indemnify plaintiff against financial loss on a lumber operation carried on by plaintiff for defendant Company. The case was first submitted to an auditor who made a report, the acceptance of which was objected to by the defendant. By a stipulation and agreement, the case came to the Law Court on report. In accordance with the terms stipulated, plaintiff non-suit.

The case fully appears in the opinion.

Carll N. Fenderson,

Currier C. Holman, for plaintiff.

Frank W. Butler,

Cyrus N. Blanchard, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

PHILBROOK, A. R. J. Action in assumpsit to recover an amount shown by account annexed to be $3,815.26. The case was submitted to an auditor who found that there was due from the defendant to the plaintiff the sum of $3,930, and that there was due from the plaintiff to the defendant the sum of $103.46, making a net balance of $3,826.54 due from the defendant to the plaintiff.

The defendant objected to the acceptance of the auditor's report for several reasons. Thereupon each side was permitted to introduce oral testimony and exhibits, and the case was reported to the Law Court.

The stipulations contained in the record are as follows:

> "It is stipulated and agreed that this case is to be reported to the law court upon writ and declaration, pleadings, the auditor's report and defendant's objections to its acceptance, and legal evidence whether objected to or not.
>
> No question is raised as to the sufficiency of the writ and declaration.

The plaintiff waives the presumption of a *prima facie* case made by the auditor's report, the report being admitted as evidence.

If the plaintiff is entitled to recover upon the evidence, damages shall be for the full amount stated in plaintiff's writ.

If the plaintiff is not entitled to recover, to become nonsuit."

The defendant corporation owned a mill in Dallas Plantation, Franklin County, Maine, erected and equipped for sawing hardwood logs into lumber. At the time of its incorporation, 1926, the plaintiff was the largest single stockholder in the company and at that time was employed by it as manager. This employment continued until June 1, 1928. During the lumbering operation in the winter of 1926-1927, he took his orders from Dr. H. C. Pitts, who was treasurer of the corporation from the date of its organization. In the spring of 1928 Harry F. Hardy, assistant treasurer of the company, came to Dallas and thereafter the plaintiff took his orders from Hardy.

There were two lots of land from which the company intended to take most of its logs, one being referred to in the record as the near piece and the other as the far piece.

In the logging season of 1928-1929, a contract was made whereby the plaintiff and one Gilbert Oakes were to cut certain hard wood and deliver it at the mill. The plaintiff testified that he had a conversation with Hardy about prices for doing the work and that Hardy told the plaintiff "it had been figured up that they couldn't figure they could pay more than fourteen dollars to sixteen dollars; fourteen dollars for the near and sixteen dollars for what is far."

The plaintiff also testified that he had a conversation with Hardy in regard to undertaking the operation with Oakes, telling Hardy that he didn't feel that he wanted to lose two or three thousand dollars on the hard wood; that he knew too much about it.

"Q. And what did Mr. Hardy then say to you?

A. He said 'the company won't see you lose anything.'

Q. What did you say to him then?

A. I said 'that is different.' I said 'I will take him (Oakes) up in the woods and show him the woods again."

It further appears that Oakes agreed to undertake the job with the plaintiff but "the agreement was that he would go in and take charge of the job and do the operation as long as he could see wages. When he couldn't make wages he would walk out."

Under this agreement, or understanding, they started the job in October, 1928, and some time in December, after working about two months, Oakes left, the reason being, to use his own words "because I couldn't make wages." After Oakes left, the plaintiff took charge of the camp for about two days and then put in a foreman by the name of Wallace Ham to take charge of the operation. The plaintiff continued the work and finished cutting about the middle of January, 1929.

As to amounts paid by the company, the record shows the following by the testimony of the plaintiff:

"Q. What was the price to be paid for the cutting on the strip that you showed Oakes, and that you and Oakes operated on first?
A. Fourteen dollars.
Q. And what advances were to be made; in what amount?
A. They were to advance eight dollars on the cutting and six dollars on the hauling.
Q. And during the winter were advances made?
A. Yes sir.
Q. Did the company advance to you more or less than these amounts?
A. More."

After the winter's work had been completed, the plaintiff says that the operation had cost him $3,815.26 over and above the amounts paid him during the winter by the company, which sum he says the company is bound to pay to him, basing his right to recover on the assurance given him by Hardy, above referred to, that the company would see that he did not lose anything.

According to the auditor's report, the plaintiff testified before

him that it was after Oakes refused to do any more this assurance was given on condition that the plaintiff would finish the work, but before the court below he testified that the assurance was given before the contract was entered into between Oakes and the plaintiff on the one hand, and the company, through Stacey, who had the power to make the contract, on the other.

Mr. Hardy was asked "Whether or not you ever had any conversation with Mr. Blackwell in the Fall of 1928 that the company would hold him — would see that he would lose nothing?" This would be before the Stacey-Blackwell Oakes contract. To this Hardy replied "I never had any talk with him about that; no sir." On being asked whether he had any conversation with the plaintiff after Oakes left, he said "I don't know but what I did. I can't remember; I probably did." He was not specifically asked whether, at the latter time, any assurance was given as now claimed by the plaintiff.

The defendant claims that it overpaid any amount due for the work done under the contract, that in completing his work the plaintiff did only the work which he was bound to do under his contract, even though working at a loss, that any agreement to complete the work after Oakes left was based upon no lawful consideration, and finally that if Hardy said what the plaintiff claims he said, which defendant does not admit, yet Hardy had no power, as agent for the defendant, to bind it by any assurance or lawful agreement to pay any loss sustained by the plaintiff.

From plaintiff's exhibit 3, an extract from the by-laws of the corporation, it appears that "The property and business of this corporation shall be managed by its board of directors, five (5) in number. Directors must be and remain stockholders." The record does not show that the plaintiff was one of those directors but it does show that he was familiar with the affairs of the company, financially and otherwise.

At a meeting of the directors held on March 29, 1928, provision was made for the appointment of an assistant treasurer "who may when necessary or proper sign checks, notes, or other evidences of indebtedness in behalf of the corporation, and endorse on behalf of the corporation for collection checks, notes and other obliga-

tions, and shall perform such other duties as may be assigned to him by the board of directors." The record shows no other duties to be performed by the assistant treasurer under assignment of the directors.

It is a familiar rule of law, as stated by this court in *Brown* v. *Weymouth*, 36 Me., 417, that the ordinary duties of a treasurer are to receive, safely keep, and disburse the funds of the company, under the supervision of the directors, but he has no authority to pay debts of the company, unless by order of the directors, nor to cancel, compromise or set off, claims due from the company by those due to it. Any attempt on his part thus to control the business of the company would be to assume powers specifically conferred by the charter upon the directors, and all such acts, unless ratified by the company, would be void.

We must therefore hold that Hardy had no express authority to bind the company under any assurance claimed by the plaintiff.

But the latter relies upon the principle of implied agency if no express agency be established.

It is well settled law that the relation of agency does not depend solely upon an express appointment and acceptance thereof, but may be, and frequently is, implied from the words and conduct of the parties and the circumstances of the particular case. The rule is well stated by Mr. Justice Harlan in *Martin* v. *Webb*, 110 U. S., 7; 28 L. ed., 49, where an implied agency on the part of a bank cashier to bind the bank was under consideration.

> "As the executive officer of the bank, he transacts its business under the orders and supervision of the board of directors. He is their arm in the management of its financial operations. While these propositions are recognized in the adjudged cases as sound, it is clear that a banking corporation may be represented by its cashier — at least where its charter does not otherwise provide — in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing upon the record of the proceedings of the directors. His authority may be by parol and collected from circumstances. It may be inferred from the general man-

ner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series of years, or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations."

It has been held that agency may be implied from a single transaction, where the transaction has been ratified by the principal, or other factors appear which would thwart justice if the agency should be denied. A leading case upholding this doctrine is *Shoninger* v. *Peabody*, 57 Conn., 42; 14 Am. St. Rep., 88, where cases are quite fully cited, among which is *Billings* v. *Mason*, 80 Me., 496. But such agency is more readily inferable from a series of transactions, similar to those relied upon to prove the implied agency, and carried on through such sufficient time as to lead a reasonable man to believe that the agency exists.

Wigmore on Evidence, Sec. 377, says that the principle of proving implied agency, by citing other acts of the alleged agent, is that the instances must be numerous enough, and have occurred under conditions so similar, as to indicate a system, plan, or habit of doing that particular thing under similar circumstances; and the only question in administering the rule is whether the instances produced have any real probative value to show such a system, plan or habit.

As to the personnel of the parties who took an active part in the contract to cut and haul the logs, the plaintiff testified in cross examination:

"Q. From whom did you take the contract to cut the logs?
A. We took it that day between us.
Q. Who was with you?

A. Mr. Stacey.
Q. What do you mean by 'Between us'?
A. The three of us together.
Q. And what part did Mr. Stacey have in the program?
A. He and I together persuaded Oakes to take the job."

Again he testified that Stacey agreed to pay fourteen dollars.

"Q. And you took the contract for fourteen dollars?
A. Yes sir."

The plaintiff again stated, when asked "with whom was that trade made" that it was "made with Stacey and myself with Mr. Oakes," and the latter testified, when asked "with whom did you make your contract" that he made it with "Mr. Blackwell and Mr. Stacey." Mr. Hardy, testifying for the defense, said that he had nothing to do with the making of the Stacey-Blackwell-Oakes trade.

It should here be observed that, according to the undisputed testimony of Dr. Pitts, treasurer of the company, Mr. Stacey succeeded the plaintiff as general manager in the fall of 1928, and that "he was to be in entire charge of the operation; to build the mill; to let the contracts; in other words to do the entire work of the lumber operation for the Saddleback Lumber Company."

While other issues have been raised in the trial and argument of this case, it seems to be necessary to consider only two; one, an issue of fact, did Mr. Hardy say to the plaintiff what the latter claims was said; the other, an issue of law involving implied agency.

Regardless of what the auditor reported as testimony of the plaintiff relating to the time when the alleged guaranty against loss, which might be sustained, was made, the plaintiff stated, and reiterated in the stenographic report of the case, that it was made in the fall of 1928, before the Stacey-Blackwell-Oakes trade was made. His testimony is not corroborated. On the other hand it is denied by Hardy, and by the unnaturalness of a claim that when a person enters into a contract with a corporation, the terms of which are well defined, especially as to the consideration to be paid, any officer would attempt to bind the corporation to payment of any financial loss made by the other party in the performance of the contract.

Upon this issue of fact, the burden of proof resting upon the plaintiff, we are not persuaded that the latter has successfully sustained his task.

Upon the issue of law, the plaintiff has failed. A contract of guaranty against financial loss in a transaction like the one at bar involves elements of large importance. The number and similarity of other acts done by Hardy in a managerial capacity, as shown by the record, fall far short of establishing the claim of implied agency made by the plaintiff.

According to the terms of the stipulation, the entry must be

Plaintiff non-suit.
So ordered.

STATE OF MAINE *vs.* WILLIAM GAMMON.

Franklin. Opinion September 16, 1930.

CRIMINAL LAW. MOTION IN ARREST OF JUDGMENT. RULES OF COURT.

Under rule XIX, in a criminal case, consideration of a motion in arrest of judgment is waived unless filed during the term at which the accused is found guilty.

On exceptions. To the denial for a motion in arrest of judgment after respondent had been found guilty of the crime of illegal manufacture of intoxicating liquor and his bill of exceptions overruled by the Law Court, respondent again seasonably excepted. Exceptions overruled. Judgment for the State.

The case sufficiently appears in the opinion.

Carll N. Fenderson, County Attorney, for the State.

Albert E. Verrill, for respondent.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. MORRILL, A. R. J.

BARNES, J. At the September term of this court, 1929, respondent was tried and found guilty of the crime of illegal manufacture of intoxicating liquor, exceptions being noted to certain parts of the charge to the jury.

Upon request of counsel, seasonably made, allowance of time was granted for the preparation and presentation of a bill of exceptions; and, after holding the respondent to bail, but without pronouncing sentence, the term of court was adjourned.

On December 26, 1929, motion for allowance of exceptions, with consent of the County Attorney, was filed.

At the February term, 1930, of the Superior Court for the same county, certificate of decision from the Law Court was received, with mandate, "Exceptions overruled for want of prosecution, judgment for State."

Whereupon a motion in arrest of judgment was filed and denied, and to the denial of the motion, exceptions were taken and allowed; sentence was imposed and the respondent admitted to bail, pending decision of the Law Court on the exceptions.

Under rule XIX this Court must dismiss the exceptions; for in a criminal case consideration of a motion in arrest of judgment is waived unless filed during the term at which the accused is found guilty.

Exceptions overruled.
Judgment for the State.

JAMES C. DURHAM ET AL *vs.* MRS. LEROY MCCREADY.

Waldo. Opinion September 17, 1930.

CONTRACTS. FAILURE OF CONSIDERATION.

When property, real or personal, is destroyed by fire, the loss falls upon the party who is the owner at the time.

When the owner of a house and land agrees to convey the same upon the payment of a certain price which the purchaser agrees to pay, and the buildings form a material part of the value of the premises, if they are destroyed by accidental fire so that the vendor can not perform the agreement on his part, he can not recover or retain any part of the purchase money.

In an action brought by vendor on a promissory note given to cover the purchase price of the property or any part thereof, where the above stated situation has arisen, vendee may properly set up failure of consideration as a defense.

But the use and occupation of the premises so agreed to be conveyed may form a part of the consideration for such a note, and in such case, vendor may recover in an action on the note a fair rental for the property.

When the amount paid in by the vendee is sufficient to cover the fair rental of the property during the period of occupation, that fact may be considered in connection with the defense of failure of consideration.

In the case at bar the evidence justified a finding that the payments already made by the plaintiff were sufficient to cover any reasonable charge for the use and occupation of the premises by the plaintiff during the period prior to the fire and that there was a failure of consideration as to the balance.

On exceptions by plaintiff. An action of assumpsit on a promissory note given by defendant to plaintiff, a part of said note having been paid and action brought for the balance alleged to be due. The defendant pleaded the general issue with a brief statement alleging failure of consideration by reason of a part of the property for which the note was given having been destroyed by fire prior to the time it was to be conveyed, without the fault of either party. Trial was had at the April Term of the Superior Court for the County of Waldo, before the sitting Justice without a jury, right of exceptions being reserved. At the conclusion of the evidence the Court found for the defendant, to which finding plaintiff seasonably excepted. Exceptions overruled.

The case fully appears in the opinion.

Arthur Ritchie, for plaintiff.

Buzzell & Thornton, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

PATTANGALL, C. J. On exceptions. Tried before a single Justice without the intervention of a jury, with right of exceptions reserved.

This was an action brought upon a non-negotiable promissory note for $365 payable in installments, upon which at the time suit was brought $117 had been paid and, including interest, $273 was due.

The note was given in payment for certain real estate, plaintiff agreeing when the payments were completed to convey same to defendant and giving bond to carry out the agreement. The note and bond were executed July 5, 1927. The writ is dated March 6, 1930. No conveyance of the property has been made. The buildings on the land to be conveyed formed a material part of the value of the premises and were destroyed by fire September 6, 1929, without fault of either party.

Defendant plead the general issue with the following brief statement. "Defendant further says that she is not liable upon the note declared upon in this action for failure of consideration, the principal part of the property for which the note was given having been destroyed by fire without the fault of either party."

On the above facts, about which there was no dispute, the presiding Justice found for defendant, to which finding exceptions were seasonably taken.

A similar situation arose in *Gould* v. *Murch*, 70 Me., 288. In that case, Mr. Justice Libbey, speaking for the Court and relying upon *Thompson* v. *Gould*, 20 Pick., 134; *Gould* v. *Thompson*, 4 Met., 224; and *Wells* v. *Calnan*, 107 Mass., 514, laid down the rule that "When property, real or personal, is destroyed by fire, the loss falls upon the party who is the owner at the time and if the owner of a house and land agrees to sell and convey it upon the payment of a certain price which the purchaser agrees to pay and before payment the house is destroyed by accidental fire so that the vendor cannot perform the agreement on his part, he cannot recover or retain any part of the purchase money. But the use and occupation of the premises from the time the agreement for the sale and purchase was made formed a part of the consideration for the notes and the plaintiff can recover in this action a sum equal

to the value of the use of the premises while the defendant occupied them."

We are aware that the weight of authority is to the contrary, that in such a case the loss falls on the vendee; although the position taken by the courts of Maine and Massachusetts in this respect is supported by California in *Conlin* v. *Osborn*, 120 Pac., 755; *Lachance* v. *Brown*, 183 Pac., 216, by Oregon in *Powell et al* v. *S. & G. R. R.*, 8 Pac., 544; *Elmore et al* v. *Stephens-Russell Co.*, 171 Pac., 763, and by New Hampshire in *Wilson* v. *Clarke*, 60 N. H., 352.

Affirming *Gould* v. *Murch*, supra, we hold that the consideration of the note had failed unless plaintiffs were entitled to recover for use and occupation of the premises during the period prior to the fire.

There was no direct evidence concerning the rental value of the property, but its location and character, the time of occupation, and the amount which defendant had paid on the note, were in evidence. The presiding Justice must have determined that these payments were sufficient to cover any reasonable charge in this respect. The evidence justified such a finding.

Exceptions overruled.

MICHEL MICHAUD *vs.* MAXIME MICHAUD.

Aroostook. Opinion September 17, 1930.

REAL ACTIONS. CONVEYANCES IN FRAUD OF CREDITORS. R. S. 1916., CHAP. 81, SEC. 14.

Real estate conveyed by a debtor, for the purpose of defrauding his creditors, may be attached, seized, and sold on execution by a creditor as if no conveyance had been made.

After title is so acquired by the levying creditor, he may maintain a real action to recover possession of the premises.

This right of levy upon premises conveyed in fraud of creditors is expressly given by R. S., Chap. 81, *Sec.* 14.

A conveyance of a debtor's entire property in consideration of his own future support or that of members of his family is prima facie *voidable as a fraud upon existing creditors.*

In the absence of a statute to the contrary, a debtor may pay one creditor for the purpose of giving him a preference, even though the debt in part or entirety is barred by the Statute of Limitations.

If an agreement for the support of the grantor or members of his family represents a substantial part of the consideration for the conveyance by a debtor of his entire property the conveyance may be avoided.

But when the grantee in such a conveyance pays a full and adequate consideration therefor, the fact that he also agrees to support the grantee does not render the transaction invalid.

In the case at bar the jury were warranted in finding that the conveyance to the defendant was in consideration of services and disbursements furnished during a period of twelve years prior to the conveyance, under and in reliance upon an agreement for a future transfer of the farm, and that the value of the services and disbursements exceeded that of the equity conveyed. Upon such finding the title of the demandant to the property conveyed, including the lots of land to be later reconveyed to the brothers of the grantee, was not superior to that of the defendant. The transaction was without fraud.

General motion for new trial by plaintiff. A real action to recover possession of seven parcels of land in St. Agatha in Aroostook County. Joseph Michaud, while indebted to the demandant under a crop mortgage, conveyed the equity in his farm in St. Agatha to the defendant, taking back a mortgage conditioned that the son should support him for life, make certain other payments to him, support another younger brother and sister during their minority, and later convey for a nominal consideration to other brothers, two lots of land included in the conveyance.

Demandant after obtaining judgment on his crop mortgage, bid in the property at sheriff's sale and sought to recover possession in a writ of entry, claiming the conveyance to the defendant to be in fraud of creditors.

Trial was had at the September 1929 Term of the Supreme Court for the County of Aroostook. The jury found for the de-

fendant. A general motion for new trial was thereupon filed by the plaintiff. Motion overruled.

The case fully appears in the opinion.

Arthur J. Nadeau,

Herbert T. Powers, for plaintiff.

Cyrus F. Small, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

STURGIS, J. General Motion for a new trial in a Real Action to recover possession of seven parcels of land in St. Agatha in Aroostook County.

October 26, 1925, Joseph Michaud conveyed his equity in his farm in St. Agatha to his son, the defendant. He took back a mortgage with this defeasance clause:

> "Provided, Nevertheless That if I the said Grantor Maxime Michaud, my heirs, executors, or administrators shall keep in a suitable room of his dwelling house, feed and clothes in a substantial and reasonable manner the said Joseph Michaud during the remainder of his natural life, shall also give him the use of a horse, harness, pung or wagon at any time when needed, shall also give him the sum of fifty ($50.00) dollars in cash each and every year in the month of December, shall also after three years from the date hereof give a deed and convey for the sum of one dollar lot of land No. 108 as above described to Joseph Michaud Jr. his brother and to his other brother Onesime Michaud lot No. one hundred ten (110). Shall also keep, feed and clothes his brother Lionel Michaud and his sister Eva Michaud and Ozithe Michaud until they shall be twenty one years old and graduated from St. Agatha high school. Then this deed shall be void and otherwise shall remain in full force."

When the deed and mortgage were given, Joseph Michaud was indebted to the demandant under a crop mortgage for fertilizer sold and delivered to him the previous spring. The crop so mortgaged, having been seized by a senior mortgagee, the demandant

began action upon his account November 11, 1925, made an attachment the next day, and eventually recovered judgment for $2,580.50 with costs taxed at $42.33. The seven parcels of land here in controversy were sold to the demandant at sheriff's sale October 26, 1925, and he claims title under his sheriff's deeds.

It is well settled 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 and sold upon execution, as if no such conveyance had been made, the conveyance being regarded as void as to the creditor. After title has been acquired by the levying creditor, he may maintain a real action 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; *Merithew* v. *Ellis*, 116 Me., 468. The right to make a levy upon premises thus fraudulently conveyed is expressly given by statute. R. S., Chap. 81, Sec. 14.

It is also a familiar principle that a conveyance of a debtor's entire property in consideration of his own future support or that of members of his family is purely voluntary and *prima facie* voidable as a fraud upon existing creditors. *Merithew* v. *Ellis*, supra; *Spear* v. *Spear*, 97 Me., 498; *Egery* v. *Johnson*, 70 Me., 258; *Graves* v. *Blondell*, 70 Me., 190; 12 R. C. L., 543.

If, then, the consideration given by this defendant for the conveyance here attacked was only that stated in the mortgage which he gave back, it not appearing that the grantor retained sufficient property to pay his debts, the conveyance, in law, must be held voluntary and invalid as to this defendant.

The claim of the defendant is, however, that the conveyance was made to him pursuant to an agreement made with his father twelve years before, under which he had stayed at home and worked on the farm. He and his father testify that, when the defendant was about to be married, the father agreed that, if the son would stay on the farm and operate it, and, with his wife, maintain a home for the family, he should have a deed to the farm subject to the support of the father and certain of the younger children during their minority. The defendant says that, in reliance upon his father's promise, he stayed at home, brought his wife there to maintain the

house, worked upon the farm and supported and clothed some of his younger brothers and sisters. His only compensation was the support of himself and family. He asserts that he repeatedly asked for a deed but his father refused or neglected to give one until the instrument of October 26, 1925, was executed. He urges that his father's conveyance to him was in payment of his prior services and disbursements as well as in consideration of his promise of support made verbally long before and renewed in writing in his mortgage back.

So far as the evidence discloses, the value of the farm at the time it was conveyed to the defendant approximated $10,000. There were outstanding mortgages upon it to the amount of $6,000. Assuming that the jury found that the defendant, in reliance upon his agreement with his father, worked on the farm without wages for twelve years and fed and clothed his younger brothers and sisters as he claims, at the standard wage in that section, they were warranted in finding that, when the defendant received his deed, the value of his services equaled the value of the equity conveyed and, supplemented by his disbursements for the children, exceeded it. His promise of future support of his father and the children, together with his promise of reconveyance of lots No. 108 and 110 set forth in the defeasance clause of his mortgage back, may have been properly looked upon as considerations for the conveyance in addition to a full and adequate consideration already paid.

If the jury found that the contract set up by the defendant was made and, in reliance thereon, he rendered services as and to the value claimed, at the time of the conveyance, the defendant himself had a valid claim against his father and was as much a creditor as the plaintiff. If the delivery of the deed had been denied him, he could have recovered the reasonable value of his services and disbursements in an action of indebitatus assumpsit. *Horne* v. *Richards*, 113 Me., 210; *Poland* v. *Brick Co.*, 100 Me., 133. In so far as the conveyance was a payment for the father's indebtedness to his son for services previously rendered, the transaction in itself is not fraudulent as a matter of law. In the absence of a statute to the contrary a debtor may pay one creditor for the purpose of

giving him a preference over others even though the debt in part or entirety is barred by the statute of limitations. *Seavey* v. *Seavey*, 114 Me., 14; *Hanscom* v. *Buffum*, 66 Me., 247.

It is urged, however, that, in as much as the agreement of the defendant to support his father and members of his family was a part of the consideration for giving the deed in controversy, the conveyance must be treated as a nullity as to attaching creditors. The rule supported by the weight of authority seems to be that, if an agreement for support represents a substantial part of the consideration, the conveyance may be avoided. But, where the grantee pays a full and adequate consideration for a conveyance, the fact that he also agrees to support the grantor does not render the transaction invalid.

In the early case of *Sidensparker* v. *Sidensparker*, 52 Me., 481, an instruction that a conveyance, in part upon the consideration of a promise to support the grantor, invalidated the transaction was sustained. And, while the Court there says that "instead of entering upon the task of determining what part of the consideration was paid in money or other property and what part was agreed to be paid in future support of the grantor and of holding the grantee responsible to the grantor's creditors for the latter sum, the law treats the conveyance as a nullity as between the grantee and the grantor's creditors and holds the property liable for their claims" it adds the pertinent observation that "it is unnecessary for us to determine what the rule of law would be if the money consideration alone had been adequate."

In *Egery* v. *Johnson*, 70 Me., 258, the plaintiff's debtor conveyed all his property to one of the defendants in consideration of the payment of debts of the grantor amounting to $250.00 and in addition thereto an agreement for support. The value of the property exceeded $1,000.00 and the Court applies the rule in these words: "It is immaterial that the consideration comprises a present sum of money paid in addition to the agreement for support provided the money alone were palpably inadequate."

In *Morrison* v. *Morrison*, 49 N. H., 69, a conveyance of property worth about $3,000.00 in consideration of the payment of obligations amounting to about $2,000.00 and the future support

of the grantor was held void on the ground that the support of the grantor was a "substantial part" of the consideration.

But in *Scott* v. *Davis*, 117 Ind., 232, it was said, "A conveyance is not fraudulent because the purchaser, in addition to the consideration paid in money and notes to a third person, agrees to support his father and mother during their lifetime; nor does such an agreement constitute a secret trust invalidating the conveyance in cases where it is otherwise supported by an adequate consideration and the grantee is not guilty of fraud."

In *Slater* v. *Dudley*, 18 Pickering (Mass.), 373, a conveyance from a father to a son with an agreement to support is sustained upon the ground that the full value was paid for the property regardless of the obligation to support.

In *Albee* v. *Webster*, 16 N. H., 362, it is held that, if a full consideration is paid by the grantee in addition to an agreement to support the grantor or members of his family, the inclusion of the latter obligation will not avoid the conveyance.

In *Cedar Co.* v. *Eul*, 95 Wis., 615, a conveyance by a father to his son and daughter for a consideration in the form of his indebtedness to them for services and an agreement for his support was sustained as against creditors upon the ground the children had paid a full and adequate consideration for the equity regardless of their agreement for support.

The distinction between the rights of creditors in case of a conveyance where an agreement for support of the grantor is the "substantial consideration" and where it is additional to another adequate consideration is pointed out and decisions reviewed in the extended note in 2 A. L. R., 144, et seq.

One other question only remains to be considered. The demandant contends that the conveyance of lots No. 108 and 110 to the defendant to be reconveyed to his younger brothers was not within the terms of the original agreement and was without consideration both as to the defendant and his brothers. He asserts that, in any event, his title to these lots is superior to that of the defendant.

The evidence supporting the original agreement shows that it was informal. It is not clear that the property to be conveyed to the defendant was then described or discussed in detail. It is fairly

to be inferred, however, that it was intended that all of the lands of Joseph Michaud were to be conveyed to his son, and the jury were warranted in so finding. Upon the theory advanced by the defendant, however, that the conveyance, when made, was in payment of the grantor's debts to his son for services rendered and disbursements made, as well as upon an additional consideration of an agreement for support and a promise to reconvey lots No. 108 and 110, the importance of the inclusion of these lots in the original agreement disappears. If the lots were also conveyed in payment of the grantor's debt and the property including them did not exceed it, the estate in them received by the grantee can not be avoided by the limitations of the original agreement or the fact that a promise to later reconvey them was added at the time of the conveyance. If the demandant has a better title to these lots than the younger brothers before or after a reconveyance from the defendant, he must establish it in another action. We are here concerned only with the superiority of his title over that of the defendant.

Upon the questions raised upon this Motion, the defendant must prevail and the verdict below be sustained.

Motion overruled.

WALTER E. FRYE *vs.* E. I. DUPONT DENEMOURS & COMPANY.

Cumberland. Opinion September 30, 1930

PRINCIPAL AND AGENT. PLEADING AND PRACTICE.

The liability of a principal is not limited to such acts of the agent as are expressly authorized or necessarily implied from express authority.

All such acts of an agent as are within the apparent scope of his authority are binding upon the principal.

Apparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise or holds him out as possessing.

When a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business uses and the nature of the particular business, is justified in assuming that such an agent is authorized to perform in behalf of his principal the particular act in question, and such particular act has been performed, the principal is estopped to deny the agent's authority.

Where evidence is admitted over objection and an Exception is taken, the party excepting will waive the benefit of his Exception if he afterward introduces the same evidence or that of like effect.

Upon the evidence in the case at bar, the jury were warranted in the conclusion that either (1) the boards shipped from the plaintiff's yard were purchased upon the Company's account and fraudulently resold on its Superintendent's personal account, or (2) while the transaction was a personal purchase on the part of the Superintendent, he was placed by the Company in such a situation that the plaintiff, in good faith, believed and had a right to believe that the purchase was made on the Company's account and was authorized.

A verdict that the defendant Company must bear the loss occasioned by the fraud of its employee was not clearly wrong.

There was no error in the refusal of the presiding Justice to strike out from the plaintiff's testimony a statement that Mr. Norris, a timber buyer, said that he was working for the defendant Company. In subsequent cross examination, counsel for the defendant brought out and left in the record without objection a statement of Mr. Norris of like effect.

Requests to the presiding Justice to instruct the jury that the verdict should be for the defendant unless it was found that Norris, the timber buyer, was the agent of the Company were properly refused.

Requested instructions that the statements of the Superintendent and local Manager were immaterial were properly refused.

Neither fact nor law warranted an instruction that the plaintiff could not recover for the first car of lumber shipped. It was not within the province of the Court to take this issue from the jury.

On exceptions and motion for new trial by defendant. An action of assumpsit to recover for three car loads of boards claimed to have been shipped direct to designated consignees on orders of the defendant's local Superintendent. The jury found for the plaintiff in the sum of $2,308.17. To the admission of certain testimony and to the refusal of the presiding Justice to give certain instructions, defendant seasonably excepted, and after the verdict filed a general motion for new trial. Motion overruled. Exceptions overruled.

The case fully appears in the opinion.

Joseph E. F. Connolly, for plaintiff.

Bradley, Linnell & Jones, for defendant.

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

STURGIS, J. Action of assumpsit to recover for three car loads of boards, claimed to have been shipped direct to designated consignees, upon the orders of defendant's local Superintendent. The verdict was for the plaintiff and the case comes forward on Motion and Exceptions.

MOTION

The evidence shows that the E. I. duPont deNemours & Company of Wilmington, Delaware, in 1926, operated a box shook mill at Deering Junction and maintained a branch office at 73 Bell Street in Portland, Maine. Its local Manager was E. L. Melia and the Superintendent of its mill was Henry E. Sargent.

As a manufacturer of boxes, the Company was a buyer of standing timber and sawed boards in this section of the State. Under the rules of the Company, all lumber contracts were made by the local Manager, but, in practice, the contracts were made by the Superintendent, except for formal confirmation and execution by the Manager. The Superintendent was "second in command," occupying an office with the Manager and, in the latter's absence, had full charge of the Company's business.

The testimony of the plaintiff is that, some time in the latter part of October, 1926, a timber buyer, Currier L. Norris, called on him at his mill and lumber yard in Poland, Maine, looked over his sawed lumber, and began negotiations for the purchase of the boards on the sticks. The plaintiff's statement of his conversation with Mr. Norris at this time, brought out on cross examination by defendant's counsel, is:

"A. Mr. Norris came up and asked me what I had for lumber to offer. I said, 'I have quite a bunch of it all around here.' He said, 'I am buying for the duPont people and I can

move by their approval what you have got here, if it suits them.' And I gave him a price of $35.00 F. O. B. cars. He says, 'I will go back and report to them and they will send their man up to look at it.' Then he said, 'They will probably buy the whole of it and move it right off.' "

According to the plaintiff, Mr. Norris came again to Poland and said, "They have been up and seen it and they are going to buy it," but gave no orders for shipment. A few days later, having heard nothing further, Mr. Frye called the Company's office at Portland on the telephone and talked with Mr. Sargent, the Superintendent of the mill, who, upon being asked about loading the lumber, said, "Place a car and we will be up — send a man up and grade it." Relying upon this order, a car was placed and, in a few days, Henry A. Cassidy, a lumber surveyor in the employ of the defendant Company, accompanied by Mr. Norris, came to Poland and graded the lumber as the plaintiff loaded it. On December 3, 1926, the car was shipped out under a bill of lading made by Mr. Cassidy, the plaintiff not being informed to whom it was consigned or in whose name it was shipped.

Hearing nothing from this shipment, in about three weeks, the plaintiff went to the Portland office of the defendant Company and his account of what happened there is as follows:

"Q. What happened?
A. I called for the boss.
Q. Tell us what was said and done?
A. They said he was busy and I waited a few minutes and then he was ready for me. I gave them my name.
Q. What boss do you refer to?
A. Mr. Melia.
Q. What did you say to him?
A. 'My name is Frye from Poland.' When he learned who I was, he says, 'Mr. Sargent is the one who has charge of that end of it.'
Q. What happened?
A. He called one of the clerks from the other room outside and he called Mr. Sargent.

Q. Going on with that, did you and he have any talk?
A. Yes, sir. He says, 'Come out. I am busy outside'; and we went out of a door, out to what he called his office, outside in the yard. I says, 'When will I expect some money for that?' He says, 'Wait a little while.' He says, 'I hope you aint afraid of this Company.' I says, 'No. Their reputation is good enough for me.' 'But,' I says, 'They have more money than I have.'
Q. What else?
A. That is about all. I said, 'When do you expect another car, or aint you going to load any?' He said, 'We are taking a car as soon as we can.'"

The plaintiff testifies that he wrote a letter, addressing it to the E. I. duPont deNemours & Company at its Portland office asking whether or not they were going to take the boards, or the "rest" of the boards. He is apparently somewhat confused as to whether he sent the letter before the first car was ordered or after that shipment and before the second car was ordered. Upon a careful reading of his testimony, we think his testimony as to the letter must be taken as a statement that it was mailed after the first shipment and before the second car was ordered. He received no reply to the letter, but a few days later was called on the phone, recognized the voice of the speaker as that of Mr. Sargent, the Superintendent, and gives as the substance of that conversation that "He wanted me to get a car placed." The second car was placed and Mr. Cassidy, the Company's grader, came up again with Mr. Norris, graded the lumber, and, on January 4, 1927, billed and shipped the car to the McDonald Mfg. Co. at Portland.

The plaintiff states that he received still another telephone message from the Superintendent asking him to place a third car, which also was loaded and graded by Mr. Cassidy, and on February 9, 1927, shipped to the Noyes Lumber Company at West Gonic, New Hampshire.

The plaintiff further testifies that, after the shipment of the third car, he again went to the office of the Company at Portland and there talked with both Mr. Sargent, the Superintendent, and

Mr. Melia, the General Manager. He says that he asked Mr. Melia for his money and was told "that the money didn't come along" and "I guess you will get your money when the time comes right." The plaintiff's reply was, "It's about time." He then said to Mr. Sargent, "When shall I expect my money? It is about time, two cars are overdue, and I can use some money." Mr. Sargent's reply was, "You will get it soon."

Dissatisfied with the results of his conference with Mr. Melia and Mr. Sargent, the plaintiff consulted his attorney and, at a conference in the latter's office, which was attended by Mr. Melia, was informed by him, or by the Company's attorney who was present, that the three car loads of boards in controversy were not purchased on the account of the defendant Corporation but by Mr. Sargent on his personal account as a private business transaction. The plaintiff asserts that this was his first knowledge of such a claim, that he intended to sell only to the Company, justifiably believed that he had, and is entitled to recovery against it.

Harry N. Cassidy, the Company's surveyor, who graded and billed the lumber, was called as a witness. His testimony is that he was ordered to go to Poland and grade the lumber by Mr. Sargent, the Company's Superintendent, and, while, from the nature of the order given to him, he suspected that the transaction was outside of the Company's business, he went there on the Company's time, made no disclosure of his suspicions to the plaintiff or any other officer of the company, and made no report of his absence or the grading upon his return. He states that he wasn't informed by Mr. Sargent that the transaction was his own personal matter, and had actual knowledge of that claim only after all shipments had been made.

The Company, in its defense, called to the stand Henry E. Sargent, formerly its Superintendent, but now discharged. He testifies that he bought the boards in controversy from Mr. Norris for his own account and not for the Company and admits that he sold them to the firms to which they were consigned, and he has received his pay. He denies that he purchased the boards from the plaintiff, either personally or for the Company.

Mr. Sargent admits, however, that he talked with the plaintiff

over the telephone, fixing the time of the conversation as after the first car was loaded. His testimony is:

"Q. Mr. Frye called up the office and asked for you and you answered the telephone?
A. I am sure that was the way of it because they called me to the telephone.
Q. He wanted to know about placing the car?
A. As I understand it, after the car was placed, Mr. Frye wanted to know about loading it.
Q. Do you recall what Mr. Frye said to you at the time?
A. That was all. That was all he wanted to know.
Q. He told you on the telephone — he told you that the car had been placed?
A. Yes. And wanted to know about loading it, because, I suppose, he was there ready to load.
Q. That was the first car?
A. Yes, sir.
Q. Did you, at that time, tell him anything about the duPont Co.?
A. No."

Mr. Sargent also insists that after the first car was shipped, he told the plaintiff that the defendant Company had nothing to do with the purchase of the boards. He says that, when the plaintiff came to the Company's office, after the first car was shipped and wanted his money, he saw that the plaintiff thought that the du-Pont Co. in some way was connected with the transaction, and so informed him that the Company had nothing to do with the lumber. His testimony on this point, in cross examination, is:

"Q. What did Mr. Frye say to you on the first trip that involved the duPont Co. in this matter?
A. He came to the duPont office for the money and wanted to get it from the duPont Co.
Q. You told him that the duPont Co. had nothing to do with it?
A. That was my statement.
Q. What did he say to that?

A. He said that he sold to the duPont Co. through Norris.
Q. Did he say that?
A. Yes, sir.
Q. And he persisted in that?
A. Yes.
Q. In spite of everything you said?
A. Yes, sir. So we had quite a little argument.
Q. You say you told him that the duPont Co. had nothing to do with it and that you bought it?
A. I am quite sure of that. I am telling it just as I remember it.
Q. That was between the first and second cars?
A. I am quite sure it was."

Mr. Norris, the lumber buyer, supports the defendant's contention. He denies that he was ever in the employ of the defendant Company or that he ever told the plaintiff he was buying for it. He claims that the plaintiff sold the boards to him and he, in turn, sold them to Mr. Sargent. He says that his only reference to the duPont Co. was a statement to the plaintiff that the boards were being sold to Mr. Sargent, who worked for that concern. Mr. Norris has filed a voluntary petition in bankruptcy and, while in his schedules he has listed the plaintiff as a creditor, no claim has been proved.

Upon this evidence, neither materially strengthened nor weakened by other evidence in the record, the jury found for the plaintiff. It is clearly evident that his testimony was accepted as substantially true. Upon the record, we are not impressed to the contrary. The questions on the Motion therefor are can the plaintiff recover upon the evidence taken most favorably in his behalf. Was there a sale to the Company? Is the Company estopped to deny its Superintendent's agency and authority in this transaction?

It is well settled that the liability of a principal is not limited to such acts of the agent as are expressly authorized or necessarily implied from express authority. All such acts of an agent as are within the apparent scope of the authority conferred upon him are binding upon the principal, apparent authority being that which, though not actually granted, the principal knowingly permits the

agent to exercise or holds him out as possessing. And whether or not a principal is bound by the acts of his agent when dealing with a third person, who does not know the extent of the agent's authority, depends not so much upon the actual authority given or intended to be given by the principal as upon the question, what did such third person, dealing with the agent, believe and have a right to believe as to the agent's authority from the acts of the principal. When a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business uses and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of his principal the particular act in question, and such particular act has been performed, the principal is estopped to deny the agent's authority to perform it. *Feingold* v. *Supovitz*, 117 Me., 371; *Davies* v. *Steamboat Co.*, 94 Me., 379, 385; *Heath* v. *Stoddard*, 91 Me., 499; 21 R. C. L., 856, 907; 2 C. J., 461. This doctrine is established to prevent fraud and proceeds upon the ground that, when one of two innocent persons must suffer from the act of a third, he is to sustain the loss who has enabled the third person to do the injury. *Packard* v. *Insurance Co.*, 77 Me., 144; *Thorne* v. *Casualty Co.*, 106 Me., 274, 281.

In the case at bar, the defendant Company placed its Superintendent, in its local office at Portland, Maine, second in command only to its local General Manager. It entrusted the purchase of standing timber and sawed lumber to these agents and they exercised this authority as occasion required. Accepting the plaintiff's testimony as true, after information from Norris, the timber buyer, that the Company would buy his boards, the plaintiff took the matter up in an ordinary and businesslike way. He called the Company's office on the telephone and received an order from the Superintendent of the mill to place a car. By direction of this same Superintendent and, as appears in the record, with the consent of the local General Manager, the Company's surveyor came to Poland and graded the car, and it is a fair inference that, the sale being F. O. B., the lumber was in fact delivered to the surveyor and by him shipped.

That is not all, if the plaintiff can be believed. Not hearing from his shipment, he went to the Company's office and called for the boss, and the General Manager, on learning his errand, turned him over to the Superintendent, who asked him to wait for his pay and told him that another car would be loaded as soon as possible. It is unnecessary to restate the plaintiff's account of subsequent conversations with the Company's employees which resulted in the shipment of two more cars of boards, a demand for his pay, and a conference with his attorney.

We are of opinion that, if the jury found the facts as the plaintiff claims them to be, they were warranted in the conclusion that, either the boards were in fact purchased on the Company's account but fraudulently resold on its Superintendent's personal account, or that, while the transaction was a personal purchase of the Superintendent, the Company had placed him in such a situation that the plaintiff, in good faith, believed and had a right to believe that he was making the purchase on the Company's account and had authority to do so. Upon either conclusion, a verdict that the defendant must bear the loss occasioned by the fraud of its employee is not clearly wrong.

It is not made to appear that the verdict for the plaintiff for $2,308.17 exceeds the unpaid value of the boards shipped, with interest from date of demands. The verdict is sustained.

EXCEPTIONS

On cross examination, defendant's counsel asked the plaintiff if he knew that Mr. Norris, the timber buyer, was not working for the duPont Co. The reply was, "No sir; he said he was." The defendant's motion, to strike out from the answer what Mr. Norris said, was denied. No prejudice resulted. The plaintiff makes no claim that Mr. Norris was an agent of the defendant Company and there is no evidence of his agency. It can not be assumed that the jury rested its verdict upon such a finding. Furthermore, in subsequent cross examination, counsel for the defendant brought out, and left in the record without objection, a statement of Mr. Norris of like effect. Where evidence is admitted over objection and an exception is taken, the party excepting will waive the benefit of

his exception if he afterward introduces the same evidence or that of like effect. *Weide* v. *Davidson*, 15 Minn., 258; *Southern R. Co.* v. *Blanford*, 105 Va., 373; 3 C. J., 958.

The defendant's second Exception can not be sustained. The declaration of the Assignee of Norris, the timber buyer, in a suit against Sargent has no probative value in establishing the market value of the board shipped by the plaintiff.

The defendant takes nothing by his Exception to the refusal of the presiding Justice to direct a verdict for the defendant. Our conclusions upon the Motion sustain this ruling below.

Exceptions four to seven, as stated by counsel on the brief, relate to the same subject matter. Ignoring the plaintiff's claim of a contract growing out of delivery of the boards upon the order of the Company's Superintendent, the counsel for the defendant insists that the plaintiff can prevail only upon proof of a contract with Norris, the timber buyer, and requested the presiding Justice below to instruct the jury that, unless they found Norris was the agent of the defendant Company, their verdict should be for the defendant. Upon the same reasoning, the defendant requested instructions that the statement of the Company's Superintendent and General Manager were immaterial. The instructions were properly refused. As presented, they excluded from consideration issues clearly within the pleading and proof.

Finally the defendant requested an instruction that, as a matter of law, upon pleadings and proof, the plaintiff could not recover for the first car of lumber shipped. Neither fact nor law warrants this instruction. It was not within the province of the Court to take this issue from the jury.

Motion overruled.
Exceptions overruled.

HERBERT L. YORK *vs.* ULYSSES G. GOLDER.

FRANK N. AND FLORA E. BLAISDELL *vs.* SAME.

Kennebec. Opinion September 30, 1930.

EASEMENTS. EVIDENCE.

An easement of necessity in the nature of a drain may be reserved by implication in the conveyance of a servient estate.

Where an easement exists over land which is open, apparent and in use, and strictly necessary to the enjoyment of another part of the same parcel of land, and the common owner of the entire premises conveys the servient part, even with covenants of warranty, there is an implied reservation of the easement for the benefit of the dominant estate.

In the case at bar the jury found that the drainage formerly enjoyed by the plaintiffs had resulted from a natural slope to and through the defendant's land and there never had been a ditch. There being sufficient believable evidence to warrant such a finding, the verdict in each case must be sustained.

On general motion for new trial by plaintiffs. Actions on the case to recover damages for obstruction of an artificial ditch alleged to have extended across defendant's land, draining surface and waste waters from the plaintiffs' premises. The plaintiff, Herbert L. York, claimed an easement of necessity reserved by implication in a deed from Ada M. LaRock to the defendant. Plaintiffs Blaisdell, claimed an easement by adverse user. The jury found for the defendant in each case. A general motion for new trial in each case was thereupon filed. Motions overruled.

The cases sufficiently appear in the opinion.

Ames & Ames, for plaintiffs.

Harvey D. Eaton, for defendant.

SITTING: DUNN, STURGIS, BARNES, FARRINGTON, JJ.
PHILBROOK, A. R. J.

STURGIS, J. In these actions on the case, tried together and brought forward on general motions in a single record, the plaintiffs charged the defendant with obstructing an open drain on his land, used as of right by the plaintiffs for the discharge of surface

and waste waters collecting on their adjoining lands, and seek recovery of resulting damages.

YORK CASE.

In this action it appears that in 1918 one Ada M. LaRock was the common owner of the lands here involved and now owned by the plaintiff and the defendant. September 5, 1922, Mrs. LaRock sold Mr. Golder his lot and on September 13, 1922, following, conveyed the rest of her lands to Mr. York. Alleging the existence of an open drain across the land sold to Mr. Golder at the time these conveyances were made and the necessity for its continuance for drainage of his land, the plaintiff claims an easement of necessity accruing to him by a reservation by implication in the defendant's grant from Mrs. LaRock.

The law recognizes that an easement of necessity, in the nature of a drain, may be reserved by implication in the conveyance of a servient estate. This suit of Herbert L. York recently came before this court on exceptions to a nonsuit at a previous trial, *York* v. *Golder*, 128 Me., 252, and in the opinion sustaining the exceptions, the rule is stated 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 parts conveys the servient part, even with convenants of warranty, there is an implied reservation of the easement for the benefit of the dominant estate."

As pointed out, however, in that opinion, the application of this rule to the instant action requires a determination of the issues of fact of whether (1) there was an open drain, (2) its purpose apparent, and (3) an easement of a drain across the defendant's land was necessary to the reasonable enjoyment of the plaintiff's premises and no substitute could be provided at a reasonable expense. If the first issue is decided in the negative, other issues become immaterial.

This record discloses that long prior to Mrs. LaRock's purchase of these lands, a covered drain had been constructed from the house now owned by the plaintiff York, emptying into an open ditch running southeasterly to the southeast corner of the York land near

where it adjoins the defendant's premises. The existence of this open drain is admitted and little doubt exists as to its location. The controversy in this case arises out of the conflicting claims of the parties as to the existence of an artificial ditch running across the defendant's premises connecting the York drain with the town culvert.

The plaintiff and his witnesses testify that, for at least thirty-five years before the defendant built his house, there was an open ditch across the defendant's land, several feet deep, clearly defined, and regularly and necessarily used to carry off waters collected by the York drain. They insist that this drain existed and was in use at the time Mrs. LaRock, owning both parcels of land, sold the defendant his lot.

The defendant's evidence is in direct conflict with these claims. He denies that a ditch ever existed across his land. He testifies that when he purchased from Mrs. LaRock there was no ditch there and none had been there for eight or nine years before. He admits that he increased the grade of his land where his house is built by about two feet but says, where the plaintiff locates the ditch, the surface of the ground remains unchanged. The defendant is supported by the testimony of Mr. Green, a civil engineer who examined the premises, found the levels, and made a chalk. Mr. Green testifies that from the northeast corner of Mr. York's buildings the land slopes easterly and southerly through an old hardwood swamp down to and through the defendant's land to the town culvert. He says there is no evidence of the existence of an artificial drain on the defendant's property. He found a natural depression or sag near the culvert and low land near the York boundary. His descriptions of present conditions and levels taken along the supposed course of the ditch and adjacent lands, if believed, cast doubt upon the existence of a ditch.

As we read the record, we think that the jury could fairly conclude that the plaintiff's witnesses were confused in their recollections of the ditch of which they now give testimony and were in error in continuing the York ditch across the Golder land. Undoubtedly, there was drainage to the eastward in former years, but the plaintiff's evidence is not so convincing as to preclude a finding

that the former drainage resulted from the natural slope and lower grade of the defendant's land and not from an artificial ditch. We have no doubt the jury so found, and other issues became and are immaterial. The verdict must stand.

BLAISDELL CASE.

These plaintiffs own property adjoining the premises of Mr. York and have drainage into the ditch on his land. Relying on adverse user for the statutory period, they claim a right of connecting drainage across the defendant's land through the open ditch already considered. The evidence as to the existence of this ditch is the same as in the York case, and the verdict was for the defendant. Assuming, as we must, that this verdict also rests on a finding that there was no ditch across the defendant's land, for the reasons already stated, the plaintiff's motion for a new trial must be overruled.

In each case, the entry will be

Motion overruled.

THE AMERICAN AGRICULTURAL CHEMICAL COMPANY

vs.

CYRUS F. SMALL.

Aroostook. Opinion September 30, 1930.

EVIDENCE. ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

In construing Assignments for the benefit of creditors, Courts are guided by the same general rules which govern the construction of other written instruments.

Whenever, from an examination of the writing itself, the intent with which it was executed can be clearly ascertained, that intent is to govern.

If the language of an Assignment is susceptible of more than one meaning, it is always allowable to take into consideration the situation of the parties and the circumstances under which the writing was made, in order to ascertain the

true meaning. This rule is not intended to enable the parties, however, to make a new contract. It is not applicable to Assignments free from ambiguity.

At common law an Assignee for the benefit of creditors succeeds only to the title of his Assignor, subject to all liens and encumbrances enforcible against the Assignor.

A sale by a common law Assignee of a mortgage, without the consent of the mortgagee, of the entire property in chattels, encumbered by the lien of a mortgage and accompanied by a delivery to the purchaser, is a conversion making the Assignee liable in trover.

In the case at bar the assignment itself disclosed no intention that the plaintiff waived its security. In unambiguous terms, it preserved the security of the plaintiff's mortgage.

The admission of extrinsic evidence, disclosing an intention to waive the security of the mortgage, if there was such in the record, violated the parol evidence rule.

Admission of testimony that the Assignor, in the case at bar, proposed to file a petition in bankruptcy unless another secured creditor joined the assignment, if admitted to prove a waiver of the plaintiff's security and thereby varying the plain terms of the written Assignment, was error.

On exceptions by plaintiff. An action of trover to recover the sum of $7,242.45, the agreed net price received by defendant from the sale of a potato house located on leased land. The issue involved the interpretation of an assignment for the benefit of creditors made by one Cyr to defendant, plaintiff having a chattel mortgage on the potato house, but joining with other creditors in the assignment. The case was heard by a single Justice without a jury, right of exceptions reserved. To the admission of certain testimony and to the judgment rendered for the defendant, plaintiff seasonably excepted. Exceptions sustained.

The case fully appears in the opinion.

Herbert T. Powers,

Cook, Hutchinson, Pierce & Connell, for plaintiff.

Cyrus F. Small, for defendant.

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

PHILBROOK, A. R. J.

STURGIS, J. This action of trover to recover the value of a potato warehouse built on leased land and personal property was

heard at *Nisi Prius* by a single Justice, without a jury but with right of exceptions reserved. The case comes forward on exceptions to the admission of evidence and to judgment for the defendant.

February 7, 1929, Isaie L. Cyr of Madawaska gave the plaintiff Company a chattel mortgage for $17,360.16 on his potato houses in Van Buren and Frenchville. May 9, 1929, following, Mr. Cyr made a common law Assignment to the defendant for the benefit of his creditors. The Chemical Company, with other creditors, became a party to the Assignment.

Claiming that the plaintiff released its mortgage of February 7, 1929, by becoming a party to the Assignment, the defendant, as assignee, sold the Frenchville potato house and has on deposit, as proceeds of the sale, $7,240.35. The plaintiff denies the release of its rights under its mortgage and seeks damages for the conversion of the house.

Under the Fourth Paragraph of *Item Twenty-four* setting out the uses and purposes of the Assignment appears the following agreement and proviso, and upon its interpretation depends the rights of the parties in this action:

> "And said parties of the third part do hereby severally and respectively agree to accept and take in full payment, satisfaction, and discharge, (excepting as hereinafter provided), all and singular their debts, claims, demands and causes of action against said party of the first part, which are provable against the estates of insolvent debtors under the laws of said State existing at the date hereof, whether payable now or at some future time, the dividends which shall be payable to said parties of the third part, respectively, under the provisions of this agreement. And said parties of the third part do hereby severally and respectively, each and every one of them, release, acquit, and forever discharge said party of the first part from all such claims, debts, and demands, excepting as hereinafter provided viz: * * *
>
> And provided, further, that no party of the third part holding security shall or does hereby release or impair, or in any

manner affect his right to such security; but if the security is applicable under the insolvency laws, or the bankruptcy laws to the payment of the debt or claim by it secured, the creditor or creditors who are or shall become parties to this agreement, holding such security, shall receive and be entitled to dividends on only so much of the claim or debt as remains after deducting from it the amount received from a sale of such security, or such sale and the time thereof, and the place of sale, such creditor or creditors holding such security shall give the party of the second part a notice of at least thirty days before the same."

In construing Assignments for the benefit of creditors, the courts are guided by the same general rules which govern the construction of other written instruments. The one guiding principle is the intent of the parties and, whenever from an examination of the writing itself the intent with which it was executed can be clearly ascertained, that intent is to govern. If the language of the Assignment is susceptible of more than one meaning, it is always allowable to take into consideration the situation of the parties and the circumstances under which the writing was made in order to ascertain its true meaning, but this rule is applicable only to Assignments in which the language is fairly susceptible of more than one interpretation. It is not intended to enable the parties to make a new contract, and it is not applicable to an assignment free from ambiguity and the meaning clear. The rule of *Snow* v. *Pressey*, 85 Me., 408, and *Bar Harbor and Union River Power Company* v. *Foundation Company*, 129 Me., 81, applies.

The application of this rule leaves the rights of the parties to this action dependent upon the language used in the Assignment. It can not include a consideration of extrinsic facts and circumstances of a date prior to the execution of the instrument. We find no ambiguity in the provision that "no party of the third part holding security shall or does hereby release or impair, or in any manner affect his right to such security; but if the security is applicable under the insolvency laws, or the bankruptcy laws to the payment of the debt or claim by it secured, the creditor or creditors

who are or shall become parties to this agreement, holding such security, shall receive and be entitled to dividends on only so much of the claim or debt as remains after deducting from it the amount received from a sale of such security, etc." Nor does a reference to other parts of the instrument bring doubt as to the intended meaning of this language. The contract of the assignor with the defendant and those creditors who assented, including this plaintiff, as evidenced by the written instrument which they executed, preserves the security of its mortgage to the Chemical Company.

The defendant seeks to read into this Assignment an intention on the part of the plaintiff Company and other parties to the instrument that the provision "that no party of the third part holding security shall or does hereby release or impair or in any manner affect his right to such security, etc." should be of no effect as to the plaintiff, but it should become an unsecured creditor by joining the Assignment and take its dividend as such. That intention is not disclosed by the Assignment itself. It can only be found, if at all, in parol evidence of facts and circumstances, prior to or contemporaneous with the execution of the Assignment by the plaintiff Company, tending to prove that the parties meant something else than the agreement which they committed to writing. If the testimony of the single witness in the case, John B. Pelletier, attorney for the assignor, can be construed to disclose such an intention, of which we are not convinced, to permit the written Assignment to be modified thereby as demanded by the defendant would be a clear violation of the parol evidence rule.

An assignee for the benefit of creditors at common law, succeeds only to such title as the assignor had, with no higher or better rights, and his title, right or interest is subject to all liens and encumbrances upon the property which might have been enforced against it in the hands of the assignor. *State* v. *Patten*, 49 Me., 383; *Rowell* v. *Lewis*, 95 Me., 83; 5 C. J., 1189. A sale by a mortgagor, without the consent of the mortgagee, of the entire property in chattels encumbered by the lien of a mortgage, accompanied by the delivery to the purchaser, is a conversion by the mortgagor. *Dean* v. *Cushman*, 95 Me., 454; *McLarren* v. *Brewer*, 51 Me., 402, 405. It is not less so when made by the common law assignee of the

mortgagor, under an Assignment preserving the lien and security of the mortgage, as in the case at bar.

Against objection by the plaintiff that the parol evidence rule was violated, the witness, Pelletier, was permitted to testify that the officers of the plaintiff Company were informed that Mr. Cyr, the assignor, proposed to file a Petition in Bankruptcy, and would do so if the Fort Kent Trust Company, one of his secured creditors, did not become a party to the Assignment. The purpose for which this testimony was offered was not stated. Counsel for the defendant argues on the brief that assent to the Assignment in the face of this threat of bankruptcy is a basis for inference that the plaintiff Corporation intended to waive its security. If this evidence was admitted for this purpose, its only effect would be to vary the plain terms of the written instrument, and its admission was error.

Being convinced also that judgment for the defendant was an error of law, the entry must be

Exceptions sustained.

FREDERICK W. HINCKLEY ET AL *vs.* THOMAS GIBERSON ET AL.

Cumberland. Opinion October 3, 1930.

ATTORNEY AND CLIENT. R. S., CHAP. 124, SEC. 12.

As provided in Sec. 12, *Chap.* 124, *R. S.* 1916, *the prosecution by contract or agreement, of any suit at law or in equity, upon shares is illegal, and the contract void.*

In the case at bar the Court holds that the contract to furnish legal services on an agreement to pay "either the sum of five thousand ($5000) dollars, or one third the fair market value of said farm," was an agreement to bring and prosecute a suit upon shares; that the uncertainty presented in the last sentence of the contract or the fact that the writ was brought to collect but five thousand ($5000) dollars, did not render the agreement other than one upon shares.

On report. An action of assumpsit brought by a law firm to recover for legal services rendered and expenses incurred, in connec-

tion with the prosecution of a bill in equity in behalf of the defendant and others. Contract of employment was in writing, the point at issue being whether or not the agreement in effect contemplated litigation on shares. Judgment for the defendant.

The case fully appears in the opinion.

Hinckley, Hinckley & Shesong, for plaintiffs.

Harry L. Cram,

Lauren M. Sanborn, for defendants.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

BARNES, J. This is an action in assumpsit, brought by a firm of lawyers, to recover for legal services rendered and expenses incurred in the conduct of a suit in equity between one of the defendants here and parties who are strangers to this suit.

The contract of hire is in writing. It reads:

"Caribou Maine Oct. 19, 1926

Memorandum of agreement made and entered into this nineteenth day of October 1926 witnesseth as follows:

In consideration that Hinckley, Hinckley & Shesong of Portland, Maine will take the case of *Thomas Giberson* v. *Grover Hardison,* Judson Briggs and Liab Shaw, trustees to recover said Giberson's farm located in Caswell plantation Aroostook County and prosecute the same, I the undersigned Thomas Giberson, and I. E. H. Doyle both of said Caribou, agree to pay said Hinckley, Hinckley & Shesong as a fee for their services either the sum of five thousand ($5000) dollars, or one third the fair market value of said farm at the time it is repossessed, or judgment against said Giberson rendered by any court in said State of Maine before which action may be brought, said appraisal to be made by three disinterested appraisers to be appointed by the parties hereto, one by said Giberson and one by said Shesong and the third by the two selected as aforesaid.

The consideration for said Doyle's agreement hereto being a certain agreement made between said Giberson and said Doyle. In the event of the fee of $5000. being agreed upon, said amount is to be in addition to necessary expenses in prosecuting said action, and as a further consideration said Doyle has paid to said Shesong the sum of $200. as a retainer, which is to be deducted from said $5000. or said one third of the appraised value of said farm at the time of final adjustment.

In witness whereof the said Parties have hereunto set their hands this nineteenth day of October 1926.

Witness. Hinckley, Hinckley & Shesong
By L. G. Shesong
Thomas Giberson
E. H. Doyle"

The wording of the contract may be held to render interpretation necessary. Its indefiniteness, if any, is in the expression of the method of arriving at the amount to be earned.

Defendants contend that under the agreement evidenced by the contract of hire plaintiffs engaged to undertake the contemplated litigation on shares.

In this state it is a crime for anyone to contract or agree to bring or prosecute any suit in equity upon shares.

We need to enter upon no disquisition on champertous engagements, for our R. S., Chap. 124, Sec. 12, provide that whoever "brings, prosecutes or defends, or agrees to bring, prosecute or defend, any suit at law or in equity upon shares, shall be punished by fine . . . or by imprisonment."

Such has been our law since the enactment of Chap. 57 of the Public Laws of 1878.

If plaintiffs contracted to conduct the litigation and take for their pay a share of the value of the equity in the farm which might be returned to one of the defendants, they brought and prosecuted the suit upon shares.

From brief of plaintiffs we find their interpretation of the contract of hire, so far as they express it, to be that defendants were

to pay the costs of suit and lawyer's expenses, and a minimum fee of $5,000.00 for professional services.

But the contract to furnish such services was on an agreement to pay "either the sum of five thousand ($5000) dollars, or one third the fair market value of said farm etc."

This we hold to be an agreement to bring and prosecute the suit upon shares; and we can not conclude that the uncertainty presented in the last sentence of the contract, or the fact the writ is brought to collect but $5,000.00 renders the agreement anything other than upon shares.

In the language of Judge Kent more than a half century ago, "It is too well settled to require the citation of authorities that no party can recover for acts or services done in direct contravention of an express statute." *Harding* v. *Hagar*, 60 Me., 340.

And in a later case, wherein the above is reviewed it is expressed as the law in this state, "It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition." *Randall* v. *Tuell*, 89 Me., 443.

Judgment for defendants.

INHABITANTS OF OTISFIELD *vs.* BOURDON SCRIBNER ET AL.

Cumberland. Opinion October 14, 1930.

COLLECTION OF TAXES. MUNICIPAL CORPORATIONS. CONSTITUTIONAL LAW.

A tax collector who has not settled with the town may not serve as an assessor of its taxes, and taxes levied by a Board of Assessors of which such former tax collector is one, can not be collected on a suit of the inhabitants of the town.

A Board of Assessors acting de facto *can not levy a legal assessment.*

Proceeding on an illegal assessment a condition is set up which the legislature by an attempted curative act can not validate.

While legislatures have the power to pass retrospective statutes, if they affect remedies only, they have no constitutional power to enact retrospective laws which impair vested rights, or create personal liabilities.

A legislature has not judicial powers, and may not pass any law which will take from any citizen a vested right.

A void tax can not be made valid by act of the legislature.

A town, proceeding to assess taxes, is exercising powers delegated to it by the State. It may proceed only according to statute directions, and within limits by statute prescribed. It may not avail itself of a curative statute in contravention of constitutional rights.

A sale for taxes in contravention of the statute, which provides the only legal method of making such sale is no sale for taxes, and extinguishes no tax.

The statute setting forth the method of perfecting the tax lien upon real estate is mandatory as to day of sale, and unless complied with the tax collector loses the lien provided by statute for his protection. He may not again offer these lands for the taxes for that particular year. But the provision is only directory as to choice of this method by the collector and does not preclude other methods of collection.

In the case at bar the act of the legislature attempting to validate the assessment and commitment of taxes in the Town of Otisfield for the years 1924 and 1925 transcended the constitutional power of the legislature and was invalid.

The plaintiff, therefore, could not collect on the assessment of taxes for 1924 and 1925.

As to the 1926 and 1927 taxes, the Town received nothing at the Collector's illegal sale and it retained nothing from the amounts turned over to it by the Collector from the proceeds of the 1926 and 1927 sales. Estoppel could not be maintained, therefore, against the Town. The Town was entitled to judgment for the sum of $276.39, the 1926 tax, with interest from July 14th of that year, together with $258.51, the 1927 tax, with interest from June 29th of that year, and for costs.

On report on agreed statement. An action of debt to recover taxes for the years 1924, 1925, 1926 and 1927. Judgment for the plaintiff for taxes for the years 1926 and 1927.

The case is fully stated in the opinion.

Robinson & Richardson, for plaintiffs.

Alton C. Wheeler, for defendants.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

BARNES, J. The defendants, one a resident of Hiram, the other of Harrison, were in 1924, and for the succeeding four years, owners of real estate in the town of Otisfield.

They are sued, in an action of debt, for taxes on the Otisfield real estate, and the case is by agreement of parties reported to this court for adjudication on a statement of facts.

Since the suit was begun the tax for 1928 has been paid.

At the times of holding the annual town meetings in Otisfield in 1924 and 1925, one Harry M. Stone, presumably a resident of Otisfield, was in that small class of residents of the town, who, with treasurers in similar straits, are the only residents by R. S., Chap. 4, Sec. 12, disqualified to serve as assessors de jure: he had been collector of taxes for Otisfield, and had not completed his duties as collector of taxes nor had a final settlement with the town.

So disqualified by statute, Mr. Stone, with others, proceeded in each of these years to assess the taxes on the defendants' real estate.

Except for the disqualification of Mr. Stone the report informs us that assessment, commitment, and demand by the collector, for each tax now sought to be recovered were proper and legal.

Until a legislature shall remove the bar a tax collector who has not settled with the town may not serve as an assessor of its taxes, and taxes levied by a board of assessors of which such former tax collector is one can not be collected on suit of the inhabitants of the town. *Springfield* v. *Butterfield*, 98 Me., 155.

But, with intent to cure this defect, the plaintiff town secured the passage of an act of the legislature of 1927, Chapter 44 of the Private and Special Laws of that session. It reads as follows:

"The acts, doings and proceedings of the town meeting of the town of Otisfield in the county of Cumberland and state of Maine held on the third day of March, nineteen hundred and twenty-four, the town meeting of said town held on the second day of March, nineteen hundred and twenty-five and the town meeting of said town held on the first day of March, nineteen hundred and twenty-

six, are severally hereby ratified, made legal and valid; also the assessments and commitment of taxes in said town of Otisfield for the years nineteen hundred twenty-four, nineteen hundred twenty-five and nineteen hundred twenty-six and the acts and doings of the municipal officers of said town, for said years, relating to the assessment and commitment of said taxes are hereby ratified, made legal and valid." . . . It is argued that this act of the legislature, by intent retrospective in its effect, cured the defect, made the assessment legal despite the statute bar at the time of assessment, and eliminates the defense.

"A curative act in the ordinary sense of the term is a retrospective law acting on past cases and existing rights.

"The power of the legislature to enact such laws is, therefore, confined within comparatively narrow limits, and they are usually passed to validate irregularities in legal proceedings or to give effect to contracts between parties which might otherwise fall for failure to comply with technical legal requirements. (Cooley) But there may be in legal proceedings defects which are not mere informalities or irregularities, but so vital in their character as to be beyond the help of retrospective legislation: such defects are called jurisdictional." *Meigs* v. *Roberts*, 162 N. Y., 371.

A board of assessors acting *de facto* can not levy a legal assessment. *Springfield* v. *Butterfield*, supra. Proceeding on an illegal assessment a condition is set up which the legislature by an attempted curative act can not validate.

To hold otherwise would be "to transfer the property of the former owner, not by force of a valid and binding sale for taxes, but by the declared will of the legislature that his title should pass from him and vest in the purchaser at a tax sale, which conferred no right.

"This the legislature have not the power to do, whether by direct and positve action, or by rendering valid and binding acts which were nugatory." *Conway* v. *Cable*, 37 Ill., 82, 90.

"There can be no doubt that legislatures have the power to pass retrospective statutes, if they affect remedies only. But they have no constitutional power to enact retrospective laws which impair vested rights, or create personal liabilities." *Coffin* v. *Rich*, 45 Me.,

507; *Berry* v. *Clary*, 77 Me., 482; *Bradford* v. *Brooks*, 2 Aikens (Vt.), 284.

"In whatever the defendant might have a vested right, it would not be competent for the legislature to destroy it." *Fales* v. *Wadsworth*, 23 Me., 553.

A legislature has not judicial powers, and may not pass any law which should take from any citizen a vested right. *Merrill* v. *Sherburne*, 1 N. H., 213.

A void tax can not be made valid by act of the legislature. *Tunbridge* v. *Smith*, 48 Vt., 648.

"Legislatures can not give force to illegal sales already made." *Forster* v. *Forster*, 129 Mass., 559.

"Without a valid assessment, the subsequent proceedings necessarily fall for the want of a basis upon which to rest." *March* v. *Chestnut*, 14 Ill., 223; Petition of Hearn, 96 N. Y., 378; *Stephan* v. *Daniels*, 27 Ohio St., 527.

A tax assessment, illegally imposed for want of jurisdiction, "is not in truth an assessment in any respect. Can not be enforced or collected as such in any lawful manner, and does not possess a single element of life or vitality," and the above is said regarding the collection of a tax after the enactment of a statute providing; "All assesments heretofore laid in said city . . . are hereby confirmed." *People* v. *Brooklyn*, 71 N. Y., 495.

A town, proceeding to assess taxes, is exercising powers of the state to it delegated. It may proceed only according to statute directions, and within limits by statute prescribed. And it may not avail itself of a curative statute in contravention of constitutional rights.

It follows, from reason and the logic of well-considered cases that the plaintiff can not collect on the assessments of 1924 and 1925.

Under the assessments for 1926 and 1927 the tax collector advertised and sold defendants' lands as "several distinct lots or parcels of land or rights, sold together at one sale instead of separately and distinctly as required by law," quoting from the agreed statement.

The town bid in the lands at the "sale"; took to itself deeds

thereof, but subsequently recognized them as ineffective and conveyed to defendants its interest in the lands as owner.

Thereafterward it brought the writ at bar.

The defenses urged to collection of the taxes for these two years in the present suit are that the taxes were extinguished by tax sale; and, secondly that "as a matter of estoppel and equity," plaintiff can not maintain an action for the taxes while yet retaining the proceeds of its settlement with the tax collector for the sales under the taxes levied.

A complete answer to the former of these defenses is that a sale for taxes, in contravention of the statute which provides the only legal method of making such sale is no sale for taxes, and "extinguishes" no tax.

As to the second defense, that of estoppel, this is of not much more moment.

Upon the several dates when sales of lands of non-resident owners for taxes of 1926 and 1927 were held, representatives of the town "bid in," in the name of the town, the lands announced by the collector as subject to sale, and subsequently, as a credit to their charge against the collector, of taxes committed to him, the municipal officers entered the amount of such taxes. The town received therefor deeds that might or might not convey to it lands of the defendants.

Finding, as the report states, that the conveyances under "tax sales" were void, the plaintiff town quitclaimed; but no title passed thereby, a cloud upon defendants' title only being removed.

The town received nothing at the collector's illegal sales; crediting the collector with the amounts of the 1926 and 1927 taxes on defendants' lands did not turn over to it anything which it now retains. Estoppel can not be maintained against the town in this suit.

The error in its account with the collector may even now be corrected by true entry.

These taxes have not been paid. The collector, or his bondsmen, may be forced to pay them to the municipal officers of the town and the collector may sue the owners for uncollected taxes on their lands, and have his day in court. Or, as in this case, the collector,

after being authorized in writing by the Selectmen of his town, may prosecute an action of debt for the taxes in the name of the town. The latter is the course pursued in the present case.

It is conceded by defendants that the several methods of collection authorized by the statutes are available in proper cases, at the option of the collector.

But, they contend that the statutory provision, "if any tax assessed on real estate . . . remains unpaid on the first Monday in February next after said tax was assessed, the collector shall sell at public auction so much of such real estate as is necessary for the payment of said tax," is mandatory, and that failure so to sell, or ineffective sale on the appropriate date extinguishes the tax, i.e., renders it not collectable.

Not so, the statute above cited expresses the method of perfecting the tax lien upon real estate.

It is mandatory as to day of sale, and unless complied with the tax collector loses the lien by statute provided for his protection.

He may not again offer these lands for those taxes. But the provision is only directory as to choice of this method by the collector.

The entry must therefore be, judgment for plaintiffs for $276.39, the 1926 tax, with interest from July 14 of that year, together with $258.51, the 1927 tax, with interest from June 29 of that year (interest on each tax to be computed to date of judgment), and for costs.

So ordered.

SADIE BUNKER, APPELLANT FROM DECREE OF JUDGE OF PROBATE.

Sagadahoc. Opinion October 22, 1930.

PLEADING AND PRACTICE. PROBATE APPEALS.

Probate appeals are statutory and there must be a strict compliance with the statutory requirements or they will be dismissed. A failure to comply with the conditions imposed by the statute can not be cured by amendment.

There being no statutory requirement as to form, an amendment may be allowed for a mere formal defect after a general appearance as in the case of writs. The addressing of a notice of appeal to the wrong court is a defect which can be cured by amendment.

On exceptions by appellant. An appeal from the decree of the Judge of Probate for the County of Sagadahoc, allowing the will of Clinton C. Gardiner. Notice of appeal was on the 20th day of April, 1930, addressed to the Supreme Judicial Court, instead of to the Superior Court, which was then the Supreme Court of Probate. To the refusal of appellant's motion to amend her appeal by striking out the words "Supreme Judicial Court" and inserting the words "Superior Court," and to the ruling of the Justice of the Superior Court dismissing the appeal, appellant seasonably excepted. Exceptions sustained.

The case fully appears in the opinion.

Wood & Shaw, for appellant.

Harry R. Drew, for appellee.

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

THAXTER, J. This case is before this court on exceptions. Within the time prescribed by statute the appellant filed in the Probate Court for Sagadahoc County notice of an appeal from a decree of the Judge of Probate of said county allowing the will of Clinton C. Gardiner. This notice of appeal was addressed "to the Supreme Judicial Court, being the Supreme Court of Probate, to be held at Bath, within and for the County of Sagadahoc, on the first Tuesday of June, A. D. 1930." Prior to the enactment of Chap. 141, P. L. 1929, the Supreme Judicial Court was the Supreme Court of Probate. Under the provisions of this act, however, the Superior Court became the Supreme Court of Probate. In the Superior Court at the June term a general appearance was entered for Margaret Herfel, the residuary legatee under the will, who through her attorney filed a motion to dismiss the appeal because "the Supreme Judicial Court to which the appellant appealed is not the Supreme Court of Probate." The motion was allowed.

The appellant then moved to amend the appeal and reasons of appeal by substituting the words "Superior Court" for the words "Supreme Judicial Court." This motion was denied. To the allowance of the motion to dismiss and to the denial of the motion to amend the appellant duly filed exceptions.

It is true that probate appeals are governed by statute and that there must be a strict compliance with the conditions prescribed or such appeals will be dismissed. *Bartlett Appellant*, 82 Me., 210; *Townshend Appellant*, 85 Me., 57; *Moore* v. *Phillips*, 94 Me., 421. Nor can the failure to comply with the statutory requirements be cured by amendment. *Carter Appellant*, 111 Me., 186; *Garland Appellant*, 126 Me., 84. There seems, however, to be no good reason why an amendment should not be allowed in the case of a mere formal defect in a notice of appeal. *Smith* v. *Chaney*, 93 Me., 214. Such allowance is in furtherance of speedy justice, and as was said in the case of *Pattee* v. *Low*, 35 Me., 121, 123, "were the technical subtleties of the common law to be required in probate proceedings, instead of facilitating, their introduction would tend to defeat the very objects of law."

After a general appearance amendments have been permitted to writs where the return day was omitted, *Ames* v. *Weston*, 16 Me., 266; and where the return day was erroneous, *Barker* v. *Norton*, 17 Me., 416; *Lawrence* v. *Chase*, 54 Me., 196; *Guptill* v. *Horne*, 63 Me., 405. If process can be so amended, there seems to be no good reason for denying the right to amend a notice of appeal for an obvious error, which by no possibility could prejudice the rights of a party.

Exceptions sustained.

JOHN F. CAREY *vs.* CHARLES R. PENNEY.

Waldo. Opinion October 22, 1930.

MONEY HAD AND RECEIVED. RESCISSION. PLEADING AND PRACTICE.

An action for money had and received is equitable in its nature and lies to recover any money in the hands or possession of the defendant which in equity and good conscience belongs to the plaintiff.

A count in ordinary form alleging a promise in consideration of money had and received is good against demurrer though no specifications are filed.

If specifications are filed, proof is limited by them and plaintiff's claim and right to recover restricted by them.

In an action for money had and received, based upon fraud and misrepresentation on the part of a vendor to whom purchase money has been paid, plaintiff must sustain the burden of proving that he has been defrauded in a manner and to a degree which would justify him in rescinding the contract; that he has rescinded it within a reasonable time after discovering the fraud; and, as a condition precedent to his right to rescind, that he has restored defendant to his original state or has been prevented from so doing by defendant's fault.

An action in tort for deceit will lie without rescission. Not so, an action in assumpsit for money had and received based upon deceit.

In the case at bar, there being no evidence of rescission and none of even an attempt toward a restoration of the status quo, a verdict for plaintiff was manifestly unwarranted.

On exceptions and general motion for new trial by defendant. An action of assumpsit with the usual money counts and with specifications. Trial was had at the April Term of the Superior Court for the County of Waldo. To the admission of certain testimony defendant seasonably excepted and after the jury had rendered a verdict for the plaintiff, filed a motion for new trial. Motion sustained.

The case fully appears in the opinion.

Buzzell & Thornton, for plaintiff.

McLean, Fogg & Southard, for defendant.

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

PATTANGALL, C. J. Motion and exceptions. Action for money had and received. Verdict for plaintiff.

In November, 1922, defendant through an agent sold plaintiff a farm, together with certain personal property thereon, for the sum of $1,200, plaintiff paying $650 cash and agreeing to give notes secured by mortgage on the farm for the balance of the purchase price. As soon as the terms of the sale were agreed to and plaintiff had made the cash payment, he took possession of the property.

Defendant executed a deed of the farm and plaintiff executed a note and mortgage. All of the documents were left with defendant's agent, awaiting the signature of plaintiff's wife to the mortgage. It was arranged that she should come to the agent's office later in the day for that purpose and she did so but did not find him there. Later she refused to sign, claiming that certain of the personal property included in the trade had been removed from the farm by defendant, and as a consequence the deed was never delivered to plaintiff and nearly four years later his note was returned to him by defendant.

Plaintiff testified that at that time, in view of the failure of defendant to deliver the personal property which he claimed belonged to him, he "refused to carry out the trade." But he had already gone into possession of the farm and of so much of the personal property as remained thereon. He made no suggestion of placing defendant in *statu quo* nor did he demand a return of the $650 he had paid. Instead, he remained on the farm until June 1926, exercising all of the prerogatives of ownership, even to the extent of making considerable alterations in the house. He treated the personal property during that entire period as his own.

He claims that during the summer of 1923 he learned that he had been deceived as to the amount of hay which the farm produced and that he communicated the fact to defendant and to defendant's agent, but he took no action looking toward a revocation of the trade at that time.

Continuing in possession of the property, he neither revoked the contract nor attempted to carry it out. He paid nothing more to defendant. Neither did he pay taxes on the property, nor insurance, nor interest on the note, nor rental.

On April 30, 1924, defendant brought a writ of entry against plaintiff, demanding possession of the premises. This writ was entered in the Supreme Judicial Court in September 1924, and in the following year the action was discontinued, plaintiff becoming nonsuit. On March 12, 1926, defendant brought a second writ of entry which was entered at the April term of that year and defaulted by agreement. Writ of possession followed and plaintiff was ejected on June 19th following.

On April 2, 1926, prior to the opening of the April term, the writ in the instant case was brought. This action, as has been stated, was for money had and received. The following specification of claim was filed:

> "SPECIFICATION: Under this count the Plaintiff will prove that the above sum of six hundred and fifty dollars was paid by the Plaintiff, John F. Carey, to Charles R. Penney, the Defendant, or to his agent, Roy C. Fish, as the first payment under a contract for the purchase of the farm and other property by the said John F. Carey, which contract the said Charles R. Penney has not carried out, or completed."

The case was tried to a jury at the September term, 1927, a verdict being rendered for plaintiff. During the trial, plaintiff offered evidence to prove false statements and pretences and misrepresentations made to him by one Roy C. Fish, an agent of the Strout Farm Company which company had been employed by Mr. Penney to negotiate the contract for sale of the farm in question. This testimony was admitted subject to defendant's objection and exception.

The case was heard by this Court and defendant's exceptions were sustained on the ground that the evidence offered was inapplicable to any issue raised by the pleadings. *Carey* v. *Penney*, 127 Me., 304.

Before the case was retried, plaintiff amended his specification by adding thereto

> "Under this count the plaintiff will prove that the sum of six hundred and fifty dollars was paid by the plaintiff, John F. Carey to Charles R. Penney, the defendant, or to his agent, Roy C. Fish, as the first payment under a contract for the purchase of the farm and other property by the said John F. Carey, which contract the said Charles R. Penney has not carried out, or completed. The Plaintiff being induced to enter into said contract by certain statements and representations made to him by said defendant or his agent and a part of said statements and representations, to wit, representations as to value of the farm, productiveness of said farm, amount of standing wood on said farm, amount of standing timber on said farm, amount and kind of personal property that was to go in trade, being false, fraudulent and deceitful."

and proceeded to trial on the issues thus framed.

An action for money had and received is equitable in its nature and lies to recover any money in the hands or possession of the defendant which in equity and good conscience belongs to the plaintiff. A count in ordinary form alleging a promise in consideration of money had and received is good against demurrer though no specifications are filed; but if specifications are filed, proof is limited by them and plaintiff's claim and right to recover restricted by them. *Carey* v. *Penney*, supra, and authorities there cited.

The plaintiff in this form of action and under this specification, assumed the burden of proving that he had been defrauded in a manner and to a degree which would justify him in rescinding the contract, that he had rescinded it within a reasonable time after discovering the fraud, and, as a condition precedent to his right to rescind, that he had restored defendant to his original state or had been prevented from so doing by fault of the defendant. *Garland* v. *Spencer*, 46 Me., 528.

He might have elected another remedy. Assuming fraud, an action in tort for deceit will lie without rescission; but this is an action in assumpsit.

We need not here discuss whether or not fraud was proved. Neither need we determine whether, in taking such action as he did take, plaintiff proceeded within a reasonable time. Nor are the events which occurred after April 2, 1926, the date when this action was commenced, of any importance.

Whatever may have happened after that date, there is no evidence in the record of a rescission by plaintiff or of any attempt toward a restoration of the *status quo*, prior to that time.

For more than two months after the suit was begun, plaintiff continued in possession of the farm and had shown no intention of abandoning it. He made all possible use of the personal property as long as any of it existed and at no time did he return it or offer to do so, replace it, or account for it to defendant.

The verdict must have been based upon the theory that at the time the writ was brought, plaintiff had rescinded the contract. There is no evidence in the record supporting such a conclusion.

In this view of the case, it is unnecessary to discuss the exceptions.

Motion sustained.

JOHN F. MCKEEN *vs.* LEANDER M. BOOTHBY.

Cumberland. Opinion October 28, 1930.

DEEDS. RESTRICTIONS. PRINCIPAL AND AGENT. MONEY HAD AND RECEIVED.

A restriction in a deed fixing the minimum cost of buildings to be erected on the real estate conveyed and fixing the distance from the street line at which such buildings shall be placed constitutes an incumbrance.

The general rule is well established, that when an agent names his principal, the principal is responsible, not the agent.

When an agent contracts in behalf of a foreign principal, if the language of the contract is ambiguous, so as to leave it doubtful to whom credit is given, the agent or the principal, the circumstance that the principal resides abroad may be taken into consideration, in determining that question.

If the contract is in writing and its terms clearly manifest to bind the principal, though a foreigner, its construction and effect should not be varied so as to charge the agent.

When an agreement to purchase real estate fails because of the inability of the owner to complete the trade and the purchaser has made a partial payment to a broker, an action for money had and received will not lie against the broker, in favor of the purchaser, if the broker, before receiving notice of the purchaser's claim, has paid the money to his principal.

But if he has not so paid it, he is so liable, even though he has disclosed his principal and regardless of his right to commissions.

When money has been paid to an agent for his principal, under such circumstances that it may be recovered back, the agent is liable as principal so long as he stands in his original position and until he has paid the money to his principal or performed some equivalent act.

After proof of the receipt of money by an agent under circumstances which give the plaintiff a right to have it returned to him, the burden of proceeding with the evidence is on the defendant, who may relieve himself of liability by proof that, prior to notice of plaintiff's claim, he had paid the money to his principal.

Unless such payment to his principal is shown, an action may be sustained against the agent.

In the case at bar there was no direct evidence presented by either party, as to whether or not the payment made to the agent had, prior to the notice of plaintiff's claim, been paid by the agent to his principal.

Inferences to be drawn from the evidence were questions of fact for the jury. The defendant was not entitled to a directed verdict.

On exceptions by plaintiff. An action of assumpsit for money had and received. Trial was had in the Superior Court for the County of Cumberland, at the June 1930 Term. After the introduction of plaintiff's evidence a motion for a directed verdict for the defendant was granted by the Court. To this ruling plaintiff seasonably excepted. Exceptions sustained.

The case fully appears in the opinion.

William Lyons, for plaintiff.

Laughlin & Gurney, for defendant.

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

PATTANGALL, C. J. Exceptions. Assumpsit. Money had and received. Verdict directed for defendant.

Defendant, a real estate agent residing in this state, offered for sale certain property in Portland, belonging to one Bishop, a resident of Canada, and plaintiff entered into an agreement in writing to purchase the same for $3,500, making a cash payment of $100. The agreement recited that the property was free of incumbrance.

An examination of the records disclosed the fact that in the deed to Bishop, the following restrictions appeared: "No house or other buildings shall be built on said lots within ten years of January 1, 1926 to cost less than $3,500. Except that after a dwelling house has been built, such out-houses as may be suitable and appurtenant thereto may also be erected. Houses built on said lots, including piazzas, sun parlors, and all other projections, must be set back twenty-five feet from the street lines."

Immediately on learning of these restrictions, plaintiff notified defendant that he would not go on with the trade, demanded a return of the cash payment, and it not being returned, brought this action for money had and received.

There is no question but that the building restrictions recited in the deed to Bishop constituted an incumbrance. *Roberts* v. *Levy* (N. Y.), 3 Abb. Prac. (N. S.), 311, 316; *Batley* v. *Foerdorer* (Pa.), 29 Atl., 868; *Whelan* v. *Rossiter* (Cal.), 82 Pac., 1082; *Hyman* v. *Boyle* (Mich.), 24 N. W., 163.

This being so, an action for money had and received would lie in favor of this plaintiff against the owner of the property to recover back any money which had been paid him on account of the purchase price, if paid in ignorance of the incumbrance.

But defendant urges that even if this is admitted, no such action lies against the agent of a disclosed principal and if plaintiff has been injured, he must seek redress from Bishop rather than from this defendant.

"No rule of law is better ascertained or stands upon a stronger foundation than this: that when an agent names his principal, the principal is responsible, not the agent." Hartop ex parte, 12 Vesey, 349; Story's Agency, 1st Ed., Sec. 261; 2 Kent's Commentaries, 3rd Ed., 629. But there are exceptions to this general rule.

It has been noted that while defendant was a resident of Maine,

his principal resided in New Brunswick. This Court in *McKenzie* v. *Nevius*, 22 Me., 138, and *Rogers* v. *March*, 33 Me., 106, decided that agents acting for foreign principals were personally liable on their contracts even in cases where the principal was disclosed and the agency was shown in the contract, basing its finding upon the authority of Judge Story, who, in his Commentaries on the Law of Agency, stated that agents acting for principals residing in a foreign country are held personally responsible upon all contracts made by them whether the principal is disclosed or not. In the words of Mr. Justice Tenney, speaking for the court in *Rogers* v. *March*, supra, "This exception to the general rule becomes itself a general rule within the scope of its application."

Judge Story's reasoning was that "the party dealing with the agent intends to trust one, who is known to him, and resides in the same country, and subject to the same law as himself, rather than one, who if known, cannot from his residence in a foreign country, be made amenable to those laws, and whose liability may be affected by local institutions, and local exemptions, which may put at hazard both his rights and his remedies." Story on Agency, 3rd Ed., Secs. 268-290.

The rule thus laid down has, however, been rejected in some jurisdictions and qualified in others. It was discussed at some length and seriously questioned in 2 Kent's Commentaries, 12th Ed., 854, and attention called to the fact that while the doctrine had been accepted in the courts of Louisiana and Maine, it had not been regarded as authoritative in the courts of New York and in the English courts in later cases.

As a result of the discussion of the matter, Judge Story in the sixth edition of his work modified the rule materially, stating his mature view as follows: "Probably the better rule is that the agent of a foreign principal is not as a matter of law personally liable on every contract made for his principal. It is rather a question of fact in each case, a question of intention, to be ascertained by the terms of the particular contract and the surrounding circumstances. When a written contract is made and expressed to be with a foreign principal and not with the agent, the latter is not liable, although the contract be signed by him and on account of the foreign principal."

The Louisiana court in *Newcastle M. Co.* v. *Red River R. R. Co.*, 36 Am. Dec., 686, followed the earlier rule given by Judge Story, but in *Maury* v. *Ranger*, 58 Am. Rep., 199, noting his changed view, reversed its position. *Bray* v. *Kettell*, 1 Allen, 80; *Kirkpatrick* v. *Stainer*, 22 Wend., 244; *Kaulback* v. *Churchhill*, 59 N. H., 296, and many other cases might be cited to the same effect.

In the latter case, the court, after quoting from Metcalf on Contracts that "the present doctrine is, that when the terms of a contract made by an agent are clear, they are to have the same construction and legal effect whether made for a domestic or for a foreign principal," adds that "the statement cited by the plaintiff from Story's Agency, sec. 268 (referring to the earlier edition), is not now recognized as law excepting perhaps in Maine and Louisiana."

The subject is briefly discussed in the notes of 6 A. L. R. at page 644. In 21 R. C. L., 850, the law is stated as originally laid down by Judge Story, the fact that he later changed his view not being noted. *McKenzie* v. *Nevius*, supra, and *Newcastle M. Co.* v. *Red River R. R. Co.*, supra, are cited as authority, the author having apparently overlooked the overruling of the latter case by *Maury* v. *Ranger*, supra. 2 C. J., 816, states that "By the more modern rule, however, it is immaterial whether the principal is a foreigner or not."

This latter statement is too general and needs qualification. The fact that the principal is a foreigner is not "immaterial." It is a fact to be considered and may, under some circumstances, affect the result. The rule now generally adopted is clearly and carefully stated in *Fowle* v. *Kerchner*, 87 N. C., 59:

> "It is just this distinction that has been taken in the case of an agent contracting in behalf of a foreign principal. There, if the language of the contract is at all ambiguous, so as to leave it doubtful to whom the credit was given, the principal or the agent, the circumstance that the principal is resident abroad may be taken into consideration in determining that question — it being reasonable, in a case admitting of doubt, to suppose that the other contracting party trusted the agent residing at home and subject to the laws and process

familiar to himself, rather than one living beyond the reach of domestic laws."

To which may be added from *Bray* v. *Kettell*, supra:

"But still it is a question of intention, and if the contract be in writing, and its terms clearly manifest a purpose to bind the principal, though a foreigner, it must be deemed to be the final repository of the intention of the parties, and its construction and effect should not be varied so as to charge the agent in consideration of its unreasonableness or inconvenience."

Because of the fact that the position taken by our court in *McKenzie* v. *Nevius*, supra, and *Rogers* v. *March*, supra, apparently rested upon the original view expressed by Judge Story and that after further study and deliberation he modified the doctrine, we are constrained to hold that these earlier cases must be overruled in so far as they conflict with the statement of law expressed in the above quotations from *Bray* v. *Kettell*, supra, and *Fowle* v. *Kerchner*, supra, and that, in the instant case, the contract being in writing, the principal having been disclosed and nothing appearing in the document to indicate that the agent was relied upon to the exclusion of the principal, the fact that the principal was an alien in no way affects the situation.

But another consideration arises. While it is true that when an agreement to purchase real estate fails because of the inability of the owner to complete the trade and the purchaser has made a partial payment to a broker, an action for money had and received will not lie against the broker in favor of the purchaser if the broker, before receiving notice of purchaser's claim has paid the money to his principal, *Bogart* v. *Crosby* (Cal.), 22 Pac., 84; *Bailey* v. *Connell* (Mich.), 33 N. W., 50; *Conness* v. *Baird* (Tex.), 124 S. W., 113; *Abbott* v. *Crawford and Connover* (Wash.), 109 Pac., 1063, it is also true that if the money remains in the hands of the broker at the time of receiving such notice, he is so liable, even though he has disclosed the name of his principal and regardless of his right to commissions. *Goslin* v. *Martin* (Ore.), 107 Pac., 959; *Messer Company* v. *Ruff* (Ala.), 64 So., 51.

"The rule is that where money has been paid to an agent for his

principal, under such circumstances that it may be recovered back later, the agent is liable as a principal so long as he stands in his original position and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it." *Pancoast* v. *Dinsmore*, 105 Me., 471, 473.

In the case at bar, it is admitted that defendant received the money now claimed by plaintiff on January 17, 1930, that on February 5 he was notified of plaintiff's claim, and that the money was not returned. There is no evidence that the money had been paid by defendant to his principal. The case is silent on that point. Defendant testified regarding other matters, but was not interrogated either by his own or plaintiff's counsel concerning this question.

In *Hathaway* v. *Burr*, 21 Me., 567, our court quoted with approval from *Butler* v. *Harrison*, Cowp., 566, the following statement of the law: "Ordinarily agents and factors for the sale of goods are expected to receive the payments. If the defendant had authority to sell, which must be presumed so far as he is concerned, there is nothing to indicate, that the money was to be paid to the principal. And there being no evidence, that he had paid it over to his principal, the action may be sustained against him."

Or, stated in different language but to the same effect, after proof of the receipt of the money by defendant under circumstances which gave plaintiff a right to have it returned to him, the burden of proceeding with the evidence devolved upon the defendant who might relieve himself of liability by proof that, prior to notice of plaintiff's claim, he had paid the money to his principal.

That fact, if it was a fact, was wholly within the knowledge of the defendant. It could not be known nor readily ascertained by plaintiff. Nor could it be presumed. In certain cases, it might be inferred from the usage of the business in which principal and agent were engaged. But whether or not the evidence justifies such an inference is a question of fact and for the jury.

In any event, defendant was not entitled to a directed verdict.

Exceptions sustained.

REED MOTOR COMPANY *vs.* CITY OF BIDDEFORD.

York. Opinion October 28, 1930.

MUNICIPAL CORPORATIONS.

When a city charter provides that "every law, act, ordinance or bill appropriating money" must be approved by the mayor, unless passed over his veto, after disapproval, a vote of the aldermen and council, not presented to the mayor, and hence neither approved or disapproved by him, as in the case at bar, confers no authority on a purchasing committee, designated by such vote to bind the city by a contract entered into by it, involving an expenditure of money.

On report. An action of assumpsit to recover the purchase price of an automobile alleged to have been sold and delivered by plaintiff to defendant under contract made with defendant. Hearing was had at the May 1930 Term of the Superior Court for the County of York. At the conclusion of the evidence the cause was by agreement of the parties reported to the Law Court for its determination. Judgment for the defendant.

The case fully appears in the opinion.

Clyfton Hewes, for plaintiff.

Thomas F. Locke, for defendant.

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

PATTANGALL, C. J. On report. Assumpsit. Account annexed for goods sold and delivered brought by an automobile dealer claiming to have sold defendant a truck and to have delivered same. Defendant denies any purchase of the truck or any contract to purchase by an authorized agent.

On March 10, 1930, the following order was passed by the Board of Aldermen of the defendant city:

"Ordered: — That the committee on Streets be and are hereby authorized and directed to purchase from the Reed

Motor Company, One Dodge Brothers, 3 ton chasis and Cab, with a 5 yard wood dump body at a price not exceeding the amount of Three Thousand Three Hundred and Sixty-Four (3,364.00) dollars, as per dimentions attached to said order. Said truck to be paid out of District ♯4 appropriation.

Rules suspended, read twice and passed."

On the back of the order appears:

"ORDERED
In Board of Aldermen
March 10, 1930
Rules suspended, read twice
and Passed.
S.D.F.C.
Attest:
Alfred Lantagne
City Clerk.
In Common Council
March 10th, 1930
Rules suspended, read twice
and Passed in concurrence.
Attest:
Alexis Bissaillon
Clerk."

Plaintiff introduced the following exhibits:

"(Plaintiff's Exhibit No. 1)

(Letterhead Reed Motor Co.)

We the committee on Streets, duly authorized, by the City Government at the regular meeting held March 10th, 1930, to purchase from the Reed Motor Co. Inc. a Dodge Brothers Truck, for the picking up of waste in the District 4 Department accept the said Dodge Brothers Truck as authorized, so to do from the City Government at there regular meeting held March 10, 1930.

Signed George C. Precourt Mayor
Philippe E. Paquet
Henry A. Palardy
Patrick J. Mahaney
Leon St. Marie"

"(Plaintiff's Exhibit No. 2)
(Letterhead Reed Motor Co.)

March 12, 1930

To Reed Motor Co. Inc.
We, the Street Committee, of the City of Biddeford, duly authorized, enter an order for the following Dodge Brothers three ton Dump Truck.

3 Ton 165 inch wheel base Cab Chassis with 34 x 7 10 ply Dual Tires	$2480.00
Type W 12 Wood Body 8 Guage Steel with removable extension Sides to make 7 cubic yards capacity	419.00
Model F 4, 51/2 Ton capacity Heavy Duty Wood Hydraulic Hoist	375.00
Removable partition in center of body	40.00
Mounting Hoist and Body	50.00
	$3364.00

Signed — Street Committee of the City of Biddeford

George C. Precourt Mayor	Authorized
Leon St. Marie	Reed Motor Co. Inc.
Henry A. Palardy	Edmund Haskins
Philippe E. Paquet	
Harry J. Michie	Salesman
Patrick J. Mahaney	J. Petrin"

There was evidence tending to show that on March 15 the truck was delivered and accepted but that for convenience it was stored in plaintiff's garage. Passing, without comment, any controversy concerning this feature of the case, it nowhere appears that the "Street Committee" had legal authority to bind defendant by the contract which it undertook to make in its behalf.

The city charter contains a provision, common to such instruments, that "every law, act, ordinance or bill appropriating money having passed both branches of the city council, shall be presented to the mayor of the city and if he approves the same, he shall sign it or return it within seven days to that branch of the city council in which it shall have originated." Then follow directions as to the appropriate action of the council in case of such return.

The order of March 10, quoted above, unquestionably falls within the scope of these provisions. It was of no effect until presented to the mayor and either signed by him or sent back to the council for further action.

The evidence does not disclose that this order was ever presented to the mayor. It negatives absolutely the propositions that it was ever signed by him or returned to the council unsigned and then passed over his objection.

True, George C. Precourt, describing himself as "mayor," did, as a member of the street committee, participate in the attempted purchase of the truck, but that has no bearing on the question at issue.

Absence of authority to act for the city in this transaction renders the contract entered into by the members of the street committee with the plaintiff a nullity so far as this defendant is concerned.

Judgment for defendant.

ALONZO W. DAVIS *vs.* HARRY R. COSHNEAR.

Cumberland. Opinion October 28, 1930.

PLEADING AND PRACTICE. DECEIT. DAMAGES. "BOOK VALUE" DEFINED. EVIDENCE.

In an action to recover damages for deceit, where plaintiff relies on false representations made by defendant's salesmen, it is not necessary to prove that the salesmen knew their statements were false. Fraud may be predicated on their

false representations of facts susceptible of knowledge, recklessly stated as of their own knowledge, which induced the plaintiff to make purchases to his injury.

In an action of deceit the measure of damages is the difference between the represented value of that sold and its actual value.

The term "book value," as applied to finance, is defined as the value of anything as shown in the books of account of the individual or corporation owning it. As applied to stock, it is the value as determined by the net profits or deficit of the corporation as shown by its books.

The omission by one party to take the stand or offer evidence, which may be within his reach, to deny or explain evidence given by others, adversely affecting his rights or interests, may be regarded as conduct in the nature of an admission from which adverse inferences may be drawn.

In the case at bar the question of the duty of the plaintiff to investigate and ascertain the truth of the statements made by the salesmen was a question for the jury.

An instruction that the only representation to be considered by the jury was that the corporation paid ten per cent dividends was properly refused. Neither pleading nor proof so limited the plaintiff's reliance.

The facts proven furnished ground for fair and reasonable inference that the value of the stock sold the plaintiff was, at the time of the sale, substantially less than it was represented to be.

In determining these comparative values, it was proper for the jury to consider actual cost of plant, machinery and trade name, as also the subsequent shut down, sale of machinery and attempted compromise with creditors.

Subsequent events in the history of a corporation may properly be considered as throwing light back on its previous condition.

The statements as to the book value of stock of Likly Luggage Inc., complained of, were representations of facts of corporate record directly affecting the value of the stock sold the plaintiff.

The refusal of the trial Judge to instruct the jury that "the fact that the defendant has not seen fit to offer a defense or testify in his own behalf should not be considered against him," was not error.

There was sufficient evidence to support a verdict.

On exceptions by defendant. An action to recover damages for deceit in the sale of stock. To the refusal of the presiding Justice to direct a verdict for defendant on requested instructions, defendant seasonably excepted. Exceptions overruled.

The case fully appears in the opinion.
Frank I. Cowan,
Frederick R. Dyer, for plaintiff.
Berman & Berman, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

STURGIS, J. At the trial of this action for deceit, the jury returned a verdict for the plaintiff. Exceptions to the refusal of the presiding Justice to direct a verdict for the defendant and to give requested instructions brings the case to this Court.

Upon the evidence, the jury were warranted in finding that, in March, 1929, two salesmen employed by the defendant, a stock broker with offices in New York, Boston and Portland, sold the plaintiff two hundred shares of the common stock of Likly Luggage Inc., a corporation which had acquired some of the assets of Henry Likly & Co., then in liquidation, but since 1840 manufacturers of high grade luggage at Rochester, New York. The stock was sold for $21 a share and payment was made in money and stocks of other corporations admitted on the record to be worth $4,200.

In making the sale, the salesmen represented that Likly Luggage Inc. was a going, successful concern which paid ten per cent dividends on its common stock, which had a book value of $35 or $40 a share. These representations were untrue.

Likly Luggage Inc., organized in 1928, purchased for $40,000 the patents, trade name, and certain machinery from Trustees liquidating Henry Likly & Co. A factory at Fitchburg was purchased for $100,000 and mortgaged for the full amount of the purchase price. Some new machinery was installed. Merchandise and raw material estimated to be worth $150,000 was acquired. Upon its books, the Corporation valued these assets at about $1,700,000 and, with debts of $240,000, showed net assets of $1,500,000 with 60,000 shares of no par value common stock issued and outstanding. Upon such inflated values, bearing little relation to cost and, as appears by this record, to actual value, the stock purchased by the plaintiff had a book value of only $25.

The Corporation never paid any dividends. It started to manufacture in its Fitchburg factory, put its stock into the hands of brokers for sale, but by March, 1930, was shut down with interest and taxes in default and its machinery sold at sheriff's sale. An attempt to compromise with its creditors was then being made.

There was no error in the refusal of the presiding Justice to direct a verdict for the defendant. The only evidence in the case came from the plaintiff and his witnesses, whose testimony convincingly proves that the plaintiff bought the stock in question, relying upon the representations of the plaintiff's salesmen, which were untrue, and, if it can be inferred that their falsity was unknown, they were of facts susceptible of knowledge, recklessly stated as of the salesmen's own knowledge and were the inducement which brought about the sale and injured the plaintiff. The question of the duty of the plaintiff to investigate and ascertain the truth, under the rule stated in *Richards* v. *Foss*, 126 Me., 413, was a question for the jury, upon which the defendant did not clearly prevail.

The defendant was liable for the false representations of his agents. *Leavitt* v. *Seaney*, 113 Me., 119; *Rhoda* v. *Annis*, 75 Me., 17. It was not necessary to prove that the salesmen knew that their statements were false. Even if they believed them to be true, as made, they might amount to fraud. *Richards* v. *Foss*, supra; *Mullen* v. *Banking Co.*, 108 Me., 498; *Banking Co.* v. *Cunningham*, 103 Me., 455; *Atlas Shoe Co.* v. *Bechard*, 102 Me., 197.

The requested instruction that the only representation to be considered by the jury was that the Corporation paid ten per cent dividends was properly refused. The request was based on the assumption that the plaintiff relied solely on that representation. His reliance is neither so limited in pleading or proof.

The Court's refusal to instruct the jury that there was no evidence that the plaintiff had been damaged and, failing to establish this element of deceit, could not recover, was not error. The facts proven furnished ground for fair and reasonable inference that, at the time of the sale of the stock, its value was substantially less than what it was represented to be. The difference between these values is the measure of damages in actions of deceit. *Wright* v. *Roach*, 57 Me., 600. The actual cost of plant, machinery, patents

and trade name, and the fact that no dividends were paid, could be properly considered in determining the value of the stock at the time of the sale. So also the subsequent shut down of the factory, default in interest and taxes, sale of machinery and compromise with creditors. Subsequent events in the history of the corporation were properly considered as throwing light back upon its previous condition. *Mullen* v. *Banking Co.*, supra, p. 505; *Hindman* v. *Louisville First National Bank*, 112 Fed., 931.

Nor can we accede to the defendant's contention that the statements of his agents as to the book value of the stock are mere puffing statements or selling talk and not actionable. The term "book value," as applied to finance, is defined as the value of anything as shown in the books of account of the corporation owning it. As applied to stock, it is the value as determined by the net profits or deficit of the corporation as shown by its books. Webster's New Int. Dict. At the trial, the parties used the term as representing the pro rata share in the net assets of the corporation, as valued on its books of account, represented by each share of stock issued. Considering the book value of the stock sold the plaintiff from this viewpoint or that of the lexicographer, we think the statements made concerning it were representations of facts of corporate record, directly affecting the value of the stock sold and material within the rule stated in *Braley* v. *Powers*, 92 Me., 203.

The last Exception reserved by the defendant has no more merit. The presiding Justice was requested to instruct the jury that "the fact that the defendant has not seen fit to offer a defense or testify in his own behalf should not be considered against him." To so instruct the jury would be to direct them to "disregard a fact existent, material and probative." The rule prevails in civil cases that the omission by one party to take the stand or offer evidence, which may be within his reach, to deny or explain evidence given by others, adversely affecting his rights or interests, may be regarded as conduct in the nature of an admission from which adverse inferences may be drawn. *Union Bank* v. *Stone*, 50 Me., 595; *York* v. *Mathis*, 103 Me., 67; *Howe* v. *Howe*, 199 Mass., 598, 599; *Attorney-General* v. *Pelletier*, 240 Mass., 264; Wigmore on Evidence, Sec. 289.

Exceptions overruled.

MARY C. WEEKS *vs.* JOHN H. HICKEY AND ALICE K. HICKEY.

Penobscot. Opinion October 28, 1930.

PLEADING AND PRACTICE. FINDINGS OF FACT.

A brief statement containing the paragraph, "that the first and successive installments on said note as declared upon in plaintiff's writ and declaration are barred by the Statute of Limitations, which defendants hereby invoke," sufficiently pleads the Statute of Limitations.

A finding of fact made by a single Justice hearing a cause without a jury, if supported is conclusive on the Law Court. But such a finding unsupported by evidence is subject to exceptions.

On exceptions by defendants. An action brought against defendants, as endorsers of a promissory note, to recover the amount due thereon. Hearing was had at the April Term 1930 of the Superior Court for the County of Penobscot before the sitting Justice without jury, right of exception as to matters of law being reserved. To the ruling of the sitting Justice and to the judgment rendered for the plaintiff, defendants seasonably excepted. Exceptions sustained. The case fully appears in the opinion.

Mayo & Snare, for plaintiff.

Stanley F. Needham, for defendants.

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

PATTANGALL, C. J. Exceptions. Case heard before single Justice. Right of exceptions reserved. The subject of the suit was a promissory note payable to Edgar B. Weeks, now deceased, of which Union Land Company, a corporation, was maker, signed by John H. Hickey, treasurer of the company, and endorsed before delivery by John H. Hickey and Alice K. Hickey.

Mary E. Weeks, widow of Edgar B. Weeks, was administratrix of his estate and after the note was defaulted, endorsed same as administratrix and took it over to herself in payment of money due her from the estate.

The declaration was in usual form. Plea, general issue with brief statement as follows:

"That the first and successive installments of said note as declared upon in Plaintiff's writ and declaration are barred by the Statute of Limitations, which Defendants hereby invoke.

Also that with reference to all installments of said note which matured prior to July 16, 1927, no demand was made upon the maker and no notice of dishonor was given to Defendants as indorsers and no liability thereby accrued as to said Defendants on all installments of said note as declared upon in Plaintiff's declaration which matured prior to July 16, 1927."

Specifications of defense were required and filed:

"1. There is absence of consideration in the execution of the note as declared upon in plaintiff's declaration.

2. Plaintiff is not a holder in due course of the instrument as set forth in plaintiff's writ and declaration.

3. Defendants invoke the Statute of Limitation as a defense to their liability on the note as set forth in plaintiff's declaration.

4. Defendants set up as a defense to their liability on the note as set forth in the plaintiff's declaration that their status on the note is that of 'indorsers' and that their liability thereon has not accrued because no legal notice has been given them of dishonor of the note by the maker.

5. They did not promise in manner and form as plaintiff has alleged in her said writ and declaration."

The presiding Justice found the following facts:

"One John H. Hickey purchased from one Edgar B. Weeks certain shares of stock. He paid $1,800 in cash, and, for the balance due, executed a note of the Union Land Company, a corporation of which he, John H. Hickey, was treasurer, payable to Edgar B. Weeks, and endorsed by himself and his wife, Alice K. Hickey, and delivered the same to the said Edgar B. Weeks.

The corporation received no benefit from the transaction, and the payee of the said note knew, or ought to have known, of this fact.

No authority was shown for the corporation to execute an accommodation note.

The note was payable in installments. Payments on the note were made as follows:

July 23, 1920 — $312.00, interest to July 16, 1920.
$700.00, on principal.

Subsequent payments, falling due, were not made.

On July 16, 1927, presentment of the note was made, and due notice of default of payment was given to the endorsers. Likewise on July 16, 1928.

The payee died, and Mary E. Weeks, the plaintiff, was appointed Administratrix of his estate. Subsequently, and after the default of payments on said note, the said Mary E. Weeks endorsed the note as Administratrix and took it over to herself in payment of money due her as beneficiary of said estate.

No affidavit under Rule X was filed."

Rulings followed:

"1. That the note was for the accommodation of the endorsers, said John H. Hickey and Alice K. Hickey, the defendants.

2. That the first defaulted payment dishonored the whole note.

3. That no presentment of said note was necessary, nor notice of default of payment by the promissor, in order to hold the endorsers.

4. That the Statute of Limitations was not properly pleaded as a defense to this action.

5. That the defendant are liable upon said note."

Defendants excepted to the first, third, fourth and fifth rulings.

The first finding was one of fact and had it support in evidence, it would be conclusive on this court. *Randall* v. *Kehlor*, 60 Me., 37; *Kneeland* v. *Webb*, 68 Me., 541; *Reed* v. *Bickford*, 70 Me., 504; *Viele* v. *Curtis*, 116 Me., 145; *Ayer* v. *Harris*, 125 Me., 249.

But such a finding unsupported by evidence is subject to exceptions. *Chabot* v. *L. T. Chabot*, 109 Me., 405; *Edwards* v. *Goodall*, 126 Me., 254. There is no evidence in the record even tending to support the proposition that the note in question was for the accommodation of Alice K. Hickey. The finding is error so far as she is concerned.

The second exception reveals a similar situation.

The third finding was based upon the proposition that "presentment for payment is not required in order to charge an indorser when the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented." Sec. 80, Chap. 257, P. L. 1917.

The evidence warranted a finding that presentment and notice of default of payment was unnecessary so far as John H. Hickey was concerned, but there is nothing upon which to predicate such conclusion with regard to Alice K. Hickey. She was clearly entitled to notice of default of payment. No such notice was given her until long after the instrument was dishonored. Lack of reasonable notice relieved her from liability. Sec. 66, Chap. 257, P. L. 1917.

The third exception is to the finding that "the Statute of Limitations was not properly pleaded as a defense to this action."

Defendants plead the general issue with brief statement which contained the following paragraph: "That the first and successive installments on said note as declared upon in plaintiff's writ and declaration are barred by the Statute of Limitations, which defendants hereby invoke."

Plaintiff moved for specifications of defense. They were filed and included "Defendants invoke the Statute of Limitations as a defense to their liability on the note as set forth in plaintiff's declaration."

In Ministerial and School Fund in *Solon* v. *Rowell*, 49 Me., 333, the Court said:

> "This is an action upon a promissory note of hand, purporting to have been signed by all the defendants, upon which is the name of Benj. F. Eaton as a subscribing witness.
>
> The defendant David Rowell, pleaded the general issue, which was joined, and with it the following: . . . 'And for brief

statement, pleads the statute of limitations.' By a counter brief statement, the plaintiff says 'that the brief statement is not such as to present any ground of defence, other than under the general issue.'

No particular form of a brief statement is prescribed, nor is it required to be subscribed by the defendant or his attorney. 'The general issue may be pleaded in all cases, and a brief statement of special matter of defence filed,' is the language of the statute. It has always been practically understood that formal words may be omitted; and that, if the special matter is so indicated that it can be readily apprehended, it is sufficient.

The special matter in defence, in this case, was brought to the notice of the plaintiff by the defendant. Rowell's pleadings in terms were concise, but it is difficult to perceive how there could have been any misunderstanding of the intention."

Chief Justice Wiswell, speaking for the court in *Clark* v. *Holway*, 101 Me., 396, said:

"The great object of the statute which provided for filing a brief statement of special matters of defense where a special plea was before required, was to do away with the technicalities and the strictness formerly required in special pleas in bar. To be sure the facts relied upon and necessary for the defense must be set out with certainty to a common intent, *Washburn* v. *Mosely*, 22 Maine, 160, by which is meant that the facts which constitute the cause of action or the ground of defense, must be so clearly and distinctly stated, that they may be understood by the party who is to answer them, by the jury which is to ascertain the truth of the allegations, and by the court who is to give judgment."

The court below erred in holding that the Statute of Limitations was insufficiently pleaded. This ground of defense was "clearly and distinctly stated." It could not fail to have been understood by the parties and by the court. It was concise, and "it is difficult to perceive how there could have been any misunderstanding of the intention."

But plaintiff urges that the finding, even if wrong, was not prejudicial because no evidence was introduced to sustain the plea. All of the evidence necessary to sustain it had been submitted. The note dated July 16, 1919, was for $5,200, payable in eleven annual installments, the first ten for $500 each, interest payable annually. On July 23, 1920, interest to date and $700 was paid on the principal. No further payments were made. The writ was dated February 12, 1929. The note was in evidence.

Every fact necessary to enable the court to decide whether or not the Statute of Limitations constituted a defense to the action was before it. There was nothing to add. Defendants were entitled to consideration of that defense. Both defendants were prejudiced by this finding.

Exceptions sustained.

GERTRUDE JACKSON *vs.* E. G. BURNHAM.

Waldo. Opinion October 31, 1930.

REAL ACTIONS. EVIDENCE.

A copy of a record in the Registry of Deeds, attested by the Register of Deeds, of a copy of a record to be found in the United States District Court, is not best evidence and its admission was a violation of the best evidence rule.

Admission of a deed given by a trustee in bankruptcy is not admissible in the absence of proof that the defendant in the case at bar and the bankrupt are idem persona.

A certified copy of a map or survey on file in the office of the Registry of Deeds is usually held admissible in evidence with the same effect as the original, provided the original has been so approved and recorded as to become a record of that office.

In the case at bar no disclaimer was filed. The real controversy was the location of the true line between two adjacent lots. A verdict ordered for the defendant would have given title to the defendant of a large portion of land, which was not in controversy between the parties. The order of a directed verdict for the defendant in this case by the lower court was error.

On exceptions by plaintiff. A real action wherein the plaintiff claimed that she had been disseized of a certain parcel of real estate situate in the Town of Freedom, Waldo County. The defendant pleaded the general issue, *nul disseizin*, with a brief statement that title to the land was not in the plaintiff but in the defendant. No disclaimer was filed. To the admission of certain exhibits presented during the trial of the issue and to the direction by the siting Justice of a verdict in favor of the defendant, plaintiff seasonably excepted. First, second and fifth exceptions sustained.

The case fully appears in the opinion.

Arthur Ritchie, for plaintiff.

Buzzell & Thornton, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

PHILBROOK, A. R. J. This is an action in a plea of land wherein the plaintiff claims that she has been disseized of a certain parcel of real estate situate in the Town of Freedom, Waldo County. The defendant pleads the general issue, *nul disseizin*, and for brief statement further says that title to the land is not in the plaintiff but is in the defendant. No disclaimer was filed. The case is before this court on plaintiff's exceptions, being five in number.

First exception: Admission of defendant's exhibit four, which, as claimed by counsel for the defendant, is a copy of an adjudication in bankruptcy of E. G. Burnham, the herein defendant. It was objected to by counsel for the plaintiff on the ground, as stated in the record of the trial of the case at bar, that "it is not the original records, and no evidence has been proven of the original records." The court below ruled "I will admit it for the reason it is an authenticated copy by the Clerk of the United States District Court." But the exhibit is not a copy of a record to be found in the District Court, attested by the Clerk of that Court, an exhibit which might have been easily obtained, but is a copy of a record in the Waldo Registry of Deeds and attested by the Register of Deeds. It is a copy of a copy and its admission was a violation of the best evidence rule. Moreover, the reported evidence fails to show that the defendant in the case at bar and the bankrupt, although of the

same name, are one and the same person. If such be the fact it could have been easily proved. The defendant testified that at the time of the trial his residence was Amherst, New Hampshire, and that prior to his residence in the latter state he had lived at Freedom, Maine. There is no testimony showing that he lived in Cutler, Maine, the town in which the bankrupt lived, at the time of this adjudication in bankruptcy.

Second exception: Admission of defendant's exhibit number three, which is a deed given by Henry W. Sawyer, trustee of the bankrupt estate of Edwin G. Burnham, of Cutler, Maine, to Jarvis B. Woods. Since this deed constitutes one link in the chain of title upon which the defendant relies, it should not have been admitted in the absence of proof that the defendant, and the Burnham who resided in Cutler, are *idem persona.*

Third exception: Admission of defendant's exhibit number twenty, a copy of a plan certified by the Register of Deeds for the County of Kennebec as a true copy of a part of a plan as filed in Book of Plans No. 4, page 44, plan 69. The legend purports to show that the original was made by Charles Hayden and Joseph Norris in the month of November, 1818. By the great weight of authority, Federal and State, a certified copy of a map or survey on file in the land office is usually held admissible in evidence with the same effect as the original, provided the original has been so approved and recorded as to become a record of that office. 22 C. J., 828, and cases there cited. The plaintiff takes nothing by this exception.

Fourth exception: Admission of defendant's exhibit number nineteen, an ancient plan. This exception was not pressed in argument, and in view of an agreement made and signed by counsel on both sides as to its presentation before this court in its original dilapidated condition, and as a part of the "admitted evidence," this exception needs no consideration.

Fifth exception: Directed verdict for the defendant. In her declaration the plaintiff claims disseizin by the defendant of land bounded and described as follows: "Northerly by land of Bert Griggs; easterly by land formerly of John Hustus and land of William S. Keen; southerly by the road leading from Montville to

Albion Corner; and westerly by land formerly of one Parson and Frank Nutt, containing one hundred and sixty acres, more or less, excepting about forty acres, with the buildings thereon, on the southerly end of the above described land, which is set off by stakes and stones for corners, set by Bragdon and Dennett, which forty-acre lot is described in deed recorded in the Waldo Registry, said Bragdon and Dennett being the grantees."

In support of her title she presents plaintiff's exhibit two, which is a warranty deed to her from Edward J. Vose dated February 12, 1926, and recorded in Waldo Registry June 3, 1926. This deed contains the following description of the land: "Situated in the town of Freedom, Maine, in the county of Waldo, bounded and described as follows; (to wit) the same deeded to Edward J. Vose and Joseph H. Sayward by Ephraim Bragdon and Ada A. Bragdon of Freedom, Sept. 19, 1894, and recorded in Book ₵240, page 450, for a better description see book 205, page 175, Sept. 18/1889; except a three cornered lot of land said to contain four acres, more or less, which I sold to Von Wiggens of Freedom, Maine, and bounded on the northerly and eastly side by Briggs and Hustus and on the westly side by road from Freedom to Liberty."

Plaintiff's exhibit three, dated November 26, 1901, and recorded November 28, 1901, is a warranty deed from Joseph H. Sayward to Edward J. Vose, conveying an undivided half of the premises conveyed by plaintiff's exhibit two, but gives no additional information as to the metes, bounds, courses or distances, which would identify, or assist in locating the land involved in this suit.

Plaintiff's exhibit four, dated September 19, 1894, recorded September 28, 1894, is a warranty deed from Ephraim Bragdon to Edward J. Vose and Joseph H. Sayward, and evidently is the conveyance referred to in plaintiff's exhibit two. In this deed the description is as follows: "A certain lot or parcel of land situated in Freedom, county and state aforesaid, to wit: same as deeded to me by Ursula G. Parsons Sept. 18" 1889 and recorded in the Waldo County Registry of Deeds in Book 205, page 175, to which deed and record reference may be had for a more particular description, and being the same real estate, or a part thereof, of the late Aaron Gould homestead (so-called) except about forty acres with the

buildings on the . . . comprising the cleared land to stake and stones for corners and bounds set by Bragdon and Frank P. Dennett to whom I sold and deeded the same about July 1893 and recorded in the aforesaid Registry at Belfast, Waldo County."

The plaintiff offered no other deeds. These exhibits fail to clearly identify the land described in the declaration or that contained in the warranty deed upon which the plaintiff relies to sustain her title.

The defendant offered twenty exhibits:

1. Quitclaim deed (copy) from Alice M. Woods to defendant, dated November 25, 1922, and recorded December 13, 1922. This is merely a release of reservations regarding standing timber and does not purport to convey any rights in land.

2. Quitclaim deed (original) from Jarvis B. Woods to defendant, dated July 11, 1921, recorded July 14, 1921. Three separate lots are described in this deed, but no one of the lots is described by metes, bounds, courses or distances which would identify or assist in locating the land involved in this suit.

3. Trustee deed from Henry W. Sawyer to Jarvis B. Woods, being the one already considered in the discussion of plaintiff's second exception. Rejection of this deed breaks the chain of title relied upon by the defendant and the remaining conveyances, thirteen in number, need not be considered.

4. Exhibits nineteen and twenty, copy of a recorded plan, and an original ancient plan, which have been already discussed.

Since the plaintiff, demandant, alleges disseizin by the defendant, tenant, it is equivalent to an admission that the latter is in possession. "Being in possession, and possession being *prima facie* evidence of title, the tenant will be entitled to prevail unless the demandant, taking upon himself the burden of proof, introduces evidence sufficient to overcome this *prima facie* evidence of title in the tenant, and shows, that, as against the demandant (not as against some third person), the tenant's possession is wrongful. The real struggle, therefore, under the general issue in a real action, is to see which party can show the better title in himself." *Wyman* v. *Brown*, 50 Me., 139.

As already observed, the plaintiff relies upon a warranty deed

dated February 12, 1926, and recorded June 3, 1926. The grantor in that deed held a warranty deed dated November 26, 1901, and recorded November 28, 1901. Possession by the demandant, or by her father in her behalf, and by her predecessors in title, is shown to have existed for more than twenty years prior to the alleged disseizin.

On the other hand the tenant shows only quitclaim deeds as basis for his claim of title, the last one in the chain being dated July 11, 1921, and recorded July 14, 1921. The writ in the case is dated October 29, 1929.

For reasons thus given we hold that the demandant has sustained the burden laid upon her.

The oral testimony given in the case is confusing and conflicting but a careful study of the same leads to the conclusion that the real issue is the true location of the boundary line between land belonging to the plaintiff and land belonging to the defendant. To allow the directed verdict for the defendant to stand would be to give him the entire lot belonging to the plaintiff, consisting of about one hundred twenty acres, instead of settling the location of a boundary line. Neither justice nor legal principles involved in the case can allow such conclusion.

The mandate must be, *First, second, and fifth exceptions sustained.*

CLARENCE H. MAXIM, APPELLANT, *vs.* HARRY F. MAXIM, EXECUTOR WILL OF LEANDER E. MAXIM.

Somerset. Opinion November 1, 1930.

WILLS. LEGACIES.

A demonstrative legacy partakes of the nature of both a general and a specific legacy. It is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund, or to evince an

intent to relieve the general estate from liability in case the fund fails. A specific legacy is liable to ademption, but that is not true of a general or demonstrative legacy.

Whether a legacy is demonstrative or specific must be decided by the intent of the testator as it appears from the will.

Courts are averse to construing legacies as specific and will do so only when the intent of the testator to make them such is clear and plain.

In the case at bar the Court holds that the testator, irrespective of the note, from the proceeds of which he directed the legacies to be paid, intended to make an unconditional gift of a specific sum in the nature of a general legacy and that therefore the several bequests were demonstrative legacies. The collection of the note prior to the testator's death did not adeem the legacies and they were therefore payable out of other available assets of the estate.

On appeal. A bill in equity seeking the construction of the will of Leander E. Maxim, of Madison, Maine. The particular issue to be determined was whether the legacies in clauses two to seven inclusive were specific, general or demonstrative legacies. The Judge of Probate of Somerset County, before whom the will was probated, decreed that the legacies were demonstrative or general. On appeal before the sitting Justice of the Superior Court this decree was reversed. Appeal was thereupon had by the original petitioner. Appeal sustained. Case remanded for decree in accordance with this opinion.

The case fully appears in the opinion.

Dana S. Williams, for plaintiff.

D. J. McGillicuddy,

Frank H. Purinton, for defendant.

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

FARRINGTON, J. The case comes up on appeal from the decree of a single Justice reversing a decree of the Judge of Probate of Somerset County on a bill in equity asking for construction of the will of Leander E. Maxim of Madison, Maine, who died on May 6, 1928. The will in question is dated January 21, 1920.

Construction was sought regarding bequests contained in clauses of the will designated as from two (2) to seven (7), inclusive. The

attorneys of record, by written stipulation filed with the Court, have agreed "to accept the finding of Judge Charles O. Small, Judge of Probate, Somerset County, and Hon. William H. Fisher, Justice of the Superior Court, as to clause Seven of the will as modified by the First Codicil to said will: both of said Judges finding that the same is a general legacy." By the same stipulation "It is agreed by the parties hereto through their attorneys of record that the Will and the First and Second Codicils thereto as certified by Philo Steward, and attached hereto are hereby made a part of the printed record of said case." We are therefore concerned for the purposes of construction with only clauses two (2) to six (6) inclusive, which, with clause seven, as it may bear on that construction, are as follows:

"Second. I have a Six Thousand Dollar Note, in the Fidelity Trust Company Bank, of said Portland, together with a Mortgage, of equal amount, and date, due me, on October 1st, A.D. 1924, from Parker Brothers Land Company, of Julesburg, in the County of Sedgwick, and State of Colorado, with Interest at Six per cent per annum, Interest payable Annually, said Mortgage being recorded in the Registry of Deeds, in the County of Perkins, and State of Nebraska, Book 7, Page 297, which said Note and Interest thereon, the said Fidelity Trust Company is to collect for me, when said money becomes due. Out of this said amount, I give and bequeath, to my beloved Grandson, Clarence H. Maxim of Lewiston, in the County of Androscoggin, and said State of Maine, the sum of Two Thousand Dollars.

Third. I give and bequeath, out of said amount of money, to my beloved Brother, George W. Maxim, of Everett, in the County of Middlesex and Commonwealth of Massachusetts, the sum of One Thousand Dollars.

Fourth. I give and bequeath, out of the said amount of money, to my beloved Brother, Truman F. Maxim, of said Portland, the sum of One Thousand Dollars.

Fifth. I give and bequeath, out of the said amount of money, to my beloved Brother, Edward A. Maxim, of Madison, in the County of Somerset, and State of Maine, the sum of One Thousand Dollars.

Sixth. I give and bequeath, out of said amount of money, to my

beloved niece, Carrie May Hetherington, of Cole's Island, Cody's Station, Queen's County, New Brunswick, the sum of One Thousand Dollars.

Seventh. I give and bequeath, out of the said amount of money, viz., the Interest Money thereof, if there be that amount, the sum of Five Hundred Dollars, to my beloved Daughter-in-law, Lilla May Eldridge, of Whitefield, in the County of Coos, and State of New Hampshire. If however, there should be a less sum, than Five Hundred Dollars, then in this event, the said Carrie May Hetherington, is to have what amount there is. If there be a greater amount, than said sum of Five Hundred Dollars, then it is my desire that my administrator, the said Harry F. Maxim, shall pay that said balance, over to Leonard Washburn, in the Town of Madison, County of Somerset, and said State of Maine."

Two codicils to the original will were made. The first one dated July 6, 1923, changed clause seven (7) to read as follows: "Section 7, I give and bequeath to my beloved daughter-in-law Lilla May Eldridge of, Whitefield in the County of Coos and State of New Hampshire, the specific legacy of five hundred dollars, said amount to be paid by the Executor Harry F. Maxim. I give and bequeath out of my said property the specific legacy of two hundred dollars to be paid to Leonard Washburne in the town of Madison in the County of Somerset and State of Maine." And then as "an addition to the Seventh Paragraph so termed in my will" the testator made this provision: "I give, bequeath and devise all the rest, residue and remainder of my estate, either real, personal or mixed wherever and however situated and wherever or however found to my beloved grandson, Clarence H. Maxim of Lewiston in the County of Androscoggin and State of Maine."

The second codicil, dated July 1, 1925, added an eighth clause which made certain provisions which have nothing to do with the clauses of the will which we are considering and throw no light on their construction.

The Judge of Probate in his decree found, "that the bequests in Clauses 2 to 6, both inclusive of the testator's will, are not specific legacies but belong to that class of legacies sometimes denominated demonstrative legacies, and the particular fund out of which they

were made payable, namely the $6,000.00 note of the Parker Brothers Land Company, fully described in the testator's will and in the plaintiff's bill, having been collected and the proceeds otherwise invested or mingled by the testator with his other property during his lifetime, are not adeemed or lost but are payable as demonstrative legacies out of any other available assets of the testator's estate, and the executor, Harry F. Maxim, is hereby instructed to pay the several legatees named in said clauses the amount of their respective bequests."

From this decree Clarence H. Maxim, one of the legatees in the second clause of the will, took an appeal, which was sustained by the sitting Justice, who reversed the decree and found that "as to the bequests in Clauses 2 to 6, both inclusive, of said will, I am satisfied that according to the weight of authority in this State, they should be held to be specific legacies, and the fund from which they were to be payable having been extinguished during the lifetime of the testator, the legatees named therein take nothing by reason of such bequests."

The issue in the instant case relating to clauses two (2) to six (6) inclusive, is thus sharply defined.

For general purposes legacies are commonly considered as falling into one of three classes designated as specific, general and demonstrative, the latter class partaking somewhat of the nature of a specific legacy in that a particular fund is indicated, but a legacy which is not lost by reason of failure or non-existence of the fund at the testator's death, and which like a general legacy is payable out of the general assets.

A specific legacy is a bequest of a specific article or particular fund which can be distinguished from all the rest of the testator's estate of the same kind. *Stilphen, Appellant*, 100 Me., at page 152; *Spinney* v. *Eaton*, 111 Me., at page 5; 28 R. C. L., 289.

"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." *Palmer, Aplt.*, v. *Palmer*, 106 Me., 25, 30.

"Where the bequest is a part of a particular thing or money it

is specified and distinguished from all others of the same kind, it is individualized, and susceptible of distinct identification, and is, therefore, a specific legacy." *Myers* v. *Myers*, 33 Ala., 85.

"A legacy is specific, when it is the intention of the testator that the legatee should have the very thing bequeathed, and not merely a corresponding amount in value." *Wallace* v. *Wallace*, 23 N. H., 149, at page 154.

Courts are averse to construing legacies as specific and will do so only when the intent of the testator to make them such is clear and plain. *Spinney* v. *Eaton et als*, supra; *Wilcox et al* v. *Wilcox et al*, 13 Allen, 256; *Wallace* v. *Wallace*, supra; *Blair* v. *Scribner et al*, 65 N. J. Eq., 498; 57 Atl., 318; *Kenaday* v. *Sinnott*, 179 U. S., 606, which cites with approval *Tifft* v. *Porter*, 8 N. Y., 516; *Shaw* v. *Shaw*, Ohio Ct. App., 167 N. E., 611; In re *Wilson Estate* (Pa.), 103 Atl., 880.

The Court in *Tifft* v. *Porter*, supra, says, "A legacy is general, when it is so given as not to amount to a bequest of a particular thing or money of the testator distinguished from all others of the same kind. It is specific, when it is a bequest of a specified part of the testator's personal estate which is so distinguished . . . The inclination of the courts to hold legacies to be general, rather than specific, and on which the rule is based that to make a legacy specific, its terms must clearly require such a construction, rests upon solid grounds. The presumption is stronger that a testator intends some benefit to a legatee, than that he intends a benefit only upon collateral condition that he shall remain till death, owner of the property bequeathed. The motives which ordinarily determine men in selecting legatees, are their feelings of regard, and the presumption of course is that their feelings continue and they are looked upon as likely to continue. An intention of benefit being once expressed, to make its taking effect turn upon the contingency of the condition of the testator's property being unchanged, instead of upon the continuance of the same feelings which in the first instance prompted the selection of the legatee, requires, as it ought, clear language to convey that intention."

The Court in *Nusly* v. *Curtiss*, 36 Col., 464, 85 Pac., 846, says, "a demonstrative legacy partakes of the nature of both a general

and specific legacy. It is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund, or to evince an intent to relieve the general estate from liability in case the fund fails. A specific bequest is subject to ademption, but such is not true of a general, or demonstrative, legacy." This definition and the principle of law involved have been uniformly recognized in this country and in England and Canada, and in our own courts in *Moore* v. *Alden et als*, 80 Me., 301; *Addition* v. *Smith et als*, 83 Me., 558; and in the *Stilphen Case*, supra.

"In determining whether the legacy is specific or demonstrative the question always is whether it is a gift out of a specified sum or security, or a gift of a specified sum, with a specified fund as security. If it falls within the former class, the legacy fails when the fund or security ceases to exist in the testator's life-time." *Georgia Infirmary, etc.*, v. *Jones et al* (N. Y.), 37 Fed., 750.

"The distinction . . . seems to be this: If a legacy is given with reference to a particular fund, only as pointing out a convenient mode of payment, it is considered demonstrative, and the legatee will not be disappointed though the fund totally fail. But where the gift is of the fund itself, in whole or in part, or so charged upon the object made subject to it as to show an intent to burden that object alone with the payment, it is esteemed specific, and consequently liable to be adeemed by the alienation or destruction of the object. . . . If it be manifest there was a fixed and independent intent to give the legacy, separate and distinct from the property designated as the source of payment, the legacy will be deemed general or demonstrative, though accompanied by a direction to pay it out of a particular estate or fund specially named." In re *Wilson's Estate*, supra.

In the *Stilphen Case* above cited the Court, having defined the difference between specific and demonstrative legacies, says, "Thus it is important to observe that two elements are necessary to constitute a demonstrative legacy. It must appear in the first place that the testator intended to make an unconditional gift in the nature of a general legacy, and secondly the bequest must indicate the fund out of which it is payable." In holding that the legacy in

that case was specific, the Court says (page 153), "In the case at bar the testatrix bequeathed to Mary D. White $600 of the $1100 in the hands of her brothers: and *a careful examination of all the other provisions of the will in connection with this bequest fails to disclose any intention on the part of the testatrix to make an unconditional gift of* $600 *which should be payable out of her general estate in case of the failure of the fund* specially mentioned. *Only one of the elements which constitute a demonstrative legacy is found to exist in this case.* A particular fund is pointed out from which the sum of $600 is to be paid. That fund was not in existence at the decease of the testatrix. The legacy must be considered a specific one which was adeemed by the failure of the fund."

Cases might be cited almost without number holding that legacies are specific or demonstrative under certain circumstances and with view to the language used in each case. Such cases can not be regarded as examples of set forms of expression which, as a matter of law, may be deemed to be either specific or demonstrative. The case of *Stevens* v. *Fisher*, 144 Mass., at p. 127, contains a simple, clear, effective and applicable statement as follows: "Where, even if a legacy is charged upon a particular fund, it appears by the will that it is not to fail by reason of any failure of the fund, or its inadequacy for the purpose, the legacy is held to be demonstrative. That a legacy which is thus charged should be demonstrative, there should appear a fixed separate intent to give the money or legacy independently of the fund. The cases in which the distinction between specific and demonstrative legacies has been pointed out, and in which it has been discussed whether that in dispute was of the one or of the other character, are very numerous, both in England and in this country. Many of them have been well and carefully considered in the argument . . . We do not think it would be profitable or desirable here to examine or analyze them individually. The circumstances under which all these cases arise, the language and expressions used in the wills to be construed, so differ that we could not expect to find exact similarity with the case at bar, or with any other which might be under discussion. Each must, therefore, be decided with reference to its own circumstances and the peculiar phraseology used. Whether all the cases can be reconciled or not,

they all proceed upon the principle that whether a legacy is demonstrative or specific must be decided by the intent of the testator as it appears from the will; and that, where a legacy is held to be demonstrative, a general intent is shown to have it paid without reference to the fund on which it is primarily charged."

That the intent of the testator is of primary importance in reaching a determination of the nature of the legacy is a principle of law established by cases too numerous to cite, if citation of authority were necessary.

"Because of the hardship of the doctrine that a specific legacy is lost if the subject of it is disposed of by the testator or is extinguished in his life, notwithstanding the will may denote unmistakably that the testator intended to treat the legatee as an object of his bounty, the courts incline to consider legacies as demonstrative, rather than specific, where the language of the will is reasonably capable of that construction. Accordingly, if the bequest, instead of being for a specified sum 'due upon' a security or obligation, is for the sum 'out of the proceeds' or 'contained in' a security or obligation, it will be treated as a demonstrative legacy, to which the rule of ademption does not apply, and whenever it can be inferred from the language of the will that the testator's intention was to give the legatee a specified sum, not necessarily out of a particular fund, although incidentally and primarily so, but irrespective of it, the gift will be construed a demonstrative instead of a specific legacy." *Georgia Infirmary, etc.*, v. *Jones et al*, supra.

After a careful consideration of the case before us we not only fail to find anything in the record persuading us to the conclusion that the testator intended to make a specific legacy, but, on the contrary, with full consideration of the case of *Stilphen, Appellant*, supra, and of the language of the Court in that case as to the two elements necessary to constitute a demonstrative legacy, and not here directly invoking those cases which show the aversion of courts to construe legacies as specific unless it is clear that the testator so intends, we are of the opinion that the testator in the case at bar, irrespective of the note, intended to make an unconditional gift of a specific sum in the nature of a general legacy.

There is clearly no intention expressed in the will to give to any

one the specific note or any fractional part of the specific note as such. The testator, when he made the will, had clearly in mind that the note was to be collected in full by the bank, and it is fair to assume that he had in mind that it would be collected during his lifetime, and it was so collected and became presumably a part of his general assets.

The language of the testator in his will, "out of this said amount," "out of said amount of money," "out of the said amount of money," and "out of said amount of money," clearly refers to the proceeds of the note described by the testator and to be collected, out of which the testator gives and bequeaths a definite sum to a grandson, to three brothers, and to a niece, a separate bequest to each.

In our opinion the several bequests are for sums "out of the proceeds of" or "contained in" the note described by the testator, as defined in *Georgia Infirmary, etc.*, v. *Jones et al*, supra, and are demonstrative legacies, and that, notwithstanding the fact that the note was collected October 4, 1927, seven months prior to his death, the several legacies contained in clauses 2 to 6 inclusive are not adeemed or lost and are payable out of other available assets of the estate of the testator.

The case is before us on appeal from the decree of the sitting Justice, and on appeal all questions which appear in the record are open. The case is heard anew and such a decree may be directed as the whole record requires. *Pride* v. *Pride Lumber Co.*, 109 Me., 452.

The entry will be,

Appeal sustained.
Case remanded for decree in accordance with this opinion.

MINNIE R. LOOK, APPELLANT

FROM DECREE OF JUDGE OF PROBATE.

Lincoln. Opinion November 3, 1930.

WILLS. ATTESTING WITNESSES. PLEADING AND PRACTICE.

Within statutory meaning, the beneficial interest, which disqualifies one from subscribing a will as an attesting witness, is of present appreciable pecuniary value, so that the witness may reasonably be said to gain financially under the will, even though the interest which the will gives him be indirect, uncertain, and contingent.

But not every interest disqualifies.

An interest of a guardian, by judicial appointment, of an orphan ward devisee of real estate, is not a beneficial interest within the prohibition of the statute.

On an appeal to the Supreme Court of Probate, a motion, after hearing and verdict, to set aside the verdict, or for a new trial is not appropriate procedure.

In the case at bar it was for the proponent to sustain the burden of establishing testamentary capacity on the part of the testatrix, and the formal execution of the instrument propounded as her will. This he did.

A will, to be valid, must be that of the testator, and not of someone else. Evidence for the contestant, upon whom the law cast the burden of proof, was insufficient to establish the allegation of undue influence.

On motion and exceptions by appellant. An appeal from the decree of the Judge of Probate for the County of Lincoln allowing the last will and testament of Isabella R. Nickerson, was heard before the Supreme Court of Probate for the County of Lincoln and the decree of the Probate Court affirmed. To the admission of certain testimony, appellant seasonably excepted. After verdict favorable to the will, which the appellate court adopted, the decree appealed from was affirmed and the will re-probated. Appellant excepted. Also appellant filed a general motion to set the verdict aside. All exceptions overruled. Motion overruled.

The case fully appears in the opinion.

Weston M. Hilton, for Proponents.

Locke, Perkins & Williamson, for Appellant.

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

DUNN, J. Isabella R. Nickerson, a resident of Boothby Harbor, in Lincoln county, died there November 25, 1929, aged 88 years. An instrument, bearing date August 24, 1929, was probated by the Probate Court for that county as and for her last will.

In the Supreme Court of Probate the issues were lack of mental capacity, undue influence, and insufficient attestation because one of the three subscribing witnesses was not disinterested. This witness was, by judicial appointment, guardian of Harry Carlisle Smith, an orphan to whom the will devises real estate.

The Court submitted to the jury, whether Mrs. Nickerson, when she made the instrument purporting to be her will, was of sound mind; also, whether she had been unduly influenced to make that instrument. "Yes," was the answer of the jury in reference to testamentary ability; "No," with regard to undue influence.

The decree appealed from was affirmed, the will re-probated, and the cause remitted to the Probate Court.

The appellant saved an exception.

Exceptions noted in the course of the trial will have consideration first.

A witness for the appellant, who, six months before the death of Mrs. Nickerson, had nursed her for five days, was asked on direct examination: "Did she have any trouble with any portions of her body about being able to handle herself?"

The witness replied: "She acted very much as though she had had one or two shocks; she was suffering from paralysis."

On objection that the answer was irresponsive, it was struck from the case. An exception was taken. The witness was directed by the Court to answer the question responsively. The witness then said: "She was unable to walk without one or two canes at most times; she had no control of her mouth when eating."

There is no merit in this exception.

A person whom the will names as a beneficiary was called by the appellant as a witness. The witness identified a letter written by her under date of April 21, 1929. The attorney purposed to read the letter aloud, in the presence and hearing of the jury, "as a basis

for examination and explanation" of the witness. Objection was sustained.

The Court said that the letter could be used to refresh the recollection of the witness. On reading the letter to herself, the witness was asked: "Having refreshed your recollection, will you kindly tell the Court and Jury, Mrs. Carlisle, what Mrs. Nickerson's condition was at the time you wrote this letter?"

The witness answered: "Well, a written statement is very different from one spoken, and it was just this. I said her condition was pitiful. So it was for one who had been really a brilliant business woman, and of course she was too old to do anything of that sort, and was failing physically all the time. That is what I meant by that paragraph."

The appellant takes nothing by this exception.

The attorney for the appellant, it was in evidence, one day before the making of the will, declined, through a messenger, to make Mrs. Nickerson's will. He inquired of Harry Carlisle Smith, the messenger: "What did I say to you?"

The question was objected. Objection was rightly sustained.

Cyrus R. Tupper, Esquire, who subscribed the will as an attesting witness, was the aforementioned guardian. The devise to the ward, the appellant contends, invested the guardian with such interest under the will as to disqualify him from witnessing the instrument.

"Three credible attesting witnesses, not beneficially interested under the will," must subscribe it. R. S., Chap. 79, Sec. 1. "Credible" is used in the sense of "competent." *Warren* v. *Baxter*, 48 Me., 193.

Obviously, the statute intends to exclude those whom the will benefits from attesting as subscribing witnesses.

Direct, certain, vested and pecuniary interest, at the time of attestation, is a "beneficial interest." *Warren* v. *Baxter*, supra; *Re Marston*, 79 Me., 25. An indirect, uncertain and contingent interest, of present appreciable pecuniary value, may be a "beneficial interest." *Trinitarian Congregational Church, Appellant*, 91 Me., 416. *Coy, Appellant*, 126 Me., 256.

But not every interest disqualifies.

A person whom a will nominated as executor was held a competent witness. *Jones* v. *Larrabee*, 47 Me., 479. Witnesses, constituted by the will trustees for their children, had no beneficial interest in the will. *Key* v. *Weathersbee* (S. C.), 21 S. E., 324. See, too, on the point that trusteeship is not disqualifying, *Montgomery* v. *Perkins* (Ky.), 74 Am. Dec., 419.

The relationship between guardian and ward, even when quasi-parental, is that of trustee and cestui que trust. But the trust does not give the guardian legal title to the estate of his ward; title remains in the ward. The right of guardians in the property intrusted to them is not coupled with an interest. 28 C. J., 1128; *Hutchins* v. *Dresser*, 26 Me.,.76; *Sanford* v. *Phillips*, 68 Me., 431; *Dorr* v. *Davis*, 76 Me., 301; *Pennington* v. *Gartley*, 109 Me., 270.

No appreciable pecuniary gain resulted to Mr. Tupper under the will; his interest was not a beneficial interest.

The verdict below was advisory only; it was for the Court to decide the case. The Court entered a decree following the verdict. The motion to set the verdict aside was not appropriate procedure.

Exception raises the vital question whether there is sufficient evidence in the cause to sustain the decree.

It was for the proponent to establish testamentary capacity on the part of Mrs. Nickerson, and formal execution of the instrument propounded as her will. *Robinson* v. *Adams*, 62 Me., 369.

The burden of establishing the allegation of undue influence was on the appellant. *Barnes* v. *Barnes*, 66 Me., 286, 297.

A subscribing witness to a will may testify his opinion of the sanity of the testator. *Cilley* v. *Cilley*, 34 Me., 162. *Robinson* v. *Adams*, supra.

The proponent called two of the subscribing witnesses, and introduced the deposition of the third, then resident in Massachusetts.

The witnesses and the deponent, all of whom had known Mrs. Nickerson for years, testified that when Mrs. Nickerson signed the writing in question, she, in their opinion, was of sound mind.

The appellant called four witneses.

The former nurse, besides testifying concerning the use of canes, testified that Mrs. Nickerson spoke with difficulty; "while at times she seemed bright enough, at other times her mind would wander."

Another witness testified that, a year before the death of the deceased, he had been unable to negotiate with her for the sale of certain real estate, but left her home hoping to induce her, on some future occasion, to sell the property.

Harry Carlisle Smith, the ward, when he testified, was twenty years of age. Mrs. Nickerson, with whom he lived for three summers next preceding her death, was his relative, but the degree of relationship between them does not appear. This witness said that Mrs. Nickerson was old and feeble.

The fourth witness to testify, she, too, of direct interest under the will, said that Mrs. Nickerson "was extremely bright for a woman of her age."

The testimony of these witnesses did not counterbalance the prima facie showing of testamentary capacity.

From written memoranda, brought to him by Harry Carlisle Smith, Mr. Tupper drafted the will.

Mr. Tupper testified that Mrs. Nickerson, in her own home, on the next day, in the absence of Smith, confirmed the memoranda.

Mrs. Nickerson, said this witness, was undecided concerning bequests other than those in the memoranda. A week later, perhaps longer, she advised definitely as to her wishes. At the same time, she wrote the name of Mr. Tupper as her choice for executor.

Mrs. Nickerson examined and approved the draft of will submitted to her, and stated her preference for witnesses. Of these, Mr. Tupper was one, and Smith was sent for the other two. When they had come to the house, the will was formally executed.

No reason is perceived for disturbing the decree of the appellate probate court.

All the exceptions are overruled.

The motion, being without office, is overruled.

Exceptions overruled.
Motion overruled.

STATE OF MAINE *vs.* HARRY MOOERS.

Aroostook. Opinion November 19, 1930.

INTOXICATING LIQUORS. P. L. 1925, CHAP. 116, SEC. 1. PLEADING AND PRACTICE.

In the absence of any evidence that the owner or the one in possession of intoxicating liquor has it in his possession for the purpose of illegal sale, such owner or person in possession is not guilty of illegal transportation under the provisions of Section 1, *Chapter* 116, *Public Laws of Maine*, 1925, *if he merely personally carries or conveys such intoxicating liquor from one portion or part to another portion or part of the premises of which he is the owner, lessee or tenant.*

To put into the law, by virtue of a decision contrary to this, that which it seems the Legislature did not intend to have there is not within the province of the Court. Each case as it arises in the future must be governed by the facts presented as to whether or not it comes within the scope of this opinion.

A bill of exceptions showing what the issue is and how the excepting party is aggrieved satisfies the requirements as to sufficiency as laid down by this Court.

On exceptions by respondent. Respondent, tried in the Houlton Municipal Court charged with unlawfully transporting intoxicating liquor from place to place without a Federal permit, was found guilty. Appeal was had to the Superior Court for the County of Aroostook, April Term 1930. To certain rulings of the presiding Justice, respondent seasonably excepted. Exceptions sustained.

The case fully appears in the opinion.

J. Frederic Burns, County Attorney for the State.

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

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

FARRINGTON, J. After a hearing in the Houlton Municipal Court from which the warrant issued, the respondent in this case, a taxi driver, was found guilty of unlawfully transporting intoxi-

cating liquors from place to place in said Houlton on February 15, 1930, without a Federal permit. An appeal was taken to the April Term of the Superior Court at Houlton and the respondent was again found guilty. Written motion was seasonably filed asking the presiding Justice to direct a verdict for the respondent on the ground that the evidence was insufficient to warrant a verdict of guilty. The case comes to this court on exceptions to the overruling of this motion by the presiding Justice.

For the purposes of this case it seems unnecessary to make extended recital or comment on the evidence produced at the trial except to note the fact appearing in evidence that the respondent was acquitted on a charge of illegal possession of the same liquor, which, however, would not absolve him from the charge on which the present case is based, if his act was one prohibited by the intent of the Statute. On the record we feel the jury was justified in its verdict, if the act of the respondent did, as a matter of law, constitute an illegal transportation.

A two and one-half story house, the lower half of which was occupied by the respondent, fronted Military Street in said Houlton. Next northerly of the dwelling house, and attached thereto, was another building used as a woodshed. Northerly of and attached to the woodshed was a building used as a garage and stable by the tenants and the owner of the premises. This last building was divided by a wooden partition extending east and west. On the southerly or street side the space was open and used for garage purposes. On the northerly or rear side of the partition was the stable occupied jointly by the respondent and his landlord and containing stalls where the respondent kept a horse. Above the garage and stable was a floor forming a loft for the storage of hay. This loft was one room to which access was had by means of a ladder placed on the floor of the part used as the stable. There was no door or opening in the partition between garage and stable so that to pass from the one to the other it was necessary to go around the corner of the building to a door in the easterly side of the stable through which one could pass to the stable, a distance of approximately fifty feet. This was the route taken by the respondent at the time of the alleged unlawful transportation and it is undis-

puted that respondent was occupying as tenant at will the premises over which he travelled on this route. It needs no citation of authority for the statement that such a tenancy carries with it the right to travel over such parts of the premises as may be necessary to the enjoyment of the tenancy for the purpose of gaining access to any part of the buildings occupied.

Sec. 20, Chap. 127, Revised Statutes (1916), provided as follows: "No person shall knowingly transport from place to place in the State, any intoxicating liquors, with intent to sell the same in the state in violation of law, or with intent that the same shall be so sold by any person, or to aid any person in such sale, under a penalty of not less than fifty, nor more than one hundred dollars, and sixty days' imprisonment . . . "

Sec. 2, Chap. 291, Public Laws (1917), while making other changes in the above section, made no change in the portion quoted *supra.*

Sec. 1, Chap. 167, Public Laws (1923), changed Sec. 20, *supra,* to read in part as follows: "No person shall knowingly transport into this State or from place to place therein any intoxicating liquor, or aid any person in such transportation without being in possession of a permit therefor duly issued under authority conferred by the provisions of the national prohibition act of October twenty-eight, nineteen hundred and nineteen, and amendments thereto, providing for the enforcement of the eighteenth amendment to the constitution of the United States; . . . "

Sec. 1, Chap. 116, Public Laws (1925), in force when the act charged as offense in the instant case occurred, while making other changes, left the same language quoted above from the 1923 Act.

The case of *Commonwealth* v. *Waters,* 11 Gray, 81, showed facts which clearly constituted an illegal transportation, but in that case the Court said, "The statute prohibits the transportation of spirituous liquor, under the circumstances particularly stated, 'from place to place within the State.' St. 1855, c. 215, s. 20. We do not think that, by a true interpretation, this latter phrase must be held to designate only towns, or counties, or such other territorial divisions or districts as have been or may be established by law or by authority of the Commonwealth. The obvious pur-

pose of the legislature in this, as in various other provisions of the statute, was to interpose the most effectual impediments in the way of the illegal traffic in spirituous liquors. It is therefore provided, in very general terms, that wherever there is reasonable cause of belief that an owner or consignee of this kind of property intends to make sale of it in violation of law, he shall not be aided or assisted by any person in the transportation or conveyance of it from one place to another. This phrase in the statute certainly admits of some qualification; for it is not every possible removal of spirituous liquor which will make a person employed by the owner to do it guilty of a criminal offence. Thus if the removal were only upon the premises of the owner, or from one to another of his warehouses, or from one to another part of his shop, this would constitute no offence and would be no violation of law." While the words, "Thus if the removal were only upon the premises of the owner . . . or from one to another part of his shop, this would constitute no offense and would be no violation of the law," may be said to be merely dicta, they have been quoted and followed in some of the cases cited, and in our opinion the language can well be applied to the case at bar.

In our opinion, the evidence in the case, which merely shows that the respondent carried the liquor from his garage to his stable, even assuming that he undertook to hide it there, is not sufficient to bring him within the legislative intent to make it a crime for any person to knowingly transport "from place to place" in this state any intoxicating liquor without being in possession of a permit therefor, as defined in the Act. The respondent can not claim that he was in possession of such permit, but the State, in order to convict, must show that the accused knowingly transported "from place to place therein." In our opinion, the Statute did not contemplate making a crime out of the mere act of an owner or one in possession of intoxicating liquor moving it from point to point on his own premises. We realize that circumstances and facts differ in each individual case but in the case at bar we do not feel that facts exist which would justify a conviction for the crime of illegal transportation. Without otherwise attempting to define "transportation" or the words "from place to place" it is our opinion

that, in the absence of any evidence that the owner or the one in possession of intoxicating liquor has it in his possession for the purpose of illegal sale, such owner or person in possession is not guilty of illegal transportation under the provisions of Sec. 1, Chap. 116, Public Laws of Maine, 1925, if he merely personally carries or conveys such intoxicating liquor from one portion or part to another portion or part of the premises of which he is the owner, lessee or tenant.

The decided weight of authority is that a transferring of intoxicating liquor from one place to another on the same premises does not constitute a transportation. *Mates* v. *State* (Ind.), 165 N. E., 316, 65 A. L. R., 980; *Hammell* v. *State*, 198 Ind., 45, 152 N. E., 161; *Hudson* v. *State*, 198 Ind., 422, 154 N. E., 7; *Warren* v. *State*, 94 Tex. Crim. Rep., 243, 250 S. W., 429; *Hill* v. *State*, 96 Tex. Crim. Rep., 165, 256 S. W., 921; *Miller* v. *State*, 27 S. W. (2d), 803, 804; *Wilson* v. *City of Batesville* (Ark.), 20 S. W. (2d), 114, 115; *Nelson* v. *State*, 116 Neb., 219, 216 N. W., 556, 557; *Ready* v. *State*, 155 Tenn., 15, 290 S. W., 28, 29; *Looney* v. *State*, 156 Tenn., 337, 1 S. W. (2d), 782.

In the foregoing cited cases the one transporting liquor was not in every instance the owner of the premises, the cases apparently deciding the point on the ground that the movement of the liquor was on the same premises regardless of ownership. There are some cases which apparently hold a contrary view but the facts in those cases are not altogether similar.

It is not our purpose to attempt to reconcile the reasoning of the various cases holding for or against illegal transportation under the facts of each individual case. We do feel, however, that on the facts of the particular case before us, or in cases with the same facts, it would be contrary to the real purpose and intent, not only of the National Prohibition Act, but of our State law, to hold that there was any transportation for which the respondent should be held criminally liable. No attempt is made to lay down any hard and fast construction which would cover facts and circumstances which might be shown in other cases.

The result which might ensue from a contrary decision would, we believe, be a violation of what we regard as the intention of the

law. To put into the law, by virtue of a decision contrary to this, that which we believe the legislature did not intend to have there is not within the province of this Court. Each case in the future as it arises must be governed by the facts presented as to whether or not they come within the scope of this opinion.

The State in its argument raises a question as to the sufficiency of the respondent's bill of exceptions and that the only specification therein to the effect that the evidence was insufficient to warrant a verdict of guilty was too general, and that it does not appear in the record that the specific question as to whether the act of the respondent was a transportation within the meaning of the Statute is properly before this Court. This point is not strongly pressed.

Enough is set forth in the bill of exceptions to enable the Court to determine that the point made is material and that the ruling to which exceptions were taken is erroneous and prejudicial. The bill shows what the issue is and how the excepting party is aggrieved. It satisfies the requirements laid down by this Court in *Jones* v. *Jones et al*, 101 Me., 447.

Exceptions sustained.

RALPH C. LORING *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion November 25, 1930.

RAILROADS. NEGLIGENCE. FEDERAL EMPLOYERS' LIABILITY ACT.

A railroad is not a guarantor or insurer of the safety of the place of work or of the machinery or appliances of the work of its employees.

It is not required to anticipate and guard against every possible danger which may befall its employees, but only such as are likely to occur and which by the exercise of reasonable care it could foresee and anticipate.

Its duty at common law, which measures its duty under the Federal Act, is to use reasonable care to furnish a reasonably safe place and reasonably safe tools and appliances for the use of its employees.

The law requires all employers of labor to give suitable warnings to employees of any and all special risks and dangers of the employment of which the master has knowledge, or by the exercise of reasonable care should know, and which are unknown to the employee and would not be known and appreciated by him in the exercise of reasonable care on his part.

Actionable negligence can not be predicated upon the mere fact that an employer has gasoline in the place of work of its employees for a specific use and fails to mark the container or give warning of the presence of the gasoline.

The mere happening of an accident carries with it no presumption of negligence on the part of an employer.

An injured employee has the burden of establishing that his employer has been guilty of negligence.

The causal connection between the defendant's act or omission complained of and the plaintiff's injury must not be left to conjecture or surmise, and, if the evidence leaves it uncertain as to what is the real cause of his injury, the employee fails to sustain the burden upon him and sympathy for his misfortune can not justify a recovery for negligence which remains unproven.

In the case at bar, considering the evidence in the light most favorable to the plaintiff, there was insufficient proof of defendant's negligence to sustain a verdict. It was unnecessary, therefore, to determine the application of the Federal Employers' Liability Act.

On exceptions and general motion for new trial by defendant. An action on the case for personal injuries brought by plaintiff, a signal helper employee of defendant railroad. Trial was had at the March Term, 1930, of the Superior Court for the County of Cumberland. To the refusal of the presiding Justice to direct a verdict for the defendant, exception was seasonably taken, and after the jury had rendered a verdict for the plaintiff in the sum of $2,500, defendant filed a general motion for new trial. Motion granted. New trial ordered.

The case fully appears in the opinion.

Walter A. Cowan, for plaintiff.

George E. Fogg, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

STURGIS, J. This action of tort to recover damages for injuries received by the plaintiff while employed by the defendant

Railroad Company, as a signal helper, comes before the Law Court on exceptions to the refusal of the presiding Justice to direct a verdict for the defendant, and on a general motion.

The plaintiff, declaring in negligence at common law, alleges that the defendant is a non-assenting employer of more than five workmen, and invokes the provisions of the Workmen's Compensation Act, R. S., Chap. 50, as amended by P. L. 1919, Chap. 238, which bars the common law defenses (a) that the employee was negligent; (b) that the injury was caused by the negligence of a fellow employee; and (c) that the employee had assumed the risk of the injury.

The defendant, by its pleadings, seeks to bring the case within the Federal Employers' Liability Act of April 22, 1908, U. S. Comp. Statutes, Vol. 8, Secs. 8657-8665, averring that, at the time of the plaintiff's alleged injury, he was employed in work in or about instrumentalities used by the defendant in interstate commerce.

It is settled law that the plaintiff's right of recovery lies only in proof of negligence, the proximate cause of his injuries. This is the rule of the common law. It is the basis of liability under the Federal Employers' Liability Act. *N. Y. Cent. R. Co.* v. *Chisholm*, 268 U. S., 29; *N. Y. Cent. R. Co.* v. *Winfield*, 244 U. S., 147; *Southern Ry. Co.* v. *Gray*, 241 U. S., 333; *Seaboard Air Line Ry. Co.* v. *Horton*, 233 U. S., 492. Unless the record shows negligence on the part of the defendant Railroad Company, a consideration of the application of the Federal Employers' Liability Act is unnecessary.

There is no material controversy as to the facts. The plaintiff, a helper in the signal department of the defendant Railroad Company, on January 1, 1928, was assigned to the Lewiston section of the department as helper to the signal maintainer stationed there. His duties were to assist in the maintenance of the signal system of the section and included sweeping out and building the fires in the signal storehouse.

On Monday morning, February 13, 1928, the plaintiff, preparatory to building a fire in the stove in the shop of the storehouse, took a can of gasoline, thinking it was kerosene, from a shelf over a workbench and was seriously burned when the gasoline exploded.

The can was an ordinary, one gallon, galvanized iron can, unmarked as to contents, and similar in appearance to three other cans which sat on the same shelf, all unmarked, but containing respectively denatured alcohol, lubricating oil and kerosene. The gasoline can had been filled and placed on the shelf by the signal maintainer for use in filling a blow torch, but the plaintiff had received no notice or warning of the character of its contents.

It appears from the plaintiff's account of his mistake and the resultant explosion, and as he was alone at the time we must rely on him for these details, that on arriving at the shop on that Monday morning he broke up the crust of the soft coal in the bottom of the stove, turned the ashes over, cleared the grate and saw no signs of fire or live coals. He felt of the stove and it was cold. He then put some split up boxwood in the stove as kindlings and, going to the shelf over the workbench where the four unmarked gallon cans sat, passed by the first knowing it contained alcohol, determined by examination that the second can contained lubricating oil, took down the third can, smelled of the nozzle and concluding it contained kerosene put it back, took down the fourth can and finding it contained kerosene put it back and again took down the third can and went to the stove to pour, as he thought, kerosene on the kindlings. The plaintiff's positive statement, reiterated on cross examination, is that, as he got to the stove or near it, and tipped the can to pour its contents into the stove, but before any gasoline came out of the can, there was an explosion hurling a part of the can against him and covering him with flaming oil.

There is some evidence tending to prove that kerosene was more or less generally used in that section, as well as other sections of the signal division, for kindling fires. The plaintiff says, that during his employment by the defendant Railroad Company for the preceding five years in signal work, he had often used kerosene for this purpose and had repeatedly poured the oil on kindlings directly from the can in the presence and with the knowledge of the inspectors and maintainers under whom he worked.

A railroad is not a guarantor or insurer of the safety of the place of work or of the machinery or appliances of the work of its employees. It is not required to anticipate and guard against every

possible danger which may befall its employees but only such as are likely to occur and which, by the exercise of reasonable care, it could foresee and anticipate. Its duty at common law, which measures its duty under the Federal Act, is to use reasonable care to furnish a reasonably safe place and reasonably safe tools and appliances for the use of its employees. *Seaboard Air Line R. Co.* v. *Horton*, supra; *Patton* v. *Texas & P. R. Co.*, 179 U. S., 658; *Millett* v. *Railroad Co.*, 128 Me., 314; *Morey* v. *Railroad Co.*, 125 Me., 272; *Sheaf* v. *Huff*, 119 Me., 469. In the discharge of this duty, the law requires the employer of labor in the operation of railroads, as in other employments, to give suitable warnings to his employees of any and all special risks and dangers of the employment of which the master has knowledge or, by the exercise of reasonable care, should know, and which are unknown to the employee and would not be known and appreciated by him in the exercise of reasonable care on his part. *Hume* v. *Power Co.*, 106 Me., 78, 82; *Wiley* v. *Batchelder*, 105 Me., 536; *Welch* v. *Bath Iron Works*, 98 Me., 361; *Wormell* v. *Maine Central R. Co.*, 79 Me., 397; *Mather* v. *Rillston*, 156 U. S., 391. The employer is bound to warn his servant against perils reasonably to be anticipated while the employee is doing his work "in the way he was told to do it, if told at all, or if not told, in any way in which he might reasonably be expected to do it." *Wyman* v. *Berry*, 106 Me., 43, 48; *Colfer* v. *Best*, 110 Me., 465; *Montevilla* v. *The Furniture Co.*, 153 Wis., 292.

Gasoline is in common use in homes, in industry, and in transportation. It is used by persons of all ages and of varying intelligence and experience, and handled properly does not readily explode. This is common knowledge. We are not of opinion that actionable negligence can be predicated upon the mere fact that an employer, having gasoline in the place of work of his servant, to be used for specific purposes, fails to mark the container or give warning to the servant of the presence of the gasoline. To so hold would charge all persons having gasoline with a measure of care beyond the due and reasonable care required by law.

But the plaintiff says that in the case at bar the fact that gasoline was deposited in an unmarked can beside a similar can con-

taining kerosene, coupled with the plaintiff's long-standing habit of pouring kerosene from cans into stoves, which should have been known by the defendant, warrants a finding by the jury that a reasonably prudent person would anticipate such a mistaken use of gasoline as here occurred and the explosion which followed. If, upon the evidence, the explosion could fairly be attributed to pouring the gasoline on fire or coals in the stove, the plaintiff's contention would require serious consideration.

It is common knowledge that an explosion often results from pouring kerosene directly from a can upon a fire or live coals in the stove. Recognizing this fact, courts have declared such an act negligence *per se*. *Riggs* v. *Standard Oil Co.*, 130 Fed. Rep., 199; *McLawson* v. *Refining Co.*, 198 Mich., 222. See also *Farrell* v. *Miller Co.*, 147 Minn., 52; *Morrison* v. *Lee*, 16 N. D., 377; *Peterson* v. *Standard Oil Co.*, 55 Ore., 511. The explosive and inflammable qualities of gasoline leave little doubt that its use in a like manner would produce even a more certain and disastrous explosion.

In the case at bar, there is no evidence that the gasoline was poured into the stove. The plaintiff, who was alone at the time he was burned, positively denies that there was any fire in the stove, that he lit any matches, or that he poured any gasoline whatever out of the can. The cause of the explosion, upon the record, remains unexplained and unknown.

It may be that there was fire in the stove or live coals which escaped the plaintiff's notice, but that is guesswork. It may be that he did pour out some of the gasoline. If we travel the field of conjecture and consider spontaneous combustion, smoking by the plaintiff, electrical contact and ignition, or other possible causes, we travel outside of proof as does the plaintiff if he attempts to draw an inference of fire in the stove in the face of his own denials of its existence.

The mere happening of an accident carries with it no presumption of negligence on the part of the employer. It is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. It is not sufficient for the employee to show that the employer may have been negligent. The causal con-

nection between the defendant's act or omission complained of and the plaintiff's injury must not be left to conjecture or surmise, and, if the evidence leaves it uncertain as to what is the real cause of his injury, the injured employee fails to sustain the burden upon him, and sympathy for his misfortune can not justify a recovery for negligence which remains unproven. *Patton* v. *Texas & P. R. Co.*, supra; *Edwards* v. *Express Co.*, 128 Me., 470; *McTaggart* v. *Railroad Co.*, 100 Me., 223; *Lesan* v. *Maine Central R. R. Co.*, 77 Me., 85; *Sullivan* v. *Old Colony St. R. Co.*, 197 Mass., 512.

Considering the evidence in a light most favorable to the plaintiff, we are convinced that, upon this record, there is insufficient proof of the defendant's negligence to sustain a verdict. It is not necessary, therefore, to pass on the exceptions or determine the application of the Federal Employers' Liability Act. For the reason stated, upon the general motion the defendant must prevail.

Motion granted.
New trial ordered.

ETHEL L. PEABODY *vs.* WILLIAM H. SWEET.

IRVING L. PEABODY *vs.* WILLIAM H. SWEET.

Cumberland. Opinion November 25, 1930.

EVIDENCE. MOTOR VEHICLES. NEGLIGENCE.

In an action to recover damages for the alleged negligent operation of an automobile, evidence that plaintiff was a trespasser in the place where he was parked, as tending to show contributory negligence on his part, is not admissible.

In the case at bar, assuming trespass, the unlawful character of that act was not a contributing cause of the injury.

The question of negligence of the defendant, as well as that of contributory negligence, was a question of fact for the jury. The record of the cases disclosed no manifest error on their part.

On exceptions and general motion for new trial by defendant. Two actions on the case for personal injury to the wife and loss of services and expenses sustained by the husband, both actions being tried together. At the close of plaintiffs' cases a motion for nonsuit was made by the defendant, which was denied by the Court and exceptions taken. At the close of the evidence a motion for a directed verdict was made by the defendant, which was denied and exceptions taken. To the exclusion of certain testimony offered by defendant exception was likewise taken, and after the jury had rendered verdicts for the wife in the sum of $1,775.00 and for the husband in the sum of $500.00, defendant filed a general motion for new trial in each case. Motions overruled. Exceptions overruled.

The cases sufficiently appear in the opinion.

Harry E. Nixon,

Wilford G. Hay, for plaintiffs.

Elton H. Thompson, for defendant.

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

DUNN, J. These separate actions, one by Ethel L. Peabody and the other by her husband, against the same defendant, were tried together in the Superior Court in Cumberland county. The plaintiffs recovered verdicts. Mrs. Peabody, by way of damages for rather serious personal injuries, has a verdict for seventeen hundred and seventy-five dollars; her husband, the other plaintiff, for consequential damages, has a verdict for five hundred dollars.

At the trial, the defendant noted, as applicable to both cases, a single exception. The exception goes to the exclusion of evidence. Also, defendant relies on general motions for new trials, but on neither motion presses excessiveness of damages.

Mrs. Peabody, there was evidence, had opened the right-hand door of her husband's automobile, then at rest and occupied by him, and was about to enter the vehicle when defendant suddenly moved his automobile backward in such a way as to hit against her.

The date of this occurrence was June 18, 1929; the place, land adjacent Higgins Beach in Scarboro. The two cars were parked,

that of the defendant first, headed in the same general direction, some six feet between them.

On plaintiff's version, defendant returned to and was seated in his automobile. He operated the car in forward direction for the distance of a few feet, then backed it, then forward and back again, then forward still once more, this time apparently to continue on from a grassy spot through sand to the public street.

Mrs. Peabody, who had watched the movements of defendant's car, came from behind her husband's car and opened its door. Unexpectedly and without reasonable warning, to continue recital from the evidence for the plaintiffs, the automobile of the defendant was backed, nor merely for a few feet, but in zigzag course to and against Mrs. Peabody, then standing on the running board of her husband's car.

The facts were in dispute.

The question of negligence of the defendant, as well as that of contributory negligence, was, upon the evidence, a question for the jury, as was the question whether the negligence of the defendant was the proximate cause of injury.

Examination and consideration of the record leads this court to the conclusion it can not say that either verdict is manifestly wrong.

Defendant offered evidence, claimed admissible "on the ground of contributory negligence," "to show that plaintiffs were trespassers at the place they parked." Objection was sustained.

Trespassing, if there were trespassing, was on land of a stranger. The right of a trespasser to recover damages is usually denied, not on the ground of contributory negligence, but on the ground that no duty rests on the owner of the land. 48 C. J., 982; *Marble* v. *Ross*, 124 Mass., 44. Assuming trespass, the unlawful character of that act was not a contributing cause of injury.

Motions overruled.
Exceptions overruled.

STATE OF MAINE *vs.* CARL HUGHES.

STATE OF MAINE *vs.* EDWARD HUGHES.

Penobscot. Opinion November 26, 1930.

CRIMINAL LAW. P. L. 1921, SEC. 16, CHAP. 211.

To warrant a conviction under Sec. 16, *Chap.* 211, *P. L.* 1921, *which provides:*

"Nor shall any vehicle, engine, team, or contrivance of whatever weight be moved upon or over any way or bridge which has any flange, rib, clamp or other object attached to its wheels, or made a part thereof, likely to bruise or injure the surface of such way or bridge, without permit."

evidence must be introduced to show that the vehicle in question was equipped with such flange or other object, or in any way so as to be likely to bruise or injure the surface of the street or way.

In the case at bar no evidence was offered even tending to show that the vehicle complained of was in any way so equipped. In accordance with the stipulation the entry must in both cases be *nolle prosequi.*

On report on an agreed statement. Complaints against the respondents were brought under the provisions of Sec. 16, Chap. 211, P. L. 1921, in the Bangor Municipal Court, from then on appeal by respondents to the Superior Court for Penobscot County. By agreement of the parties the cases were reported on agreed statement to the Law Court for its determination. *Nolle prosequi* in both cases.

The cases sufficiently appear in the opinion.

Albert G. Averill, County Attorney, for the State.

George E. Thompson, for respondents.

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

PATTANGALL, C. J. On report. Agreed statement of facts. These cases arose on complaints filed with the Bangor Municipal Court alleging violations of the provisions of Sec. 16, Chap. 211, P. L. 1921, respondents being specifically charged with having "unlawfully driven a vehicle, to wit, a gasolene shovel which was equipped with flanges and other objects attached to the wheels likely to bruise or injure the surface of the way, along and over Main Street, in said Bangor, without permit as required by law."

Respondents were found guilty and an appeal to the Superior Court followed, from which the cases were reported with this stipulation:

> "If the gasolene shovel operated by the defendants is within the prohibition of the provisions of Sec. 16 of Chap. 211 of the Laws of Maine, 1921, then both respondents are to stand convicted and judgment is to be rendered by the Law Court for the state in both cases and remanded for sentence; if not, then a *nolle prosequi* is to be entered in both cases."

Sec. 16, Chap. 211, P. L. of 1921, so far as its provisions are applicable here, reads:

> "Nor shall any vehicle, engine, team or contrivance of whatever weight be moved upon or over any way or bridge which has any flange, rib, clamp or other object attached to its wheels, or made a part thereof, likely to bruise or injure the surface of such way or bridge, without permit."

The agreed statement contains an admission that the shovel was operated by respondents, on the highway, at the time alleged. State's attorney construes the language of the statement to include an admission that the shovel was "unlawfully" operated and that it was of such construction as to make it "likely to bruise or injure the surface of such way."

Such a construction is negatived by the plea of not guilty and further negatived by the stipulation already quoted.

It was also agreed that the shovel "was of the caterpillar type, the propulsive power of which was exerted by means of a flexible band known as a movable track."

This latter agreed fact, defendants contend, takes the shovel out of the prohibition of Sec. 16, *supra*, claiming that Sec. 23 of the act which reads: "Tractors, the propulsive power of which is exerted not through wheels resting upon the ground, but by means of a flexible band or chain known as a movable track, shall not be subject to the limitation upon permissible weight per inch width of tire as provided in section forty-nine if the portions of the movable track in contact with the surface of the way present plane surfaces." makes an entirely separate class of machines which are constructed and propelled as was this shovel.

We can not agree with that contention. Such machines are by Sec. 23 exempted from the necessity of procuring permits as to weight. But the gist of this complaint is not the weight of the shovel. Indeed the weight is not given in evidence. The offence charged here is that the shovel is so constructed and equipped that its movement on the highway is "likely to bruise or injure the surface of the way."

The only evidence before us, other than the agreed statement, is a photograph of a similar shovel submitted as State's Exhibit 1.

An examination of this exhibit shows very plainly that the shovel had no "flange, rib or clamp" attached to its wheels or made a part thereof which could possibly come in contact with the surface of the way over which it was propelled.

Whether or not the "flexible band known as a movable track" might be considered "an object attached to the wheels" may be arguable, but even if this were admitted there is no evidence that its connection with the shovel or the equipment taken as a whole was "likely to bruise or injure the surface of the way." That is a question of fact. It is properly averred and the averment is material. The burden is upon the state to adduce sufficient proof in its support to satisfy the requirements of a criminal charge. This it has failed to do.

The entry in both cases must be,

Nolle prosequi.

ELLIOTT S. PETERSON CO. *vs.* NORMAN M. PARROTT.

Cumberland. Opinion November 26, 1930.

RECOUPMENT. DAMAGES. PLEADING AND PRACTICE.

Exceptions taken to ordered verdict for plaintiff must be sustained when defendant, having set up recoupment in answer to a suit on promissory notes, offers evidence sufficient to prove real damage even though the amount is indefinite.

Nominal damages may not be recovered in recoupment but any substantial damage, even though it may be compensated for by a small award, may be so recovered.

Where there is proof of damage but the amount is uncertain, the Court may properly instruct the jury to allow the smallest sum which satisfies the proof.

On exceptions by defendant. An action on the case brought to recover on two promissory notes each of $200.00 with interest, the notes being a part of the consideration of the purchase price of a new automobile bought by the defendant from the plaintiff. Defendant pleaded the general issue with a brief statement setting up as matter of special defense a partial failure of consideration because of breach of warranties. At the close of the testimony, on motion of the plaintiff, a verdict was directed for the plaintiff. Exceptions were seasonably taken by the defendant. Exceptions sustained.

The case fully appears in the opinion.

Chaplin & Burkett,

Albert Knudsen, for plaintiff.

Hinckley, Hinckley & Shesong, for defendant.

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

PATTANGALL, C. J. Exceptions. Directed verdict for plaintiff. Action on promissory notes given in part payment for automobile.

Plea general issue and brief statement claiming partial failure of consideration and right to recoupment because of certain alleged defects in the automobile.

Defendant purchased a new car of plaintiff on April 6, 1929, the price thereof being $2,170. An old car was accepted in part payment, some cash was paid and notes given to make up the total. Of these notes, defendant paid all but two, each for $200, the subject matter of this suit.

When the car was purchased, a written order therefor was signed by defendant. The order was accepted subject to certain conditions printed upon the reverse side of the document, the important feature of which was a warranty, reading:

> "We warrant each new motor vehicle manufactured by us, whether passenger car or commercial vehicle, to be free from defects in material or workmanship under normal use and service, our obligation under this warranty being limited to making good at our factory any parts or part thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser, be returned to us with transportation charges prepaid, and which our examination shall disclose to our satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties express or implied and of all other obligations or liabilities on our part, and we neither assume nor authorize any other person to assume for us any other liability in connection with the sale of our vehicles.
>
> "We make no warranty whatsoever in regard to tires, rims, ignition apparatus, horns or other signaling devices, starting devices, generators, batteries, speedometers or other trade accessories, inasmuch as they are usually warranted separately by their respective manufacturers."

The parties are bound by this warranty. It is urged that defendant's attention was not called to it, that he was given no copy of the document which he signed, and that he was not aware of its contents, at least so far as what was printed on the reverse side of the paper was concerned. This avails him nothing. He was com-

petent to do business. No deceit was practised on him. If he signed a document without reading, examining and understanding it, no one is responsible for the fact excepting himself and no court can protect him or any other person competent to contract from the result of that particular form of carelessness. He took the car subject to the exact terms of the written contract.

Under these terms, it was incumbent on plaintiff to deliver to defendant a car "free from defects in material or workmanship" or to make good "any part or parts thereof which shall, within ninety (90) days after delivery . . . be returned . . . and which shall disclose to our (plaintiff's) satisfaction to have been defective."

The particular defects of which defendant complains are set forth in detail in his brief statement:

"(1) The speedometer on said automobile was disconnected, and not in running order.

(2) The carburetor leaked, and after an attempt at repairing the same by the plaintiff the work was so improperly done that the gas supply was shut off from the engine, as a result of which the defendant was obliged to leave his automobile at a point a long distance from a garage, and have said automobile towed to a garage causing said defendant to lose the use of said automobile in his business for one day.

(3) A spring inside the right front brake drum became detached and scored the inside of said drum causing serious damage to said drum.

(4) The steering gear was defective and improperly assembled. Said plaintiff attempted to remedy the condition, causing it to be in worse condition than it was before. This condition continued for a long period of time and the plaintiff was unable to remedy the condition.

(5) A bearing in the transmission was faulty so that it had to be replaced by said plaintiff, but the condition could not be remedied and it was necessary to have a new transmission installed.

(6) A wrist pin in one of the engine cylinders was faulty, and it was necessary to have a new one.

(7) Squeaks and noises developed in the springs, which it was impossible to remedy due to the faulty condition of the springs, so that is was necessary for the defendant to expend a large amount of money to remedy the situation.

(8) The dome light switch was defective so that it broke under ordinary operation.

(9) The rear wheels were not properly adjusted so as to run true and in alignment.

(10) The buttons on the rear cushions were not properly attached to the cushions and came off.

(11) The rear footrest bracket was defective and broke while being used in a proper and ordinary manner.

(12) Several shock absorber straps broke because the shock absorbers were not suitable and proper for said automobile.

(13) The generator was defective and incapable of doing the work required of it.

(14) The paint on said automobile was not in good condition and was not properly applied.

(15) The rear springs of said automobile are not suitable and will not carry the weight required in a car of that size, as a result of which when an ordinary load is in the rear seat the body of the car bumps against the housing."

No evidence was introduced concerning the ninth, eleventh and thirteenth items. They may therefore be disregarded.

The first and sixth items were not called to the attention of plaintiff during the ninety days provided in the warranty, so that if they could properly be considered defects, defendant could not recover damages because of them.

The second, third, tenth, and twelfth items were taken care of by plaintiff as soon as they were called to its attention.

As to the fifth item, plaintiff attempted to remedy the defect, was unable to do so during the ninety-day period, but arranged so that it was entirely remedied later.

The evidence does not disclose any defect in workmanship or material which would warrant recovery on the fourth, seventh, eighth or fifteenth items.

Evidence was offered, tending to sustain the fourteenth item, which brought it within the scope of the warranty. If "the paint on the automobile was not in good condition and was not properly applied," defective workmanship or material or both was plainly indicated, for which defendant would be entitled to damages in recoupment.

It is argued that the evidence of the amount of such damage was too vague and uncertain to furnish a jury a reasonable basis of computation. Nominal damages may not be recovered in recoupment. *Foote and Davies Co.* v. *Maloney* (Ga.), 42 S. E., 143. But the damages claimed on this item were not nominal; they were substantial, even though the evidence may have been such as only to warrant a verdict for a nominal amount.

"Where there is some proof of damages sustained from a breach of contract but the amount is uncertain, the court has sometimes instructed the jury to allow the smallest sum which will satisfy the proof." *Adams Express Co.* v. *Egbert* (Penn.), 78 Am. Dec., 382.

Proof of breach of contract by plaintiff and some actual resulting damage to defendant raised a question which should have been submitted to the jury.

Exceptions sustained.

CLAUDE A. NOYES *vs.* RALPH L. PERKINS, ET ALS.

Penobscot. Opinion November 28, 1930.

STATUTE BOND. R. S. 1930, CHAP. 124, SEC. 49.

The fact that, at the time of an attempted surrender or delivery of himself under a six months' bond, given under Chap. 115, Sec. 49, R. S. 1916 (R. S. 1930, Chap. 124, Sec. 49), the debtor is in the jail under arrest awaiting commitment to the State Prison, does not destroy the effectiveness of such surrender or delivery.

Even if the Sheriff refuses to receive the debtor on his voluntary surrender to the jail, the latter has complied with the condition of his bond relative to surrender or delivery, and his bond and sureties are discharged.

In the case at bar, the principal defendant had been, on the evening of February 25, 1930, arrested and committed to the county jail in Bangor to await removal to the Maine State Prison to serve sentence. While in the jail and in the custody of the Sheriff and keeper of the jail, on February 26, 1930, he told the Sheriff that he surrendered himself under the bond. The debtor did all he could do and all he was required to do to deliver himself to the Sheriff. Such a bond does not require the debtor to furnish any precepts or copies but only to "deliver himself."

On report. An action of debt on a six months' bond given under Chap. 115, Sec. 49, R. S. 1916 (R. S. 1930, Chap. 124, Sec. 49). Defendants pleaded performances of the condition of the bond. At the trial, after the evidence had been taken out, the case was by agreement of counsel reported to the Law Court for its determination upon so much of the evidence as was legally admissible. Judgment for the defendants.

The case fully appears in the opinion.

George E. Thompson,
Abraham Rudman, for plaintiff.
Fellows & Fellows,
Ross St. Germain, for defendants.

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

FARRINGTON, J. On report. This is an action of debt on a bond given for the purpose of release from arrest on execution under the provisions of Chap. 115, Sec. 49, R. S. (1916).

The plaintiff on October 4, 1929, obtained in the Supreme Judicial Court for Penobscot County a judgment against Ralph L. Perkins for the sum of $1,014.94. On October 12, 1929, an execution was issued for Perkins' arrest, and on October 18, 1929, he was arrested and committed to jail. On the same day he gave bond as stated above and was released from custody. Alvah W. Blaisdell and Charles H. Page, the two other defendants, were sureties.

The bond was in the usual form. It could be rendered void if the debtor within six months should do one of three things: (1) cite the creditor before two Justices of the Peace and submit to examination as provided by law and take the oath prescribed; (2) pay the debt, interest, costs and fees arising on said execution; or (3) de-

liver himself into the custody of the keeper of the jail to which he was liable to be committed under the execution.

On the evening of February 25, 1930, Perkins was arrested and committed to the county jail awaiting removal on a warrant from the Superior Court of Penobscot County to the warden of the state prison issued for the purpose of removing Perkins from Bangor to Thomaston to begin service of a sentence imposed on him September 30, 1929, the case having been taken to the Law Court whose mandate was received on the day of the arrest. On February 26, 1930, while he was in the county jail in the custody of John K. Farrar, Sheriff and keeper of the jail, Perkins was given entrance to the Sheriff's office by one of the deputies and told the Sheriff that he surrendered himself under the Noyes bond.

The evidence is convincing that the debtor did all he could do and all that he was required to do to deliver himself to the Sheriff. The Sheriff himself so testifies, although not absolutely certain whether the date was February 26 or February 27. The place of the surrender was in the front office of the jail building where the debtor was actually confined, and a new commitment was unnecessary and superfluous. In answer to the question, "Did you at that time accept Mr. Perkins into your custody under this alleged surrender under the bond?" the Sheriff replied, "I didn't accept him and I didn't reject him. I simply says, 'You can leave any papers you wish and we will keep them here *as a record*.' " The question at once presents itself, "A record of what?" There is only one thing of which it could be a record and that was the fact of the surrender and delivery of the debtor into the custody of the Sheriff as keeper of the jail. The copy of the bond which was left with the Sheriff, regardless of when it was left, which we do not regard as important because not necessary to the act of surrender, silently corroborates the claim of surrender and the Sheriff's own testimony relating thereto, and to our mind shows acceptance of the debtor into the jail under his surrender. No more definite act of receiving seems necessary. Written on this copy of the bond and signed by Ralph L. Perkins, in the presence of his attorney, were these words, "I Ralph L. Perkins, the debtor named herein, under the terms in the within bond and by the provisions of law, do hereby deliver my-

self into the custody of the keeper of the jail in and for the County of Penobscot at Bangor."

Even if the Sheriff had refused to receive Mr. Perkins, in our opinion the sureties on the bond would nevertheless have been discharged, because the debtor had done all that he could do under the third provision of the bond. The case of *Saunders' Exr.* v. *Quigg et als*, 112 Pa. St., 546, 3 Atl., 814, held that where an insolvent failed in obtaining his discharge as an insolvent debtor and voluntarily surrendered himself to the county jail, he complied with the alternative condition of his bond "that he shall surrender himself to the jail of the county"; and, though the warden refused to receive him, his bond was void and his sureties were discharged. This case is followed and approved in *Marks et als* v. *Drovers' Nat. Bank, etc.*, 114 Pa. St., 490, 6 Atl., 774.

The sole question involved in the case at bar is whether or not under all the circumstances the debtor made such surrender as would relieve his bondsmen from liability. The record shows some doubt as to just when the copy of the bond was handed to the Sheriff but we do not regard that phase of the case as controlling or even important. Our Court has said in *Hussey* v. *Danforth et als*, 77 Me., 17, that "the production of this attested copy of the execution and return, or of the bond, may be waived, and if the jailer receives the debtor without either, or upon the production of such data as may be satisfactory to him, the delivery is undoubtedly sufficient, *Jones* v. *Emerson*, 71 Me., 407." This case is affirmed in *March* v. *Barnfield et als*, 107 Me., 40, where the Court says, "The bond did not require the debtor to furnish any precepts or copies but only to 'deliver himself.' He did all that he and his sureties engaged he should do."

Did the debtor in the instant case "deliver himself into the custody of the keeper of the jail"?

No question or doubt could have been raised that it would have been a good delivery or surrender to the custody and control of the jailer, if this debtor had come voluntarily from his home to the jail and had done the same things and uttered the same words as he did and said in this case. Nor, under the same assumption, would it be questioned or doubted that what happened in this case was an

actual receiving into custody on the part of the jailer. This was all the debtor's bond required him to do in order that the sureties or bondsmen might be released from liability.

Does the fact that, at the time of the attempted surrender or delivery of himself under this bond, the debtor was in the same jail, under arrest for commitment to the state prison at Thomaston, change the situation? In our opinion, it does not change it. We known of no reason or law to prevent a sheriff holding the same man at the same time in his custody in jail under different and separate processes. One process may be superior to another and in this case the warrant for the debtor's commitment to the State Prison was superior to the execution in connection with which the bond was given and under the terms of which the debtor delivered himself into jail. It was by virtue of the execution that he was originally committed to jail, before the bond was given, and to this detention he returned himself by surrender. A bond is a substitute for the detention of the body of the debtor. *Craggin* v. *Bailey*, 23 Me., 104, 108; *Lowell* v. *Haskell et al*, 45 Me., 112, 113.

If the debtor had actually been in jail under the original arrest on execution when he was arrested for the purpose of commitment at Thomaston, that fact would not have prevented his being taken to the latter place under the superior authority of the warrant. Undoubtedly the Sheriff would have the right, and we believe it would be his duty, at the end of the sentence on which commitment was made at Thomaston to again take the debtor into his custody. We can see no difference in principle between the case where the arrest for purpose of commitment follows confinement under the arrest on execution, and a case, like the instant one, where the surrender and delivery into the custody of the Sheriff under the bond follows the arrest for commitment, and we feel the Sheriff's right and duty after expiration of sentence would be the same.

The reverse of the case before us is found in *Steelman* v. *Mattix*, 9 Vroom, 247, 20 Am. Rep., 389, which is enlightening. This was a suit upon a bond executed by the defendants under the insolvent laws of the state, conditioned that the defendant, Mattix, would appear and apply for the benefit of the insolvent laws, and if he were refused this discharge as insolvent debtor, he would surrender

himself to the custody of the Sheriff of the county. Mattix was refused his discharge and did not surrender himself. The defendants offered in excuse that the surrender was rendered impossible by act of law; that, at the time the discharge was refused, Mattix was incarcerated in the same jail to which he was supposed to have surrendered himself, prior to his removal to the state prison, to which he had been sentenced for a term of years for the crime of rape. The question in that case was whether this was a lawful excuse for the failure to make surrender. The Court in that case said, "In this case, at the very time he was refused his discharge, he was in the custody of the sheriff at the county jail, on the criminal charge, and it was in his power to say to the sheriff, that he put himself into his custody, also, according to the condition of the insolvent bond, in exoneration of his sureties. That would have been an actual surrender in compliance with his undertaking, not at all inconsistent with the fact that he was already held under the criminal charge, and it would have enabled the sheriff to re-take him after he had been liberated from incarceration from the criminal offense. For want of such voluntary surrender, neither the sheriff nor the plaintiff could re-take him after the expiration of his term of imprisonment. The surrender, therefore, was not rendered impossible by the act or operation of law, and the sureties are not released from their stipulation that Mattix should make it."

It being our opinion that there was such surrender and delivery in this case as relieved the principal and sureties on the bond from all liability thereon, the entry must be,

Judgment for the defendants.

BROCHU'S CASE.

York. Opinion November 28, 1930.

WORKMEN'S COMPENSATION ACT. DEPENDENCY.

Aside from those who are by Statute conclusively presumed to be dependent upon an injured employee, there may be those who are so dependent in fact.

In cases involving the latter class, dependency is to be determined as of the time of the accident or injury.

Subsequent changes in condition are not to be taken into consideration. Compensation is not to be denied to one who was in fact dependent at the time of injury and became independent prior to the death of the injured employee; nor does it cease when dependent reaches the age of eighteen, provided that some portion of the award remains unpaid at that time.

The right to receive compensation is not a vested right. The dependent may not assign it nor would it pass by descent. It is wholly created by statute and may neither be enlarged nor limited other than by legislative enactment.

On appeal from decree of a single Justice affirming the decision of the Industrial Accident Commission, awarding compensation to petitioner. The issue involved a question of dependency of the petitioner. Appeal dismissed. Decree below affirmed.

The case fully appears in the opinion.

Joseph E. Harvey, for plaintiff.

Strout and Strout, for defendants.

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

PATTANGALL, C. J. Workmen's Compensation. On appeal from decree of single justice affirming decision of Industrial Accident Commission awarding compensation to petitioner.

Joseph I. Lachance was injured on October 1, 1926 while in the course of his employment by an accident arising out of his employ-

ment. His death, which occurred on December 12, 1929, was a result of the accident. Compensation for total disability was paid to him from the time of the injury to the date of his death.

At the time he received the injury, he was a widower and had dependent upon him but one child, then fourteen years of age, the petitioner in this case.

In July 1928, she married. On March 15, 1930, she reached the age of eighteen. At the time of her marriage she ceased to be actually dependent upon her father and was not thereafter so dependent upon him.

On August 22, 1930, petitioner having filed a claim on March 31, 1930 for compensation as a dependent child of Joseph I. Lachance, the Commission ordered payments continued from the date of last payment to deceased for a period not to exceed three hundred weeks from the date of injury, the total amount paid not to exceed four thousand dollars.

Two questions are involved in the consideration of this case. (1) Whether the marriage of petitioner previous to her father's death bars her right to compensation as a dependent? (2) If this question be answered in the negative, then did her right to compensation as a dependent terminate when she reached the age of eighteen?

The case is governed by the provisions of Sec. 1, Chap. 222, P. L. 1921, and Sec. 2, Chap. 201, P. L. 1925, the laws in force at the time of the accident, which read:

> "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, earnings or salary, but not more than eighteen dollars nor less than six dollars a week, for a period of three hundred weeks from the date of the injury, and in no case to exceed four thousand dollars."
>
> " '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.

The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

* * *

(C) A child or children, including adopted and step-children under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning) upon the parent with whom he is or they are living, or upon whom he is or they are dependent at the time of the death of said parent, there being no surviving dependent parent.

* * *

In all other cases questions of entire or partial dependency shall be determined in accordance with the fact, as the fact may have been at the time of the accident."

Petitioner did not come within the class described in clause (c). She was neither living with her father at the time of his death nor actually dependent upon him at that time. She was not therefore "conclusively presumed to be dependent." But there are two classes of dependents who may receive compensation under the terms of the Act — first, those who are, as a matter of law, conclusively presumed to be dependent; second, those who are, as a matter of fact, dependent. And aside from those who are beneficiaries of the legal presumption, the fact of dependency, under the law as it stood when this case arose, depended upon the situation which existed at the time of the injury. *McDonald* v. *Liability Corporation*, 120 Me., 58; *William's Case*, 122 Me., 479; *Gallagher's Case*, 219 Mass., 140; *Ressi's Case*, 243 Mass., 528; *Paul* v. *Accident Commission* (Ore.), 272 Pac., 267; *Birmingham* v. *Westinghouse Co.*, 167 N. Y. Supp., 520; *Donoho* v. *Iron Works*, 206 N. Y. Supp., 494; *Adelman* v. *Ocean Accident and Guarantee Co.* (Md.), 101 Atl., 529.

Petitioner was, at the time of the injury, admittedly dependent upon her father for her entire support.

Subsequent changes in condition are not to be taken into consideration. *Re Yeople*, 169 N. Y. Supp., 584; *Davy* v. *Norwood-White Coal Co.* (Iowa), 192 N. W., 304; *Bott's Case*, 230 Mass.,

154. The marriage of petitioner prior to the death of her father does not bar her right to compensation.

Whatever incongruity there may be in continuing payments to a person on the presumption that she is dependent on a deceased father, when in fact she is receiving ample support from a husband, is a matter for the legislature and not for the Commission or the Court to correct. *Bott's Case*, supra.

The appellant agrees that under the strict interpretation of the statute a widow would be entitled to compensation until death even though she re-married if the present provisions of the law did not terminate compensation upon her re-marriage, but denies that the same principle applies in the case of children becoming eighteen years of age. This question arose in *Cronin's Case*, 234 Mass., 5, where the Court held there was no distinction between the case of a dependent widow who re-married and a dependent son who became eighteen years of age and self-supporting within the period during which compensation had been awarded him.

The right to receive compensation is not a vested right. *Murphy's Case*, 224 Mass., 592. It would cease at dependent's death in any event. It would not pass to her heirs or legal representatives, nor could it be assigned by her to another. But she has a right to receive the full amount of the compensation awarded to her.

That right is wholly a creature of the statute and is defined by its terms. Its express conditions can not be extended beyond their reasonable import, *Moran's Case* (Mass.), 125 N. E., 157, nor can they be limited other than by legislative enactment.

Appeal dismissed.
Decree below affirmed.

ESTHER L. CROCKETT *vs.* ETHEL R. BORGERSON.

Knox. Opinion November 28, 1930.

REAL ESTATE ATTACHMENT. EXECUTION LEVY. TITLE BY DESCENT. DEEDS.
R. S. 1930, CHAP. 95, SEC. 63. R. S. 1930, CHAP. 90, SEC. 31.
R. S. 1930, CHAP. 89, SEC. 9.

On a real estate attachment made on a writ in which the account annexed uses the following form for consecutive months, namely, "To groceries and provisions for the month of ————, 1920, $————", no lien under the provisions of Sec. 60, Chap. 86, R. S. (1916) (*Sec. 63, Chap. 95, R. S.* 1930), *is created.*

But under the provisions of Sec. 32, Chap. 81, R. S. (1916) (*Sec. 31, Chap. 90, R. S.* 1930), *"seizure and sale pass to the purchaser, all the right, title and interest that the execution debtor has in such real estate at the time of such seizure, or had at the time of the attachment thereof on the original writ, subject to the debtor's right of redemption" and where there are no hostile or intervening rights it is immaterial that the levy or seizure is not recorded.*

If the court in which the proceedings take place has jurisdiction to render the judgment on which an execution levy and sale is based, such judgment can not be collaterally attacked.

Under the provisions of Sec. 9, Chap. 80 (*Sec. 9, Chap. 89, R. S.* 1930), *R. S.* (1916), *a wife can not by sole deed release her "right and interest by descent" until after the expiration of the time provided by law for redemption by the husband from a sale on levy on execution, and a sole deed of such "right and interest" given by a wife before such redemption period expires, conveys nothing. And if a sole deed so given is a quitclaim deed, without covenants of any kind, a grantee purchaser can not recover back the purchase money paid for it, nor is the vendor estopped from setting up a subsequently acquired title, "unless by so doing he is obliged to deny or contradict some fact alleged in his former conveyance."*

The same rule as to assertion of title is true of a person who, though having a definite interest in real estate, at the time of giving such quitclaim deed is in fact without power to make an effective conveyance of it.

The mere fact of the signing and delivery of an ineffective deed of quitclaim without covenants by one person to another person grantee, without evidence of any word, act, statement, assurance or promise, calculated to influence or mislead such grantee, is not sufficient ground on which to base an equitable estoppel

to the assertion of title to an interest in real estate which is still owned by the one who gave the ineffective deed.

On report. An action in a plea of land. Testimony in the cause was taken out at the May Term, 1930, of the Superior Court for the County of Knox, and by agreement of the parties reported to the Law Court for its determination on so much of the evidence as was legally admissible. Judgment for demandant for one-third in common and undivided of the demanded premises. Case remanded for further proceedings in accordance with stipulations.

The case fully appears in the opinion.

Elisha W. Pike, for plaintiff.

Walter H. Butler,

Frank A. Tirrell, Jr., for defendant.

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

FARRINGTON, J. This is an action in a plea of land, reported upon so much of the evidence contained in the record as may be legally admissible, together with certain admissions, agreements and stipulations.

The defendant pleaded the general issue and by way of brief statement recited her purchase at the Sheriff's sale May 31, 1922, her payment of the mortgage herein referred to, and the discharge thereof, and claims subrogation to the right and lien of the mortgage thus paid. Further claim is made in said brief statement that the demandant being cognizant of all the facts as to the judgment under which defendant took title, and having given a deed of her own interest, and having "stood by" for eight years, and having suffered the defendant to expend money for improvements, is now estopped from setting up any title for her own advantage in this action. Certain other claims made in the brief statement need not be mentioned or considered under the result reached in this opinion.

The demandant claims title to an undivided two-thirds of the demanded premises under a Sheriff's deed to her dated March 25, 1930, as will appear. Title to the other undivided third is claimed by her by reason of a decree of divorce from Vernard C. Crockett granted January 17, 1929, in the Supreme Judicial Court for

Knox County, in which decree she was given $2,750.00 in lieu of alimony, together with taxable costs.

A recital of events leading down, in point of time, to the divorce proceedings above mentioned, and a discussion of the law therein involved, will serve to show the defendant's claims to title and whether those claims avail her, and also will bring us to the final conclusion as to whether or not, or how far, the demandant can prevail.

On January 17, 1918, Frank M. Piper by warranty deed conveyed the demanded premises, situated on the Northerly side of Clarendon Street in Rockland, Maine, to Vernard C. Crockett, aforesaid, the then husband of the demandant in this action. On January 18, 1918, he, the demandant joining in the deed, mortgaged the premises to Rockland Loan and Building Association for the sum of $1,200.00. The mortgage was duly recorded January 19, 1918.

By writ dated July 19, 1921, Webber Market Company brought suit against "Vernard Crockett." The account annexed to the writ was as follows:

"To groceries and provisions for the month of June, 1920 $34.74
" " " " " " " " July, 1920 76.20
" " " " " " " " Aug., 1920 72.08"

and then ditto marks for "groceries and provisions for the month of" August, September, October, November and December, 1920, and January, February, March, April, May, June and July, 1921, with the amounts carried out for each month as above.

On the same date as that of the writ a real estate attachment on said writ was made in the usual form, duly filed and recorded. On April 7, 1922, judgment was rendered for $780.54, covering debt and costs. On April 12, 1922, execution was issued, and on April 17, 1922, by virtue of this execution, Raymond E. Thurston, Sheriff of Knox County, according to the record of his levy, attached to the execution and part of the record in this case, "took the following described estate and all the right, title and interest which the within named Vernard Crockett had in and to the same on the nineteenth day of July A.D. 1921, at five minutes past two o'clock in the afternoon, the time when the same was attached

on the original writ, to wit: — " and after describing other parcels "all the equity" which the said Crockett had in the demanded premises. It appears in evidence and undisputed that "Vernard Crockett" referred to is the same "Vernard Crockett" from whom the divorce was later secured by the demandant, as appears in the opinion. At this time the Rockland Loan and Building mortgage was still in force, a discharge having been obtained by defendant October 9, 1928.

On May 31, 1922, Sheriff Thurston, in consideration of the sum of three hundred fifty dollars, executed and delivered to the defendant a deed of "all the right, title and interest which the said Crockett has or had to the premises above described," being the demanded premises. In the deed due recital was made that the conveyance was subject to redemption as provided by law. The record discloses no redemption either by Crockett or by any other person.

It is admitted that when the writ was served on defendant, she was in possession of demanded premises and had been since May 31, 1922.

Sec. 60, Chap. 86, R. S. (1916), contains this provision: "No attachment of real estate on mesne process creates any lien thereon, unless the nature and amount of plaintiff's demand is set forth in proper counts, or a specification thereof is annexed to the writ, . . ."

It is admitted under the stipulations that the formal notices, posting, notice to the principal defendant, and publication were properly given as recited in the Sheriff's deed to the defendant. The demandant, however, contends that in the writ in the suit of Webber Market Company "the nature and amount of plaintiff's claim" is not "set forth in proper counts" and that no proper specification was annexed to the writ, and that for that reason the real estate attachment created no lien on the premises attached, and that therefore the Sheriff's deed conveyed no title to the defendant.

The demandant's contention that the real estate attachment created no lien is well founded. *Bennett* v. *Davis*, 62 Me., 544; *Belfast Savings Bank* v. *Kennebec Land and Lumber Co.*, 73 Me.,

404; *Bartlett* v. *Ware*, 74 Me., 292; *Hanson* v. *Dow*, 51 Me., 165; *Saco* v. *Hopkinton*, 29 Me., 268.

In the instant case, however, no rights of third parties are concerned. The record shows no intervening attachments, or conveyances by way of mortgage or otherwise, between the date of the attachment and the date of the sale to defendant on the levy on the execution. In the cases cited in regard to the attachment lien, rights of innocent third parties had arisen between dates of attachment and sale under the levy and sales on seizure or levy were properly held to convey no title against them.

Chap. 81, Sec. 32, R. S. (1916), provides that "such seizure and sale pass to the purchaser, all the right, title and interest that the execution debtor has in such real estate at the time of such seizure, or had at the time of the attachment thereof on the original writ, subject to the debtor's right of redemption."

The defendant is not limited to rights of levy or seizure afforded by and under a lien created by the attachment which in this case failed. The seizure and sale passed to her "the right, title and interest" that Vernard C. Crockett had in the real estate at the time of the seizure, when there were no other hostile or intervening rights, and for that reason, in our opinion it is immaterial that the levy or seizure in the instant case was not recorded. "The record is important to protect innocent parties; it is of no importance to the debtor. He does not suffer if a record is never made, nor can he be injured by a subsequent sale or extent upon his land, under an unrecorded seizure." *Swift* v. *Guild*, 94 Me., 436.

The seizure and sale in the case before us were sufficient to vest the title in the defendant, the purchaser, although the seizure was not recorded in the Registry of Deeds. After a seizure and before a sale it would be otherwise as against a bona fide purchaser without notice or an intervening right of an innocent third party.

The general rule against collateral attack on judgments precludes the demandant from raising any question as to the validity of the levy based on the judgment recovered against Crockett. The rule is stated by the Supreme Court of the United States as follows: "If the Court in which the proceedings took place had jurisdiction to render the judgment which it did, no error in its pro-

ceedings which did not affect the jurisdiction will render the proceedings void, nor can such error be considered when the judgment is brought collaterally into question." *McGoon* v. *Scales*, 9 Wall., 23. This rule is approved in *Blaisdell* v. *Inhabitants of the Town of York*, 110 Me., at page 509.

In the Sheriff's deed to defendant it is stated, "Whereas I, Raymond E. Thurston, Sheriff . . . did on the nineteenth day of July A.D. 1921, take and seize . . ." This is manifestly error because just before this statement he recited he was acting on an execution issued on a judgment recovered April 7, 1922. The levy itself attached to the execution and signed by the Sheriff shows the true date of the levy as hereinbefore stated and controls the situation. We do not regard the error as of sufficient importance to require further comment as the rights under the deed are not in any way affected by it.

At this point title to an undivided two-thirds of the demanded premises is in the defendant and there has been no redemption. There is nothing in the record to show that Vernard C. Crockett ever afterwards acquired title to any part of the demanded premises.

On the same date on which the Sheriff's deed was given, May 31, 1922, the demandant, for consideration expressed as "one dollar and other valuable considerations," by quitclaim deed without covenants conveyed to the defendant "all my right, title and interest in and to the house and lot situated on the Northern side of Clarendon Street in said Rockland and known as numbers 26 and 28 on said street, *being my right and interest by descent* in said real estate as the lawful wife of the said Vernard C. Crockett, there being a mortgage on said premises and this interest is in the right in the equity of redemption I may have as the wife of the said Vernard C. Crockett."

No question is raised as to the identity of the property in this deed from the demandant. It is described as "a house and lot on the Northern side of Clarendon Street" in said Rockland known "as numbers 26 and 28 on said Street." These numbers nowhere else appear in the record and outside of the fact that the location is on the Northern side of Clarendon Street, there is nothing else to in-

dicate that it may be or is any part of the demanded premises. The parties to the case, however, appear to have taken the identity as established and to have acted and proceeded on that basis, and the Court therefore feels justified in assuming that the fact of the identity is unquestioned.

Chap. 80, R. S. (1916), Sec. 9, contains this provision: "A husband or wife of any age, may bar his or her right and interest by descent, in an estate conveyed by the other, by joining in the same, or by a subsequent deed, or with the guardian of the other; or by sole deed; but shall not be deprived of such right and interest by levy or sale of the real estate on execution; but may, after the right of redemption has expired, release such right and interest by sole deed."

In our opinion, under the statute quoted, the demandant could not release her "right and interest by descent," which was one-third undivided, subject to the mortgage, until after the right of redemption had expired, and that she did not in her deed release any right.

Moving on in the course of events, we find that on June 21, 1928, the demandant brought divorce proceedings against her husband, Vernard C. Crockett, the writ being returnable at the September Term, 1928, of the Supreme Judicial Court for Knox County. On June 25, 1928, a real estate attachment was made in the usual form. Service on the libelee, "whose residence is unknown" and referred to as "of parts unknown," was by publication, and on January 17, 1929, divorce on the ground of desertion and judgment for $2,750.00 and costs in lieu of alimony was decreed. On execution issued January 24, 1930, from the Knox County Superior Court, levy was made on January 28, 1930, on whatever interest Vernard C. Crockett had in real estate in Knox County, specifying an undivided two-thirds of the demanded premises, and on March 25, 1930, a Sheriff's deed was given to the demandant covering "all the right, title and interest which the said Vernard C. Crockett has or had at the date of the seizure aforesaid."

The Sheriff's deed to the defendant under date of May 31, 1922, there having been no redemption, conveyed all of Vernard C. Crockett's title to the demanded premises, and, there having been

no subsequent acquisition of any interest in it, there was nothing on which an attachment or a levy could operate in connection with the later divorce proceedings, and consequently nothing could or did pass by the Sheriff's deed to the demandant on March 25, 1930. It is therefore not necessary to give further consideration to the validity of that deed.

At this point title to two undivided thirds of the demanded premises is clearly in the defendant. There was no title in the libelee, Vernard C. Crockett, on which the demandant could base her claim to two undivided thirds, as has been stated, and no title upon which she could base a claim to one undivided third as provided in Sec. 9, Chap. 65, R. S. (1916), that "when a divorce is decreed to the wife for the fault of her husband for any cause (*save impotency*), she shall be entitled to one-third in common and undivided of all his real estate . . . which shall descend to her as if he were dead."

If the demandant has title to a one-third undivided interest it is by virtue of the situation existing May 31, 1922, when she gave to the defendant a quitclaim deed, without covenants of any sort, of her "right and interest by descent" in the demanded premises "as the lawful wife of the said Vernard C. Crockett."

It appears to be a well settled principle of law in this state that if a grantee receives and accepts a deed containing no covenants he can not recover back the consideration on failure of title, unless there has been fraud, circumvention or purposed concealment. *Joyce* v. *Ryan ext.*, 4 Me., 101; *Bishop* v. *Little*, 5 Me., 366; *Emerson* v. *County of Washington*, 9 Greenleaf, p. 94; *Butman* v. *Hussey*, 30 Me., 263; *Stewart* v. *Crosby*, 50 Me., 130.

In *Stewart* v. *Crosby*, supra, the Court says, "The mistake which the grantee in a deed of quitclaim makes, when he pays for a release which is valueless, is not a mistake of fact, which will enable him to recover back the money paid. Everyone who takes such a deed expects to be benefited thereby, else he would not purchase, but, if there be no covenants, he risks the goodness of the title acquired. Neither would the plaintiffs be better off in equity." These cases came up in an action for money had and received, an action based and grounded in equity.

In the case of *Pike* v. *Galvin*, 29 Me., 183, which was a writ of entry, the Court said, "Where one has made a conveyance of land by deed containing no covenant of warranty, an after acquired title will not enure or be transferred to the vendee; nor will the vendor be estopped to set up his title subsequently acquired, unless by doing so he be obliged to deny or contradict some fact alleged in his former conveyance."

In the same case, page 187, the Court says, "One, who acquires no title by a release without covenants respecting the title, can not recover back the purchase money, which he paid for it. *Emerson* v. *The County of Washington*, 9 Greenl., 88. To permit him to acquire a title subsequently purchased by his releasor, would often enable him to obtain in another and less direct mode, property of more value than the purchase money." And the demandant in the action was nonsuited.

The case of *Pike* v. *Galvin* is approved in *Loomis et als* v. *Pingree et als*, 43 Me., 299, at page 314.

The case of *Bennett* v. *Davis*, 90 Me., at page 461, which was a petition for partition, again reaffirms *Pike* v. *Galvin*, supra, and in the opinion the Court says, "Thus we find the law settled in this State as to three classes of deeds, (1) those of full warranty against all the world, (2) those with the covenants of non-claim, and (3) those which purport in terms to convey only the grantor's existing right, title or interest. Under deeds in the first class an after acquired title inures to the grantee. Under deeds in the second and third classes an after acquired title does not pass to the grantee.

"But there seems to be a criterion which, for the purpose of this opinion, may reduce the above named three classes to two, (1) those in which the parties intend to convey an actual estate and protect it against all the world; and (2) those in which parties intend to merely transfer whatever estate the grantor then has, with a guaranty against any then conflicting conveyances or encumbrances. (Which guaranty did not appear in the deed in the instant case.) A grantor in a deed of the first class, having assumed to convey an actual estate and to make it good in the grantee, can not afterwards acquire and hold that estate against his grantee, nor convey it to the detriment of his grantee. He is bound by his

covenant to transfer it to his grantee, and the law, as settled in this state to save circuity of actions, holds it to be thus transferred *ex vigore legis*, even against a subsequent grantee where the first deed was recorded. A grantor in a deed of the second class, not having assumed to convey an actual estate and to make it good against all claims but only to relinquish whatever estate he may have with a guaranty that he has not given anyone else any claim to it, is not bound to make any other title or estate good to grantee. If at the time of his deed, he has suffered no one else to acquire any rights or claims under him, there can be no breach of his covenant. After such a deed he is free to acquire other titles or estates in the same land, and hold them against his grantee, for he never covenanted against such titles or estates, but only against the title or estate he conveyed, whatever it was."

We can see no distinction between the cases where a person gives a quitclaim deed, without covenants, of some interest in real estate which he does not have, and the case of a person who, though having a definite interest in real estate, is at the time of giving the deed, without power to give or make a conveyance effective in fact. In the instant case, when she delivered her deed to the defendant May 31, 1922, the demandant's power to convey was wholly dependent on the statute. On May 31, 1923, or thereafter, she could have conveyed her interest in the premises. Up to that time it was the same in effect as if she had no interest whatever. From May 31, 1923, to the date of bringing her writ in the present action the legal title to that one-third has been and now is in the demandant, and she has the immediate right of possession and can sustain her action to the extent of her ownership.

As to the matter of subrogation claimed by the defendant, we feel that the record in the case is not sufficiently complete to warrant or justify any finding. While it is admitted as a part of the case that the defendant did pay a total of $1,104.24 on the Rockland Loan & Building Association mortgage and that a discharge was executed and delivered to her, there is no testimony throwing any light upon the conditions and circumstances surrounding and accompanying this transaction and we feel that consideration and decision of so important a matter without an opportunity for full

hearing would be unwise and unfair. The fact that the defendant felt that she had title under her two deeds might on its face appear as a sufficient and impelling reason for her to have discharged the mortgage, but to deprive the demandant of the right to furnish whatever explanation she could of the apparently justifiable reason on the part of the defendant for discharging the mortgage might foreclose her case and cause injustice to be done. The court of equity is open to the defendant if she wishes to press her claim for subrogation, and there full opportunity for bringing in all evidence bearing on the point would be assured to both parties litigant and the danger of a decision on what might prove to be only a part of the facts would be avoided.

The only remaining point to be considered is the claim of the defendant that the demandant is estopped from asserting title. From anything in the record, or from any reasonable inference that might be drawn from what is contained in the record, we are unable to see anything which by way of estoppel, equitable or otherwise, would or could bar the demandant from assertion of her title to the one-third interest.

At the time when the demandant attempted to release her rights to the defendant under the deed of May 31, 1922, she did have a right in the property which, as far as the record shows, she honestly attempted to convey to the defendant. Her deed was ineffective, because she did not wait until the redemption period had expired on the levy and sale. It is our opinion that the demandant has full title to this one-third interest which she attempted to convey, unless she is barred under the principles of an equitable estoppel from maintaining against the defendant her right to this interest. The only thing that she did, as far as the record shows, was to sign and deliver a deed to the defendant. There is no evidence of any other act and no evidence of any word or statement. There is nothing to show that the demandant said anything, did anything, or held out any assurances or made any promises calculated to or tending to in any way influence or mislead the defendant. The record is entirely bare of any evidence bearing on that point, although it is argued by counsel. The demandant owed the defendant no duty of calling her attention to any conditions which might

render her deed void or ineffective, even if she knew of such conditions, and there is no evidence that she did know. On the other hand, if the defendant before receiving the deed had taken steps to ascertain through proper advice whether or not the demandant was in a position to give a proper deed, her present difficulties might have been unnecessary. If after receiving the two deeds and taking possession and doing whatever she did thereafter, in connection with the mortgage or otherwise, she had taken further steps to make certain of her rights, other difficulties might also have been prevented. We do not feel that the mere giving and delivery of a deed by demandant is in itself, accompanied by no more evidence than that disclosed by the record, even when combined with the fact that the defendant occupied the property claimed under her two deeds and eventually paid the mortgage, a sufficient exposition of facts to warrant this Court in saying that this demandant is equitably estopped from asserting her title to this one-third interest.

Parties having agreed that the value of improvements, admittedly judicious and proper, shall be ascertained by commissioners to be appointed by the Court at *nisi prius*, and that the tenant may file written claim to compensation for such improvements, and that the demandant may file written request for estimation of values of demanded premises at the time of the trial, if no improvements had been made, and, as under Sec. 10, Chap. 109, R. S. (1916), "the demandant may recover a specific part or undivided portion of the premises to which he proves title, although less than he demanded," the entry will be,

Judgment for demandant for one-third in common and undivided of the demanded premises. Case remanded for further proceedings in accordance with stipulations.

SARAH P. STUART AND ELIZABETH K. DODGE

vs.

CHARLES E. FOX AND EDWARD E. FOX.

SARAH P. STUART AND ELIZABETH K. DODGE *vs.* JESSIE C. MINOTT.

SARAH P. STUART AND ELIZABETH K. DODGE

vs.

HARRY M. SHWARTZ AND JESSE M. ROSENBERG.

Cumberland. Opinion November 29, 1930.

BOUNDARIES. RAILROADS. REAL ACTIONS. DEEDS.

While it is a well established rule in this state that a conveyance of land bounded on a highway, of which the grantor owns the fee, carries title to the center unless a contrary intent appears, and the like rule prevails in conveyances bounded on non-navigable streams, and on tidewater to low water mark, the same principal does not apply in conveyances bounded by a railroad right of way.

The ownership of the fee in a railroad right of way is of no benefit to the abutting owner. He is excluded from all use of such right of way and the reasons, which exist in the case of highways for extending the lines of an abutting owner to the center, are not present. Considerations of public policy do not require this extension of the rule.

In the case at bar, it is apparent that there was no intention in the Nutter deed to include any portion of the railroad way in the land now owned by the plaintiffs. The distances, accurately designated, carried only to the exterior lines of the location. The words "to" and "by" the location used in the Nutter deed were words of exclusion.

On report. Three real actions brought under writs of entry for the purpose of trying title to certain real estate, possession of which was alleged by the demandants to be wrongfully withheld. By agreement of the parties, after the evidence was taken out, the three causes were reported together to the Law Court for its deter-

mination on so much of the evidence as was legally admissible. Judgment for the defendants.

The cases fully appear in the opinion.

Frank H. Purinton, for demandants.

Verrill, Hale, Booth & Ives, for C. E. Fox et al.

George H. Allen, for Jessie C. Minott.

Brooks Whitehouse, for Harry M. Shwartz and Jesse M. Rosenberg.

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

THAXTER, J. These three cases, which are writs of entry, involve the same facts, and are reported to this court for final determination on so much of the evidence as is legally admissible. From this evidence the following facts appear:

In 1850 James Deering was the owner of a large tract of land in what is now a growing and populous part of the City of Portland. In that year the York and Cumberland Rail Road Company, which subsequently became the Portland & Rochester Railroad Company, acquired under the terms of its charter by condemnation a right of way six rods wide through the Deering land. One rod of this was subsequently reconveyed so that the width of the way as finally used by the railroad was eighty-two and one-half feet. In 1886 the heirs of James Deering, then owning the land on each side of this right of way, conveyed to Carrie A. Nutter a piece of land on the westerly side of it described as follows:

> "A certain lot of land situated on the Northerly side of Noyes Street in said Deering and described as follows viz., beginning at the corner formed by the intersection of the Northerly side line of said Noyes Street with the Northerly side line of Longfellow Street; thence Westerly by said Longfellow Street sixty (60) feet to a point; thence Northerly on a line at right angles to said Longfellow Street two hundred and seventeen (217) feet and .95 of a foot more or less to the location of the Portland and Rochester Railroad; thence Southeasterly by said location two hundred and ten (210) feet more or less to said Noyes Street; thence Westerly by

said Noyes street, ninety eight (98) feet more or less to the corner begun at. For a more particular description reference may be had to a plan in the possession of the said Grantors."

This lot of land, through various conveyances and devises, and through descent, is now owned by the plaintiffs. The area on the other side of the railroad location opposite this lot between the railroad and Forest Avenue, being a piece varying in width from one hundred and thirty-nine to one hundred and fifty-four feet, was held by the Deering heirs until 1894, when it was conveyed to Arthur E. Marks. The northerly and westerly bounds of this land were described in the deed as follows:

"thence westerly on a line parallel with Noyes Street one hundred and thirty-nine (139) feet more or less, to the location of the Portland and Rochester Railroad Company; thence Southerly by said location two hundred and sixty (260) feet more or less to said Noyes Street."

It will be seen from these two deeds therefore that the Deering heirs, owning the fee in the railroad right of way and in the land on both sides of it, conveyed the area first on the westerly side, and eight years later that on the easterly side, describing both of such lots as running "to" and "by" the railroad location.

In 1911 the Portland & Rochester Railroad abandoned its right of way, and in 1922 the Deering heirs by three warranty deeds conveyed to the predecessors in title of the defendants in these actions the area comprising such location between the lots previously conveyed to Carrie A. Nutter and to Arthur E. Marks.

These suits are brought to recover the westerly half of such railroad location in so far as it abutted the property now owned by the plaintiffs, whose claim is that the deed to Carrie A. Nutter conveyed to her the fee to the center of the railroad property and that on the abandonment of this they became possessed of this land free from the encumbrance of the railroad right of way. The defendants claim through the deed from the Deering heirs, their contention being that title to the fee in this strip was retained by the grantors when the land on each side of it was conveyed.

The question here presented has never come before the courts of

this state, although there are conflicting decisions in other jurisdictions. It is important not only to the parties in this case who are contesting the title to real estate, on which have been built permanent structures of substantial value, but also to others similarly situated. It is also possible to foresee the abandonment of other railroads in this state, and extensive litigation to determine the title to their rights of way, if this question is not definitely settled in this jurisdiction.

The contention of counsel for the plaintiffs is that a railroad right of way is a highway and that the same rule which applies in the case of land bounded on a highway should apply to that adjoining a railroad. This well established principle is that a conveyance of land bounded on a highway, the fee of which is owned by the grantor, carries title to the center of it unless a contrary intent appears. *Oxton* v. *Groves*, 68 Me., 371; *Low* v. *Tibbetts*, 72 Me., 92; 4 R. C. L., 78. A glance at the reasons for this rule will perhaps indicate how far it is applicable to land abutting on a railroad.

The procedure for the location of highways is now largely governed by statute. In early times they were ordinarily created by a dedication express or implied by the owner of the land through which they ran. *British Museum* v. *Finnis*, 5 C. & P., 460. However created, the right given was ordinarily an easement. The public had the right of passage, but title to the soil was retained by the original owner. *Peck* v. *Smith*, 1 Conn., 103; *Webber* v. *Eastern Railroad Company*, 2 Met., 147, 151; *Burr* v. *Stevens*, 90 Me., 500. It is true that the grant of this easement carried with it all the incidents necessary to make the enjoyment of the public right effective, not only with reference to the amount and methods of travel in vogue at the time of the grant, but with respect to such as an advancing civilization might indicate were reasonable and proper. *Milhau* v. *Sharp*, 15 Barb., 193, 210; *Burr* v. *Stevens*, supra. The ownership of the fee in the highway in early times, when the means of travel were primitive, was of distinct benefit to the owner of the adjoining land, and today even with the enlargement of the public right, this claim to the freehold is of advantage to the abutting property holder. Thus the proprietor of the soil in the highway had the right to the grass along its untravelled border,

and he could maintain trespass against one who permitted his cattle to graze there, *Woodruff* v. *Neal*, 28 Conn., 164; the right to make a reasonable use of it for the unloading and temporary storage of fuel for the use of his house, *Commonwealth* v. *Passmore*, 1 Serg. & Rawle, 217, 219; the right to the minerals under it, *Chester* v. *Alker*, 1 Burr., 133, 143; the right to sink drains under it, *Perley* v. *Chandler*, 6 Mass., 453; the right to build vaults under the street for storage or other uses connected with his buildings, *Allen* v. *City of Boston*, 159 Mass., 324; the right to plant ornamental or shade trees, *Wellman* v. *Dickey*, 78 Me., 29. Other advantages associated with the enjoyment of the abutting property by reason of the ownership of the fee in the highway could be enumerated.

Courts have attempted to justify the presumption that title to land bounded on a highway extends to the center of the way on the theory that the grantor could not have intended to retain the ownership in a long narrow strip of land of no apparent benefit to himself. This is undoubtedly a consideration which should be given weight, but looking at the principle in its early origin, it seems to be of even greater moment that the grantor should not be presumed to retain for himself that which is of distinct benefit to his grantee in connection with the proper use and enjoyment of the estate conveyed.

An almost perfect analogy with the rule as to highways is that governing the boundaries of land on non-navigable streams. The title to land so bounded extends to the thread of the stream unless a contrary intent appears. *Lincoln* v. *Wilder*, 29 Me., 169; *Bradford* v. *Cressey*, 45 Me., 9; *Wilson* v. *Harrisburg*, 107 Me., 207. This was the rule in England as far back as the time of Lord Hale and was brought by the colonists to New England as a part of the common law. The riparian proprietor owns the bed of the stream and all but the public right of passage. *Pearson* v. *Rolfe*, 76 Me., 380. As he could take herbage from the highway for his cattle, so he may take water from the stream, *Blanchard* v. *Baker*, 8 Me., 253, 266; as he could use the land under the highway so long as the public right of passage was not affected, so may he use the bed of the river. *Carleton* v. *Cleveland*, 112 Me., 310. He is entitled to

the ice that forms in winter, and to the rocks and stones in the stream, and he may use its momentum for power. *Pearson* v. *Rolfe*, supra. These rights, of such immeasurable benefit to the proprietor of the shore, are of little advantage disconnected with the ownership of it. Hence we have the same presumption as in the case of highways.

A similar situation exists in the case of the title to tidewater flats between high and low water mark. Originally these belonged to the crown, but under the provisions of the Colonial Ordinance of Massachusetts, 1641-47, it was declared "that in all creeks, coves, and other places, about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low water mark, where the sea doth not ebb above one hundred rods, and not more wheresoever it ebbs further." As in the case of the soil comprising the highway, and of the land forming the bed of the stream, the ownership of the flats was of paramount importance to the proprietor of the uplands above the sea, and in accordance with the rule followed in the other two instances, a conveyance of the uplands is construed to include such flats unless a contrary intent appears. *Whitmore* v. *Brown*, 100 Me., 410.

In all three of these cases, the principles of which have been a part of the common law, this court has endeavored merely to give effect to the real intention of the parties. It has gone no farther than that, and has sought to establish no arbitrary rule on supposed grounds of public policy. It is merely adopting a general principle, which is based on the well-known rule of construction that the circumstances and situation of the parties shall be considered in determining the meaning of the language used by them.

In *Bradford* v. *Cressey*, supra, the court, after showing that the rule with respect to streams and highways is the same and in holding that a bound by the west bank of a stream excludes the stream, says at page 13: "The intention of the party is always to be sought in the interpretation of deeds, as in other written instruments. If the language leaves that intention at all doubtful, the instrument should be examined and construed, when practicable, by the light of the circumstances which surrounded and were connected with the execution of the instrument."

In *McLellan* v. *McFadden*, supra, Chief Justice Savage, in deciding that the flats were excluded from a conveyance, said at pages 246-7: "In construing the grant we are to give effect, if possible, to the intention of the parties, so far as it can be ascertained in accordance with legal canons of interpretation. We are to give effect to the expressed, rather than the surmised, intent. We are to consider all the words of the grant in the light of the circumstances and conditions attending the transaction. But we must consider and construe the grant according to settled rules of construction. They are rules of property. And the security of real estate titles depends upon a strict adherence to these rules of construction."

In *Crocker* v. *Cotting*, 166 Mass., 183, 185, Judge Holmes says: "The rule by which the mention of a way as a boundary in a conveyance of land is presumed to mean the middle of the way, if the way belongs to the grantor, is not an absolute rule of law irrespective of manifest intention, like the rule in Shelley's case, but is merely a principle of interpretation adopted for the purpose of finding out the true meaning of the words used."

In *Vanderbilt University* v. *Williams*, 152 Tenn., 664, the court found sufficient evidence of intention to exclude the highway. One important factor in the case was that the distances, which were short and given with extreme accuracy, carried only to the exterior lines of the way. In discussing the ordinary presumption that arises with respect to land bounded on a highway the Court said at page 669: "But over all runs the rule requiring effect to be given to the intent of the parties."

The following are to the same effect as the above cases: *Winslow* v. *Allen*, 48 Me., 249; *Hamlin* v. *Pairpoint Manufacturing Co.*, 141 Mass., 51; *Hamlin* v. *Attorney General*, 195 Mass., 309; *The Boston Five Cent Savings Bank* v. *Massachusetts General Hospital et als*, 255 Mass., 583; *In re Parkway, Woolf* v. *Pierce*, 209 N. Y., 344; *Warden* v. *South Pasadena Realty Co.*, 178 Cal., 440; *Watson* v. *New York*, 73 N. Y. S., 1027, affirmed 175 N. Y., 475; *Wood* v. *Culhane* (Mass., 1929), 164 N. E., 622; *Hughes* v. *Providence & Worcester Railroad Co.*, 2 R. I., 508; *Buck* v. *Squiers*, 22 Vt., 484.

Some courts have leaned very far to the view that public policy is the controlling consideration, and that the language of a deed will be strained to give effect to a construction, which will not leave the fee of a narrow strip of land in the possession of a grantor, which may be of no real value to him and may be a cause of litigation in future years, when his heirs may be scattered and difficult to find. *Paul* v. *Carver*, 26 Pa., 223; *Cox* v. *Freedley*, 33 Pa., 124.

The language of Justice Taft, while a Circuit Judge, illustrates this point of view. In the case of *Paine* v. *Consumers Forwarding & Storage Co.*, 71 Fed., 626, he said at page 632: "The evils resulting from the retention in remote dedicators of the fee in gores and strips, which for many years are valueless because of the public easement in them, and which then become valuable by reason of an abandonment of the public use, have led courts to strained constructions to include the fee of such gores and strips in deeds of the abutting lots. And modern decisions are even more radical in this regard than the older cases." That case was, however, merely one which involved the application of the ordinary presumption recognized in Maine and in all other jurisdictions that a conveyance of land bounded on a highway includes the fee to the center of the way, and the language of the court should not be considered as applying to any other state of facts.

The Pennsylvania cases, though they hold, contrary to the general weight of authority, that land bounded specifically by the side line of a street extends to the center, base their decisions on what they claim to be the real intention of the parties. The court lays more stress on the surrounding circumstances than on the language used in determining what that intention is.

The majority and minority opinions in the case of *Buck* v. *Squiers*, supra, show very clearly the divergent views of those who base this boundary rule on the intention of the parties and of those who find its justification in reasons of public policy. In this case a conveyance bounded land by the easterly side of a road and the northerly side of a stream and the court held that the exterior lines marked the boundaries. The majority opinion held that it was the intention of the parties that governed, with the burden on the

party who sought to show that the ordinary presumption did not apply, which extended such boundaries to the center lines. Judge Redfield in an able dissenting opinion contended that the primary consideration was public policy. He said at pages 494-495: "The rule, to be of any practical utility, must be pushed somewhat to the extreme of ordinary rules of construction, so as to apply to all cases when there is not a clearly expressed intention in the deed to limit the conveyance short of the middle of the stream, or way. If it is only to be applied, like the ordinary rules of construction as to boundary, so as to reach, as far as may be, the clearly formed idea in the mind of the grantor at the time of executing the deed, it will ordinarily be of no utility, as a rule of expediency, or policy." The doctrine of the majority opinion has, however, been generally followed.

If the rule is founded on considerations of expediency to prevent title to small remnants of land being left in remote grantors, there would seem to be no reason why it should not apply as well to land bounded on private ways as on public ones. Yet Maine has not so extended its application. *Bangor House* v. *Brown*, 33 Me., 309; *Palmer* v. *Dougherty*, 33 Me., 502; *Ames* v. *Hilton*, 70 Me., 36; *Winslow* v. *Reed*, 89 Me., 67; *Coleman* v. *Lord*, 96 Me., 192; *Young* v. *Braman*, 105 Me., 494. These cases are an indication of the hesitancy of this court to establish an arbitrary rule of construction not founded on a real intent. This rule has been followed in Connecticut. *Seery* v. *City of Waterbury*, 82 Conn., 567. Chief Justice Baldwin in this case said at page 571: "There is here no statute or judicial precedent which governs, nor any general custom of which we can take judicial notice. The question is one, also, not settled by the common law. It is therefore our duty to answer it by the choice of the rule which, in our judgment, is best calculated to do justice in cases of this character. This we have done. We adopt that which does not raise, in case of a boundary on a private way, the presumption which obtains in case of one on a highway. By that rule, because it is (or by our adoption of it becomes for Connecticut) the rule of justice, it may fairly be assumed *prima facie* that the parties to such a transaction intended to be governed, by force of the words which they employed."

Counsel for the plaintiffs in the instant case contends that this court should extend the presumption recognized generally in the case of land bounded on a highway to land bounded as here on a railroad location. He argues that such railroad is a highway and that in the charter of this company it is specifically provided that the land taken by the railroad for its right of way "shall be held as lands taken and appropriated for public highways." He cites some cases which support his view.

In *Center Bridge Co.* v. *Wheeler & Howes Co.*, 86 Conn., 585, the court holds squarely that a railway right of way is analogous in all respects to a public highway in that it has permanence and is used by the public in distinction from the use made of a private way; and the court therefore concludes that exactly the same presumption applies as in the case of the highway.

To the same effect are the following: *Rice* v. *Clear Spring Coal Company*, 186 Pa., St. 49; *Roxana Petroleum Corporation* v. *Sutter*, (C. C. A. 8th Cir.), 28 Fed. 2ds, 159; *Roxana Petroleum Corporation* v. *Jarvis*, 127 Kan., 365.

There are dicta in two Vermont cases which likewise support the plaintiff's contention. *Maynard* v. *Weeks*, 41 Vt., 617; *Church* v. *Stiles*, 59 Vt., 642.

Counsel cites three decisions from South Carolina, *Wright* v. *Willoughby*, 79 S. C., 438; *Foster* v. *Foster*, 81 S. C., 307; *Boney* v. *Cornwell*, 117 S. C., 426. In the first two of these cases the court recognizes a distinction between the case where land is bounded by a railroad and that where it is bounded by land occupied as a railroad, and holds that in the former instance the right of way to the center is included, in the latter case that is not. In *Foster* v. *Foster*, supra, the Court says at page 312: "if it had been the intention to reserve the land occupied by the railroad, the boundary should, and doubtless would, have been given as the land so occupied. When it was in fact given as the railroad itself, the conveyance covered all the land, including that occupied as a right of way, to the center of the railroad track." This distinction seems to be in accord with the language used by Judge Gray in *Boston* v. *Richardson*, 13 Allen, 146, at page 154. It appears to have been overlooked in the third case of *Boney* v. *Cornwell*.

Numerous other authorities cited by counsel for the plaintiffs do not seem to be in point.

When we consider the real origin of the highway rule, that it had its foundation in the early customs of the people which gave to the abutting property owner, having title to the fee in the highway, certain rights in the highway of real advantage to him in the daily use of his adjoining land, we can see very little analogy between his situation and that of the owner of land bordering on a railroad right of way. The land owner beside the railroad has no use whatsoever of the railroad way. In fact he is absolutely excluded from it. The use of it by the railroad is altogether inconsistent with the idea that it could in any way be of advantage to his adjoining land. It is quite true that a railroad way is often referred to as a public highway. This designation has reference to the fact that it is open to the public for travel under the restrictions imposed by law; but it has never been considered that, for this reason, it has the other incidents of a public highway. This court has very clearly pointed out this distinction in *Hayden* v. *Skillings*, 78 Me., 413, 416, when it said: "It follows that the easement in lands taken for the purpose of a railroad is obviously vastly different from that in lands appropriated to the various kinds of other public ways." The court then indicates clearly what these differences are, one of which is that the railroad must have the exclusive occupation and control of its property without any interference by the adjoining land owner.

Nor does the fact that the Portland & Rochester Railroad under its charter held its right of way "as lands taken and appropriated for public highways" in any way alter the case. The legislature by this language did not mean to imply that its right of way was in all respects similar to a highway, but merely that it held it as an easement devoted to the public use in distinction from an ownership in fee.

The only analogy which we can see between the railroad right of way and the highway is that in both cases the grantor, if he retains the fee in such a way, may own a long narrow strip of land which may not be of any great value to him. To hold that because of that fact he must be presumed to have conveyed the fee in that strip

with a deed of the adjoining property is an extension of the ordinary rules of construction which in our opinion will lead to more confusion than the evil which it is sought to remedy. Such a doctrine this court refused to adopt in the case of land bounded on a private way. In our opinion it loses sight of the most important consideration of all — that the presumption in the case of bounds on highways and streams is based, not so much on the fact that the grantor does not intend to retain that which is of no apparent benefit to himself, but rather on the assumption that he does not intend to withhold that which has a real and present advantage to his grantee. The views which we have here expressed appear to be sustained by courts of high authority.

In *Thompson* v. *Hickman*, 1907, 1 Ch., 550, 556, is found the following statement of the court: "I am, however, asked to hold that, where land on either side of a railway line is granted, the minerals underlying the railway line pass, unless they have been previously vested in the railway company, and I am asked so to hold on the analogy of the presumption which obtains in the case of land bounded by highways. I cannot come to the conclusion that I should be right in acting upon any such presumption, which, so far as I know, is wholly unknown to the law at the present time. I think the very different circumstances under which railways came into existence and those in which watercourses and highways came into existence are sufficient to shew that the presumption does not apply to the case of a railway."

In *Couch* v. *Texas Pacific Railway Co.*, 99 Texas, 464, 467, the Supreme Court of Texas said: "The right of way of a railroad is not a public highway in the sense of a public road or street, and the rule of construction which applies to a deed for land bounded by a public highway does not apply in this case so as to make the deed convey land not included in its terms."

Not only can we see no reason which compels us, because of analogy, to extend the highway rule to railroad rights of way, but there are cogent reasons why this should not be done. The instant case is a striking example that considerations of public policy cut both ways. In reliance on the usual and ordinary rules of construction, the defendants in this case accepted deeds from the sup-

posed owners of this railroad right of way. They have built permanent structures on it of large value; and the railroad location has become incorporated in an important business center of the city of Portland. To disturb land titles there over a large area, to give to property owners land which for many years they never thought that they owned, and to take it from those who had every reason to suppose it was theirs, is a result which only compelling reasons of public policy can justify. These we do not find. The deed to this adjoining property, bounding it on the railroad location, was given in 1886. Except for the dicta in the two Vermont cases previously noted, no case had to that time intimated that land so bounded would extend beyond the exterior lines of that way. The parties to that deed presumably knew the rule governing boundaries on highways, streams and tidewater, and that Maine had not extended the presumptions there applied to the case of boundaries on private ways. They were justified in assuming that the usual rules would apply to the interpretation of their deed. Moreover, if there had been any change in the law, which we do not hold, the deed should be construed in the light of the law existing at the time when it was made. *Brown* v. *Peabody*, 228 Mass., 52; *DeBaun* v. *Pardee*, 139 N. Y. S., 1077. In our opinion the safe rule, which in the long run will do justice, is to rely on the language used by the parties interpreted in the light of established rules. So construed, what do the words mean used by the grantors in the deed to Carrie A. Nutter?

Plaintiffs' counsel contends that the words "railroad location" designate a monument as the boundary, such as a tree, a ditch, a stake and stones, or a wall, and that the lines as in the case of such other monuments extend to the center of it. This argument presupposes as a fact the very thing that we are here attempting to decide — whether the parties so intended to designate it. Such intention, as we have stated, is not to be presumed. The fact that the distances given by the grantors in their deed are set out with great particularity and extend the bounds to the side lines of the railroad location is a consideration of great importance. The westerly bound of the lot conveyed in this deed is described as follows: "Thence northerly on a line at right angles to said Longfellow

street two hundred and seventeen (217) feet and .95 of a foot more or less to the location of the Portland and Rochester Railroad." This measurement given to a fraction of an inch carries accurately to the side line of the railroad. The use of the words "more or less" is of no particular consequence when we consider that the plaintiffs' contention would extend this line more than forty feet farther. Moreover, as this course does not approach the railroad at a right angle, the direction from the point where it touches the railroad property would have to be materially changed to include the property claimed by the plaintiffs. Furthermore, this court has held that the words "to," "from" and "by" are words of exclusion. *Bradley* v. *Rice*, 13 Me., 198, 201. The language of the parties would seem clearly to exclude the right of way from the conveyance. If, however, anything more were needed, this conclusion is fortified by a consideration of the surrounding circumstances. The grantors kept the title to the land on the other side of the railroad for eight years after giving the deed to Nutter. This land was a comparatively narrow strip between Forest Avenue and the railroad. If the ownership of the fee in the right of way was of any value, it was worth more to the grantors in connection with land retained by them than to anyone else.

It is our opinion that the language used by the parties clearly excluded the railroad right of way. To hold otherwise would do violence to accepted rules for the interpretation of deeds. The entry must therefore be in each case

Judgment for the defendants.

HENRY M. DEROCHEMONT

vs.

CAMDEN AND ROCKLAND WATER COMPANY.

Knox. Opinion December 1, 1930.

NEGLIGENCE. WATER COMPANIES. WAIVER.

The failure to use a safety device prescribed by the rules of a water company is such contributory negligence as will prevent recovery by an injured party for the damage which he suffered in the collapse of a hot water tank.

The mere fact that such a safety device does not always work is not an excuse for the failure to install it, and obtain the benefit of such protection as it does afford.

The mere failure of the company to inspect the system of each taker is not a waiver by it of the requirements of its rule.

In the case at bar, it did not appear that the defendant had actual knowledge of the conditions in the plaintiff's house. The company was therefore under no obligation to guard against the consequences of the plaintiff's negligence in not installing the check safety valve required by the company's rules.

On report. An action on the case to recover for damage done to a hot water tank in the house of the plaintiff, through the alleged negligence of defendant company in shutting off the water without notice to the plaintiff. At the trial, after the evidence had been taken out, the case was, by agreement of the parties, referred to the Law Court upon so much of the evidence as was legally admissible, for its determination. Judgment for the defendant.

The case fully appears in the opinion.

Charles T. Smalley, for plaintiff.

Alan L. Bird, for defendant.

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

THAXTER, J. This is an action based on the negligence of the defendant company. The specific act charged is that without warn-

ing it shut off the water in the main which supplied the plaintiff's house, whereby damage was caused to a direct pressure hot water tank. The plaintiff pleads his own due care. The case is before this court on report for determination on so much of the evidence as is legally admissible.

It appears that the plaintiff's house is situated on high ground in the City of Rockland near a dead end of the water main. In the evening of November 5, 1929, the water company at a point below the plaintiff's house shut off the water for a period of six minutes, in order to be able to screw out a pipe from the main and to insert a plug. The water ran out of the main and from the plaintiff's tank. A vacuum was thereby created in the tank and it collapsed, due to pressure on its outside walls. Had the plaintiff been notified of the plan to turn off the water, air could have been admitted to the tank by the simple expedient of opening the faucets, and the creation of the vacuum and the consequent damage would have been prevented.

The rules of the defendant duly filed with the public utilities commission in accordance with the provisions of R. S. 1916, Chap. 55, Sec. 25, and properly posted read in part as follows:

> "6. All consumers having direct pressure hot water tanks must place a check valve between such hot water tanks and the street main and also a pressure relief valve between the tank and the check valve. The Company will not be responsible for any damage to any consumer's premises where direct pressure hot water tanks are used."

The use of such a simple device as the check valve referred to in the above regulation would have prevented the water draining from the pipes and fixtures in the house, and the rule of the company requiring its use was apparently promulgated as a safeguard against the happening of such an event as here took place.

The defendant strenuously contends that there was no negligence by reason of its omission to give notice before shutting off the water in this instance. We do not deem it necessary to decide this question, for in our opinion the failure to use the ordinary device here prescribed by the rules of the company is negligence on the

part of the plaintiff, which will prevent his recovery. The plaintiff contends that the numerous safety devices referred to are unsatisfactory and do not always work. That they do not always function furnishes no excuse for the failure to use them and to have the benefit of such protection as they do afford. The check valve it is said sometimes causes tanks to explode, but this is only so because it prevents the forcing of the water in a tank back through the mains of the company. Users of water have, however, no presumptive right to use the mains for the relief of pressure within their houses, instead of installing suitable relief valves.

Counsel for the plaintiff insists that the company had waived the requirements of its rule by permitting numerous installations without the check valve thus prescribed. There is no evidence of the company's knowledge of the omissions to comply with its regulation. Its mere failure to inspect the appliances of each taker would not be regarded as a waiver of it. If the company had actual knowledge of the conditions within the plaintiff's house, and that the shutting off of the water might cause damage to fixtures there, we should have a different case from that here presented. It was under no obligation here to guard against the consequences of the plaintiff's negligence.

The entry must be

Judgment for the defendant.

STATE OF MAINE *vs.* JAMES A. PULSIFER.

Franklin. Opinion December 1, 1930.

INLAND FISH AND GAME LICENSES. P. L. 1929, CHAP. 331. P. L. 1923, CHAP. 121.

A license granted by the state is not a contract or property right and may be revoked by the sovereignty which granted it at its pleasure and without notice.

A person accepting such license takes it subject to such condition.

The provisions of Chapter 331 *of the Public Laws of* 1929, *in so far as they govern the issuing of licenses, are inconsistent with the provisions of the act of* 1923 *and supersede them. To this extent the earlier act must be held to have been repealed. All outstanding fishing licenses were revoked by Chapter* 331 *of the Public Laws of* 1929.

In the case at bar, as the respondent, a resident over eighteen years of age, did not have the license required by the Public Laws of 1929, he was guilty of the offense charged.

On report on an agreed statement of facts. Respondent was tried on complaint for fishing in the inland waters of the state without the license required by Chapter 331 of the Public Laws of 1929. Respondent did have in his possession the license prescribed by Chapter 121 of the Public Laws of 1923, which he claimed was valid and in force, authorizing his fishing as he was doing. Judgment for the State.

The case fully appears in the opinion.

Carll N. Fenderson, County Attorney, for the State.

Pulsifer & Ludden, for respondent.

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

THAXTER, J. The respondent, a resident of this state, is charged by complaint with fishing in the inland waters of the state without having in his possession the license required by the provisions of Section 14 of Chapter 331 of the Public Laws of 1929. The case is reported to this court on an agreed statement, which admits that the respondent did not have such license but that he did have in his possession the license prescribed by Section 1 of Chapter 121 of the Public Laws of 1923, which had never been revoked because of any act of his. He contends that this license was valid and in force and that under its authority he could lawfully fish as he was doing. The State claims that this license was not then effective, and that he could only fish lawfully, when possessed of the license required by the terms of the later act.

Section 2 of the act of 1923 provides that any resident of the state may make written application to the clerk of the city, town or plantation in which he resides for a license to hunt and fish, which

shall be issued to him on the payment of a fee of twenty-five cents. Section 3 of the act provides that:

> "Each certificate issued under the provisions of this act shall be valid so long as the registrant remains a citizen of this state."

Chapter 331 of the Public Laws of 1929 revised the fish and game laws of the state and provided for the repeal of all acts or parts of acts inconsistent with its provisions. In this act the requirements, under which licenses for fishing and hunting may be issued, are set forth in separate sections.

Section 14 provides in part as follows:

> "No resident of the state over eighteen years of age and no non-resident of whatever age, shall fish in any inland waters of the state except in accordance with the following provisions;"

The provision which, according to the claim of the State, applies to this case requires each resident to purchase a written license from the commissioner or his duly authorized agent, which shall be kept upon the person while fishing or transporting fish and shall be exhibited to any warden on request. Town clerks are appointed such agents and licenses are issued by the clerk of the town in which the applicant resides upon the payment of a fee of sixty-five cents.

Section 16 of the act prohibits the hunting of any wild bird or animal without a license, which shall be kept upon the person while hunting or transporting game and exhibited to any warden on request. The license is issued in the same manner as the fishing license and for the same fee; but a combination fishing and hunting license may be issued for a fee of a dollar and fifteen cents. By the terms of subsection 4 it expires on December thirty-first of the calendar year for which it is issued.

The respondent contends that his license issued under the provisions of the act of 1923, which authorized him to hunt and to fish in accordance with the laws of the state, was still in force in spite of the provisions of the act of 1929, which was in effect at the time when the State alleges that the offense in question was committed.

He claims in the first place that the state, having issued to him a license valid according to its terms and according to the requirements of the act under which it was issued so long as he should remain a citizen of the state, was without power to revoke it, and secondly that if the state had power to revoke it, the act passed in 1929 did not purport to do so. We will consider these two contentions in their order.

A license granted by the state is in no sense a contract or property right, and may be revoked by the sovereignty which granted it at its pleasure and without notice. *State* v. *Cote*, 122 Me., 450; *Bornstein, Appellant*, 126 Me., 532; *Burgess* v. *Mayor and Aldermen of Brockton*, 235 Mass., 95; *Commonwealth* v. *Kinsley*, 133 Mass., 578; *Doyle* v. *Continental Insurance Co.*, 94 U. S., 535.

The respondent contends that the right to fish is a species of property held in trust by the state for the public benefit, and he cites the language of Judge Savage to this effect in the case of *State* v. *Leavitt*, 105 Me., 76, 79. That very decision holds, however, that such right is subject to regulation by the state, and the respondent concedes in his brief that the state can require a license before the privilege is exercised. The power to grant a license presumes the right to revoke it. In *Doyle* v. *Continental Insurance Co.*, supra, the Court said at page 540: "The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a state is always revocable." Counsel concedes that licenses are in some instances revocable, but claims that the rule does not apply to the case of the fisherman. No peculiar sanctity, however, attaches to his privilege and the case of *State* v. *Cote*, supra, involved the suspension of a fishing license.

The principle of law is clear that the state could here revoke the permission which it had granted, and the respondent in accepting a license took it subject to that condition.

Did the provisions of Chapter 331 of the Public Laws of 1929 operate to revoke licenses granted under the authority of Chapter 121 of the Public Laws of 1923? We think that this question must be answered in the affirmative. It is quite true that the legislature in the later act does not expressly provide for the revocation of

licenses outstanding under the former. Such express declaration is not however necessary, if it is obvious that such is the intent. When the legislature in 1929 provided that no one should fish until licensed under the new act, it automatically revoked all other licenses. Counsel cites the case of *Foster* v. *Dow*, 29 Me., 442. The decision of that case is entirely correct. It merely holds that the repealing of the act granting peddlers' licenses in force for one year does not operate as a revocation of licenses already issued, when it is not inferable that such was the intention of the legislature. It is pointed out that a right given by statute may exist after the repeal of the act. The court uses these significant words at page 447 — "the law of 1846 does not require the license to be obtained under that act." The law of 1846 was the later act. In the instant case the law of 1929 is the later act and does require that the license be obtained under its provisions; and the decision which we here announce is in entire accord with the opinion in *Foster* v. *Dow*.

The provisions of the law of 1929, in so far as they govern the issuing of licenses, are inconsistent with the provisions of the earlier act and obviously were intended to supersede them. The amount of the fee is raised. The old license remained in force so long as the holder remained a citizen of the state; the new license, at least in so far as the hunting privilege is concerned, expires with the calendar year. The later act provides in express terms for the repeal of all acts or parts of acts inconsistent with it; and, even though this provision were absent, there would be a repeal of this part of the act by implication. The case is not unlike that of *Staples* v. *Peabody*, 83 Me., 207, in which the court held that the provisions of the lobster act of 1887 were repealed by the inconsistent provisions of the act of 1889. We can well adopt, as applying to the 1929 law, the language of the court in that case at page 211: "We think this must be taken as the last declaration of the will of the legislature."

Judgment for the State.

PERLEY E. EMERY *vs.* OTIS N. WHEELER, ADMR.

Cumberland. Opinion December 2, 1930.

CONTRACTS. PLEADING AND PRACTICE. WORDS AND PHRASES. "CARE" DEFINED. "NURSE" DEFINED.

A person may make a valid contract for the disposition of property by will to a particular person or for a particular purpose.

Where services are performed pursuant to such a contract and the promissor fails to comply with the agreement, it may be enforced by a bill in equity to impress and declare a trust; or if recovery is not barred by the statute of frauds, an action at law will lie for damages for breach of contract, or upon a quantum meruit *for the reasonable value of the services rendered.*

The use of account annexed as a substitute for the common count of quantum meruit *is unobjectionable.*

A variance requires a real difference between allegation and proof. If the proof corresponds to the substance of the allegation, there is no variance.

No variance between pleading and proof will be deemed material if the adverse party is not surprised or misled to his prejudice in maintaining his action or defense on the merits.

The word "care" has no fixed and limited significance in law or in its common use.

It is defined as "responsibility, charge, or oversight, watchful regard or attention."

To "nurse" is "to take care of or tend as a sick person or invalid; to attend upon"; or "to care for or provide tenderly or sedulously."

In the case at bar, the evidence introduced by the defendant did not sufficiently refute the plaintiff's case to prevent a finding that services were rendered by the plaintiff under and pursuant to an agreement with the intestate substantially as claimed.

A reasonable construction and comparison of pleading and proof and the claim filed with the administrator as required by R. S., Chap. 96, Sec. 119, disclosed no real difference which can be held to have surprised or misled the defendant.

The refusal to direct a verdict for the defendant was not error.

Assuming that the amended count in the case at bar introduced a new cause of action, it was manifest that the verdict rested only on a consideration of the original pleading, no evidence having been offered under the amendment. The allowance of the amendment was not prejudicial error.

On exceptions by defendant. An action of assumpsit for recovery for services rendered the defendant's intestate under an agreement alleged to have been made by her, to will plaintiff whatever property she had at her decease. Plaintiff declared in account annexed for care and nursing, and also at the close of his case was allowed to amend by adding a count purporting to be in *quantum meruit* for recovery of the reasonable value of the services rendered. At the close of plaintiff's case, the defendant moved that a verdict be directed in his favor. To the denial of this motion exception was seasonably taken. To the allowance of plaintiff's motion to amend his writ by adding a second count, the defendant likewise excepted and to certain rulings and instructions given by the presiding Justice, defendant also seasonably excepted. The jury rendered a verdict for the plaintiff in the sum of $1,435.50. Exceptions overruled.

The case fully appears in the opinion.

Hinckley, Hinckley & Shesong, for plaintiff.

Joseph E. F. Connolly, for defendant.

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

STURGIS, J. This action of assumpsit against the defendant as administrator of the estate of Ella F. Loveitt, late of South Portland, deceased, grows out of the plaintiff's claim for services rendered the intestate in her lifetime under an oral agreement that she would bequeath and devise to the plaintiff by will all property which she had at her decease.

The case comes forward on exceptions to the refusal of the presiding Justice to direct a verdict for the defendant, to the allowance of an amendment by the addition of a new count, and to instructions given the jury.

It is well settled that a person may make a valid contract for the disposition of property by will to a particular person or for a

particular purpose, and the contract will be enforceable. *Brickley* v. *Leonard*, 129 Me., 94; 28 R. C. L., 64; 40 Cyc., 1063. And where services are performed in pursuance of such a contract and the promissor fails to comply with the agreement, it may be enforced by bill in equity to impress and declare a trust if attending facts and circumstances disclose the requisite equity, *Brickley* v. *Leonard*, supra; or, if recovery is not barred by the Statute of Frauds, an action at law will lie for damages for breach of the contract, *Strakosch* v. *Conn. Tr. and S. D. Co.*, 96 Conn., 471; *Thompson* v. *Romack*, 174 Iowa, 155; *Clarke* v. *Treasurer*, 226 Mass., 301; *Wellington* v. *Apthorp*, 145 Mass., 69; *Jenkins* v. *Stetson*, 9 Allen (Mass.), 128; *Ruch* v. *Ruch*, 159 Mich., 231; *Day* v. *Washburn*, 76 N. H., 203; *Andrews* v. *Brewster*, 124 N. Y., 433; *Snyder* v. *McGill*, 265 Pa., 122; or upon a *quantum meruit* for the reasonable value of the services rendered. *Hudson* v. *Hudson*, 87 Ga., 678; *Huntington's App.*, 73 Conn., 582; *Hensley* v. *Hilton*, 191 Ind., 309; *Ginders* v. *Ginders*, 21 Ill. App., 522; *Bross* v. *Ramsay*, 216 Ill. App., 312; *Dixon* v. *Lamson*, 242 Mass., 129; *Canada* v. *Canada*, 6 Cush. (Mass.), 15; *Schwab* v. *Pierro*, 43 Minn., 520; *Howe* v. *Day*, 58 N. H., 516; *Collier* v. *Rutledge*, 136 N. Y., 621; *Moorhead* v. *Frye*, 24 Pa. St., 37; *Nelson* v. *Christensen*, 169 Wis., 373. See *Saunders* v. *Saunders*, 90 Me., 284.

The case at bar went to trial on issue joined on the plaintiff's declaration in account annexed, the only item relied on being,

"To care and nursing of said Ella F. Loveitt from July 4, 1926, to January 6, 1929, 130½ weeks at $20.00 2610"

The evidence adduced by the plaintiff tends to show that after the death of the intestate's husband, the plaintiff, who had long been a boarder in the family, continued to make his home with Mrs. Loveitt, then aged and a sufferer from frequent severe heart attacks. He carried much of the responsibility of the maintenance of the home, did most of the housework, ran the fires, and kept the grounds in order. He assisted her in walking in and out of the house, about the grounds and to the neighbors. He took her to ride frequently in his automobile. Except as a woman's services were required at time of serious illness or for spring house cleaning,

his was the only personal care and attention received by Mrs. Loveitt.

The plaintiff was barred from testifying in his own behalf. R. S. (1930), Chap. 96, Sec. 119. Apparently disinterested neighbors, however, testify to the facts stated, and one or more say that Mrs. Loveitt, in the plaintiff's presence, told them in substance, if not in exact words, that for these services rendered by the plaintiff she was going to give him her property at her death. One witness testifies that she stated that she had promised the plaintiff to give him by her will all property she had left at her decease.

The evidence introduced by the defendant does not sufficiently refute the plaintiff's case to bar a finding that services were rendered by the plaintiff under and pursuant to an agreement with the intestate substantially as claimed.

The original form of pleading adopted by the plaintiff, considered in the light of the evidence offered and the theory upon which the case was tried, indicates an election to seek recovery for the reasonable value of the plaintiff's services. The use of account annexed as a substitute for the common count of *quantum meruit* is unobjectionable. *Lynch* v. *Stebbins*, 127 Me., 203; *Levee* v. *Mardin*, 126 Me., 133; *Cape Elizabeth* v. *Lombard*, 70 Me., 396.

But the defendant raises the question of variance between pleading and proof. He contends that the services rendered by the plaintiff to the intestate were not "care and nursing." He makes further objection that the proof at the trial does not conform with the claim filed with the administrator as required by R. S. (1930), Chap. 101, Sec. 14. *Kelley* v. *Forbes*, 128 Me., 272.

A variance requires a real difference between allegation and proof. If the proof corresponds to the substance of the allegation, there is no variance, the test to be applied being the tendency of the evidence substantially to prove the allegation, not the literal identity of facts alleged and facts proven, 49 C. J., 807. "It is not indispensable to recovery that a party should make good his allegations to the letter." *Sposedo* v. *Merriman*, 111 Me., 530; and it is now held that no variance between pleading and proof will be deemed material if the adverse party is not surprised or misled to his prejudice in maintaining his action or defense upon the merits.

Charles v. *Harriman*, 121 Me., 484, 491; *Sposedo* v. *Merriman*, supra.

We think the plaintiff's proof substantially, if not literally, supports his allegation. "Care" is not a word of rigid and inflexible meaning but is one of broad comprehension admitting of a variation in its application to different persons and circumstances. It has no fixed and limited significance in law. *Bless* v. *Blizzard*, 86 Kan., 230; nor in its common use. An accepted definition is "responsibility, charge or oversight, watchful regard and attention." *Hewey* v. *Insurance Co.*, 100 Me., 523, 528; 1 Words & Phrases (2nd Series), 571. "Nursing" used in conjunction with "care" does not necessarily so restrict the scope of the latter word as to make the instant pleading a misleading description of the services proven. To "nurse," says Webster, is "to take care of or tend, as a sick person or invalid; to attend upon"; or "to care for or provide for tenderly or sedulously."

It is not beyond fair inference to conclude that the plaintiff had a general responsibility or oversight over the home in which he and Mrs. Loveitt lived, and extended watchful regard and attention to her, or that he attended upon and cared for her when she was stricken with heart attacks and in the enfeeblement of her declining years. A reasonable construction and comparison of pleading and proof, as well as the claim filed with the administrator, discloses no real difference which can be held to have surprised or misled the defendant to his prejudice. The defendant takes nothing by his first exception.

The defendant's second exception is directed to the allowance of an amendment offered by the plaintiff at the close of his case. A general objection was made and exception reserved. The amendment allowed reads:

> "Also for that the Ella F. Loveitt at South Portland aforesaid, County and State, on the fifth day of July, 1926, in consideration that the plaintiff at her request should perform certain services for her, namely, to care and nurse her, promised the plaintiff to pay him on demand so much money as he reasonably deserved to have therefor; and the plaintiff avers that he did care for and nurse the said plaintiff from the

fourth day of July, 1926, to the sixth day of January, 1929. And the plaintiff avers that he reasonably deserved to have therefor the sum of twenty-six hundred and ten dollars for said 130½ weeks, yet he has never been paid for said services."

The plaintiff views this amendment as a count in *quantum meruit* permitting recovery for the reasonable value of the services he rendered to the defendant's intestate under her agreement to will him her property. If this contention is tenable, the new pleading adds nothing to the original declaration on account annexed, and there is no error. The common counts, including *quantum meruit*, however, are founded on an express or implied promise on the part of the defendant to pay money on a precedent consideration already executed, and must be so pleaded. Chitty on Pleading (16th Am. Ed.), 348; 2 Encyc. Pl. & Pr., 1004. The new count does not meet this test. The consideration of the defendant's promise, there averred, is executory and the contract declared upon can be construed only as an express, executory contract.

Acceding to this construction of the new pleading, the defendant insists that it introduces a new cause of action, and its allowance was error. Assuming the point well taken, we do not think the defendant has suffered by the amendment. The entire evidence is made a part of the bill of exceptions and it is abundantly manifest that no evidence was offered in support of the new count, and the verdict rests on a consideration only of the original pleading. If the allowance of the amendment was error, it was not prejudicial. *Holmes* v. *Robinson Manufacturing Co.*, 60 Me., 201, 205.

The exception to the charge of the presiding Justice requires brief consideration. The instructions objected to deal only with the right of the plaintiff to recover the reasonable value of his services in *quantum meruit*. As already pointed out, he may do this under his declaration on account annexed. No exception lies to the charge.

Exceptions overruled.

DONALD A. MCDONALD, ADMR. *vs.* FRED PRATT, JR.

Penobscot. Opinion December 3, 1930.

NEGLIGENCE. PROVINCE OF COURT AND JURY.

While the question of contributory negligence is ordinarily for the jury, where on uncontradicted testimony a want of due care on the part of an injured party is apparent, it is the duty of the Court to set aside a verdict in his favor.

In the case at bar, on the uncontradicted testimony of the plaintiff's witnesses as to the conduct of the deceased in crossing the street, contributory negligence was clearly shown, and the burden placed on defendant by the provisions of R. S. 1916, Chap. 87, Sec. 48, was sustained. The defendant's car was at least three hundred fifty feet away when first sighted, and no sudden emergency was presented which would excuse the deceased's running blindly into the side of the car.

On exceptions and general motion for new trial by defendant. An action on the case in which the plaintiff sought to recover damages from the defendant on account of the alleged conscious pain and suffering endured by plaintiff's decedent, as a result of injury sustained in an accident in which he was struck by an automobile driven by the defendant. At the close of the evidence the defendant moved the Court to direct a verdict in his behalf. To the denial of this motion defendant seasonably excepted. To the admission of certain testimony offered by plaintiff, defendant likewise seasonably excepted, and also to certain portions of the charge of the presiding Justice. The jury rendered a verdict for the plaintiff in the sum of $3,550.00. A general motion for new trial was thereupon filed by defendant. Motion sustained. New trial granted.

The case fully appears in the opinion.

A. M. Rudman,

G. E. Thompson, for plaintiff.

Cook, Hutchinson, Pierce & Connell,

F. J. Doyle, for defendant.

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

THAXTER, J. This is an action by an administrator to recover for conscious pain and suffering of his decedent, who died from injuries received when he was struck by the defendant's automobile. The defendant pleaded the general issue with a brief statement setting up the plaintiff's own want of due care. The case is before this court on a general motion and on exceptions.

It appears that at about seven o'clock in the evening of the nineteenth day of September, 1929, the deceased, Roderick A. MacDonald, was engaged with his son, the plaintiff, and with Roderick A. McLean in cleaning up some branches and brush from a tree which had been felled on the McLean lawn in East Millinocket. The McLean house and that of MacDonald were situated beside each other on the main highway leading from Medway to Millinocket with a narrow driveway between them. On the same side of the street for a distance of more than a quarter of a mile the houses were situated close together. On the opposite side of the road, however, there was an open meadow, and the branches and brush were being taken across the street and deposited in this vacant field. The plaintiff's father, a strong, rugged man of seventy-three years of age, had made a number of trips across the road carrying brush before the happening of the fatal accident. The width of the travelled or tarvia portion of the highway at this point was twenty-eight feet, and two feet beyond that on the farther side of the road was a ditch or gully. There was an unobstructed view on the road northerly from the plaintiff's house of three hundred and fifty to four hundred feet. The weather was clear and the road was dry. It was dusk, almost dark, so that street lights and automobile lamps were burning. Northerly on the road toward Millinocket, about three hundred feet from the plaintiff's house, there is a street lamp, and southerly toward Medway another about one hundred and fifty feet away. The deceased, just prior to receiving his injuries, picked up an armful of brush, and, carrying it on his left arm and preceded by the young child of McLean, started across the street. Beyond the middle of the road he was struck by the car of the defendant, a Ford sedan, which the defendant was driving on his right-hand side of the road in the direction of Medway. So far the facts do not seem to be in dispute.

There were two eyewitnesses of the accident who testified for the plaintiff, Roderick McLean, the owner of the adjoining property, and Donald MacDonald, the administrator, who is the plaintiff. Their testimony, which is substantially the same, is to the effect that before MacDonald started across the street with the load of brush he looked both ways, that he had an unobstructed view for three hundred and fifty or four hundred feet in the direction from which the defendant's car came, that at that time no car was visible, that he walked practically straight across the street, and that as he did so the defendant's car appeared travelling at the rate of forty or forty-five miles an hour. Walking with MacDonald or just in front of him was the young boy of the witness, McLean. Both witnesses testified that the automobile had but one headlight burning. When the car was first seen, Mr. MacDonald was, according to this evidence, about in the center of the road, and the car at that time was three hundred and fifty to four hundred feet away. What then happened is best described in the words of the plaintiff.

"Q. Did anything happen at that time, so far as a warning was concerned? Did anybody give any warning at that time?

A. Yes.

Q. Who?

A. Mr. McLean.

Q. What did he say or do?

A. He hollered, 'Look out for the car.'

Q. Mr. McLean, when your father was in the center of the street, hollered, 'Look out for the car,' and at that time it was three hundred and fifty to four hundred feet away from him: is that correct?

A. Yes.

Q. What did your father do then?

A. He quickened his pace, trying to get out of the way.

Q. What had he been doing, or what was he doing just before McLean hollered this warning to him?

A. Walking across the road.

* * * *

Q. When he quickened his pace, after Mr. McLean shouted this warning to him, about how fast would you say he was going?

A. He didn't go very far.

Q. Did he start to run?

A. Yes.

Q. In other words, he was walking before the warning was shouted to him, and, when he heard the warning, he started to run: is that correct?

A. Yes.

Q. And he ran from the center portion of the highway over to a point three to four feet away from the ditch?

A. Yes.

Q. When he was hit?

A. Yes, about that."

Mr. McLean testified as follows:

"Q. Now, after you yelled this warning, 'Look out for the car,' did Mr. McDonald start to run?

A. No; I should say that he stopped for a second.

Q. Then what did he do?

A. He dashed across the street."

Both witnesses seem to agree that at the time he was hit Mr. MacDonald had nearly crossed the travelled part of the highway and was near the ditch on the farther side of it.

It appears that just prior to the accident a car with four young ladies in it passed in the opposite direction. Mr. MacDonald was at that time on the sidewalk preparing to cross, and one of the occupants of this car testified that they passed so close to him that the branches which he was carrying brushed against her. It is significant as showing the deceptive shadows which this brush must have thrown that she did not realize that a man was carrying it. Another of the passengers merely saw what she at first thought was a shadow, but on coming nearer discerned the pile of brush and a man's hat and shoes.

The defendant's version is that shortly after passing the car with the young ladies in it, while he was travelling toward Medway on his right-hand side of the road at a moderate rate of speed, he noticed the McLean child directly in front of his car and but a few feet away. He rose up to be able better to see the little child, put on his brake, veered about three feet to the left and cleared the child, but, as he did so, a clump of bushes with Mr. MacDonald's

face peering through them loomed up in front of his windshield on the left-hand side of his car. The left side of the windshield struck the man and he fell to the street. The defendant drove his car ahead and to the right-hand side of the road, went back and found MacDonald lying about in the center of the road.

The specific allegations of negligence are that the defendant was driving his car at an excessive rate of speed and that his lights were not properly lighted; and the only evidence tending to show defendant's negligence bears on these two charges. To substantiate them we have the testimony of the deceased's son and the neighbor McLean, who both saw the accident. They both agree that but one headlight on the car was burning. On this point they are contradicted by the defendant and by the occupants of the car which passed by before the accident. In any event the car was plainly visible to Donald MacDonald and McLean, when it was, according to their testimony, three hundred and fifty to four hundred feet away, and presumably could have been seen by the deceased. The testimony as to speed is conflicting. The two men who saw the approaching car agree that it was travelling more than forty miles an hour, the defendant's testimony is that he was going between ten and twenty. The determination of the issues as to defendant's negligence raised by this conflicting evidence was for the jury.

Under the provisions of R. S. 1916, Chap. 87, Sec. 48, the burden of proving the contributory negligence of the deceased was here on the defendant. That burden we believe has been sustained. It is obvious that the defendant knew nothing of the conduct of the deceased just prior to the accident, but we can not ignore the testimony of McLean and of the son. Theirs is the only evidence in the case which shows what this unfortunate man did as he proceeded to cross the street. Their testimony is not altogether satisfactory, but the two men are in complete agreement that the defendant's car was sighted by them when it was at least three hundred and fifty feet away, that McLean then warned the man. His son said that he immediately started to run, McLean said that he stopped for a second and then dashed across the street; and it is obvious that, continuing so to do, he came in contact with the defendant's car somewhere on its left-hand side without ever coming in the line of

the defendant's vision in front of the car. The son does not know which side of the car struck him. McLean says it was the left side, the defendant says it was the left, and the cracked glass in the left side of the windshield tells its own story. In view of the fact that he was picked up approximately in the center of the street, when all parties admit that the car was on its right side of the way, is a most convincing circumstance. The want of due care by the deceased would seem to be definitely established by the testimony of the plaintiff's own witnesses. We are not unmindful of the rule that the failure of one to utilize the best means of escape when confronted with a sudden emergency is not necessarily negligence, *Blair* v. *Lewiston, Augusta & Waterville Street Railway Co.*, 110 Me., 235; but, accepting the uncontradicted testimony of McLean and of the son that the automobile was sighted three hundred and fifty feet away, there was no sudden emergency presented which would excuse this man's then running across the street into the side of the car, unless we assume that the automobile was approaching at an almost incredible rate of speed and faster than the plaintiff's own witnesses contend that it was going.

The question of contributory negligence is ordinarily for the jury, *Shaw* v. *Bolton*, 122 Me., 232; but where as here on the uncontroverted testimony a want of due care by an injured person is clearly shown, it is the duty of the court to set aside a verdict in his favor. *Page* v. *Moulton*, 127 Me., 80.

The view which we have taken of the case makes it unnecessary for us to consider the exceptions.

Motion sustained.
New trial granted.

THEODORE RITCHIE *vs.* F. HEWELL PERRY.

Waldo. Opinion December 3, 1930.

MISTRIAL. PLEADING AND PRACTICE. NEGLIGENCE. VERDICTS.

Whether or not to order a mistrial is a matter of discretion and no exceptions lie to refusal to so order unless discretion is abused.

Evidence that defendant in negligence case carries liability insurance has no bearing on liability or damages. Such evidence is not only immaterial but prejudicial, and when introduced either directly or by inference through interrogations may properly be cause for mistrial.

Such evidence improperly and deliberately introduced constitutes misconduct on the part of an attorney; introduced by inadvertence, it is less reprehensible but still prejudicial. The most careful and emphatic instructions by the presiding Justice may fail to remove prejudice from the minds of jurors. The situation is best cared for by ordering a mistrial when such a course is requested by opposing counsel.

A jury verdict may properly be set aside when prejudicial factors appear in evidence which may have caused the jury to err in its judgment.

The fact that the driver of an automobile has the technical right of way does not relieve him from the exercise of ordinary care.

In the case at bar, even assuming the defendant's negligence, which was by no means clear, no unprejudiced jury, properly instructed and comprehending the testimony, could fail to find the plaintiff, though having a technical right of way, guilty of negligence. The finding of the jury, though on an issue of fact, must be rejected.

On exceptions and general motion for new trial by defendant. An action on the case to recover property damage to plaintiff's automobile resulting from collision with automobile of the defendant, alleged to have been caused by the negligence of defendant. Trial was had in the Superior Court for the County of Waldo, at the April Term, 1930. During cross-examination of defendant, counsel for the plaintiff indirectly brought to the attention of the jury that the defendant carried liability insurance. Counsel for defend-

ant seasonably objected and moved the Court for a mistrial. Testimony was excluded but a mistrial was refused and exceptions taken. To further rulings and instructions of the Court, exceptions were likewise taken by the defendant and after the jury had rendered a verdict for the plaintiff in the sum of $500.00 defendant filed a general motion for new trial. Motion sustained.

The case fully appears in the opinion.

Buzzell & Thornton, for plaintiff.

Ralph W. Farris, for defendant.

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

DUNN, J., took no part in the decision of the case.

PATTANGALL, C. J. Exceptions and motion. Action for property damage sustained in collision between two automobiles, alleged to have been caused by negligence of defendant. Verdict for plaintiff.

Exception was taken to the refusal of the presiding Justice to order a mistrial after counsel for plaintiff, during cross-examination of defendant, had begun a question with the assertion "At that time, September 11, 1929, you carried insurance . . ." September 11, 1929 was the date of the collision.

The question, thus prefaced, was not completed. Objection was made and mistrial requested. The presiding Justice excluded the question, warned the jury that the matter of insurance was immaterial and refused to order a mistrial. Exceptions were noted.

Counsel for plaintiff then proceeded:

Q. "You and Mr. Ritchie talked this affair over after the accident, right there that night of September 11th?"

A. "Why, yes. We naturally would."

Q. "And did you and he have any talk that night about insurance?"

The Court: "Excluded."

Plaintiff's Counsel: "I will take exceptions to the Court's ruling."

The request that a mistrial should be ordered was not renewed.

The matter of bringing or attempting to bring to the attention of the jury the fact that defendant is insured against liability or, to state it more accurately, that an insurance company, and not the party of record, is liable to pay damages if verdict is for plaintiff, has been before this court on three occasions, although never before in the exact form in which it now appears.

In *Sawyer* v. *Shoe Co.*, 90 Me., 369, direct evidence of the fact was admitted. Exceptions were taken and a new trial ordered. Mr. Justice Wiswell, voicing the opinion of the court, discussed the question in the following language:

> "While the fact that the defendant was insured against accidents should have no legitimate bearing, it might very naturally have an improper influence upon the jury in passing upon the one question involved, whether or not the defendant had failed to exercise that degree of care which the law required of it . . .
>
> "We think that to allow juries, in cases of this kind, to take into consideration the fact that an employer was insured against accidents, would do more harm than good, and would increase the already strong tendency of juries to be influenced, in cases of personal injury, especially where a corporation is defendant, by sympathy and prejudice."

This opinion was handed down June 1, 1897, and the Bar generally recognizing the impropriety of attempting to introduce evidence which this court had declared to be not only immaterial but prejudicial, apparently refrained for many years from attempting to influence juries by calling attention to the factor of insurance in cases involving negligence on the part of a defendant.

Twenty years later, however, the question again arose in a slightly different form. In *McCann* v. *Twitchell*, 116 Me., 490, as a part of a conversation alleged by plaintiff to have occurred between him and defendant, plaintiff testified that defendant said "that he was protected by liability insurance." Exceptions were taken to the introduction of this testimony. But it appeared that the presiding Justice, after having permitted the inadmissible

testimony, changed his ruling, ordered it stricken from the record and instructed the jury to disregard it. Exceptions were overruled on the ground that "ordinarily the erroneous admission of improper evidence is cured, or so far cured as to be no longer a sufficient ground for a new trial, by being withdrawn or struck from the record and an instruction given to the jury to disregard it entirely."

It is to be noted that defendant did not in this case request a mistrial. He objected to the admission of the testimony and his objection being overruled, noted an exception. After deliberation, the presiding Justice reversed his ruling and ordered the evidence stricken from the record, thus in effect sustaining defendant's objection and leaving him no ground for exception.

It is also to be noted that the admissible evidence in the case warranted a finding of liability and that the damages assessed were reasonable; in other words, that the result indicated that the jury was not prejudiced by having learned of the fact of insurance. The opinion states, "A careful study of the evidence does not satisfy us that the verdict was wrong, either as to defendant's liability, or as to the amount of damages awarded the plaintiff."

Apparently some members of the Bar were impressed with the view that the position taken by the Court in *McCann* v. *Twitchell*, supra, created an opportunity to get before the jury the immaterial and prejudicial fact of insurance and suffer no more severe penalty than an instruction from the Court to the jury that the fact should be disregarded in so far as liability or the extent of damages was concerned; and in the case of *Goodie* v. *Price*, 125 Me., 36, it appeared that plaintiff's attorney was guilty of "deliberately pursuing a course of cross-examination of defendant's son for the purpose of disclosing the fact that an insurance company was defending the cause."

That case came before this court on general motion, in connection with which defendant urged that "though the verdict might be permitted to stand upon the evidence pertaining to the accident and the manner in which it happened, the case was prejudiced against the defendant by improper conduct of plaintiff's attorney."

After stating that "a careful examination of the evidence does not reveal a verdict that warrants the intervention of the court," the opinion discussed the matter of the injection into the case of the insurance feature: "The court cannot avoid the conclusion from the testimony that the plaintiff's attorney in pressing the cross-examination which was calculated to disclose the presence of an insurance company deliberately transgressed the bounds of legal ethics in his persistent effort to accomplish that end."

We must assume that, had not the verdict satisfied the conscience of the Court, new trial would have been ordered because of the misconduct of counsel so emphatically condemned.

In *People* v. *Ah Len* (Cal.), 27 Am. St. Rep., 103, where it appeared that respondent's counsel attempted to get before the jury matters not within the issues, by means of asking improper questions, it was held that such conduct furnished good reason for a new trial; and in *Marshall* v. *Taylor* (Cal.), 35 Am. St. Rep., 144, the Court, after citing the former case with approval, said, "The rule is a most wholesome one. A trial court should always be alert to prevent an attorney from obtaining advantages in jury trials by the practice of methods not countenanced by the ethics of the profession."

We think that the attitude of this court in *Goodie* v. *Price*, supra, has been misunderstood. The basic fact has apparently been overlooked, that in that case the court denied the motion on the ground that the effort which counsel had made to instill prejudice in the minds of the jurors failed to prevent them from judging the case fairly on its merits, and the case has been considered authority for the proposition that the introduction of prejudicial evidence may be attempted with impunity, that the presiding Justice does his full duty in the premises by excluding it and instructing the jury to disregard it, and that these things having been done, this court is without power to disturb the verdict if plaintiff prevails, or to do more than to somewhat impotently suggest that counsel acted improperly.

We do not so read *Goodie* v. *Price*. If we did regard it as establishing such a rule, we should unhesitatingly overrule it. Correctly interpreted, it stands for no more than that the appellate court

will not order a new trial under any circumstances when the verdict is manifestly just.

We have already noted that the instant case is the first to come before this court in which the point involved is raised on exceptions to the refusal of the presiding Justice to order a mistrial.

The ordering of a mistrial is discretionary with the presiding Justice and no exceptions lie to his refusal unless that discretion is abused. *Gregory* v. *Perry*, 126 Me., 99. We are not willing to say that this record discloses abuse of discretion. Had the motion been renewed after plaintiff had, in spite of the admonition of the presiding Justice, persisted in bringing the matter of insurance to the attention of the jury, we assume that the motion would have been granted. Had not such been the case, we should not hesitate to sustain an exception. As the case stands, we can only say that the presiding Justice was too confident of his ability to impress the jury with a correct view of the situation.

His idea was that expressed by Mr. Justice Harlan in *Penn Co.* v. *Roy*, 102 U. S., 451, that "the presumption should not be indulged that the jury were too ignorant to comprehend or too unmindful of their duty to respect instructions as to matters peculiarly within the province of the court to determine." That this, ordinarily speaking, is the correct view goes without saying; but jurors are human beings and as such occasionally err in judgment even when unmoved by prejudice. The chance of error in their findings is multiplied many times when prejudice once finds lodgment in their minds and prejudicial impressions once formed are not readily effaced by judicial admonition or otherwise. This evidently is the belief of attorneys who insist upon calling the jury's attention to matters which even those least learned in the law know to be immaterial, and the result finally reached, as expressed in the verdict rendered in the case at bar, confirms our view and theirs in this respect and emphasizes the fact that when evidence of the nature complained of is improperly introduced, the only safe course to be followed is to order a mistrial when requested to do so by opposing counsel. This is true whether the offending testimony is offered deliberately or comes into the case by real or seeming inadvertence. In the one case, the misconduct of counsel merits re-

buke, and in the other, possibility of a prejudiced verdict is imminent.

Without reviewing in unnecessary detail the facts in the instant case, its salient features may be concisely stated. Defendant, driving upon the right side of the road, approached his home from a direction which necessitated his crossing the highway in order to enter his premises and turned from his direct line of travel for that purpose. Plaintiff was proceeding in the opposite direction at a rate admitted to be forty miles an hour and, while distant, according to his own testimony, "sixty or a hundred feet" from defendant, with an unobscured view on a practically level highway twenty feet wide, observed the course taken by defendant. He continued to drive on his extreme right and the cars collided near the edge of the ditch on plaintiff's right. He testified that he slowed down to twenty miles an hour as he approached defendant and at the same time put on his brakes. There was no question but that the collision would have been avoided had he swung to the left and passed to the rear of defendant's car. He had that opportunity as well as the opportunity to stop his car. He did neither but continued on a course which made collision inevitable unless defendant stopped his car.

Under these circumstances, even assuming defendant's negligence, which is by no means clear, no unprejudiced jury, properly instructed and comprehending the testimony, could fail to find plaintiff guilty of negligence. The evidence is so clear in this respect that, reluctant as we are to reject the finding of a jury on an issue of fact, we are compelled to do so in this case.

The situation differs from that which appeared in *Fernald* v. *French*, 121 Me., 4. In that case, the evidence indicated that defendant undertook to cross the highway in front of an approaching car and so near that the exercise of ordinary care would have caused him to await its passage. In that opinion, the Court said, "It should be declared as a rule of law governing the movement of motor vehicles under the conditions and circumstances of the present case that a car intending to cross the street in front of another car should so watch and time the movements of the other car as to reasonably insure its safe passage either in front or rear

of such car, even to the extent of stopping and waiting if necessary. This is no new rule but simply the application of a well established principle to new conditions."

Obviously the rule was not new. The case simply emphasizes the proposition that the driver of every motor vehicle must exercise ordinary prudence; and this is so whether he has a right of way or not.

In the instant case, plaintiff had the technical right of way, and we are but reiterating familiar law when we say that the possession of the right of way does not relieve the driver of a motor vehicle from the exercise of ordinary care. He proceeded with utter disregard of the danger of collision. His conduct in this respect was not that of a reasonably prudent man.

We can account for the verdict on no other ground than that the prejudicial testimony which was introduced caused the jury to err in its judgment.

Motion sustained.

ELI ARSENAULT *vs.* INHABITANTS OF TOWN OF ANSON.

Somerset. Opinion December 8, 1930.

DRAINS AND SEWERS. MUNICIPAL CORPORATIONS. R. S. 1916, CHAP. 22, SEC. 2. R. S. 1930, CHAP. 25, SEC. 2.

By R. S. (1916), *Chap.* 22, *Sec.* 2 (*R. S.* 1930, *Chap.* 25, *Sec.* 2), *the authority to construct public drains or sewers along or across any public way is vested, not in the city or town of their location, but in the municipal officers.*

Municipal officers, constructing a sewer pursuant to the statutory authority thus conferred upon them, act not as agents of the town but as public officers, for whose torts the municipality is not liable.

In the case at bar, it not appearing that the town of Anson assumed any responsibility as to the construction of the extension of the sewer in which the plaintiff was injured beyond authorizing its construction and appropriating money therefor, the verdict below against the town was contrary to law.

On general motion for new trial by defendant. An action against the defendant town to recover damages for personal injuries sustained by plaintiff who was caught in and crushed by falling debris in a cave-in of the ditch where he was then working at laying a sewer pipe. The jury rendered a verdict for the plaintiff in the sum of $1,357.25. A general motion for new trial was thereupon filed by defendant. Motion granted. New trial ordered.

The case fully appears in the opinion.

Merrill & Merrill, for plaintiff.

James H. Thorne, for defendant.

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

STURGIS, J. In this action, the plaintiff seeks to recover damages from the Town of Anson for injuries resulting from the cave-in of a trench in which he was employed on the construction of the extension of a sewer. The case comes forward on a general motion to set aside a verdict for the plaintiff.

Under R. S. (1916), Chap. 22, Sec. 2, in force at the time this action accrued, the authority to construct public drains or sewers along or across any public way is vested, not in the city or town of their location, but in the municipal officers. Authority for such construction must be authorized by the vote of the town and an appropriation made for the purpose. Obviously, the construction of sewer extensions falls within these provisions.

It has long been settled in this state that municipal officers, constructing a sewer pursuant to the statutory authority thus conferred upon them, act not as agents of the city or town but as public officers, for whose torts the municipality is not liable. *Bulger* v. *Eden*, 82 Me., 352; *Gilpatrick* v. *Biddeford*, 86 Me., 534; *Gas Light Co.* v. *Village Corporation*, 92 Me., 493, 495; *Atwood* v. *Biddeford*, 99 Me., 78, 80.

The contention of the learned counsel for the plaintiff that this long-established and frequently reaffirmed rule should be set aside and the view taken by the Massachusetts Court as to the liability of municipalities for negligence in the actual construction of

sewers was considered in *Bulger* v. *Eden*, supra, and the conclusion reached was:

> "Nor is this case governed by the principles, enunciated in another class of decisions, where cities and other municipalities have been held chargeable for negligence in the construction of sewers, or other particular works, on account of some provision in their charter or ordinances, — or where authorized by some special statute to construct such works and from which to receive profits as a private corporation might, and when they have, therefore, assumed duties and liabilities by the acceptance of obligations not imposed by general law, as in the case of *Murphy* v. *Lowell*, 124 Mass., 564; *Emery* v. *Lowell*, 104 Mass., 15; *Child* v. *Boston*, 4 Allen, 41, 52; *Merrifield* v. *Worcester*, 110 Mass., 218; *Oliver* v. *Worcester*, 102 Mass., 500. And see also *Hill* v. *Boston*, 122 Mass., 358, 359; *Tindley* v. *Salem*, 137 Mass., 172; *Bigelow* v. *Randolph*, 14 Gray, 543."

The cases cited include or are the supporting authority for those relied upon by the plaintiff.

The conclusions of this court upon this question have been based upon a construction of the statute. Decisions from other jurisdictions, founded upon the common law or a local statute or ordinance, are not precedents for a reversal of the rule of *Bulger* v. *Eden*, nor does reason or logic convincingly demand it.

It not appearing that the Town of Anson has assumed any responsibility as to the construction of the sewer in which the plaintiff was injured, beyond authorizing its construction and appropriating money therefor, the verdict against the Town was contrary to law, and other questions open upon the motion need not be considered.

Motion granted.
New trial ordered.

CARL L. PEASLEY *vs.* NEALSON GEORGE WHITE.

Penobscot. Opinion December 9, 1930.

MOTOR VEHICLES. INVITED GUESTS. NEGLIGENCE.

The driver of an automobile, encountering a fog, is not bound, as a matter of law, to stop and wait for the fog to lift.

It is common knowledge that the fogs from the sea and from the inland are usually penetrable to the eye and, while visibility may be low, if the driver proceeds with due care, progress may be made through them with reasonable safety.

The degree of care to be exercised must vary with conditions of fog, of roadway and of traffic.

The driver of a car in a fog must exercise a degree of care consistent with existing conditions.

When dangers which are either reasonably manifest or known to an invited guest confront the driver of the vehicle and the guest has an adequate and proper opportunity to control or influence the situation for safety, and sits by without warning or protest and permits himself to be driven carelessly to his injury, his negligence will bar his recovery.

In the case at bar, the plaintiff was bound to exercise some degree of care. He did not wholly escape the duty of keeping a lookout and warning the driver of apparent danger.

This duty did not require or empower him to assume control of the car, and if in the exercise of reasonable care he could not have done anything to avert the accident, he was not barred from recovery.

The facts of the case clearly show that the driver of the car was negligent and that the plaintiff was in the exercise of due care.

The jury erred in their conclusions and the verdict below must be set aside.

On general motion for new trial by plaintiff. An action on the case to recover damages for injuries sustained by plaintiff, an invited guest, riding with the defendant, by the overturning of the automobile, through the alleged negligent driving of the defendant. Trial was had at the April Term, 1930, of the Superior Court for

Penobscot County. The jury rendered a verdict for the defendant. A general motion for a new trial was thereupon filed by the plaintiff. Motion granted. New trial ordered.

The case fully appears in the opinion.

Clinton C. Stevens, for plaintiff.

Merrill & Merrill, for defendant.

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

STURGIS, J. This is an action of negligence brought by the plaintiff against the driver of an automobile in which he was riding as a gratuitous passenger. The verdict was for the defendant and the plaintiff files a general motion for a new trial.

Late Sunday afternoon, September 22, 1929, the plaintiff accepted an invitation for himself, his wife and infant daughter to accompany the defendant and his wife and a Mr. and Mrs. Willet on an automobile ride from Pittsfield to Waterville. The party arrived safely at their destination, took supper at a local restaurant, and about nine-thirty in the evening started back towards Pittsfield.

The defendant was driving a large Hupmobile Eight. The night was generally clear but land fogs lay in the low places, and as the car came to Mudgett's curve, so-called, near Burnham Junction, the defendant drove into a heavy fog, obscuring his view of the road, and, without slackening his speed of twenty-five to thirty miles an hour, rode on into the curve. In fifty feet of travel, he found his car across the road with its left wheels out on the gravel shoulder. He still kept up his speed, applied no brakes, but tried to pull back on to the hard surface of the way. Hitting a rock fill, the car turned over and the plaintiff was seriously injured.

The defendant seeks excuse for getting off the road in the misleading location of telephone poles, which did not parallel the curve of the road, but ran straight ahead at one side. He admits, however, that he doesn't "Regard them a very safe line to follow." He insists that his judgment dictated that an attempt to pull back into the road and a continuance of his speed was safer than an application of brakes while riding the shoulder with his left wheels. His attention being directed to his travel in the blinding fog along and

across the hard road before he struck the shoulder, he gives as his reason for not then reducing his speed, "Thought I was all right." One further fact should be noted. Just before the defendant drove into the fog at Mudgett's curve, he passed a west-bound automobile and, practically blinded by its headlights, almost instantaneously rode out of this glare into the fog.

The statement of facts just made conforms in all essential details with the story told by the defendant on the stand. The testimony of other witnesses adds nothing of probative value upon the issue of the defendant's negligence.

The driver of an automobile, encountering a fog, is not bound as a matter of law to stop and wait for the fog to lift in order to escape the charge of negligence. It is common knowledge that the fogs from the sea and of the inland are usually penetrable to the eye and, while visibility may be low, if the driver proceeds with due care, progress may be made through them with reasonable safety. The degree of care to be exercised must vary with conditions of fog, of roadway, and of traffic. The type, size and power of the car may be of greater or less importance. It is impossible to enumerate all factors involved, but it has been well said that the duty of the driver of a car in a fog is, "He must exercise, however, a degree of care consistent with the existing conditions." *Cole* v. *Wilson*, 127 Me., 316.

We are convinced that the defendant in this case in driving his car into and through the fog in Mudgett's curve at the speed indicated by his own admissions, with his view of the road so obstructed that he lost its course, was negligent, and a contrary finding could only result from a misconception of the law and facts of the case or a bias or prejudice upon which no just verdict can stand.

The plaintiff was bound to exercise some degree of care. He could not wholly escape the duty of keeping a lookout and warning the driver of apparent danger. This duty did not require or empower him to assume control of the car, and if in the exercise of reasonable care he could not have done anything to avert the accident, he is not barred from recovery. *Dansky* v. *Kotimaki*, 125 Me., 72, 76. It is of "apparent" danger which the passenger must give warning,

not necessarily apparent to the individual but that which is or ought to be reasonably manifest to the ordinarily prudent person. As is said in *Minnich* v. *Transit Co.*, 267 Pa. St., 200, 18 A. L. R., 296, it is, "when dangers which are either reasonably manifest or known to an invited guest confront the driver of a vehicle and the guest has an adequate and proper opportunity to control or influence the situation for safety, and sits by without warning or protest and permits himself to be driven carelessly to his injury" that his negligence will bar his recovery.

The plaintiff was riding on the back seat of the automobile with his wife at his side and his child on his lap.

Three persons, including the driver, occupied the front seat and obstructed his view of the road. The car was proceeding on the right-hand side of the road and within the speed limit prescribed by law. To use the words of the defendant, he "passed the other car and went by it and into the fog on the curve all about the same time." In almost a second, as the car crossed the road and went out on the shoulder, the plaintiff's wife cried out, "My God, George, you are out of the road!" What followed has already appeared. The danger of Mudgett's curve and the fog bank confronted the defendant as he passed the on-coming car. The plaintiff had no opportunity to control the situation before they were off the road. It does not appear that an added warning from him would have averted the accident.

It is not within the province of this court to usurp the proper functions of the jury. There can be no substitution of our judgment on questions of fact where reasonably fair-minded men might differ, but when, upon undisputed facts, it is clear that a jury has erred in its conclusion, the verdict below must be set aside. Being convinced that the negligence of the defendant and the plaintiff's exercise of due care is clearly proven, a new trial is ordered.

Motion granted.
New trial ordered.

ALBERT A. CLOUTIER *vs.* OAKLAND PARK AMUSEMENT COMPANY.

Androscoggin. Opinion December 15, 1930.

AMUSEMENT HALLS. NEGLIGENCE.

The proprietor of a place of amusement, in maintaining such, is bound to exercise only the degree of care that would be expected of an ordinarily careful and prudent person in his position.

If the visitor is present for the benefit of the host, the latter should be held liable for the want of any ordinary care in respect to the condition of the property.

The proprietor of a place of public amusement is not an insurer against accident occurring because of the condition of the building, but, so far as the exercise of ordinary care will assure it, he is bound to provide and maintain a structure that will not, because of any insecurity or insufficiency for the purpose for which it is used by him, injure any person rightfully within it.

It can not be said that decoration of inflammable crepe paper above a dance floor is evidence of negligence per se.

Nor is it evidence of negligence that the paper decoration of the ceiling extended down on the faces of certain posts to the top of the mirrors, and around their margins.

In this state there is no statute regulating means of exit to be provided in places of amusement, below a second floor.

One is not liable in an action of tort for mere nonfeasance by reason of his neglect to provide means to obviate or ameliorate the consequences of the act of God, or mere accident, or negligence or misconduct of one for whose acts towards the party suffering he is not responsible.

The common law gives a remedy to a servant who is injured by the wrongful or negligent act of the master; the liability arising upon the doing of the act. But the common law goes no further; it does not provide a remedy when the master is not responsible for the act, on the ground that he has omitted to provide means to avoid its consequences.

In the case at bar, the record showed that at the beginning of the season of 1929 the electric wiring in the building was fully inspected and pronounced in proper condition by a wiring inspector.

Testimony also showed that smoking was forbidden in the building, and placards to that effect maintained.

The condition of the ceiling and post decorations was not latent or hidden, and it appeared from the evidence that the plaintiff had visited the hall and noticed the decorations during the summer of 1928.

The case presented the further condition that direct and positive evidence, entirely uncontradicted, was advanced that the fire was deliberately set by a person over whose sudden action the proprietor and his agents had no control.

However grievous plaintiff's hurts, under existing statutes he had no remedy.

On report. An action of tort to recover damages for personal injuries sustained by plaintiff in a fire occurring in a dance hall conducted by the defendant, at which dance hall plaintiff was present as a patron. Trial was had at the June Term, 1930, of the Superior Court for the County of Androscoggin. After the testimony had been taken out, the cause was, by agreement of the parties, reported to the Law Court for its decision on so much of the evidence as was legally admissible. Judgment for defendant.

The case fully appears in the opinion.

Clifford & Clifford,

W. H. Hines, for plaintiff.

Locke, Perkins & Williamson, for defendant.

SITTING: PATTANGALL, C. J., DUNN, STURGIS, BARNES, FARRINGTON, JJ. PHILBROOK, A. R. J.

BARNES, J. A patron of defendant Amusement Company, who had paid the admission fee required of frequenters of its dance hall, on the night of August 31, 1929, while within the hall, and while the program provided for the amusement of those present was being carried on, was burned on head and hands by flaming material that dropped upon him.

He sued for damages, alleging negligence on the part of defendant and its servants in the construction and decoration of the dance hall. The case comes to this court on report.

The dance hall was a rectangular building with inside measurements about 105 feet by 50 feet.

Eight posts on a side, with two more at each end, of timber 6

inches by 6 inches and 12 feet 11 inches high, supported the ceiling beams, and separated the dancing floor from a promenade nearly 9 feet wide that surrounded the hall on three sides, except for a low orchestra platform on the promenade and projecting slightly onto the dance floor, halfway down the building, on the northerly side. From the posts the roof sloped over the promenade to the eaves. The lateral walls of the building, except for the front, or westerly end, were of boards to about the height of five feet; and from the rail, at the top of the boarding to the eaves, strong wire screening of about two inch mesh was fastened securely about all except the front end of the building.

Through boarded wall or wire screening there was no door or provision for exit.

The westerly and front end of the building contained an entryway in one corner, a ticket room, check room and refreshments booth, all without the 105 foot floor of the dance hall.

The entryway was 9 feet 8 inches wide, communicating with the southerly promenade by double doors, of ordinary size and opening outward. A patron would enter the building, passing by a ticket window in the north wall of the entryway and through the more northerly of the double doors, to the south and west promenades.

This northerly door was commonly fastened open; the other door being held closed by a spring catch at its top. Thus the commonly used way of exit and entrance faced the southerly promenade.

Facing the northerly promenade was the refreshments booth, having next the promenade, a counter 9 feet long, 18 inches wide, and set 3 feet 2½ inches above the floor, the space above it being clear of obstruction. At the north end of the counter, within the booth, was a door 30 inches wide, opening outward and northerly.

The refreshments booth was 9 feet 10 inches deep, and, directly opposite the counter described, in the outer wall, had a second counter for use in serving customers outside the building. Above this outer counter the space was clear and unobstructed, to the eaves, about 7 feet from the floor.

Ceiling beams crossed the dancing floor from promenade to promenade nearly 13 feet above the floor.

In 1928 the defendant constructed a ceiling over the dance floor and promenade, made of inflammable crepe paper in decorative colors and designs. The crepe paper, with festoons and streamers of the same material, hung from the ceiling beams and from cords stretched from beam to beam as a thick, canopy top, dependent from the beams and cords and carried from the lines of posts at the inner sides of the promenades, along the rafters to the eaves at their outer sides.

Thus dancers and spectators, while within the building, were beneath a closely aggregated ceiling of gauzy paper, hanging free from its supports.

Each post, separating promenades from the dance floor, was stayed at its top with a pair of braces in the plane of the row of posts in which it stood. The braces were of timber about 3½ feet long and joined the posts more than 3 feet below their tops. On one or more of the faces of the posts, 4 feet 2 inches above the floor, 18 inch mirrors were fixed; and streamers or festoons of inflammable crepe paper, similar to that used to make the ceiling, were run down the inner faces of the braces and posts and gathered into knots or decorative bodies above the mirrors. These runners of paper were tacked to the posts.

Around some of the mirrors, if not all, the crepe paper decoration known as festoons was run as a border.

Below the mirrors the posts were bare. The decoration known as festoons was made of ribbons of tissue paper 2 inches in width, glued together along their center lines on a cotton thread, the size of the finer sewing thread, and cut from margins to thread into bars not a sixteenth of an inch wide.

This canopy ceiling and the decorations of the posts had been maintained through the seasons of 1928 and 1929, and on the night of the fire the paper was all as originally hung, except that from some of the posts portions of the paper may have been worn or torn away. The hall was lighted by proper electrical appliances.

Settees and other seats were in use upon the promenades during the intervals between dances or as spectators sat while others danced.

Plaintiff escorted a young lady to the dance hall on the night of

the fire; and at some time after ten o'clock in the evening, when between three hundred and four hundred people were in the hall, during an interval between dances, while his companion was seated at the inner margin of the promenade, about midway of the rear of the building, and plaintiff was standing near her, someone cried, "Fire!" and plaintiff saw flame running up the post at the inner margin of the promenade in the front of the building, nearly opposite where he stood.

This post stood about twenty-five feet from a point opposite the joining of the double doors.

So far there appears no material discrepancy in the testimony.

It is not disputed that the fire was started in the decoration paper on this post, nor that it was communicated almost instantly to the paper ceiling, nor that at once the glowing and burning paper fell toward the floor as the flames swept to every portion of the canopy ceiling.

And it is not disputed that plaintiff, while in the exercise of due care, suffered exceedingly painful and for a time completely disabling burns which required professional care and treatment.

It is not disputed that the fire was communicated to the paper decorations on the post by one of a group of men near the post, none of whom were employees of defendant.

The plaintiff does not know how it was communicated. The defendant contends that the decorative paper was deliberately and purposely fired, from a flaming lighter, a match, or a glowing cigarette, by one of the group of men, who touched off the paper, pinched out that flame and again ignited the paper.

After the second or possibly the third lighting, the miscreant failed to extinguish the flame, and the alarm was given. The creature, who defendant alleges set the fire, was never identified.

At the alarm of fire plaintiff, with his companion, rushed toward the double doors but were stopped, on the dance floor, by the throng of people ahead of them, in like manner seeking exit. Noting a hole in the wire screening near him at this time, which plaintiff says someone had rammed through it, he assisted his companion through the hole and followed her into the outer air.

He had been subjected to a shower of flaming and glowing material from the ceiling for only a few moments, but the damage complained of was done.

He complains of the material used in decorating the hall, and of the number of available exits, the one doorway, 4 feet 6 inches in width provided for general entrance and exit.

The proprietor of a place of amusement, in maintaining such, is bound to exercise only the degree of care that would be expected of an ordinarily careful and prudent person in his position.

"When one expressly, or by implication, invites others to come upon his premises for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger; and, to that end, he must exercise ordinary care and prudence to render the place reasonably safe for the visit."

Thornton v. *Agricultural Society*, 97 Me., 114, 53 Atl., 979; *Easler* v. *Amusement Company*, 125 Me., 334, 133 Atl., 905.

If the visitor is present for the benefit of the host, the latter should be held liable for the want of any ordinary care in respect to the condition of the property. *Selinas* v. *Vermont Agri. Soc'y*, 60 Vt., 249, 15 Atl., 117; *Dunn* v. *Brown Co. Agri. Soc'y*, 46 Ohio St., 93, 18 N. E., 96.

The proprietor of a place of public amusement is not an insurer against accident occurring because of the condition of the building, but, so far as the exercise of ordinary care will assure it, he is bound to provide and maintain a structure that will not, because of any insecurity or insufficiency for the purpose for which it is used by him, injure any person rightfully within it. *Ryder* v. *Kinsey*, 62 Minn., 85, 64 N. W., 94, 34 L. R. A., 557; *Dettmering* v. *English*, 64 N. J. L., 16, 44 Atl., 855, 48 L. R. A., 106; *Williams* v. *Mineral City Park Ass'n*, 128 Iowa, 32, 102 N. W., 783, 1 L. R. A. (N. S.), 427; *Schofield* v. *Wood*, 170 Mass., 415, 49 N. E., 636.

It can not be said that decorations of inflammable crepe paper above a dance floor is evidence of negligence *per se*.

The building was not artificially heated. It was wired for and lighted by electricity, and it is admitted of record that at the beginning of the season of 1929 the electric wiring was fully inspected and pronounced in proper condition by a wiring inspector.

Nor is it evidence of negligence that the paper decoration of the ceiling extended down on the faces of certain posts to the top of the mirrors, and around their margins. There is testimony that smoking was forbidden within the building, and placards to that effect maintained.

The condition of ceiling and post decorations was not latent or hidden. It was evident to a patron on a first visit, and plaintiff had visited the hall and noticed the decorations during the summer of 1928, when the materials and their arrangement were as on the night of the fire, ordinary wear excepted.

There is testimony that one manufacturer of decorative crepe paper had on the market, in 1929, a paper so treated as to be comparatively noncombustible.

But the paper here used was that commonly on sale for such uses as here made, and there is no evidence that defendant knew of the existence of noncombustible decorative material useful to his purpose.

That the provision for egress was limited to the westerly end of the building is complained of as negligence in construction and operation.

It is true there was a partial barrier to the door in the northwest corner. But the assembly on the crowded dance floor failed to avail itself of this exit, and surged against the opening afforded by the pair of folding doors in the southwest corner.

Neither in this state, nor any other, so far as we are informed, is there statute regulation of means of exit to be provided in places of amusement, below a second floor.

Whence it follows that recovery, if any, in the case at bar, is determined under the rules of the common law.

"At common law there was no duty imposed upon the owner of a building to provide fire escapes, nor consequent liability for failure to provide them, where the building was properly constructed for its intended use and purpose, the ordinary means of escape by halls, stairs, doors and windows being deemed sufficient." 4 R. C. L., 404.

"At common law there was no liability imposed upon the owner of a building to provide the same with fire escapes or other means

of exit in case of fire." *Arms* v. *Ayer*, 192 Ill., 601, 58 L. R. A., 277.

"We are satisfied that if any duty devolved upon the defendant to anticipate the possible burning of its building, and provide modes of escape adequate to that emergency, such duty did not exist at common law." *Pauley* v. *Steam Gauge & Lantern Co.*, 131 N. Y., 90, 15 L. R. A., 194.

Prior to any enactment of statute requiring fire escapes or other exits, a workman in a factory was injured in escaping after the occurrence of a fire.

"If the fire was not a casualty peculiarly incident to the business and reasonably to be anticipated, then no obligation rested upon the defendant to guard against it in any way." *Jones* v. *Granite Mills*, 126 Mass., 84; *Ryder* v. *Kinsey*, supra.

But this case presents the further condition that direct and positive evidence, entirely uncontradicted, is advanced that the fire was deliberately set by a person over whose sudden action the proprietor and his agents had no control.

In *Jones* v. *Granite Mills*, supra, the Court says:

"The other question is of somewhat different character, for it cannot be said that a failure to construct proper and additional means of exit from a mill in case of fire in any way contributed to the occurrence of the fire itself. All that can be said is, that, if they had been provided, some of the results that followed from the fire might have been lessened, alleviated, or prevented. And the narrow question is presented, whether a master is required by the common law so to construct the mill, or so to arrange the place where his servants work, that they shall be protected from the consequences of a casualty for which he is not responsible. We know of no principal of law by which a person is liable in an action of tort for mere nonfeasance by reason of his neglect to provide means to obviate or ameliorate the consequences of the act of God, or mere accident, or the negligence or misconduct of one for whose acts towards the party suffering he is not responsible. If such liability could exist, it would be difficult, if not impossible, to fix any limit to it. And we are therefore of opinion that it is no part of the duty of a master to his servant, employed in a building properly con-

structed for the ordinary business carried on within it, in the absence of a statute requirement, to provide means of escape from it, or to have remedial agencies at hand to alleviate the results, or to insure the safety of a servant from the consequences of a casualty, to which his negligence does not directly contribute. The common law gives a remedy to a servant who is injured by the wrongful or negligent act of the master; the liability arising upon the doing of the act. But the common law goes no further; it does not provide a remedy when the master is not responsible for the act, on the ground that he has omitted to provide means to avoid its consequences. The master is not liable to the servant unless he has been negligent in something which he has contracted or undertaken with his servants to do, and he has not undertaken to protect him from the results of casualties not caused by him or beyond his control. See *Wilson* v. *Merry*, L. R., 1 H. L. Sc., 326.

"It is no part of the contract of employment between master and servant so to construct the building or place where the servants work, that all can escape in case of fire with safety, notwithstanding the panic and confusion attending such a catastrophe."

The case was decided upon the common law, and the plight of a servant in the Granite Mills horror is comparable in many respects, and his right to recovery as strong as in the case at bar.

Further, it should be said, upon the record we are unable to state that had there been another set of double doors the plaintiff would have escaped from the dance floor without injury.

However grievous plaintiff's hurts, under existing statutes he has no remedy.

Judgment for the defendant.

INHABITANTS OF TOWN OF MILO *vs.* MILO WATER COMPANY.

Piscataquis. Opinion December 18, 1930.

ACTIONS. TAXATION. MUNICIPAL CORPORATIONS. MUNICIPAL OFFICERS. PLEADING AND PRACTICE. R. S. 1930, CHAP. 11, SEC. 64.

The declaration in an action of debt brought by the collector in the name of the inhabitants of a town under the provisions of Sec. 64 of Chap. 11, R. S. (1916) (R. S. 1930, Chap. 11, Sec. 64), must contain an averment that the direction by the selectmen to commence the action was in writing. Such written direction being necessary to the maintenance of the action, it must be alleged in the writ. It is a traversable fact, and is put in issue under the plea of the general issue.

A cause of action is neither the circumstances that occasioned the suit, nor the remedy employed, but a legal right of action. If a person has a legal right to sue, he has a good (that is legally sufficient) cause of action. If he has no legal right to sue, he has not merely a bad cause of action, but no cause, so that good cause of action can never mean more than cause of action.

If one has a cause of action and in his writ fails to state it, he has no better standing in court than as if he had in fact no cause of action whatever.

And where no cause of action is stated, such a defect is not, in any case, cured by the verdict.

When any particular fact is essential to the validity of the plaintiff's cause of action, if such fact is neither expressly stated, in the declaration, nor necessarily implied from those facts which are stated, the cause of action must be considered as defective, and judgment must be arrested; but if such fact, although not expressly stated, be necessarily implied from what is stated, the cause of action must be considered only as defectively stated, and the defect is cured by a verdict.

Failure to demur does not waive the defense that the facts stated do not state a cause of action.

In the case at bar, the presiding Justice by ordering a verdict for the plaintiff town ruled as a matter of law that the cause of action was stated and the exception to that ruling must be sustained. It was error to have directed a verdict for the plaintiff on a writ which failed to state a cause of action.

On exceptions by defendant. An action of debt for taxes. At the conclusion of the evidence the presiding Justice, on motion, directed a verdict for the plaintiff. To this, and to certain other rulings, defendant seasonably excepted. Exceptions sustained.

The case sufficiently appears in the opinion.

Hiram Gerrish,
C. W. & H. M. Hayes,
Ryder & Simpson, for plaintiff.
McLean, Fogg & Southard,
J. S. Williams, for defendant.

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

FARRINGTON, J. Action of debt for taxes for the year 1928. No question is raised as to the validity of the assessment. The defendant Company pleaded the general issue with brief statement.

At the conclusion of the evidence produced at the trial the presiding Justice, on motion therefor, directed a verdict for the plaintiff town in the sum of $5,156.93. The case comes to this court on an exception to the direction of the verdict and on other exceptions.

The action was brought under the provisions of Sec. 64 of Chap. 11, R. S. (1916), which is as follows: "In addition to other provisions for the collection of taxes legally assessed, the mayor and treasurer of any city, the selectmen of any town, and the assessors of any plantation to which a tax is due, may in writing direct an action of debt to be commenced in the name of such city or of the inhabitants of such town or plantation, against the party liable; . . ."

The declaration in the case before us alleges, in part, that "the plaintiff further avers that on the third day of August, A.D. 1929, at said Milo, the Selectmen of the said town of Milo *directed* an action to be commenced, in the name of the inhabitants of said town of Milo against the said defendant for the recovery of said taxes."

There is no averment that the direction by the selectmen was "in writing" as required by the statute.

"Such written direction being necessary to the maintenance of

the action, it must be alleged in the writ. It is a traversable fact, and is put in issue under the plea of the general issue." *Inhabitants of Wellington* v. *Small*, 89 Me., 154, at page 156.

No amendment was offered or suggested and whether an amendment could have been allowed need not be considered at this time.

The collector had no legal right to bring suit to collect the taxes in the name of the inhabitants of the town unless and until the selectmen in writing directed such action of debt to be so commenced. But the writ in the case at bar contains no allegation of written direction, an allegation essential to the stating of a cause of action.

"A cause of action is therefore neither the circumstances that occasioned the suit, nor the remedy employed, but a legal right of action. The adjectives good and bad cannot, strictly speaking, be applied to it. 'If a person have a legal right to sue, he has a good (that is legally sufficient) cause of action. If he have no legal right to sue, he has not merely a bad cause of action, but no cause, so that good cause of action can never mean more than cause of action.' " *Anderson, Admx.* v. *Wetter*, 103 Me., 257, at page 266.

If one has a cause of action and in his writ fails to state it, he has no better standing in court than as if he had in fact no cause of action whatever.

And where no cause of action is stated, such a defect is not, in any case, cured by the verdict. *Farrington* v. *Blish et als*, 14 Me., 423, 426; *Low* v. *Tilton*, 19 N. H., 271, 272, citing *Walpole* v. *Marlow*, 2 N. H., 385; *Daly, Admr.* v. *The City and Town of New Haven*, 69 Conn., 644; *Hollis et al* v. *Richardson*, 13 Gray, 392, 393; *Kennedy Lumber Co.* v. *Rickborn et al*, 40 Fed. (2d), 228, 231; *Chichester* v. *Vass* (Va.), 1 Am. Dec. at page 511.

In distinguishing between defective causes of action, which are not causes of action at all (*Anderson* v. *Wetter*, supra), and causes of action defectively stated, the Court in *Walpole* v. *Marlow*, supra, expresses it in plain and simple language when it says, "The true distinction between a defective title, and a title defectively stated, is this: when any particular fact is essential to the validity of the plaintiff's title, if such fact is neither expressly stated, in the declaration, nor necessarily implied from those facts which are stated,

the title must be considered as defective, and judgment must be arrested; but if such fact, although not expressly stated, be necessarily implied from what is stated, the title must be considered only as defectively stated, and the defect is cured by a verdict."

In the instant case it can not be contended that the direction to bring suit was by implication a direction in writing. The omission of the averment that such direction was in writing is in our opinion a fatal defect in the declaration.

Failure to demur does not waive the defense that the facts stated do not state a cause of action. *Nakdimen* v. *First National Bank of Fort Smith et al* (Ark.), 6 S. W. (2d), 505; *Goff et al* v. *First National Bank of Tifton* (Ga.), 153 S. E., 767; *Williams* v. *St. Louis-San Francisco Ry. Co.*, 7 S. W. (2d), 392.

As a matter of law, under the decision in *Wellington* v. *Small*, supra, the declaration in the instant case did not state a cause of action. The presiding Justice by ordering a verdict for the plaintiff town ruled as a matter of law that a cause of action was stated. Exception, which always lies to rulings on questions of law, was seasonably taken to the order directing the verdict and the exception must be sustained. It was error to have directed a verdict for the plaintiff on a writ which failed to state a cause of action.

The case at bar can be distinguished from the case of *Inhabitants of Charleston* v. *Lawry*, 89 Me., 582, because in the latter case a written direction signed by the selectmen was introduced in evidence without objection, whereas in the instant case such written direction was admitted over objection and exceptions were taken to its admission. We do not regard the case of *Inhabitants of Charleston* v. *Lawry* as authority for the proposition that mere failure to demur is a waiver of the defense that certain alleged facts do not state a cause of action. Nor do we regard it as making, or intended to make, an unqualified statement that a verdict may be directed for a plaintiff on a writ which fails to state a cause of action.

It is not necessary to consider any exceptions other than that relating to the direction of the verdict for the plaintiff which has already been discussed, inasmuch as the entry as to that must be,

Exception sustained.

ADA B. COMSTOCK'S CASE.

Knox. Opinion December 26, 1930.

WORKMEN'S COMPENSATION ACT. DEPENDENCY. SECTIONS 12 AND 14 DEFINED.

Where death results from injury, after weekly compensatory payment to the employee, compensation to his dependents begins from the date of the last payment, if within three hundred weeks of the day of the employee's injury, and thence continues to the expiration of such three hundred week period.

The proof, to establish compensable status for a dependent, must show not alone death of the employee from injury, but death within three hundred weeks from the date of the injury.

In Section 14 of the Act there is not the qualification that death result from injury.

In the case at bar, if, under Section 14, instead of actual incapacity compensable within the limits while it existed, and only while it existed, the injury occasioned Mr. Comstock by assault, had been any of those which the section conclusively presumes total and permanent, and he had died before receiving the compensation or while receiving compensation, which Section 14 defines, the same would have been payable to the dependents of the employee for the specified period, viz.: four hundred weeks from the date of injury. But his injury being outside the category of presumed incapacity, the weekly payments came to an end when death terminated not merely supposed but real incapacity.

On this state of facts, as a matter of law, nothing was payable to the dependents of the employee for the specified period. Dependent's rights were under Section 12, not Section 14, of the Act. More than three hundred weeks had elapsed from the date of injury.

On appeal from decree of a sitting Justice affirming decree of the Industrial Accident Commission denying compensation to the petitioner, the dependent widow of the deceased employee. Appeal dismissed. Decree below affirmed.

The case fully appears in the opinion.

Frank H. Ingraham, for plaintiff.

Clement F. Robinson,

Richard Small, for defendant.

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

DUNN, J. An employee, whose case was held compensable in adversary proceedings under the Workmen's Compensation Act (the 1916 revision of the statutes, as amended, applying) received compensation to the time of his death, which occurred more than three hundred weeks from the day of his injury.

The dependent widow of the deceased employee was denied compensation.

The Associate Legal Member of the Industrial Accident Commission held that R. S. 1916, Chap. 50, Sec. 12, as amended by Chap. 238, P. L. of 1919, and by Chap. 222, P. L. of 1921, rather than R. S. 1916, Chap. 50, Sec. 14, as amended by the 1919 and 1921 Laws, governed the case, and gave no right to claim compensation.

The case being ripe for affirming decree, a Justice of the Superior Court entered such decree. The widow appealed from that decree.

Hiram A. Comstock, the husband of the appellant, was an overseer at the state's prison. On June 19, 1923, a convict assaulted him. As a consequence of battery, Mr. Comstock was off duty for eight days. He then resumed his employment, and continued in such employment, on full wages, to May 5, 1928.

In June of 1928, five years after the assault and battery, Mr. Comstock petitioned for compensation. He alleged his incapacity, as a result of the injury, to do heavy labor. Counsel for defense filed no formal answer.

At the hearing, provisions laid down by the Workmen's Compensation Act, in respect to the giving of notice of claim and the beginning of proceedings, were expressly waived. The member of the Commission, who heard the case, says this was to the end that decision might go on the merits.

The Commissioner found the accident responsible "for the present condition of total incapacity," and awarded compensation from May 5, 1928, the day the employee stopped working, at $16.00 per week.

Liability thus established took effect and was binding upon the parties.

Weekly payment was made until Mr. Comstock died. The date of his death was July 6, 1929.

Petition of the widow was filed the next following August. The petition alleged, among other things, that the employee died as a result of the injury. Answer denied all the allegations of the petition, except that the employee received an injury; and that he died on the day alleged in the petition. Besides, the answer pointed out, as reason for dismissing the petition, that three-hundred-weeks period from the date of injury expired March 18, 1929.

The Workmen's Compensation Act, in application to the case at bar, does not exhaust the subject of compensation for employees, and for dependents of employees, in a single section. Different sections create, define, and admeasure different obligations.

R. S. 1916, Chap. 50, Sec. 12, as amended, so far as its prescription is material to inquiry, is in these words:

> "Sec. 12. 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, earnings or salary, but not more than sixteen dollars nor less than six dollars a week, for a period of three hundred weeks from the date of the injury, and in no case to exceed four thousand dollars. . . . When weekly payments have been made to an insured employee before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury."

Of Section 14, in connection with present purpose, this is the tenor:

> "Sec. 14. While the incapacity for work resulting from the injury is total, the employer shall pay the injured employee a weekly compensation equal to two-thirds his average weekly wages, earnings or salary, but not more than sixteen dollars, nor less than six dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks from the time of incapacity, nor the amount more

than six thousand dollars; and if the employee shall die before having received compensation to which he is entitled or which he is receiving as provided in this act, the same shall be payable to the dependents of said employee for the specified period, and the said dependents shall have the same rights and powers under this act as the said employee would have had if he had lived."

Also, the section makes the conclusive presumption that, from any of six injuries which the section enumerates, the result is total and permanent disability for working.

But the legislative conclusion that, from injuries of the character the section distinctly names, disabilities are total and permanent, regardless of the circumstances of fact about it, is not of present relation, for Mr. Comstock's injury was not of those kinds.

However, it was decided by the sitting member of the Industrial Accident Commission that incapacity for working, on the part of Mr. Comstock, was total in the actuality of fact.

Section 14, opposing counsel agree, fixed the compensation of the injured employee.

The same section is advanced as the reliance of the appellant. But contention in her behalf can not be sustained.

It was for the injured employee, within restrictions of the statute as to time and amount, to receive compensation in the duration of his total incapacity to do work.

The employee did not, in the language of Section 14, "die before having received compensation to which he was entitled." When he died, he was, as has been noticed already, "receiving compensation." But his injury being outside the category of presumed incapacity, the weekly payment came to an end when death terminated, not merely supposed, but real incapacity.

On this state of facts, as a matter of law, nothing was "payable to the dependents of said employee for the specified period." Section 14.

If, under Section 14, instead of actual incapacity, compensable within limits while it existed, and only while it existed, the injury occasioned Mr. Comstock by the assault had been any of those which the section conclusively presumes total and permanent, and

he had died before receiving the compensation, or while receiving compensation, which Section 14 defines, "the same (would have been) payable to the dependents of the said employee for the specified period." Section 14.

"Specified period," taken alone in Section 14, clouds the subject.

Sections of the same statute on the same matter, in order to get at a provision which seems obscure, you take the sections together to determine meaning, and what effect should be given to the particular provision; you consider what the purpose of the Legislature was, what object the Legislature had in view, and what it expected to accomplish. These rules apply to any law; they are rules of common sense.

Section 15 of the act deals only with compensation for partial incapacity. Section 16 schedules disabilities, other than those in Section 14, and denominates such disabilities total for specific periods.

"In cases included in the following schedule," runs Section 16, "disability . . . shall be deemed to be total for the period specified and after such specified period, if there be a total or partial incapacity for work resulting from the injury specified, the employee shall receive compensation while such total or partial incapacity continues under the provisions of sections fourteen and fifteen respectively . . . ."

The several sections, 12, 14, 15, 16, have to do with the legislative substitution for the rights of action and grounds of liability given by the common law, perhaps by earlier statutes, of a system of weekly payments, based upon the loss of wages resulting from injury, and burdened upon the industry in which, and because of employment in which, injury was sustained.

Section 14, read apart from any other section, may bring this case within the stretch of its letter.

But a thing within the letter of a statute is not within the statute, unless it is within the intention of the Legislature. Legislative intention, in the instant situation, is gatherable by taking all the sections as a whole and construing them together. So taken and so construed, Section 14 does not govern the case of the appellant dependent widow. *Nickerson's Case*, 125 Me., 285.

Section 12 defines the rights of dependents of employees, where death results from injury. *Nickerson's Case*, supra. The opening sentence of Section 12 is positive and direct. It is this: "If death results from injury." In Section 14, there is not the qualification that death result from injury.

The provision of Section 12, as it concerns this case, may be stated thus wise:

> "Where death results from injury, after weekly compensatory payment to the employee, compensation to his dependents shall begin from the date of the last payment, if within three hundred weeks of the day of employee's injury, and thence continue to the expiration of such three-hundred-week period."

The proof, then, must show, to establish compensable status for a dependent, not alone death of the employee from injury, but death within three hundred weeks from the incurrence of injury.

The requirement is a part of the section, a part of the compensation act itself, which the industrial accident tribunal and the judicial courts are bound to enforce.

The appellant could not, the fact being otherwise, establish that her husband's death occurred within three hundred weeks from the time of accident. So her petition was denied.

Counsel concedes that, if Section 12 be governing, the three-hundred-weeks period having preceded death, his client is entitled to no compensation, "unless the employer has waived the provisions of that section."

Argument is, not waiver in the familiar sense of waiver in pais, i.e., the voluntary surrender or abandonment of a known right, but, using the expression as a convertible term, the analogous practical result of the inhibition to assert the right.

In appellant's brief it is said that, "Having paid compensation for more than 300 weeks, the employer is estopped from asserting that compensation was only payable for the 300 weeks period, having by its payments admitted it was 500 weeks."

It may be answered simply, that if, under the Workmen's Compensation Act, it be possible to put the state in the stage of quasi estoppel, the elements are wanting.

Compensation was awarded the injured employee during total disability; to be sure, to recur to the statute, within five hundred weeks, or six thousand dollars. Payment of compensation was made until the employee died. He died within five hundred weeks and before weekly payments amounted to six thousand dollars. If, in the case of the employee, there were mistake as to what the law was, it would not, in the case of the widow, make the law other than it is, nor estop the employer from relying on the law as it really is.

Further contention is, that payment of compensation to the employee for more than three hundred weeks was circumstance to warrant the finding of an admission that the employer was bound to pay compensation, under Section 14, for total permanent incapacity for working.

There was recognition, manifested by weekly payment to the employee, that liability, incapacity, and compensation had been determined by the Industrial Accident Commission.

That was the case of the injured workman. This is the case of his widow. The rights of the former were governed by Sec. 14, R. S., *supra*. Section 12 governs the case of his widow. R. S., *supra*.

Finally, the brief stresses the provision of the Workmen's Compensation Act that it be construed liberally with a view to carrying out its general purpose.

Though the Legislature has declared for liberal interpretation and construction of the act, "its express provisions can not be extended beyond their reasonable import." *Moran's Case*, 234 Mass., 152.

As there was no proper basis to make an order for compensation, the prayer of the petition of the appellant was rightly denied.

Appeal dismissed.
Decree below affirmed.

BIRGER E. HAMILTON *vs.* OSMOND B. GEORGE.

Somerset. Opinion December 27, 1930.

PLEADING AND PRACTICE.

The absence of a seal on a writ is a fatal defect, not to be cured by amendment.

Bearing an improper seal, a writ is as though it had no seal.

Such a defect can not be waived. Jurisdiction can not be conferred by agreement.

To such a defect, motion to dismiss will lie at any stage of the proceedings, even after verdict.

On exceptions by plaintiff. An action of tort to recover damages for injuries arising out of an automobile collision occasioned by the alleged negligence of the defendant. The jury rendered a verdict for the defendant, which was duly entered on the clerk's record. Six days later, as the term was about to adjourn, plaintiff filed a motion to have his writ dismissed for alleged want of jurisdiction on the face of the record. To the ruling of the presiding Justice denying this motion plaintiff seasonably excepted. Exceptions sustained.

The case sufficiently appears in the opinion.

H. R. Coolidge, for plaintiff.

Ryder & Simpson,

Locke, Perkins & Williamson, for defendant.

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

PATTANGALL, C. J. Exceptions to the overruling of motion to dismiss filed by plaintiff after verdict had been rendered against him.

The motion was based on the proposition that lack of jurisdiction appeared on the face of the record, the writ not bearing a proper seal.

The writ, dated January 24, 1930, bore the seal of the Superior Court of Penobscot County.

By the provisions of Chap. 141, P. L. 1929, the Superior Court of Penobscot County was combined with the Superior Courts of Cumberland, Kennebec and Androscoggin Counties and the jurisdiction of the court so constituted was extended to include the remaining twelve counties. This law became effective on January 1, 1930, and in accordance with Section 7 of the act, the Justices of the Superior Court, on that date, established a seal to be used by it from that date, bearing the words "Superior Court, State of Maine."

Somerset County in which this writ was brought and action tried was never within the jurisdiction of the Superior Court of Penobscot County, nor could the writs of that court be returned to any court in Somerset County and the seal which this writ bore was superseded, even in Penobscot County, by the seal authorized on January 1, 1930.

Bearing an improper seal, the writ was as though it had borne no seal. *Tibbetts* v. *Shaw*, 19 Me., 204. This defect may not be remedied by amendment. *Bailey* v. *Smith*, 12 Me., 196; *Witherel* v. *Randall*, 30 Me., 168. Nor can it be waived. Parties can not confer jurisdiction by agreement. To such a defect, motion to dismiss will lie at any stage of the proceedings. *Pinkham* v. *Jennings*, 123 Me., 345; *Miller* v. *Wiseman*, 125 Me., 8.

Exceptions sustained.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

LILLIAN BLAISDELL *vs.* HAROLD S. PRATT.

Androscoggin County. Decided February 24, 1930. On exceptions to an ordered verdict in defendant's favor. Action for damages based on alleged malpractice of physician.

Defendant attended plaintiff during childbirth. Following her delivery, plaintiff was in hospital several weeks suffering from acute metritis and undergoing very considerable pain and suffering, for which she desires to hold defendant responsible.

Obliged to base her claim on negligence, she sets up two propositions: (1) that defendant did not give her case the attention which it merited and which the law demands from a physician who undertakes to treat a patient, and (2) that defendant "carelessly allowed a portion of the placenta to remain in plaintiff's body."

Defendant first saw the case on Thursday, July 19; the child was born Saturday morning; plaintiff was removed to the hospital on the afternoon of Monday. In the meantime, defendant had made seven calls in person and had conferred with the nurse four times over the telephone.

Complaint of neglect is based on failure to make personal call on Sunday. During a part of that day, he was engaged in attending another confinement case and during the entire day and night was in close touch with this case, advising and instructing the nurse,

once in a personal interview at his office and several times over the telephone. There is no evidence upon which to base a charge of neglect. On the other hand, defendant appears to have given the case a greater degree of attention than is usual or ordinarily possible.

The second complaint has no more foundation than the first. There was a conflict of testimony as to whether or not a portion of the placenta failed of removal when the child was born. But if such were the case, negligence on the part of defendant could not be predicated on that fact, nor could the troubles which afterwards arose and which compelled hospital treatment be attributed to it.

In ordering a verdict for the defendant, the presiding Justice committed no error. On the contrary, he exercised a wise discretion. Had the case been presented to a jury and a finding for plaintiff resulted, the verdict could not have been sustained. The case is devoid of any evidence which would warrant such a verdict. Exceptions overruled. *Frank A. Morey*, for plaintiff. *Locke, Perkins & Williamson*, for defendant.

STATE *vs.* RALPH L. PERKINS.

Penobscot County. Decided February 24, 1930. At the May Term of the Superior Court in Bangor, respondent was arraigned on and pleaded not guilty to an indictment charging extortion, threatened extortion and the soliciting of bribes, as a private citizen and also as an executive officer of the state and as a town constable.

The indictment was drawn in nine counts. Later in the term two of the counts were nol-prossed, whereupon respondent, under leave of Court, retracted his plea of record and pleaded "nolo."

Subsequently, during the same term of court, the state's attorney moved for sentence on the fifth count, a sentence that would be much less serious than would sentence on certain other counts in the indictment.

Upon inquiry by the Court it was learned that the state's attorney, after sentence had been passed under count five, would move to have the Court order the indictment filed as to the remaining six counts therein.

The Court heard counsel's reasons for the procedure asked, with objections by counsel for the respondent, and announced that nothing said would justify him in filing the more serious charges and sentencing on one of less moment.

Counsel for the respondent objected to sentence that day being imposed under any count but the fifth, presenting that a great number of witnesses would be needed to set out the circumstances which he claimed would prove extenuating, and many character witnesses, and moved that the case be continued to the September Term for sentence.

This motion was granted, the Court saying, "I take it that it is fully understood by counsel and the respondent that when this case does come up for sentence it is open for sentence on each, any or all of the counts as the Court may decide." To this, counsel for the respondent rejoined, "I understand that is the position of the Court."

On the twenty-ninth day of the September Term, the respondent being in court for the purpose of sentence, his counsel, without previous notice to the court or to state's attorneys, filed a motion to retract the plea of nolo, and for leave to plead over.

The Court overruled this motion and respondent took exceptions.

The Court, of his own motion, then proceeded to pronounce sentence on one of the graver charges in the indictment and a second exception was taken because the Court proceeded without a motion for sentence by the state's attorney.

The second exception is not argued by counsel, and we may assume it is not relied on.

We find no abuse of judicial discretion in the course pursued by the Court below. Exceptions overruled. Judgment for the State. *Clement F. Robinson*, Attorney General, for the State. *Hinckley, Hinckley & Shesong*, for defendant.

STANLEY WILDER *vs.* WILLIAM H. JONES.

Penobscot County. Opinion February 24, 1930. This was a tort action in which the plaintiff sought to recover damages for injuries received by reason of an alleged assault and battery committed upon him by the defendant on August 15, 1928. The jury returned a verdict for the plaintiff in the sum of $1,237.50. The case comes up on general motion as to evidence and amount of damages.

The story of the plaintiff is that of an unprovoked, unwarranted and brutal assault resulting in a broken nose and other painful injuries from which the plaintiff suffered for some time.

The defendant contended that he acted only in self-defense.

The issue was necessarily one of fact. The jury heard the evidence and had the opportunity to observe the plaintiff and defendant, who were the only witnesses who testified as to what transpired at the time the blows were struck, and found in favor of the plaintiff. A careful study of the printed testimony discloses no error in the verdict.

In order to find for the plaintiff the jury must have believed his story which would have warranted the award of punitive damages. Whether or not the verdict included such award does not appear, but even if punitive damages were not considered, we do not feel that the amount of the verdict is so clearly excessive as to be disturbed. Motion overruled. *W. S. Townsend*, for plaintiff. *D. I. Gould*, *B. W. Lenfest*, for defendant.

GERTRUDE M. PRINN *vs.* FRANK DE RICE.

Cumberland County. Decided March 15, 1930. This was an action for the recovery of damages for personal injuries sustained by the plaintiff while riding as a gratuitous passenger in an automobile owned by her sister, the wife of the defendant driver.

The accident occurred in the Commonwealth of Massachusetts while the parties were en route from Portland, Maine. By agreement and stipulation the case was tried under the Massachusetts rule with the burden on the plaintiff of establishing the gross negligence of the defendant, as defined in *Altman* v. *Aronson et als*, 231 Mass., 588; *Burke* v. *Cook*, 246 Mass., 518; and *Massaletti* v. *Fitzroy*, 228 Mass., 487, and her own due care, as defined in *Shultz* v. *Old Colony Street Rail'way Co.*, 193 Mass., 309; *Oppenheim* v. *Barkin*, 262 Mass., 281; *Lambert* v. *Eastern Massachusetts Street Railway Co.*, 240 Mass., 495.

At the close of the evidence the defendant filed a written motion for a directed verdict. This motion was denied by the presiding Justice and to this refusal the defendant took exceptions.

A verdict in favor of the plaintiff, in the sum of sixty-five hundred fifty-eight dollars and seventy-five cents ($6,558.75) was found by the jury, and a general motion for a new trial on the usual grounds was seasonably filed by the defendant.

The exception and the motion, except as far as the latter relates to the amount of damages, depend on the answer to the same fundamental question as to whether, under the Massachusetts rule as stipulated, the verdict in this case is so plainly contrary to the evidence that manifestly the jury was influenced by prejudice, bias, passion or mistake.

Without recital of testimony, but after a most careful reading and weighing of the entire record in the case, we are convinced that the verdict of the jury is supported by such a degree of sufficient and convincing evidence that it should not be disturbed by this Court.

And for the same reason we find no error in the refusal of the presiding Justice to direct a verdict for the defendant.

From the evidence in the case the jury was justified in finding that the burden of establishing her own due care was sustained by the plaintiff, and was also justified in the further finding, in accordance with the stipulations in the case, that the defendant was guilty of gross negligence, a doctrine not recognized in this state, but which by agreement of parties to this suit has been made the rule of recovery.

It is not for this court to interfere with a verdict on the ground of excessive damages merely because the amount is large or because the court might have awarded a smaller amount. Unless the verdict very clearly appears to be excessive upon any view of the facts which the jury is authorized to adopt, it will not be disturbed.

In view of all the evidence bearing on the pain and suffering of the plaintiff, her expenses, the extent of the injury, and its permanent effect as testified by the physicians on both sides, we are unable to say that the jury was not justified in its finding as to damages.

The entry, therefore, must be, Exceptions and motion overruled. *Edmund F. Mahoney*, for plaintiff. *David H. Fulton*, *William B. Mahoney*, *John B. Thomes*, for defendant.

TAPPER *vs.* WARREN ET AL.

York County. Decided March 26, 1930. Action of assumpsit to recover damages for alleged breach by defendants of contract to purchase real estate.

By their contract under seal, dated January 20, 1923, the plaintiff agreed to sell to defendants, and defendants agreed to purchase of plaintiff certain real estate situated in Lynn, Massachusetts. The contract was made at an attorney's office in Lynn; the plaintiff and her husband then lived and now live in Lynn; the defendants then lived and have continued to live until the present time in South Berwick, Maine. By the terms of the agreement said premises were "to be conveyed on or before February 28, 1923 by warranty deed . . . conveying a good and clear title to the same, from all encumbrances." The purchase price was nineteen thousand dollars, of which the defendants paid two hundred dollars as a deposit upon the execution of the agreement. The premises were subject to four mortgages aggregating in principal amount ten thousand dollars. The plaintiff agreed "to raise" (i.e. to secure or obtain) for the defendants a "ten thousand dollar standing

mortgage on the granted premises," to run for a period of five years with interest at six per cent payable semi-annually. "At the time of passing final papers" the defendants were to pay four thousand eight hundred dollars in cash, and to give to plaintiff a note for four thousand dollars payable on terms stated in the agreement, and secured by a second mortgage upon the property in question. The "time of passing of final papers" was not agreed upon except as within the limit above stated, and the place therefor was not mentioned in the agreement or otherwise agreed upon.

The record fails to show any breach of their agreement by the defendants. The acts to be performed by the respective parties were to be concurrent acts by the express terms of the contract.

The defendants were not called upon to tender the cash payment, nor to execute the second mortgage, and they could not execute a first mortgage for ten thousand dollars until they had been notified that the plaintiff had procured for them the "standing mortgage" of that amount and was ready to convey the property by warranty deed, giving a good and clear title free of encumbrances. The record fails to show that she, or anybody in her behalf, did this, and the defendants testify positively, without contradiction, that they received no communication from the plaintiff, or anybody in her behalf, relating to the contract or property. They are not shown to be in default. *Brown* v. *Gammon*, 14 Me., 276; *Appleton* v. *Chase*, 19 Me., 74; *Brown* v. *Davis*, 138 Mass., 460; *Warren* v. *Wheeler*, 21 Me., 484, 490. Motion overruled. *Leroy Haley*, *White & Willey*, for plaintiff. *F. Roger Miller*, for defendants.

STATE *vs.* JAMES MALLIOS.

Somerset County. Decided April 2, 1930. At the April Term, 1927, of the Supreme Court, held in Somerset County, respondent was indicted, convicted and sentenced to the state prison, for a term of not less than five years and not more than ten years, for being an accessory before the fact in the crime of arson.

He then took no appeal, made no motion for a new trial, and has been, to the present time, serving sentence in prison.

After the lapse of more than two years, at the September Term, 1929, in said county, motion, accompanied by affidavits, was presented to the presiding Justice for new trial. The motion was denied and appeal taken.

The ruling at *nisi prius* was correct. With its judgment in 1927, no legal bar being then raised, the jurisdiction over that cause and respondent ceased. *State* v. *Cole*, 123 Me., 340. Appeal dismissed. *F. A. Anderson*, County Attorney, for the State. *Nicolaus Harithas*, for respondent.

GEORGE J. JASON, PET'R *vs.* J. HAROLD GODDARD ET AL.

Cumberland County. Decided April 3, 1930. This is a petition for a writ of review.

A civil action, returnable to the Superior Court in Cumberland County at the February, 1929, Term, had been begun against the petitioner by the respondents and service of summons made.

It may be that the petitioner retained an attorney in respect to the suit, but of this the testimony of the petitioner alone, bearing on the point, was so vague and withal so contradictory, that it may well have been stamped unsatisfactory.

On the return day of the writ in the action, petitioner himself came to the court, so he witnessed, but he never did make the fact of his presence there known, and he left without having made any pertinent inquiry.

In its turn the case was called. Petitioner made default. Judgment adverse to him was rendered for $1,115.25 damages and costs.

The instant proceeding is under a statute which provides among other things that, on a petition presented within six years after judgment, a review may be granted, where it appears that through accident or mistake, justice has not been done, and that a further hearing would be just and equitable. R. S., Chap. 94, Sec. 1, par. vii.

Absence of proof of the statutory elements, (a) accident or mistake, (b) that the judgment with unjustness is corrupted, (c) that in fairness and equitableness there should be for the original cause another judicial day, or the want of proof of any of these elements, leaves a petition for review such as this without judicial standing.

The Justice before whom the petition was heard must be held to have found at least one essential element not proved. He dismissed the petition. Exception was noted.

To the exercise of discretionary power, to which the petition had been addressed, exception will not lie. Exception, to be sure, lies to the abuse of magisterial discretion, but it is idle to argue in behalf of the petitioner that discretion was abused just because the Judge declined to go into the merits of that controversy to review which no sufficient basis had been shown. Exception overruled. *Harry E. Nixon*, for petitioner. *Oakes & Tapley*, for respondents.

LILLIAN HILLIARD

vs.

RACHEL P. EDMUR, OTHERWISE KNOWN AS RACHEL L. KALIMUSIS.

Penobscot County. Decided April 11, 1930. This was an action of assumpsit. The writ contained only an account in *quantum meruit* for labor and services. The case comes up on general motion after verdict for the plaintiff in the sum of four hundred and seventy dollars ($470.00).

The questions involved were entirely those of fact, the determination of which was, under the usual rule, peculiarly within the province of the jury, and we can see no reason for disturbing its findings. Motion overruled. *James G. O'Connor*, for plaintiff. *Albert G. Averill*, for defendant.

MAINE ACCEPTANCE CORPORATION *vs.* J. FRED SHEEHAN.

Penobscot County. Decided April 11, 1930. On exceptions. Plaintiff in replevin, assignee of a conditional sale contract, claimed title to an automobile held by defendant, a deputy sheriff, on attachment in favor of a creditor of the vendee. The sale was made on September 12, 1928, and the vendee took possession of the automobile on that day.

On September 15 the contract was recorded in the clerk's office of the city in which vendee resided. In the meantime, the automobile had been attached.

Sec. 8, Chap. 114, R. S. 1916, reads:

> "No agreement that personal property bargained and delivered to another shall remain the property of the seller till paid for is valid unless the same is in writing and signed by the person to be bound thereby, and when so made and signed whether said agreement is or is called a note, lease, conditional sale, purchase on instalment, or by any other name, and in whatever form it may be, it shall not be valid except as between the original parties thereto unless it is recorded in the office of the clerk of the city, town or plantation organized for any purpose in which the purchaser resides at the time of the purchase."

An unrecorded conditional sale contract is not valid against an attaching creditor. Exceptions overruled. *S. Arthur Paul, George E. Thompson*, for plaintiff. *Maxwell & Conquest*, for defendant.

WILLIAM H. SNOW ET ALS, PETITIONERS

AND

FRANK V. SMALL ET ALS, PETITIONERS.

Penobscot County. Decided April 11, 1930. The petitioners, being regularly summoned, appeared at a January term of the

Superior Court and were empanelled as traverse jurors, in which capacity they attended court from the ninth day of January, 1930, until the thirty-first day of the month. They were then excused from duty by the presiding Justice until the seventeenth day of February following, a recess having been taken until the latter date. They then resumed service and were in attendance until the final adjournment of the term on March first, at which time they presented these petitions to the presiding Justice, praying that he order the clerk of courts in making up their pay roll to include the days embraced in the two weeks recess.

This prayer was refused, to that refusal exceptions were taken, and are presented here.

The statute governing the situation reads:

> "Grand and traverse jurors, attending the Supreme Judicial Court or Superior Courts, and jurors attending on any other occasion prescribed by law, shall be allowed five dollars a day for their attendance, and six cents a mile for their travel out and home, to be paid out of the County Treasury."

The sole issue presented is whether or not, under the provisions of this statute, the presiding Justice erred in his ruling. His action was based upon a correct interpretation of the law. Exceptions overruled. *George E. Thompson*, for petitioners.

D. E. McCann's Sons *vs.* Fred J. Foley.

Cumberland County. Decided April 12, 1930. Under the title of a bill of exceptions, appellant states that his petition for review was "dismissed" by a Justice of this court, and that he excepts to "said finding and decree," and nothing further.

This is no bill of exceptions. Repeatedly and with patient iteration the court has, in almost every alternate volume for the past decade, stated the fundamental requisites as to form.

That future bills of exception be drawn as prescribed by good practice, pleaders should consult, *Frost* v. *Livery Co.*, 126 Me.,

409; *State* v. *Wombolt*, ibid., 351; *Felts* v. *Power Co.*, 120 Me., 101; *Doylestown Agr. Co.* v. *Brackett*, 109 Me., 301, 308; *Leathers* v. *Stewart*, 108 Me., 96, 100; *Jones* v. *Jones*, 101 Me., 447, or *Atkinson* v. *Connor*, 56 Me., 546.

If exceptions herein were summarily dismissed opposition could not be maintained, for the claim of review is based on ability, after trial of an action in assumpsit between men of business experience and standing, to recover a commission for procuring the purchaser to whom plaintiff in review sold real estate, to show by testimony of the purchaser, who was not called as a witness at the trial, that plaintiff there did not perform the services.

At the trial defendant should have presented its customer as a witness, or at least have asked for delay to enable it to do so. Trial was in Portland; the witness a resident of Lewiston. In short, the testimony offered in review was available at the first trial.

Before the Justice in review, the purchaser was presented as a witness and frankly admitted that defendant directed him to plaintiff and that he bought.

Here is plaintiff's witness testifying that defendant did procure a customer able, ready and willing to buy.

Perjury is not proven. A petition for review is addressed to the discretion of the court. No abuse of sound discretion can be found. Exceptions overruled. *Charles L. & Paul E. Donahue*, for plaintiff. *Samuel L. Bates*, *John J. Devine*, for defendant.

ORMSBY L. HAYES, LIBELANT *vs.* MAYBELLE H. HAYES, LIBELEE.

Cumberland County. Decided May 20, 1930. This is a contested libel for divorce heard before a single Justice without jury. The libel charges adultery and desertion. The reply of the libelee charges adultery on the part of the libelant. Divorce denied. Libelant brings the case to this court upon exceptions.

R. S., Chap. 65, Sec. 2, provides that when both parties have been guilty of adultery divorce shall not be granted.

The finding of the presiding Justice will not be disturbed if it be based upon any evidence in the case which would justify the court below in finding that both parties had been guilty of adultery. The record contains testimony which would sustain such finding if the testimony so presented was deemed credible by the Justice who heard the case. We think that upon this ground alone the finding of the presiding Justice should not be disturbed. Exceptions overruled. *Howard Davies*, for libelant. *Matthews & Varney*, for libelee.

WILLIAM MOORE *vs.* OLLIE C. DAGGETT, APLT.

Knox County. Decided May 28, 1930. Motion by defendant for a new trial in an action to recover for damages to plaintiff's automobile caused by collision.

The only reason relied upon in argument is: "Because the damages are excessive, and because no evidence on which to properly base damages was introduced or presented in evidence." If the latter proposition is sustained by the record, the verdict should have been for nominal damages only. *Rollins* v. *Blackden*, 112 Me., 459, 470.

This contention, however, loses sight of very material testimony on the question of damages. The plaintiff's car unquestionably sustained substantial injuries. The jury had before it the fact that the car was new, of 1928 model, when purchased by the plaintiff; that it had been used only about five months, had never been involved in another accident, and that it cost $1,190. They also had descriptions, quite in detail, of the injuries to the car from the mechanic who put the frame back in line, from the owner, and from an eyewitness of the collision. The injuries included a bent frame and bent forward axle, damaged front and rear mudguards on the left hand side, a broken bumper brace, dented body, injury to the steering gear, and broken braces supporting the engine. The car was driven away from the scene of the collision under its own power. The testimony leaves no doubt that the cars collided with a considerable degree of violence.

The record is brief and upon a careful examination we think that the jury had sufficient basis for an intelligent application of the established rule that the damages in this class of cases are the difference between the value of the car immediately before the collision and its value immediately after the collision. The description of the injuries presented to the jury a picture of the condition of the car after the collision quite as helpful in assessing the damages as the opinion of any expert automobile dealer. The defendant submitted the case as to damages upon the testimony introduced by the plaintiff, without request for instructions as to nominal damages.

The court does not perceive that the verdict is either so clearly excessive, or so clearly the result of mere conjecture as to warrant the substitution of its own judgment for the judgment of the jury and for interfering with their conclusion. Motion overruled. *Charles T. Smalley*, for plaintiff. *Frank A. Tirrell, S. Arthur Paul*, for defendant.

JOHN C. LOVENDALE *vs.* ERNEST C. BROWN.

Cumberland County. Decided June 10, 1930. Motion for new trial in action for criminal conversation. The record discloses convincing evidence from which the jury was warranted in finding that the defendant debauched and carnally knew the plaintiff's wife. No reason is found for disturbing the verdict against the defendant for $2,891.75. Motion overruled. *William Lyons*, for plaintiff. *Harry E. Nixon, Wilfred A. Hay*, for defendant.

CHARLES L. RICE *vs.* CHARLES E. KEENE

AND

HELEN DUGAN RICE *vs.* CHARLES E. KEENE.

Penobscot County. Decided June 28, 1930. These two actions, tried together, were brought to recover damages for in-

juries sustained by reason of defendant's automobile colliding with plaintiff, Helen Dugan Rice, a pedestrian crossing one of the principal streets of the City of Bangor. Her claim was based upon serious physical injuries received. The claim of Charles L. Rice, her husband, was for financial loss arising from the same cause.

A jury found for the plaintiffs, assessing damages in the case of Mrs. Rice in the sum of $3,600, and in her husband's case $1,000. The cases are here on exceptions and general motion.

The sole exception relates to the refusal of the presiding Justice to give the following instruction: "The defendant did not owe the duty to the plaintiff to be expecting the plaintiff to cross the street at a place other than at a crosswalk." The presiding Justice, after reading the requested instruction to the jury, said, "I give you that instruction with this modification. He was not bound to anticipate in advance that she would cross at a place other than the crosswalk; but if, in the exercise of ordinary diligence, he should have known of her crossing, whether on a crosswalk or not, then he is charged with that knowledge."

This was equivalent to a ruling that the mere fact that plaintiff was crossing the street at a place other than a crosswalk did not necessarily relieve defendant from a charge of negligence, which is so manifestly correct that it requires no discussion.

The general motion is not based on the premise that defendant was not negligent. The evidence is plenary on that point. It is based upon the contributory negligence of plaintiff and specifically upon the proposition that because she was, in contravention of a city ordinance, crossing the street at a place other than a crosswalk, her conduct was necessarily negligent and a contributing cause to the injury, precluding recovery of damages.

Such crossing is evidence of negligence, not proof of it. It is to be, and doubtless was, considered by the jury together with the other circumstances of the case and a conclusion was reached which we can not say was unwarranted.

Objection is made to the amount of the verdict in the case of the husband. His testimony was to the effect that the bills paid by him to a physician, to the hospital, and to nurses amounted to $716. Mrs. Rice was in the hospital thirty-two days and the injuries sus-

tained prevented her resuming her usual household duties for a much longer time. This situation involved additional expense, not testified to in detail, but very properly considered by the jury. Exceptions and motion overruled. *Fellows & Fellows*, for plaintiffs. *Michael Pilot*, *E. P. Murray*, for defendant.

ERNEST BOUCHER *vs.* MELVERN H. DALRYMPLE.

Aroostook County. Decided July 2, 1930. This was an action to recover damages for personal injuries received by the plaintiff on October 21, 1928, while riding in an automobile owned and driven by the defendant. The case is before this court on general motion after verdict for the plaintiff in the sum of two thousand five hundred ninety dollars ($2,590.00).

Two questions were necessarily involved, each of which was a pure question of fact. First, was there actionable negligence on the part of the defendant? This question has been answered in the affirmative. Second, was there contributory negligence on the plaintiff's part? To this question a negative answer has been made.

The evidence, although somewhat meager and unsatisfactory, presented sufficient facts from which the jury was justified in reaching the conclusion expressed in its verdict, which was not so manifestly against the weight of that evidence that it should not be permitted to stand.

In the absence of exceptions we must assume that the charge of the presiding Justice correctly stated the law and the issues involved.

We find no error as to the amount of the damages expressed in the verdict. The entry will therefore be, Motion overruled. *R. W. Shaw*, *J. B. Roberts*, for plaintiff. *Myer W. Epstein*, *Cyrus F. Small*, for defendant.

GEORGE D. O'ROAK *vs.* CHARLES S. GILLILAND.

Aroostook County. Decided July 7, 1930. This is an action on the case wherein the plaintiff charged the defendant with illegal arrest. The jury found a verdict for the plaintiff and assessed damages in the sum of three hundred four dollars and sixteen cents. The incident arose when the defendant, acting as moderator in a town meeting, caused the defendant to be arrested and removed from the hall, claiming authority to do so under the provisions of R. S., Chap. 4, Secs. 33, 34 and 35. The plaintiff charged the defendant with exceeding the authority vested in him as moderator. The case was one peculiarly within the province of a jury to hear, and to determine liability and the proper amount of damages. No questions of law are presented for our consideration. Motion for new trial overruled. *R. W. Shaw*, *T. S. Bridges*, for plaintiff. *Cyrus F. Small*, for defendant.

STATE *vs.* JAMES CARUSO.

Penobscot County. Decided July 25, 1930. The respondent, at the January Term of the Superior Court held at Bangor, was tried on a complaint issuing from the Bangor Municipal Court charging him with illegal possession of intoxicating liquors. A verdict of "Guilty" was returned by the jury.

While one of the deputy sheriffs, a State witness, was being cross-examined by the attorney for the respondent, he was asked the following question, which the Court did not permit him to answer:

"Q. In your official capacity as deputy sheriff, you did go to this place quite frequently prior to the time Mr. Caruso went in?"

The witness had several times testified as to the condition of the premises prior to the respondent's occupancy and had testified to his knowledge of several "hides," but had stated that the particular "hide" in which the liquor in this case was found was one of which he had no prior knowledge.

The case comes to this court on exceptions to the refusal of the presiding Justice to allow the witness to answer the question above quoted. There was considerable testimony showing the existence of old "hides" as well as the positive statement on the part of the witness that the "hide" in which the liquor was found was previously unknown to him. It had already appeared in evidence that the witness had frequently gone to the place prior to the respondent's occupancy. An affirmative answer to the above quoted question could have disclosed only what had already been stated. Moreover the respondent's attorney had already brought out from the same witness the answer which he was seeking to elicit from him as a reply to the question which is the basis of his exception, as appears by the following:

"Q. You testified, I think, in your other examination, Mr. Edgerly, that you had searched these premises off and on several times prior to the time Mr. Caruso occupied them as a tenant?"

"A. Yes, Sir."

The respondent was not prejudiced by the refusal to permit an answer to a question already answered.

The entry must therefore be, Exceptions overruled. Judgment for the State. *Albert G. Averill*, County Attorney, for the State. *Arthur L. Thayer*, for respondent.

ROSE TANOUS *vs.* MICHAEL E. NAGEM.

Aroostook County. Decided August 5, 1930. On a suit to recover damages for breach of defendant's promise to marry, a jury awarded the plaintiff $5,244.66.

Defendant argued a motion for a new trial on the ground that the damages found are excessive.

The plaintiff and defendant became engaged to marry in 1928, when she was about twenty-five years of age, and he some four years older.

She was in trade with a sister, in Van Buren, and he the proprietor of a wholesale candy business in Waterville. Against the young woman's character not a word is said. At a ceremonial, attended by a houseful of people of Van Buren and from other towns, defendant participated in a formal and public announcement of the betrothal. For about a year the lovers met and corresponded, and then defendant curtly and coldly announced to the plaintiff that he would not marry her.

There are no material contradictions in the testimony.

Plaintiff's standing in the community where she lives was detailed to the jury; and the defendant's statements were given them as to his property and prospects.

It can not be determined that the damages are excessive. Motion overruled. *N. H. Solman*, *A. S. Crawford*, for plaintiff. *James L. Boyle*, for defendant.

CHARLES W. GUSTIN *vs.* JOHN ASSKOV.

Androscoggin County. Decided August 12, 1930. The motorcycle of the plaintiff, while he himself was operating it, and an automotive truck, owned and then being operated by the defendant, were in collision on a highway in the western part of the town of Falmouth, on August 24, 1929.

Plaintiff, who sustained a broken left leg besides minor physical injuries, and whose motorcycle was somewhat damaged, has a verdict for $1,477.50.

At the trial, counsel for the defendant saved three exceptions, but the exceptions are not pressed. The case is presented, however, on general motion for a new trial.

Plaintiff and defendant were traveling the highway, each on his own proper side, in opposite directions. The jury could find, from sufficient evidence of probative nature, that, to enter a driveway, defendant turned his truck diagonally to the left and, proceeding without warning or notice across the road, in the direction of the

mouth of the driveway, crossed the path of the plaintiff, who, on seeing the truck, swerved, in effort to avoid collision, to the extreme right of the cement pavement.

The evidence, and the justifiable inferences, warranted finding, in rational rather than in distinctively mechanical conclusion, that the defendant did not act with the care expected of a man of ordinary prudence under the same or similar circumstances, in consequence whereof personal injury and property damage resulted to the plaintiff, who was acting with reasonable prudence and care.

Quite naturally, each member of the jury panel may well have asked himself why, at whichever of the distances, on his own version, defendant, when crossing the street, saw the motorcycle approaching, did defendant not stop his truck instead of attempting to cross, in danger imminent, in front of the motorcycle. Surely, as the jury could have found, opportunity to stop was ample, the motorcycle, as against the truck, having the right of way, and the truck, as defendant maintains, being all the while practically motionless.

Whether the defendant was guilty of negligence was under the circumstances a question of fact. This question the jury has answered affirmatively. Whether the plaintiff was guilty of contributory negligence was also a question of fact. The answer of the jury is in the negative. The answers must stand.

The award of damages is not clearly excessive. Actual pecuniary loss for medical and hospital expenses, and lost wages for a period of six weeks, is $399.00. Counsel for defendant makes the point that if plaintiff had earned wages during the period he would have incurred, in connection with earning the wages, expenses of $144.00. Even so, pecuniary loss is $255.00. The leg was broken in three places. Plaintiff testifies his ankle is still stiff. The doctors differ as to the time it is probable plaintiff will again have normal use of his limb. One year, two, five, maybe ten years, are the opinions in evidence, with a possibility of rheumatism meanwhile.

This is one of a class of cases in which it is difficult to establish the damages. One jury might fix the damages at one sum, and another at a different sum, and yet both act honestly. In such a case, the verdict is not disturbable. Exceptions overruled. Motion

overruled. *Harris M. Isaacson*, for plaintiff. *Eugene F. Martin*, for defendant.

CHARLES F. HASTY *vs.* ERNEST NOWELL ET ALS.

York County. Decided August 12, 1930. Trespass to realty. Plaintiff has verdict for $148.18. One of the defendants, pressing the usual general motion grounds, moves for a new trial. There was evidence enough to furnish a basis for the finding of an unwarrantable entry on the land of the plaintiff. The injury consisted in tearing down a fence, swamping, road making, and cutting and carrying away trees. The amount of damages, in a case of this kind, rests largely in the discretion of the jury, whose verdict is not disturbable as excessive unless the award, considered in connection with the facts in evidence, creates a belief that the jury was influenced by improper motives, or fell into some error. In this case, there is no room for any such presumption. The verdict is not clearly excessive. Motion overruled. *Matthews & Varney*, for plaintiff. *Ray P. Hanscom*, *E. P. Spinney*, *F. R. Miller*, for defendants.

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

York County. Decided October 30, 1930. When this case was here for the second time, this being the third time, the verdict which the jury had returned for the plaintiff was set aside and a new trial granted. 128 Me., 453.

At the new trial, on the close of all the evidence, counsel for the defendant moved the presiding Justice to order, and the Justice ordered a verdict for the defendant. Opposing counsel saved an exception.

When, for the reason that the jury verdict is contrary to evidence, or against the weight of the evidence, the Law Court sets the verdict aside and grants another trial, the decision of the appellate tribunal becomes the law of the case to be followed by the trial court on the new trial, unless the facts appearing on such trial are essentially different from those which were before the Law Court when it rendered its decision.

The defendant, a Portland surgeon, was called to Biddeford to remove the tonsils of the plaintiff, which defendant did, attended by assistants and nurses, on January 6, 1927.

While, preliminarily to operating on his tonsils, plaintiff was being etherized, his body became blue and rigid, due to insufficient aeration of his blood. In this emergency, defendant inserted in the mouth of plaintiff, to open it, and keep it open while breathing was being restored, a mechanical appliance which witnesses and counsel alike call a mouth gag.

This appliance consisted of two steel prongs with handles, movable on a pin, by which they were held together. A rubber tube, about two inches long, encircled each prong, to protect the teeth of the patient in case of use of the appliance to pry open his jaw.

Cyanosis overcome, more ether was administered, and tonsillotomy begun.

One of the tubes was missing, but how it had become detached from its prong, or where it was, was not known.

The tube was in a subdivision of the windpipe of the plaintiff. Eleven days later, in a Massachusetts institution to which defendant had taken plaintiff, the tube was removed from his bronchus.

Plaintiff contends that defendant was unskillful and actionably negligent, (1) in selecting a mouth gag which, whatever it may originally have been, was then an unsuitable instrument; (2) in his inspection and "preparation" and use of the instrument; (3) in failure to make a proper diagnosis after the tubing was lost.

Viewing the evidence in the light most favorable for plaintiff, there is nothing to warrant finding that the defendant did not possess that reasonable degree of learning and skill which others of his profession ordinarily possessed in the vicinity.

The weight of proof, on previous review by this court of the

evidence, did not establish any failure by the defendant to exercise his skill and apply his knowledge to the case.

The evidence on the last trial did not differ essentially from that on the immediately preceding trial, either in weight or in proving new facts. Therefore, the verdict for the defendant was properly directed. Exception overruled. *Homer T. Waterhouse, Hiram Willard, Cecil J. Siddall,* for plaintiff. *Locke, Perkins & Williamson,* for defendant.

OAKES ET ALS *vs.* LEAVITT.

York County. Decided October 30, 1930. The record in this case is apparently incomplete. In its present form it discloses no ground for the exercise of the equitable jurisdiction of the Superior Court. The report is discharged. So ordered. *Raymond S. Oakes, John V. Tucker, Cecil J. Siddall,* for plaintiffs. *Laurence C. Allen,* for defendant.

MARY E. BRENNAN, LIBELANT
vs.
JOHN L. BRENNAN, LIBELEE
AND GREAT NORTHERN PAPER COMPANY, TRUSTEE.

Penobscot County. Decided November 18, 1930. The case comes up on exceptions to the granting of a motion to dismiss a divorce libel on the ground that the residence of the libelee was not stated in the libel, as provided in Sec. 4 of Chap. 65, R. S. (1916), and that therefore the court lacked jurisdiction.

A divorce libel in the usual form and signed by the libelant was inserted in a writ of attachment in which the Great Northern Paper Company was named as Trustee. The writ contained the command "to attach the goods and estate of John L. Brennan of Brewer, in

the County of Penobscot and State of Maine," but in the body of the libel or petition the residence of the libelee was not named, nor was the residence stated in any place other than as above indicated.

The docket entries show that the libelee, through counsel, entered a general appearance. Actual notice was obtained on the libelee as required by the above statute.

The contention of the libelee is that a libel for divorce is a complete petition in itself and should set out all matters which are required by statute, and that the residence of the libelee not being named in the libel or petition, such omission or failure can not be cured by the fact that the residence is named or stated in the writ in which the libel is inserted, the evident contention being that the writ is no part of the libel and that the statement as to the residence in the writ is not in compliance with the statute which provides that the residence, when it can be ascertained, "shall be named in the libel."

The contention of the libelant was in effect that when the libel was inserted in the writ the two papers were merged in legal effect and formed one instrument, that instrument still being the libel, and that it was sufficient compliance with the statute that the residence was named in that part called the writ.

After full consideration of the case, a majority of the court having failed to agree as to either contention, the entry will be, Exceptions overruled. *George E. Thompson*, for libelant. *Michael Pilot*, for libelee.

GULF REFINING COMPANY *vs.* THE RAY MOTOR COMPANY.

Penobscot County. Decided November 21, 1930. This case is before this court on exceptions by the plaintiff to the allowance of a motion for a nonsuit. An automobile of the plaintiff, driven by one of its employees, collided with a car driven by one Leo L. Whelden. Defendant's brief admits that the accident happened because of the negligence of Whelden.

It appears that Whelden, who was considering the purchase of an automobile, went to the defendant's place of business and was shown a secondhand Chandler car by one Chapman. There is a dispute as to Chapman's status with the defendant company, but we will assume that he was a duly qualified salesman and had authority to do what he did. He and Whelden took the car out and drove it a short distance, and the prospective purchaser said that it appeared to be all right, but that he would like to have his wife see it. He asked Chapman to drive it over and show it to his wife, but Chapman said that he was unable to do so and told Whelden to take the car over himself. Whelden drove off in the car, but instead of following out his laudable purpose of obtaining his wife's approval for his contemplated purchase, met a friend, had some drinks of "split" with him, and then in attempting to get home ran into the car of the plaintiff and ended his adventure in jail.

On just what theory the defendant can be held liable for Whelden's acts it is difficult to see. Counsel for the plaintiff contend that Whelden was either acting as agent for the defendant in selling the car to his wife, or that the defendant was liable in entrusting the car to Whelden who was an improper person to drive it.

As to the first contention, the evidence clearly shows that Whelden himself was expecting to make the purchase. To hold that he was acting as agent for the company in persuading his wife to buy the car, not only finds no support in the evidence but contemplates a relationship of the parties which even to the casual observer seems absurd. As to the second claim, it is sufficient to note that Whelden became intoxicated after he left Chapman, but not before. His plan to get his wife's approval was so highly commendable that Chapman surely had no reason to expect such a sudden change of heart as seems to have taken place. It is admitted that Whelden had no operator's license. If such a fact has any bearing, it is sufficient to say that there is no evidence that either Chapman or anyone else connected with the defendant knew of it. The motion for a nonsuit was properly granted. Exceptions overruled. *George E. Thompson, Clinton C. Stevens*, for plaintiff. *Gillin & Gillin*, for defendant.

MARGARET ROBERTSON, ADMINISTRATRIX *vs.* ARMOUR COMPANY.

Penobscot County. Decided December 1, 1930. At the close of the plaintiff's case, the presiding Justice ordered a nonsuit. An exception to this ruling brings the case here.

The evidence permits of but one finding. Saturday afternoon, July 28, 1928, the plaintiff's intestate was killed when one of the defendant's trucks on which he was riding collided with a telephone pole on South Main Street in Brewer. James E. Doucette, the driver of the truck and an employee of the defendant company, at the time of the accident was at liberty from service, using the truck for his own personal ends not within the scope of his employment. Contrary to express orders from the Company, he had invited the plaintiff and two other men to ride on the truck as his guests.

Upon these facts the defendant is not responsible for its servant's acts, and the question of the latter's negligence and the due care of the plaintiff are immaterial. Exception overruled. *George E. Thompson*, *Benjamin W. Blanchard*, for plaintiff. *George F. Eaton*, for defendant.

DOMINIQUE J. CASAVANT

vs.

EVA L. SCOTT, FREEMONT H. BENNETT AND HELEN A. BENNETT.

Androscoggin County. Decided December 5, 1930. This case comes up on appeal from the decree of a sitting Justice dismissing, on the ground that certain proper and necessary persons were not made parties, a bill in equity brought for specific performance of a contract to convey real estate.

The basis of dismissal being as stated, and it clearly appearing that certain persons in interest are not parties to the bill, the entry must be, Appeal dismissed. Decree below affirmed. *Frank A. Morey*, for plaintiff. *B. L. Berman*, for defendants.

ERNEST D. LEE *vs.* CYRUS E. WALKER.

Somerset County. Decided December 31, 1930. The parties to the trade and thirteen witnesses testified to the terms of purchase of a pair of mules; what representations as to the mules were made; how their traits and habits, both natural and acquired, conformed to the representations, and as to the rescission of the contract.

The jury brought in a verdict which would cause defendant to return the equivalent of the instalment paid on the purchase price, with interest, and the defendant, vendor of the mules, presents the case on motion, alleging that the verdict is against the evidence and the law.

That rescission was effected and without prejudicial delay is evident, if it be found there were representations of warranty and failure of the animals to come up to the warranty. The long record has been minutely studied, and it is found there was evidence given the jury on both sides of every question properly in issue.

These were all questions of fact; and perceiving no indication of error on the part of the jury we order entry. Motion overruled. *Merrill & Merrill*, for plaintiff. *Ames & Ames*, for defendant.

REVISED RULES
OF THE
SUPREME JUDICIAL
AND
SUPERIOR COURTS
OF THE
STATE OF MAINE

The following rules are hereby adopted, established and recorded as the rules governing procedure in trials and the conduct of business in the Supreme Judicial and Superior Courts of the State of Maine in all matters within their jurisdiction.

1

Time of the Entry of Actions

All writs and libels shall be filed in the clerk's office forty-eight hours at least, exclusive of Sundays, before the first day of the term, and no civil action shall be entered after the first day of the term, unless by consent of the adverse party and by leave of the court; or unless the court shall allow the same upon proof that the entry was prevented by inevitable accident, or for other sufficient causes; and in all cases the Christian and surname of the parties and of each trustee shall be entered upon the docket. Writs are to be filed as provided above before entry of the action and shall not be taken from the files, except by special leave of court. Any action may be made a mis-entry at any time during the first term, upon proof that the action was settled before the sitting of the court.

2

Entry of the Attorney's Name on the Clerk's Docket Change of Attorney

Upon the entry of every action or appeal, the name of the plaintiff's or appellant's attorney shall be entered at the same time on the clerk's docket, and in default thereof a nonsuit may be entered; and after entry of the action or appeal, before the call of the new docket, the attorney of the defendant or respondent shall cause his name to be entered on the same docket as such attorney, and if it be not so entered, the defendant or respondent may be defaulted. And if either party shall change his attorney, pending the suit, the name of the new attorney shall be substituted on the docket for that of the former attorney, and notice thereof given to the adverse party in writing. And until such notice of the change of an attorney, all notices given to or by the attorney first appointed, shall be considered in all respects as notice to or from his client, excepting only such cases in which by law the notice is required to be given to the party personally. *Provided, however*, that nothing in this rule contained shall be construed to prevent either party in a suit from appearing for himself, in the manner provided by law; and in such case the party so appearing shall be subject to all and the same rules that are or may be provided for attorneys in like cases, so far as the same are applicable.

3

Amendments in Matters of Form

Amendments in matters of form will be allowed, as of course, on motion; but if the defect or want of form be shown as cause of demurrer, the court will impose terms on the party amending.

4

Amendments in Matters of Substance

Amendments in matters of substance may be made, in the discretion of the court, on payments of costs, or such other terms as

the court shall impose; but if applied for after joinder of an issue of fact or law, the court will in its discretion refuse the application or grant it upon special terms; and when either party amends, the other party shall be entitled also to amend, if his case requires it. No new count or amendment of a declaration will be allowed, unless it be consistent with the original declaration, and for the same cause of action.

5

Pleas and Motions in Abatement

Pleas or motions in abatement, or to the jurisdiction, in actions originally brought in this court, must be filed within two days after the entry of the action, the day of the entry to be reckoned as one, and if alleging matter of fact not apparent on the face of the record, shall be verified by affidavit.

6

Time of Filing Pleas

In all cases in order for trial at any term, the pleadings of the defendant, except in cases where the general issue without brief statement is to be pleaded, shall be filed within the first three days of the term, and failure to so file pleadings shall be, in the discretion of the court, cause for continuance.

7

Obtaining a Rule to Plead

Either party may obtain a rule on the other to plead, reply, rejoin, etc., within a given time to be prescribed by the court; and if the party so required neglect to file his pleadings at the time, all his prior pleadings shall be struck out, and judgment entered of nonsuit or default, as the case may require, unless the court for good cause shown shall enlarge the rule.

8

Time of Filing Amendments or Pleadings

When an action shall be continued with leave to amend the declaration or pleadings, or for the purpose of making a special plea, replication, etc., if no time be expressly assigned for filing such amendment or pleadings, the same shall be filed in the clerk's office by the middle of the vacation after the term when the order is made; and, in such case, the adverse party shall file his plea to the amended declaration, or his answer to the plea, replication, etc., as the case may be, by the first day of the term to which the action is continued as aforesaid. And if either party neglect to comply with this rule, all his prior pleadings shall be struck out, and judgment entered of nonsuit or default, as the case may require; unless the court for good cause shown, shall allow further time for filing such amendment, or other pleadings.

9

Specifications of Defense

Parties pleading the general issue may be required to file, in addition thereto, a brief specification of the nature and grounds of their defense; and shall, in all cases, be confined on the trial of the action to the grounds of defense therein set forth; and all matters set forth in the writ and declaration, which are not specifically denied, shall be regarded as admitted for the purposes of the trial.

10

Denial of Signatures, and Partnerships

No party shall be permitted at the trial of any cause to call for proof of the signature or execution of any paper declared on or filed in set-off, or mentioned in specifications filed by either party, or of the existence of a partnership alleged in the writ, declaration or specifications of defense, when the names of the members thereof are set forth, unless such party, at least ten days before

such trial, shall make and file affidavit that he has reason to believe, and does believe, that such signature or execution is not genuine, or that said paper has been mutilated or altered since it was executed, or that such partnership does not exist. A witness examined in chief only as to the signature to or execution of a paper, shall be cross-examined by the adverse party only as to such signature or execution.

11

Specifications by Plaintiff

In actions of assumpsit on the common counts, a specification of the matters to be proved in support thereof shall be filed, on motion of the defendant, within such time as the court shall order. And in actions upon an account annexed, one copy of the specifications shall be furnished by the party presenting the same, for the court, and one other copy for the jury.

12

Trustee Disclosures

In cases commenced by trustee process, when any trustee shall present himself for examination, he or his attorney shall give written notice thereof to the attorney for the plaintiff, or in his absence cause the same to be noted on the docket; and, upon motion, the court may fix a time for the disclosure to be made. Before the disclosure is presented to the court for adjudication, there shall be minuted upon the back thereof the names of the counsel for the plaintiff, and such trustee, with the date of the service of the writ upon him, and the number of the action upon the docket.

13

Costs Upon Continuance

Unless for cause shown, no costs shall be allowed either party for any term at *nisi prius* when a case is continued by agreement of parties entered on the docket. When a case is under an order of

reference to a referee or auditor, costs shall be allowed for the terms at which the rule is issued and the report filed, but not for the intervening terms. Costs shall be allowed for only one term in the Law Court.

14

Time for Making Motions for Continuance

Motions for continuance of any civil action shall be made at the opening of the court on the morning of the second day of the term unless the cause shall come in course to be disposed of in the order of the docket on the first day. But when the cause or ground of the motion shall first exist or become known to the party after the time prescribed by this rule, the motion shall be made as soon afterward as it can be made, according to the course of the court; and whenever an action is continued on such motion, after the time above prescribed, the party making the motion shall not be allowed any costs for his travel and attendance for that term, unless the continuance is ordered on account of some fault or misconduct in the adverse party.

15

Affidavit to Support Motions for Continuance

No motion for a continuance based on the want of material testimony will be sustained, unless supported by an affidavit which shall state the name of the witness, if known, whose testimony is wanted, the particular facts he is expected to prove, with the grounds of such expectation, and the endeavors and means which have been used to procure his attendance or deposition, to the end that the court may judge whether due diligence has been used for that purpose.

No counter affidavit shall be admitted to contradict the statement of what the absent witness is expected to prove; but any of the other facts stated in such affidavit may be disproved by the party objecting to the continuance. And no action shall be continued on such motion if the adverse party will admit that the absent witness would, if present, testify to the facts stated in the

affidavit, and will agree that the same shall be received and considered as evidence on the trial, in like manner as if the witness were present and had testified thereto; and such agreement shall be made in writing at the foot of the affidavit, and signed by the party, or his counsel or attorney, if required. And the same rule shall apply, *mutatis mutandis*, when the motion is based on the want of any material document, paper or other evidence that might be used on the trial.

16

Evidence to Support Motions Based on Facts

No motion based on facts will be heard unless the facts are verified by affidavit, or are apparent from the record or from the papers on file in the case, or are agreed and stated in writing signed by the parties or their attorneys. The same rule will be applied as to all facts relied on in opposing any motion.

17

Motions for New Trials

Motions for new trials must be in writing and assign the reasons therefor.

When a motion is made to have a verdict set aside as against law or the evidence, it must be filed during the term at which the verdict is rendered. Such a motion may be addressed to the presiding justice or to the Law Court. If addressed to the presiding justice, it shall be heard either in term time or vacation at his discretion and in either case, the decision may be rendered in vacation and no exceptions lie to such decision and no appeal except in prosecutions for felony. If addressed to the Law Court, the party making it shall cause a report of the whole evidence in the case to be prepared within such time as the presiding justice shall by special order direct, and, if no such order is made, it must be done within thirty days after the adjournment of the court; if not so done, the motion may be regarded as withdrawn, and the clerk, at a subsequent term, may be directed to enter judgment on the verdict.

When a motion for new trial is made for any other cause, it may be filed with the clerk at any time before final judgment, and the clerk shall give immediate written notice thereof by mail or otherwise to the adverse party or his attorney. The evidence in support thereof, or in rebuttal or impeachment, shall be taken within such time and in such manner as the court, or any justice thereof in vacation, shall order, or the motion shall be regarded as withdrawn.

18

Exceptions

Exceptions to the admission or exclusion of evidence must be noted at the time the ruling is made, or all objections thereto will be regarded as waived.

Exceptions to any opinion, direction or omission of the presiding justice in his charge to the jury must be noted before the jury, or all objections thereto will be regarded as waived.

Requested instructions shall be submitted in writing.

19

Motions in Arrest of Judgment in Criminal Cases

Motions in arrest of judgment in criminal cases shall be filed and presented to the court for adjudication during the term at which the accused has been found guilty, whether exceptions be or be not filed and allowed; and if not so presented, the right to file the same shall be considered as waived.

20

Time of Filing Motions, Presenting Petitions, Etc.

Motions, petitions, reports of referees, applications for commissioners to take depositions, surveys, or for views by the jury in cases touching the realty, and all like applications, shall be made and presented at the opening of the court on the morning of the second day of the term; provided, that when the cause or ground

of such motion or other application shall first exist or become known to the party after the time in this rule appointed for making the same, it may be made at any subsequent time. But motions or applications such as from their nature require no notice previous to granting the same, may be made at the opening of the court on the morning of each day.

21

Objections to Reports

Objections to any report offered to the court for acceptance, shall be made in writing and filed with the clerk and shall set forth specifically the grounds of the objections, and these only shall be considered by the court.

22

Notice Previous to Motions

When any motion is made in relation to any civil action at the times specifically assigned for such motions by the rules of this court, no previous notice need be given to the adverse party. But the court, if notice have not been given, will allow time to oppose the motion if the case shall require it. Where, however, for any special cause, such motion may, by the proviso of any rule, be made at a subsequent time, it will not be heard unless seasonable notice thereof shall have been given to the adverse party.

23

Depositions Taken in Term Time

Depositions may be taken for the causes and in the manner by law prescribed, in term time, as well as in vacation; provided, they be taken in the town in which the court is holden, and at an hour when the court is not actually in session. But neither party shall be required during term time to attend the taking of a deposition, at any other time than is above provided, unless the court, upon good cause shown, shall specially order the deposition to be taken.

24

Commissions to Take Depositions

The court will grant commissions to take the depositions of witnesses and will appoint the commissioners. In vacation a commission may be issued upon application to any justice of the court, in the same manner as may be granted in term time; or either party, upon application to the clerk, may obtain a like commission; but, in the latter case, unless the parties shall agree on the person to whom the commission shall issue, the commission shall be directed to any judge of any court of record. In each case the evidence, by the testimony of witnesses shall be taken upon interrogatories to be filed in the clerk's office by the party applying for the commission, and upon such cross-interrogatories as shall be filed by the adverse party. A copy of all the interrogatories shall be annexed to the deposition. No such commission shall issue except upon interrogatories filed as aforesaid by the party applying and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to cross-interrogatories within fourteen days from the service of such notice.

No deposition taken out of the State without such commission shall be admitted in evidence unless the same were taken by some justice of the peace, notary public, or other officer, legally empowered to take depositions or affidavits in the state or county in which the deposition was taken, nor unless the adverse party was present, or was duly and seasonably notified, but unreasonably neglected to attend.

25

Filing Depositions

Depositions shall be opened and filed by the clerk at the term for which they are taken. If the action in which they are to be used shall be continued, such depositions shall remain on file and be subject to objections when offered at the trial as at the term when filed; and if not so left on the files they shall not be used by the party who originally produced them. The party producing a

deposition may, if he see fit, withdraw it during the same term in which it is originally filed, in which case it shall not be used by either party.

26

Use of Copies of Deeds

In actions touching the realty, office copies of deeds material to the issue, from the registry of deeds, may be read in evidence without proof of their execution where the party offering the same is not a grantee in the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs.

27

Notice to Produce Written Evidence

Where written evidence is in the hands of the adverse party, no evidence of its contents will be admitted unless previous notice to produce it on trial shall have been given to the adverse party or his attorney, nor shall counsel be allowed to comment upon a refusal to produce such evidence, without first proving such notice.

28

Trial List and Order of Trials

All actions, except libels for divorce, shall be considered in order for trial at the return term, unless the court shall otherwise direct, when the party desiring it shall have given written notice thereof to the adverse party. Such notice shall be given by a plaintiff thirty days, and by a defendant ten days, before the sitting of the court. Cases brought up from an inferior court by appeal or by removal shall be in order for trial at the term of entry without such notice. Libels for divorce shall not be in order for hearing until the second term, unless service has been completed at least sixty days before the return term.

In all counties except Cumberland, immediately after the call of the docket, a trial list of all actions to be tried by the jury shall be

made, and a time assigned for the trial of each action upon the list, and all other actions shall be tried or otherwise disposed of in the order in which they stand upon the docket.

Civil cases shall be assigned for trial in the County of Cumberland in the following manner:

On the first day of each term, the clerk shall present a trial list made up of such cases as shall have, at least three days exclusive of Sunday, theretofore been submitted to him in writing by counsel for either party; requests for assignment which do not give the docket number, name of plaintiff and defendant, may be disregarded.

29

Taxation of Costs

Bills of costs shall be taxed by the clerk upon a bill to be made out by the party entitled to them, if he shall present such bill; otherwise upon inspection of the proceedings and files. No costs shall be taxed without notice to the adverse party to be present, provided he shall have notified the clerk in writing of his desire to be present at the taxation thereof.

30

Day of Rendition of Judgment

All judgments on whatever day given shall date and be entered as of the last day of the term unless upon written motion stating the reason therefor an earlier day be specially ordered.

31

Custody of Papers by the Clerk

The clerk shall be answerable for all records and papers filed in court, or in his office; and they shall not be lent by him, nor taken from his custody, unless by special order of court; but the parties may at all times have copies. No original writ or process filed in the clerk's office shall be taken from the files for the purpose of service, but attested copies thereof shall be made for that purpose

and the expense thereof shall be included in the taxable costs. Depositions may be withdrawn by the party introducing them at the same term at which they are filed; but while remaining on the files they shall be open to the inspection of either party at all reasonable hours.

32

Filing Papers and Recording Judgments

In order to enable the clerks to make up and complete their records within the time prescribed by law, it shall be the duty of the prevailing party forthwith to file with the clerk all papers and documents necessary to enable him to make up and enter the judgment and to complete the record of the case. If the same are not so filed within three months after judgment shall have been ordered, the clerk shall make a memorandum of the fact on the record, and the judgment shall not be afterwards recorded unless upon a petition to the court at a subsequent term and after notice to the adverse party, the court shall order it to be recorded. No execution shall issue until the papers are filed as aforesaid. When a judgment shall be recorded upon such petition the clerk shall enter the same, together with the order of court for recording it, among the records of the term in which the order is passed, with apt references in the index and book of records of the term in which the judgment was awarded, so that the same may be readily found. When so recorded, the judgment shall be considered in all respects as of the term in which it was originally awarded. The party delinquent in such case shall pay to the clerk the costs of recording the judgment anew, the costs on the petition and also the costs of the adverse party if he shall attend to answer thereto.

33

Writs of Venire Facias

Every *venire facias* shall be made returnable into the clerk's office by ten o'clock in the forenoon of the first day of the term, and the jurors shall be required to attend at that time, unless some

justice of the court shall designate a different day or hour, and in such case the venire shall specify such day and hour. Venires issued in term time may be returnable forthwith or upon any day or hour as ordered by the court.

34

Capias Upon Indictments and Scire Facias Upon Recognizances

On indictments found by the grand jury, the clerk shall, ex-officio, issue a capias without delay. In vacation, he shall also issue capias against respondents not under bail, when requested by the county attorney. When a respondent has been sentenced to imprisonment but the mittimus has been stayed pending exceptions, or when a prisoner has been admitted to bail awaiting the decision of the Law Court on his exceptions, the clerk upon receipt of the certificate of decision of the Law Court overruling the exceptions shall issue the mittimus forthwith.

When default is made by any party under recognizance in any criminal proceeding, the clerk shall in like manner issue a *scire facias* thereon, returnable to the next term, unless the court shall make a special order to the contrary and when not otherwise provided by statute.

35

Examination of Witnesses, Etc.

The examination and cross-examination of each witness shall be conducted by one counsel only on each side, except by special leave of court, and counsel shall stand while so examining or cross-examining unless otherwise permitted by the court.

The re-examination of a witness, whether direct or cross, shall be limited to matters brought out in the last examination by the other party, unless by special leave of court.

36

Order of Evidence

A party having rested his case can not afterwards introduce further evidence except in rebuttal unless by leave of the court.

37

Limitation of Time for Argument

In all trials of causes, whether by jury or by the court, after the evidence is closed counsel for the moving party (and in criminal cases the attorney for the State) shall argue and shall be limited to fifty minutes. Opposing counsel shall then argue and be limited to one hour; counsel for the moving party (or in criminal cases counsel for the State) shall be allowed ten minutes for rebuttal argument. The court may, before the commencement of argument, for good cause shown, allow further time, which shall in all cases be fixed and definite.

38

Attorneys Not to be Bail or Witnesses

No attorney shall give bail or recognize as principal or surety in any criminal matter in which he is employed as counsel or attorney, nor shall he become bail in any civil suit.

No attorney or counsellor shall be permitted to take any part in the conduct of a cause before a jury in which he is a witness for his client, except by special leave of the court.

39

Assessment of Damages by Clerk

When the defendant is defaulted by agreement to be heard in damages by the clerk or an assessor instead of the presiding justice or a jury, the clerk or assessor may, on reasonable notice, hear the parties in vacation and assess the damages; and judgment may be entered on such assessment as of the term of the default without

the right of a party aggrieved to have the assessment returned to the next term for acceptance or rejection, unless such right is reserved.

40

Establishing Truth of Exceptions

A party desiring to establish before the Law Court the truth of exceptions presented to a justice at *nisi prius* and not allowed by him shall within ten days after notice of refusal to allow them file in the court where they were taken his petition supported by affidavit and setting forth in full the bill of exceptions presented and all material facts relating thereto, and give a copy thereof to the opposite party or his attorney of record. A transcript of so much of the official stenographer's notes as relates to the exceptions must be filed with the petition. The affidavit may be made by the party or his attorney of record but must be positive, based upon actual knowledge and not upon information or belief.

Within ten days after being served with a copy of the petition the opposite party may if he desire file in the same court an answer verified by a similar affidavit and setting forth any material facts against the petition.

Upon motion of either party any justice of the court may appoint a commissioner to take the deposition of such witnesses as may be produced by either party, the depositions to be filed in the court where the exceptions were taken.

The case thus made shall be entered and heard at the next law term upon certified copies as in other cases. If the truth of the exceptions be established they will be heard and judgment rendered thereon as if originally allowed.

41

Disposition of Dormant Cases, Etc.

Cases remaining on the docket for a period of two years or more with nothing done, shall be dismissed for want of prosecution unless good cause be shown to the contrary. Motions for further

continuance for judgment after the term of the default must be in writing, stating the reasons therefor. Motions for renewal of orders of notice also must be in writing, stating the reasons why the former order was not complied with.

42

STIPULATIONS IN RULES OF REFERENCE

In references of cases by rule of court, the decision of the referee upon all questions of law and fact shall be final unless the right to except as to questions of law is specifically reserved and so entered on the docket, but the referee may find the facts and report questions of law for decision by the court.

43

NATURALIZATION

The second day of each term of the court for any county is fixed as the stated day on which final action may be had on petitions for naturalization as provided by Federal law, except that the third day of the September term for Piscataquis County, the fourth day of the September term for Franklin County, the third day of the October term for York County, the fourth day of the October term for Waldo County, the third day of the November term for Penobscot County, the fourth day of the November term for Lincoln County, the fifth day of the November term for Knox County, the third day of the April term for Kennebec County, the fourth day of the April term for Aroostook County, the fifth day of the April term for Penobscot County, the third day of the May term for Somerset County, the eighth day of the May term for Oxford County, and the fourth day of the June term for Washington County are so designated.

44

COURT RECORDS

Clerks shall, without unreasonable delay, after the rendition of final judgment in civil actions, make extended records of proceedings in court in real actions, including actions for the foreclosure

of mortgages, in complaints for flowage, libels for divorce and annulment of marriage, and petitions for partition. In all other civil cases at law, it shall be sufficient to record the names of the parties, date of the writ, petition or complaint, the term of the court at which it was entered, date of service or notice to defendant, verdict of jury, if any, the date of rendition of judgment, its nature and amount, and the number of the case upon the docket at the judgment term.

Upon application of any party in any civil cause, either at law or in equity, the court or a justice thereof in vacation, may upon or within ninety days after judgment or final decree order a full record in any case, or such additional record as to him may seem proper.

45

Practice in Taking Bail

Every bail commissioner upon taking bail shall either endorse upon the warrant or precept upon which the prisoner is held the following facts: Date and place (town or city) of taking bail, court and term at which prisoner is required to appear, offense of which he is accused, amount of bail, names and residences of principal and each surety; or if the bail is taken after arrest and before the issuing of a warrant, shall forthwith deliver to the officer having the prisoner in charge a printed memorandum signed by such bail commissioner of the following form:

State of Maine

.....ss.

Memorandum of Recognizance
Date.....

Offense .....
Amount of Bail $.....
Returnable .....
.....of.....Principal.
.....of.....Surety
.....of.....Surety
..... Bail Commissioner.

All recognizances taken by bail commissioners shall be reduced to writing in the usual form and be certified to by the commissioner and returned to the county attorney or to the magistrate or clerk of the court at or before the time at which the principal is required to appear.

46

Schedule of Fees

Writ of attachment including power of attorney, declaration, attorney's fees and blank	$3.54
Libel, petition or complaint	3.50
Writ of replevin and bond	4.58
Travel: For every ten miles to and from court, observing the rule prescribed in R. S.	.33
Attendance: For each term until the action is disposed of, except as otherwise provided in these rules	3.50

No costs shall be allowed after a defendant is defaulted and the action continued for judgment.

Clerk

For use of Counties

Copy of writ, libel or other process, or abstract thereof, together with copy of order of notice thereon	$1.00
Entry, *nisi prius*	.60
Exemplifying copies, not less than	1.00
Commission to referee, auditor, surveyor or other officer appointed by the court	.50
Warrant to make partition	1.00
Process to enforce a lien on personal property	1.00
Each certificate attached to renewed execution	.25
Copy of decree of divorce or certificate of same	1.00
Computing damages and taxing costs	.25
Writ of execution	.15

Execution for possession	.25
Writ of restitution	.40
Writ of supersedeas	.50
Writ of protection	1.00
Writ of seisin of dower	1.00
Subpoena	.10

Miscellaneous

Service as taxed by the officer, subject to correction.

Surveyors, commissioners and other officers appointed by the court, fees as charged by them subject to correction.

Costs of reference as reported by the referee, and allowed by a justice of the court.

For hearing in damages or in costs, the clerk shall have such reasonable compensation as a justice of the court may allow, and the same shall be paid by the county.

Transcripts of cases made by the official stenographers, and printed copies certified by the clerks to the Law Court, may be taxed for in the bill of costs at the rate actually paid to the stenographers for transcripts, not exceeding the rate established by statute, and at the rate actually paid to the printers for the printing, not exceeding, however, ninety cents per page for pages averaging two hundred and forty words each (exclusive of initials "Q" and "A" for Question and Answer), together with compensation to the clerks for preparing manuscripts for the printer when necessary, and for correcting proof and certifying, at the rate of ten cents per printed page, for pages averaging two hundred and forty words each. If a party prints his own case, there may be taxed, also, compensation paid to the clerk for copies for the printer of writs, pleadings and exhibits which are in his official custody, but not of the transcript of the testimony.

RULES APPLICABLE
ONLY TO
PROCEEDINGS
IN
SUPREME JUDICIAL COURT

1

Admission to the Bar

Applications for admission to the Bar may be heard by single justices on rule days.

2

Regular Sessions of the Supreme Judicial Court

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 clerk of courts shall so notify the chief justice, who will assign a justice to so preside.

3

Sessions of the Law Court

Prior to the first day of December of each year, the chief justice shall give notice of the times and places at which the Supreme Judicial Court shall sit as a Law Court during the ensuing year.

4

Limitation of Time for Argument

Oral arguments before the Law Court, including arguments in reply, are limited to one hour for each side, unless for cause shown the court shall fix a longer time before the arguments are begun.

5

Copies for the Law Court

No cause standing for argument on the law docket will be heard unless at least fourteen days before the commencement of the term at which such cause would be in order for hearing the clerk of the Law Court has been furnished with twelve copies of the case, properly indexed, printed or fairly and legibly written or typewritten on good paper of the size of 8 x 10½ inches, containing the substance of all the material pleadings, facts and documents on which the parties rely.

In cases of facts agreed and stated by the parties, or reported by consent of the parties, it shall be the duty of the plaintiff to furnish the papers or abstracts for the court; and in all other cases the same shall be done by the party who moves for a new trial, or who holds the affirmative upon the question to be argued. If the party whose duty it is to furnish the papers neglects so to do, the adverse party may furnish them. If the party whose duty it is neglects to furnish them, as required by this rule, he shall not have any costs for that term, and further he shall be liable to be nonsuited, defaulted, or have judgment entered against him for want of prosecution, or such other judgment as the case may require.

This rule shall take effect December 1, 1930.

6

Briefs for the Law Court

Counsel for each party, at least fourteen days before the commencement of the term at which a case is in order for hearing, shall furnish to the clerk of the Law Court twelve copies of a brief, properly indexed, and fairly and legibly printed, written or typewritten, on good paper of the size of 8 x 10½ inches, which said brief shall contain in order here stated,

1. A concise abstract or statement of the case, presenting succinctly the questions involved in the manner in which they are raised.

2. A summary of the points of law relied upon, noting under each point the authorities to be cited to sustain it.

3. A brief of the argument exhibiting a clear statement of the points, both of law and fact, to be discussed, with a reference to the pages of the record and the evidence and authorities relied upon in support of each point.

Either party may at or before the argument of the cause, file a supplemental brief strictly confined to matter in reply to the brief of the opposite party.

Upon receipt of such copies, the clerk shall forthwith forward a copy to each attorney of record, and to the reporter of decisions, reserving six copies for use of the sitting justices at time of argument.

If both parties have neglected to comply with this rule, the case, when it is reached in its order on the docket, will be continued, or the parties will be ordered to argue in writing, or judgment will be immediately entered at the discretion of the court. If one party has complied with the rule, and the other has not, only the party complying will be heard in oral argument, and the other party will be ordered to argue in writing, or the case may be decided without argument by the other party, at the discretion of the court.

This rule shall take effect December 1, 1930.

EQUITY RULES

1

THE COURT

The court held by one justice may sit in equity in any county on any day not prohibited by statute.

2

THE CLERK

The clerks of the court shall act as clerks in chancery and may, as of course, issue such processes and make and enter such orders as do not require the consideration of the court. They may keep for equity causes a separate docket upon which they shall minute in detail all proceedings in the cause, with the date, and by whom each order is made.

3

RULE DAYS

Rule days shall be held the first Tuesday of each month at ten o'clock in the forenoon at the courthouse in each county for the proper dispatch of equity business, when and where all processes shall be returnable, unless otherwise ordered by the court or directed by statute.

4

THE BILL

Bill shall be drawn succinctly and in paragraphs numbered *seriatim*, and without prolixity or unnecessary repetition. The confederacy clause, the charging part, and the jurisdictional clauses may be omitted.

The prayer for answer may be omitted, unless discovery is sought or answer upon oath is desired. The prayer for relief shall state the specific relief sought and may also ask for general relief. The

prayer for process shall contain sufficient information for the proper frame thereof.

Bills shall be addressed:

"To the Supreme Judicial Court or to the Superior Court.

In Equity. A. B., of ————————, complains against C. D., of ————————, and says:

First: . . . " etc.

5

VERIFICATION

Bills for discovery and those praying for injunction must be verified by oath.

6

PROCESS

Process shall not issue until the bill is filed, unless the bill is inserted in a writ, when no special process shall issue until the writ is filed.

Upon the filing of a bill, subpoena shall issue and be returnable as provided by statute, or as the court may order.

7

SERVICE ON NON-RESIDENTS

When it shall appear that a defendant is and resides out of the state, the clerk, on application of the plaintiff at any time after filing the bill, shall enter an order for the defendant to appear and answer the bill, if in any of the states of the United States, or the District of Columbia, or in any of the provinces of the Dominion of Canada, within one month; if in any other part of North America including the West India Islands, or in Europe or Egypt, within two months; if in any other part of the world, within three months, after the date of the service of the order upon him, if personally served, or after the last publication of the order, if served by publication only. A copy of the order and an attested copy of the bill (or an abstract thereof approved by a justice) shall be served on

such defendant in person within three months from the date of the order by an officer qualified to serve civil processes in the place where served, or in any foreign country by such officer, or by any consul, vice-consul or consular agent of the United States in such foreign country, or by any person specially appointed by the court to serve the order; or the order and an attested copy of the bill (or an abstract thereof approved by a justice) shall be published three times in different weeks, all within thirty days after the date of the order, in some newspaper published in the county where the suit is pending. The return of personal service shall be verified by the affidavit of the person making the service. In case of service by an officer, his authority shall be certified by the clerk of a court of record, if within the United States or any of its possessions, and if without the United States or its possessions, by such a clerk, or by a United States consul, vice-consul or consular agent.

8

Appearance

Appearance shall be entered on the docket by the party or his counsel or filed with the clerk.

9

Pleadings in Defense

Pleadings in defense may omit formal clauses not essential to the merits of the cause.

10

Answers

Answers shall be concise and direct in statement, and shall fully and particularly answer each paragraph of the bill; and shall be paragraphed and numbered to conform thereto so far as may be. Answers not in compliance with this rule may be stricken from the files and a new answer ordered with costs, or the bill may be taken *pro confesso* for want of an answer.

Answers shall be entitled:

"In the Supreme Judicial Court or to the Superior Court,
In Equity, *A. B.* v. *C. D.*
The answer of C. D., who answers and says:
First: . . . " etc.

11

Jury Trials

If the defendant desires any issues of fact submitted to a jury, he shall at the close of his answer make such claim, and succinctly state such issues. If the plaintiff desires any issues of fact submitted to a jury, he shall make such claim at the end of his replication, and succinctly state the issues.

12

Jurats

Oaths to bills and answers shall be upon the affiant's own knowledge, information or belief; and, so far as upon information and belief, that he believes his information to be true.

13

Discovery, Etc.

Discovery and answer, when necessary to the entering of a proper decree, may be required; and to enforce the same a writ of attachment may issue by special order of the court, on which the defendant will be bailable on a bond with sufficient sureties given to the plaintiff in such sum as the court may order, which is to be returned with the writ. In case of neglect of the defendant to enter his appearance according to the statute, the bond shall be forfeited, and may be enforced by petition and notice thereon; and on a summary hearing, damages may be assessed and an execution issue therefor; and a new writ of attachment may issue on a special order therefor, on which he will not be bailable.

14

Demurrers and Pleas

Defenses by demurrer or plea may be inserted in an answer; and unless the plaintiff sets such defenses for hearing before a single justice in order that proper amendments may be speedily had (and such defenses prevail in the Law Court), no amendment on account thereof shall then be allowed, except upon terms.

15

Certifications

Demurrers and pleas shall not be filed until certified by counsel to be in good faith and not intended for delay; and if pleas, that they are true in fact.

16

Answers to Cross-Bills

The answer to a cross-bill shall not be required before answer is made to the original bill.

17

Replications

The replication shall state in substance that the allegations in the bill are true and that those in the answer are not true.

18

Signature of Counsel

Counsel shall sign all pleadings as a guaranty of good faith.

19

Exceptions to Bills

Exceptions to bills may be filed within twenty days after return day, and to answers within ten days after notice that they have been filed, and shall be disposed of by reference to a master, or

otherwise, as the court may direct. Costs, double and treble, may be awarded on exceptions and execution issued therefor as the court may order.

20

AMENDMENTS

Amendments as to parties shall be made under order of court. Other amendments may be made before issue as of course. After issue, amendments may be allowed by the court with or without terms.

21

BILLS OF REVIVOR

Amendments may serve the purpose of bills of revivor or bills supplemental or bills of that nature, but they shall be served as such bills should be served.

22

SETTING CASES FOR HEARING

When a demurrer is filed, the court upon motion of either party may set the cause for hearing upon bill and demurrer at any time. When a plea or answer is filed, the court upon motion of the plaintiff may set the cause for hearing upon bill and plea, or bill and answer, at any time. When a replication is filed to a plea or answer the court upon motion of either party may set the cause for hearing upon bill, plea or answer, and evidence, but such hearing shall not be had until after sixty days from the filing of the replication unless by consent. If a jury trial has been duly asked for in the answer or replication and is moved for in the motion for a hearing, the court in setting the cause for hearing may in its discretion order a jury trial and frame the issues therefor. The cause shall in such case be in order for trial at the jury term next after such sixty days in the county where the case is pending. Any time fixed for hearing or trial may be extended for good cause shown.

23

Overruled Defenses

A defense interposed in one form and overruled shall not afterwards be sustained upon subsequent pleadings in the same case.

24

Oral Evidence

At any hearing or trial in equity the evidence of witnesses may be presented by oral testimony or by depositions or both. When oral testimony is given it shall be reduced to writing by the court stenographer, certified by him and filed with the depositions.

25

Documentary Evidence

Deeds and other instruments in writing or copies of them certified by counsel may be filed with the clerk and notice given twenty days before the hearing or trial, and may then be admitted in evidence without proof of execution if otherwise admissible, unless the execution is denied, or fraud in relation thereto be alleged, and notice given within ten days after notice that they are filed.

Copies of any votes, entries or other records upon the books of any corporation, or of any papers on its files attested by its clerk may be received as evidence, instead of the books and papers unless it shall appear that the opposite party or counsel has been denied access to them at reasonable hours.

26

Production of Documents

When books, papers or written instruments material to the issue are in possession of the opposite party and access thereto is refused, the court upon motion, notice and hearing, may require

their production for inspection. Extracts from any books, papers or instruments thus produced, verified by counsel, may be filed as documentary evidence by either party, instead of the originals.

27

Allegations Not Traversed

All allegations of fact well pleaded in bill, answer or plea, when not traversed, shall be taken as true.

28

Decrees

When a party is entitled to a decree in his favor, he shall draw the same and file it, and give notice.

If corrections are desired they shall be filed within five days after receipt of notice. If the corrections are adopted, a new draft shall be prepared and submitted to the justice, who heard the case, for approval. If they are not adopted, notice shall be given of the time and place, when and where the matter will be submitted to such justice for decision, and he shall settle and sign the decree.

When the Law Court has certified its decision upon an appeal or exceptions from a final decree, and a decree has been entered therein by a single justice as in accordance with the certificate and opinion of the Law Court, a party aggrieved by the form of such last named decree may within ten days take exceptions thereto. Such exceptions and the record connected therewith, including a copy of the opinion of the court, shall be transmitted to the chief justice and be argued in writing on both sides within thirty days thereafter and they shall be considered and decided by the justices as soon as may be. If the decision is adverse to the excepting party, treble costs on these exceptions may be allowed to the prevailing party.

29

Forms of Decrees

Drafts of orders and decrees shall be entitled with the name of the county, the date of the hearing, the docket number of the cause, and the names of the parties, and may then proceed substantially as follows: "This cause came on to be heard (or, to be further heard, as the case may be), this day and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed, as follows, viz.: (Here insert order or decree)." No part of the pleadings, the master's report or any prior proceeding, need be recited or stated.

30

Master

When any matter shall be referred to a master, he shall, upon the application of either party, assign a time and place for a hearing, which shall be not less than ten days thereafter; and the party obtaining the reference shall serve the adverse party, at least seven days before the time appointed for the hearing, with a summons signed by the master requiring his attendance at such time and place, and make proof thereof to the master; and thereupon, if the party summoned shall not appear to show cause to the contrary, the master may proceed *ex parte*; and if the party obtaining the reference shall not appear at the time and place, or show cause why he does not, the master may either proceed *ex parte*, or the party obtaining the reference shall lose the benefit of the same at the election of the adverse party.

31

Compensation of Master

The compensation to be allowed to masters for their services shall be fixed by the court in its discretion in each case, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. Such compensation may, however, be paid

by the county. The master shall not retain his report as security for his compensation, but when it is allowed he shall be entitled to an attachment for the amount against the party ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

32

Exceptions to Master's Report

When exceptions shall be taken to the report of a master, they shall be filed with the clerk at once and notice thereof be forthwith given to the adverse party, and the exceptions shall then be set for argument. In every case the exceptions shall briefly and clearly specify the matter excepted to and the cause thereof; and the exceptions shall not be valid as to any matter not so specified.

33

Costs

When a party is entitled to costs, his counsel shall tax each item of the bill in writing, referring to the documents on file or inclosed with it as proofs, and give notice thereof. The opposing counsel may, within two days, after notice, make his objections to the same in writing and give notice. A reply may be made in writing and the bill filed with the inclosed papers for the decision of the clerk, who will make his decision in writing, from which either party may appeal and submit the papers to a justice of the court for decision. The clerk may regard costs as correctly taxed, when the opposing counsel certifies in writing on the back of the bill that he does not find cause to object, or when no objections are made within two days after notice of taxation.

34

Responsibilities of Attorney

The attorney making the application shall be personally responsible for the payment of fees to commissioners, examiners, stenographers, or magistrates taking testimony; to the clerk for his fees;

and for costs imposed as terms of amendment or relief. When it shall be made to appear by the affidavit of a person interested, that an attorney who is so liable has, after request, neglected to pay, he shall, unless good cause is shown for such neglect, be suspended from practice in equity cases, until payment is made. When any attorney or counsel shall violate the great confidence reposed in him by these rules, he will be suspended in like manner until the further order of court.

35

VERIFICATION OF COPIES

Copies required by these rules may be verified by signature of counsel, who will be held responsible for the accuracy thereof.

36

NOTICES

Notices required by these rules shall be served in writing signed by counsel, and delivered to the opposing counsel, or left at his office, when he has one in the same city or village; and in other cases shall be properly directed to him and placed in the post office and postage paid. Copies are to be preserved and produced, and the original will in all cases be regarded as received when the counsel giving the notice produces a memorandum, made at the time on the copy retained, of its having been delivered or sent by mail on a day certain, unless the reception is positively, and not for a want of recollection denied on affidavit. Either party may designate on the docket the name of his counsel to whom notices are to be given, and in such case none will be good unless given to him. In case of a change of such counsel, notice will be given thereof, and the change noted on the docket.

37

APPLICATIONS ACTED UPON

When an application for an injunction or for an order or decree under the statute or these rules, is made to one justice of the

court and the same has been acted upon by him, it shall not be presented to any other justice.

38

Writs of Injunction

Writs of injunction, preliminary, pending the suit, or perpetual, may be granted according to the principles of equity procedure and as authorized by the statute and may be in the form annexed with such changes as the case may demand.

39

Rehearings

Applications to the discretion of the court for a rehearing may be made on petition, verified as required by Rule 12, setting forth particularly the facts, the name of each witness, and the testimony expected from him. The petitioner can examine only witnesses named, except to rebut the opposing testimony. The petition having been presented to a justice of the court and by him allowed, may be filed and the same proceedings had thereon as on an original bill. If the decree has not been executed, such justice of the court may suspend its execution until the further order of court by a writ of supersedeas or order, on the petitioner's filing a bond, with sufficient sureties, in such sum and approved in such manner, as he may direct, conditioned to perform the original decree in case it shall not be materially modified or reversed, and pay all intermediate damages and costs.

40

Interlocutory Hearings

When the decision of a justice is desired upon any interlocutory matter, the clerk shall forward to him the papers in the cause and enter his decision as soon as received.

41

Other Procedure

All equity proceedings not provided for by statute or these rules shall be according to the usual course of proceedings in equity.

42

Disposition of Dormant Cases

A cause in equity remaining on the docket for a period of two years or more without any action therein being taken shall be dismissed for want of prosecution unless good cause is shown to the contrary.

43

Court Records

In equity cases it shall be sufficient, except in cases for dissolution of corporations, cases or proceedings involving title to real estate, and bills for the construction of wills, to record the names of the parties, date of filing bill and issue of subpoena or order of notice and return day thereof, dates of filing answer and replication, if any, date of filing decree that bill be taken *pro confesso*, date of final decree, and number of the case upon the docket; in addition to the foregoing particulars, in proceedings for the dissolution of corporations, the decree of dissolution shall be recorded in full; in bills for the construction of wills, the decree construing the will in question shall be recorded in full; in bills to quiet title to real estate the proceedings shall be recorded in full; in interlocutory proceedings by receivers, trustees and masters in selling real estate, the petition for authority to sell and the decrees authorizing sales shall be recorded in full, with date of decrees confirming the sales; and in cases in equity to enforce liens on real estate only final decrees authorizing sale of real estate shall be recorded in full, with date of decree confirming sale; provided that the justice signing the final decree in any case may by special order direct that such additional record be made as to him seems proper.

Upon application of any party in any civil cause, either at law or in equity, the court or a justice thereof in vacation, may upon or within ninety days after judgment or final decree order a full record in any case, or such additional record as to him may seem proper.

FORMS

Writ of Attachment

(Seal)

State of Maine

To the sheriffs of our counties and their deputies:

We command you to attach the body of A. B., of ———, in our county of ———, so that you have him before our Supreme Judicial Court, at ———, within and for our county of ———, on ———, the ——— of ——— next, at ——— o'clock in the ——— noon, to answer for an alleged contempt in not (here insert the cause), and you may take a *bond with sufficient sureties to C. D., the party injured, in the sum of ———, conditioned that he then and there appear and abide the order of court.

Hereof fail not and make due return of this writ, with your doings thereon, at the time and place aforesaid.

Witness, ———, Justice of our said court, the ——— day of ———, in the year of our Lord nineteen hundred and ———.

——— ———, Clerk.

Writ of Injunction

(Seal)

State of Maine

———, ss.

To the sheriffs of our counties and their deputies:

We command you to make known to A. B., of ———, in our county of ———, that C. D., of ———, in the county of ———, has filed his bill in equity before our Supreme Judicial Court, in the county of ———, therein alleging (here insert the allegations in the bill showing the cause for issuing the writ), and that in consideration thereof, he, the said A. B., and his attorneys and agents, are strictly enjoined and commanded by our said court, under the

* When the party is not entitled to bail, that part of the writ is to be omitted.

penalty of fine or imprisonment as the court may order therein, absolutely to desist and refrain from (here insert the acts enjoined) and from all attempts, directly or indirectly, to accomplish such object until the further order of our said court.

Hereof fail not and forthwith make due return of this writ, with your doings thereon, to our court, where the bill is pending.

Witness, ———, Justice of our said court, the ——— day of ———, in the year of our Lord nineteen hundred and ———.

——— ———, Clerk.

When the injunction is to be perpetual, the writ is to be varied accordingly.

SUBPOENA

———

(Seal)

State of Maine

———, ss.

To A. B., of ———:

GREETING.

We command you to appear before our Supreme Judicial Court, at ———, in the county of ———, on ——— rules, viz., Tuesday, the ——— day of ——— next, then and there to answer to a bill of complaint, there exhibited against you by C. D., of ———, and abide the judgment of said court thereon.

And we further command you to file with the clerk of said court for said county of ———, within ——— days after the day above-named for your appearance, your demurrer, plea or answer to said bill, if any you have.

Hereof fail not under the pains and penalties of the law in that behalf provided.

Witness, ———, Justice of our said court, at ———, the ——— day of ———, in the year of our Lord ———.

——— ———, Clerk.

Oath

———, ss.

——— 19——.

Then personally appeared ——— and made oath that he has read the above ——— and knows the contents thereof, and that the same is true of his own knowledge, except the matters stated to be on information and belief, and that, as to those matters, he believes them to be true.

Before me,

——— ———.

Summons to Show Cause

(Seal)

State of Maine

———, ss.

To the sheriffs of our several counties, or either of their deputies:

Greeting.

We command you that you summon ——— ——— (if he may be found in your precinct), to appear before ———, the Supreme Judicial Court of the State of Maine, to be holden ———, at ———, in the county of ———, on ———, the ——— day of ———, A. D. 19——, at ——— o'clock in the ——— noon, then and there to show cause, if any he have, why an injunction ——— should not be granted as prayed for in the bill of complaint ——— of ———.

Hereof fail not, and make due return of this writ, with your doings thereon, into our said court.

Witness, ———, Justice of said court, at ——— aforesaid, the ——— day of ———, in the year of our Lord one thousand nine hundred and ———.

——— ———, Clerk.

EQUITY FEE BILL

Attorneys

Drawing and filing bill or answer, including attorney fee	$5.00
Drawing amendment to bill or answer when such amendment is occasioned by an amendment by the opposing party.	2.50
Drawing and filing formal decree dismissing bill	1.00
Drawing and filing other decrees when not requiring material alteration, each	5.00
Drawing each rule	.50
Drawing interrogatories, each set	1.00
Drawing demurrer or plea	2.00
Travel: For each ten miles to and from court in filing bill, answer, replication or decree, and in attending each hearing before a justice or master, observing the rule prescribed in R. S.	.33
Attendance: For attendance at each hearing before a justice or master	3.50
For each jurat attached to bill, answer or necessary paper	.25

Law Court

For travel and attendance, the same fees as for attending a hearing before a justice or master, but for one term only. If the plaintiff prevails, he may tax one attorney's fee in addition to that embraced in his bill. If the defendant prevails, he may be allowed one attorney's fee in addition to that in his answer.

Clerk

Entry and filing bill	$ .60
Copies, for each 224 words	.12

Subpoena	.25
Copies for same, each	.25
Each notice given	.25
Summons to show cause	1.00
Writ of injunction	1.00
With ten cents for each one hundred words of the allegations in the bill incorporated therein.	
Commission to receivers, masters and other officers appointed by the court	1.00
Taxing costs	.25

* * * *

The foregoing rules, including fee bills and forms, shall be recorded in Volume 129 of the Maine Reports, and shall take effect and repeal all former rules on the first Tuesday of January in the year 1931, except as herein otherwise provided.

By All the Justices of the Supreme Judicial and Superior Courts.

W. R. Pattangall
Chief Justice.

Attest:
November 13, 1930.

INDEX

ACTIONS.

In an action of assumpsit by the beneficiary against the trustee to obtain payment of the balance of a trust fund provided in the will of Jonas Edwards as follows: "I give and bequeath to my son, Dwight H. Edwards, in trust, the sum of Ten Thousand (10,000) Dollars for the benefit of my said daughter's child, Blaine Penley. I direct my said son, as trustee, to use the income from said sum from time to time for the benefit of my said grandson, Blaine Penley, and for his education, and if my said grandson proves worthy, by his conduct, to receive said principal sum, I direct my son to turn the same over to him absolutely on his attaining the age of twenty-five years;" where plaintiff rested after introducing an affidavit under the provisions of Sec. 127 of Chap. 87 of the Revised Statutes, and where evidence was admitted that on a libel brought by plaintiff's wife less than four years after the marriage a divorce was decreed on the grounds of cruel and abusive treatment:

HELD:

That the contention of the plaintiff that the trust had ceased and terminated and the further claim that there was a contract apart from the trust relationship were not substantiated by the evidence.

The plaintiff, although he had at the time of the suit attained the age of twenty-five years, failed by allegation and proof to establish his worthiness, which was a condition precedent to any right of recovery. Something more than the mere payment of money on the part of the trustee was involved. The plaintiff had resting upon him the burden of establishing the fact of worthiness and this burden was not sustained. The direction of a verdict for the plaintiff on the evidence in this case was error.

Section 127 of Chapter 87 does not cover a case of this kind. It is not applicable to such an action. Being a statute in derogation of common law, it must be strictly construed. It is essentially a statute to facilitate collection of accounts in actions of assumpsit and its terms and plain intent should not be extended by judicial legislation.

Penley v. *Edwards*, 156.

In an action brought by vendor on a promissory note given to cover the purchase price of the property or any part thereof, where the buildings have been destroyed in an accidental fire, vendee may properly set up failure of consideration as a defense.

But the use and occupation of the premises so agreed to be conveyed may form a part of the consideration for such a note, and in such case, vendor may recover in an action on the note a fair rental for the property.

When the amount paid in by the vendee is sufficient to cover the fair rental of the property during the period of occupation, that fact may be considered in connection with the defense of failure of consideration.

Durham v. *McCready*, 279.

An action for money had and received is equitable in its nature and lies to recover any money in the hands or possession of the defendant which in equity and good conscience belongs to the plaintiff.

An action in tort for deceit will lie without rescission. Not so, an action in assumpsit for money had and received based upon deceit.

Carey v. *Penney*, 320.

In an action to recover damages for deceit, where plaintiff relies on false representations made by defendant's salesmen, it is not necessary to prove that the salesmen knew their statements were false. Fraud may be predicated on their false representations of fact susceptible of knowledge, recklessly stated as of their own knowledge, which induced the plaintiff to make purchases to his injury.

In an action of deceit the measure of damages is the difference between the represented value of that sold and its actual value.

Davis v. *Coshnear*, 334.

The declaration in an action of debt brought by the collector in the name of the inhabitants of a town under the provisions of Sec. 64 of Chap. 11, R. S. (1916) (R. S. 1930, Chap. 11, Sec. 64), must contain an averment that the direction by the selectmen to commence the action was in writing. Such written direction being necessary to the maintenance of the action, it must be alleged in the writ. It is a transversable fact, and is put in issue under the plea of the general issue.

A cause of action is neither the circumstances that occasioned the suit, nor the remedy employed, but a legal right of action. If a person have a legal right to sue, he has a good (that is legally sufficient) cause of action. If he have no legal right to sue, he has not merely a bad cause of action, but no cause, so that good cause of action can never mean more than cause of action.

If one has a cause of action and in his writ fails to state it, he has no better standing in court than as if he had in fact no cause of action whatever.

And where no cause of action is stated, such a defect is not, in any case, cured by the verdict.

When any particular fact is essential to the validity of the plaintiff's cause of action, if such fact is neither expressly stated, in the declaration, nor necessarily implied from those facts which are stated, the cause of action must be considered as defective, and judgment must be arrested; but if such fact, although not expressly stated, be necessarily implied from what is stated, the cause of action must be considered only as defectively stated, and the defect is cured by a verdict.

Failure to demur does not waive the defense that the facts stated do not state a cause of action.

Milo v. *Water Co.*, 463.

AGENT.

See Principal and Agent.

ANNULMENT.

In the absence of any statute on the effect of cohabitation after discovery of the practised fraud, recourse may be had to the rules of equity, for annulment is a proceeding in equity on the theory that the marriage was void *ab initio*.

A marriage procured through fraud may be good at the election of the injured party, who, on being set free from the influence of the fraud or duress, may then give a voluntary consent . . . may ratify and confirm the contract.

A husband who was guilty of illicit sexual relations with a woman before marriage, can not, after marriage and more than four months' cohabitation with her, in equity and good conscience put her from him by annulment, even if she induced the marriage through fraud.

Whitehouse v. *Whitehouse*, 24.

To test the validity of a marriage a libel for annulment or affirmance is the appropriate procedure.

Ordinarily the motives behind the appearance of a consent which was clearly manifest will not be examined.

While the statute forbids the issuance of a license to a male minor having no consenting parents in this state, a marriage in violation thereof is not void.

Marriage is a status wherein public policy rises superior to mere sympathy.

Brook-Bischoffberger v. *Bischoffberger*, 52.

APPEAL.

The right of appeal from the estimate of damages by municipal officers for land taken for public use is solely a statutory right and does not survive. Proceedings on it may not be carried on by those succeeding to the estate or interest of a deceased person.

But when such an appeal has been fully heard and decided and final award made during the lifetime of the appellant so that nothing is left except the enforcement of the judgment, the right to the amount so awarded has vested and may be recovered by the legal representatives of the appellant who has since deceased.

Starrett v. *Town of Thomaston*, 132.

On appeal in a criminal cause it is the province of the Law Court to review the case as presented in the printed record to see whether or not there is sufficient believable evidence to justify the jury in its finding.

State v. *Rist*, 222.

On an appeal to the Supreme Court of Probate, a motion, after hearing and verdict, to set aside the verdict, or for a new trial is not appropriate procedure.

Look, Appellant, 359.

ASSESSORS.

A tax collector who has not settled with the town may not serve as assessor of its taxes, and taxes levied by a Board of Assessors of which such former tax collector is one, can not be collected on a suit of the inhabitants of the town.

A Board of Assessors acting *de facto* can not levy a legal assessment.

Otisfield v. *Scribner*, 311.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

In construing Assignments for the benefit of creditors, Courts are guided by the same general rules which govern the construction of other written instruments.

Whenever, from an examination of the writing itself, the intent with which it was executed can be clearly ascertained, that intent is to govern.

If the language of an assignment is susceptible of more than one meaning, it is always allowable to take into consideration the situation of the parties and the circumstances under which the writing was made, in order to ascertain the true meaning. This rule is not intended to enable the parties, however, to make a new contract. It is not applicable to assignments free from ambiguity.

At common law an assignee for the benefit of creditors succeeds only to the title of his assignor, subject to all liens and encumbrances enforcible against the assignor.

A sale by a common law assignee of a mortgage, without the consent of the mortgagee, of the entire property in chattels, encumbered by the lien of a mortgage and accompanied by a delivery to the purchaser, is a conversion making the assignee liable in trover.

Chemical Co. v. *Small*, 303.

ASSIGNMENT OF WAGES.

At common law, the mere expectation of earning money can not, in the absence of any contract upon which to found any such expectation, be assigned. But future wages to be earned under a present existing contract, imparting to them a potential existence, may be assigned.

ASSUMPSIT.

ATTACHMENTS.

ATTORNEY AND CLIENT.

At common law, the defendant is liable to the plaintiff upon the notes as an original promisor or maker.

It being satisfactorily proven, however, that the plaintiff took the notes with knowledge that the defendant was in fact a surety or accommodation maker and extended the times of payment of the several notes without the defendant's knowledge, the defendant is discharged from his personal liability upon the paper unless his assent to the extensions is established.

Without knowledge, there can be neither assent nor waiver.

Upon the evidence, the jury were not warranted in finding that the defendant knew of the extension granted by the holder of the notes or assented thereto. The verdict below was manifestly wrong.

Pokroisky v. *Potter*, 70.

Statements of a defendant maker that the payee had destroyed the note in his presence thereby canceling the same are self-serving and wholly inadmissible.

Norton v. *Smith*, 127.

BONDS.

The fact that, at the time of an attempted surrender or delivery of himself under a six months' bond, given under Chap. 115, Sec. 49, R. S. 1916 (R. S. 1930, Chap. 124, Sec. 49), the debtor is in the jail under arrest awaiting commitment to the state prison, does not destroy the effectiveness of such surrender or delivery.

Even if the Sheriff refuses to receive the debtor on his voluntary surrender to the jail, the latter has complied with the condition of his bond relative to surrender or delivery, and his bond and sureties are discharged.

In the case at bar, the principal defendant had been, on the evening of February 25, 1930, arrested and committed to the county jail in Bangor to await removal to the Maine State Prison to serve sentence. While in the jail and in the custody of the Sheriff and keeper of the jail, on February 26, 1930, he told the Sheriff that he surrendered himself under the bond. The debtor did all he could do and all he was required to do to deliver himself to the Sheriff. Such a bond does not require the debtor to furnish any precepts or copies but only to "deliver himself."

Noyes v. *Perkins*, 386.

BOUNDARIES.

While it is a well established rule in this state that a conveyance of land bounded on a highway, of which the grantor owns the fee, carries title to the center unless a contrary intent appears, and the like rule prevails in conveyances

bounded on non-navigable streams, and on tidewater to low water mark, the same principle does not apply in conveyances bounded by a railroad right of way.

The ownership of the fee in a railroad right of way is of no benefit to the abutting owner. He is excluded from all use of such right of way and the reasons which exist in the case of highways for extending the lines of an abutting owner to the center, are not present. Considerations of public policy do not require this extension of the rule.

In the case at bar, it is apparent that there was no intention in the Nutter deed to include any portion of the railroad way in the land now owned by the plaintiffs. The distances, accurately designated, carried only to the exterior lines of the location. The words "to" and "by" the location used in the Nutter deed were words of exclusion.

Stuart et al v. *Fox et als*, 407.

BRIBERY.

See Criminal Law — *State* v. *Beattie*, 229.

BUILDING RESTRICTIONS.

See Deeds — *McKeen* v. *Boothby*, 324.

BURDEN OF PROOF.

See *Blackwell* v. *Lumber Co.*, 270.

See *Carey* v. *Penney*, 320.

CHATTEL MORTGAGES.

A sale by a common law assignee of a mortgage, without the consent of the mortgagee, of the entire property in chattels, encumbered by the lien of a mortgage and accompanied by a delivery to the purchaser, is a conversion making the assignee liable in trover.

Chemical Co. v. *Small*, 303.

CONSTITUTIONAL LAW.

While legislatures have the power to pass retrospective statutes, if they affect remedies only, they have no constitutional power to enact retrospective laws which impair vested rights, or create personal liabilities.

A legislature has not judicial powers, and may not pass any law which will take from any citizen a vested right.

A void tax can not be made valid by act of the legislature.

In the case at bar the act of the legislature attempting to validate the assessment and commitment of taxes in the Town of Otisfield for the years 1924 and 1925 transcended the constitutional power of the legislature and was invalid.

Otisfield v. *Scribner*, 311.

CONTRACTS.

While the law is well settled that a second action following a judgment on a prior action for a breach of the same entire contract is barred, and while the cases hold generally that in an action for such breach recovery may be had for future as well as for present damages, yet if one contracts to do several things, at several times, an action of assumpsit will lie on each default, for although the agreement is entire, the performance is several and the contract is divisible in its nature.

Where an agreement provides for the payment of installments of money, suit may be brought for successive installments, if they are not paid as they become due, during the continuance of the agreement, and a judgment recovered in the first suit is no bar to the second suit if the second suit covers only subsequent installments.

Goodwin v. *Amusement Co.*, 36.

In construing written contracts the intention of the parties as deduced from the language of the instrument with reference to the situation of the parties at the time the contract was made, must prevail.

Power Co. v. *Foundation Co.*, 81.

To constitute a legal contract to forebear bringing suit there must be a valid promise to do so, so that for some time the holder of the debt has no right to maintain an action for it.

In the case at bar, even if the expression in Laura A. Merrill's letter might be construed as a promise, no action could be prosecuted thereon, because no consideration was proven. On the evidence presented the Court was forced to hold that in 1919 there was no debt collectible from the A. J. Merrill estate by the plaintiff. There was therefore no debt of her husband that Mrs. Merrill's letter would bind her to pay.

Bowler v. *Merrill*, 142.

To establish a legal contract to forbear, forbearance being a delay in enforcing rights, there must be proof, allegation permitting, of request to forbear, of promise to forbear, followed by forbearance for the time specified, or for a reasonable time when no definite time is named.

In the case at bar there was no promise on the part of the plaintiffs not to redeem, nor was it shown that relying upon the promise of the defendant to pay plaintiffs three thousand dollars on the expiration of the foreclosure they did forbear to redeem. No contract to forbear having been proved the defendant's promise was without consideration.

Shaw v. *Philbrick*, 259.

When property, real or personal, is destroyed by fire, the loss falls upon the party who is the owner at the time.

When the owner of a house and land agrees to convey the same upon the payment of a certain price which the purchaser agrees to pay, and the buildings form a material part of the value of the premises, if they are destroyed by accidental fire so that the vendor can not perform the agreement on his part, he can not recover or retain any part of the purchase money.

In an action brought by vendor on a promissory note given to cover the purchase price of the property or any part thereof, where the above stated situation has arisen, vendee may properly set up failure of consideration as a defense.

But the use and occupation of the premises so agreed to be conveyed may form a part of the consideration for such a note, and in such case, vendor may recover in an action on the note a fair rental for the property.

When the amount paid in by the vendee is sufficient to cover the fair rental of the property during the period of occupation, that fact may be considered in connection with the defense of failure of consideration.

Durham v. *McCready*, 279.

A person may make a valid contract for the disposition of property by will to a particular person or for a particular purpose.

Where services are performed pursuant to such a contract and the promissor fails to comply with the agreement, it may be enforced by a bill in equity to impress and declare a trust; or if recovery is not barred by the statute of frauds, an action at law will lie for damages for breach of contract, or upon a *quantum meruit* for the reasonable value of the services rendered.

Emery v. *Wheeler*, 428.

CONTRIBUTORY NEGLIGENCE.

See Negligence.

CORPORATIONS.

The ordinary duties of a treasurer or assistant treasurer are to receive, safely keep, and disburse the funds of the company, under the supervision of the directors. He has no authority to incur or pay debts of the company unless by order of the directors or to cancel, compromise or set off claims due from the company by those due to it; any attempt on his part thus to control the business of the company would be to assume powers specifically conferred by the charter upon the directors and all such acts, unless subsequently ratified by the company, would be void.

Blackwell v. *Lumber Co.*, 270.

The term "book value," as applied to finance, is defined as the value of anything as shown in the books of account of the individual or corporation owning it. As applied to stock, it is the value as determined by the net profits or deficit of the corporation as shown by its books.

Emery v. *Wheeler*, 428.

COURTS.

There is no provision by statute or rule in this state for a rehearing by the Law Court after a decision rendered.

Under certain circumstances, review might lie after such final decision but the Law Court can not reconsider a case on its merits after it has finally acted and review has been denied. Litigation may not be indefinitely prolonged.

Starrett v. *Town of Thomaston*, 132.

COVENANTS RUNNING WITH THE LAND

In construing a clause of partial release in a mortgage when the provision renders the release demandable by the grantor of the mortgage or his assigns, the burden is on the grantee to release, and the benefit runs with the land.

But when the covenant is that the grantee will release to the grantor, with no mention of his assigns, the better rule seems to be that, in the absence of clear intention to the contrary, the covenant is personal and does not run with the land.

Gilman v. *Forgione*, 66.

CRIMINAL LAW.

Alcohol, within the judicial notice of the Court and the common knowledge of all men, is an intoxicating liquor.

verdict may be set aside and a new trial ordered, should be construed to mean that where a treat or gratuity had had, or might have had, an effect unfavorable to the opposing party, the verdict, whether right or not, should be set aside.

The State, as party to a prosecution, can act only through officers or agents.

Deputy sheriffs are public officers. They owe to the aggregate public, and not alone to a single member of the body of the people, the impartial performance of official duties.

The act of a deputy sheriff, in getting evidence in a criminal cause, must be regarded as that of a party adverse to the respondents.

In the case at bar the giving of each ride by the deputy sheriff to the juror, whether with ulterior motive, in mere courtesy or civility, or in thoughtless indiscretion, was improper conduct.

State v. *Brown*, 169.

On appeal in a criminal cause it is the province of the Law Court to review the case as presented in the printed record to see whether or not there is sufficient believable evidence to justify the jury in its finding.

In the case at bar the Court concludes that the jury might well have found beyond a reasonable doubt, that the respondent operated the automobile with the degree of recklessness or carelessness which would prove him guilty of manslaughter.

State v. *Rist*, 222.

The essential elements of the crime of bribing or offering to bribe a public officer, include a knowledge on the part of the accused of the official character or capacity of the person to whom the bribe is offered, the fact that the thing offered is of some value and that it was offered with intent to influence his official action.

An indictment for bribery must specifically set forth respondent's knowledge of the official character of him to whom the bribe is offered.

An indictment must contain an allegation of every fact which is legally essential. If the intention with which an act is done be material to constitute the offense charged, such intention must be truly laid in the indictment, and it must be laid positively. The want of a direct allegation of anything material, in the description of the substance, nature or manner of the offense, can not be supplied by any intendment or implication whatsoever.

Form of indictment in "Directions and Forms for Criminal Procedure for the State of Maine," Whitehouse and Hill, page 70, applicable to Sec. 5, Chap. 123, R. S. 1916, is defective.

State v. *Beattie*, 229.

DAMAGES.

DECEIT.

DEEDS.

The mere record of a conveyance by a mortgagor, containing a clause that the grantee has assumed the payment of the mortgage, is not constructive notice of the transaction to the mortgagee. The registry of a deed is constructive notice only to after-purchasers under the same grantor.

Blumenthal v. *Serota*, 187.

A restriction in a deed fixing the minimum cost of buildings to be erected on the real estate conveyed and fixing the distance from the street line at which such buildings shall be placed constitutes an incumbrance.

McKeen v. *Boothby*, 324.

Under the provisions of Sec. 9, Chap. 80 (Sec. 9, Chap. 89, R. S. 1930), R. S. (1916), a wife can not by sole deed release her "right and interest by descent" until after the expiration of the time provided by law for redemption by the husband from a sale on levy on execution, and a sole deed of such "right and interest" given by a wife before such redemption period expires, conveys nothing. And if a sole deed so given is a quitclaim deed, without covenants of any kind, a grantee purchaser can not recover back the purchase money paid for it, nor is the vendor estopped from setting up a subsequently acquired title, "unless by so doing he is obliged to deny or contradict some fact alleged in his former conveyance."

The same rule as to assertion of title is true of a person who, though having a definite interest in real estate, at the time of giving such quitclaim deed is in fact without power to make an effective conveyance of it.

The mere fact of the signing and delivery of an ineffective deed of quitclaim without covenants by one person to another person grantee, without evidence of any word, act, statement, assurance or promise, calculated to influence or mislead such grantee, is not sufficient ground on which to base an equitable estoppel to the assertion of title to an interest in real estate which is still owned by the one who gave the ineffective deed.

Crockett v. *Borgerson*, 395.

While it is a well established rule in this state that a conveyance of land bounded on a highway of which the grantor owns the fee, carries title to the center unless a contrary intent appears, and the like rule prevails in conveyances bounded on non-navigable streams, and on tidewater to low water mark, the same principle does not apply in conveyances bounded by a railroad right of way.

The ownership of the fee in a railroad right of way is of no benefit to the abutting owner. He is excluded from all use of such right of way and the reasons which exist in the case of highways for extending the lines of an abutting owner to the center, are not present. Considerations of public policy do not require this extension of the rule.

Stuart et al v. *Fox et als*, 407.

DEMURRER.

DESCENT.

Under the provisions of Sec. 9, Chap. 80 (Sec. 9, Chap. 89, R. S. 1930), R. S. (1916), a wife can not by sole deed release her "right and interest by descent" until after the expiration of the time provided by law for redemption by the husband from a sale on levy on execution, and a sole deed of such "right and interest" given by a wife before such redemption period expires, conveys nothing. And if a sole deed so given is a quitclaim deed, without covenants of any kind, a grantee purchaser can not recover back the purchase money paid for it, nor is the vendor estopped from setting up a subsequently acquired title, "unless by so doing he is obliged to deny or contradict some fact alleged in his former conveyance."

The same rule as to assertion of title is true of a person who, though having a definite interest in real estate, at the time of giving such quitclaim deed is in fact without power to make an effective conveyance of it.

Crockett v. *Borgerson*, 395.

DEVISE AND LEGACY.

DRAINS AND SEWERS.

EASEMENTS.

An easement of necessity in the nature of a drain may be reserved by implication in the conveyance of a servient estate.

Where an easement exists over land which is open, apparent and in use, and strictly necessary to the enjoyment of another part of the same parcel of land, and the common owner of the entire premises conveys the servient part, even with covenants of warranty, there is an implied reservation of the easement for the benefit of the dominant estate.

York v. *Golder*, 300.

EQUITY.

An administrator can not maintain a bill for the reconveyance to himself of land conveyed by his intestate without consideration and in trust for his own benefit.

Averill v. *Cone*, 9.

In the absence of any statute on the effect of cohabitation after discovery of the practised fraud, recourse may be had to the rules of equity, for annulment is a proceeding in equity on the theory that the marriage was void *ab initio*.

Whitehouse v. *Whitehouse*, 24.

As the law permits a man to dispose of his own property at his pleasure, he may make a valid agreement for its disposition by will to a particular person or for a particular purpose. Such an agreement, where, in reliance upon it, the promisee has changed his condition and relation so that a refusal to complete would be a fraud upon him, and where the courts of law afford no adequate remedy, may be enforced in equity, if not within the statute of frauds, or if oral and by part or full performance removed from its operation, if there is present no inadequacy of consideration and there are no circumstances or conditions rendering the claim inequitable. In such cases the court does not act on the ground that it has the power to compel the actual execution of a will carrying out an agreement to make a bequest, or a devise, as this can be done only in the lifetime of, and by him, who makes such an agreement, and no breach can be assumed as long as he lives. The theory on which the court proceeds is to construe the agreement as binding the property of the testator or intestate so as to fasten or impress a trust on it in favor of the promisee.

Brickley v. *Leonard*, 94.

In equity, if an assignment of wages to be earned in the future, but not under an existing contract of employment, specifies the time during which such wages are to be earned and the employment from which they are expected to arise, if no rule of public policy is contravened and no equities are violated, it will be upheld.

In equity, under the statute, *qui prior est tempore, potior est jure* applies unless a superior equity in the assignment of later record may require a variance in the rule.

Holt v. *Woolen Co.*, 108.

When one is proved to have in his possession money which in equity and good conscience he ought to refund, the law will conclusively presume that he has promised to do so.

As a general rule, any set of facts which would, in a court of equity, entitle a plaintiff to a decree for money in question, held by a defendant, if that were the specific relief sought, will entitle him to recover it in an action for money had and received.

Fraud in equity includes all willful or intentional acts, omissions, and concealments which involve a breach of either legal or equitable duty, a trust or confidence, and are injurious to another or by which an undue or unconscientious advantage is taken over another.

Undue influence is a species of constructive fraud.

Whenever two persons have come into such a relation that confidence is necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted in equity to retain the advantage, although the transaction could not have been impeached if no such confidental relation had existed.

The term "fiduciary or confidential relation" embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. The relations and duties involved in it need not be legal, but may be moral, social, domestic, or merely personal.

Whenever a fiduciary or confidential relation exists between the parties to a deed, gift, contract, or the like, the law implies a condition of superiority held by one of the parties over the other, so that in every transaction between them, by which the superior party obtains a possible benefit, equity raises a presumption of undue influence and casts upon that party the burden of proof to show affirmatively his compliance with equitable requisites and of entire fairness on his part and freedom of the other from undue influence.

The relation of brothers and sisters may be of such reciprocal confidence as to cast upon either the burden of proof to show the exact fairness of a transaction between them by which either is benefited.

Eldridge v. *May*, 112.

A gift consistent with the law will not be set aside because of the donor or his privy in interest regrets the transaction or the Court may regard the gift improvident or undeserved.

Equity will not set aside a voluntary conveyance except in case of fraud actual or constructive.

Fraud is never presumed; it must be proved.

In suits to set aside a gift on the ground of fraud, if no confidential relation exists between the donor and donee, the burden is upon the person attacking the gift to show its invalidity.

In the absence of evidence raising suspicion of fraud or undue influence on the part of the donee, the fairness of the gift will be presumed.

If a confidential relation exists between the donor and donee at the time of the gift, the burden of proof is on the donee to show the absolute fairness and validity of the gift and that it is free from the taint of undue influence or other fraud.

No such fiduciary relation exists as to preclude a life tenant from acquiring by gift or purchase from the remainderman his estate in remainder.

The burden of proving the fairness of the gift is not, as a matter of law, upon the tenant for life in a suit to set aside a gift to him from his remainderman. To shift this burden to him, a confidential relation in fact must be established.

Mallett v. *Hall*, 148.

Suspicion, surmise and supposition can not take the place of evidence and should not be permitted to determine and control the rights of parties, nor do they constitute sufficient grounds upon which plaintiffs in a bill in equity seeking to establish the existence of a trust can base the right to a decree in their favor. They must prove their case by the usual rule as to the weight of evidence under the allegations in the bill.

The findings of a single Justice in equity upon questions of fact necessarily involved are not to be reversed upon appeal unless they are clearly wrong. The burden is always on the appellant to satisfy the court that such is the fact.

Adams v. *Ketchum*, 212.

A person may make a valid contract for the disposition of property by will to a particular person or for a particular purpose.

Where services are performed pursuant to such a contract and the promissor fails to comply with the agreement, it may be enforced by a bill in equity to impress and declare a trust; or if recovery is not barred by the statute of frauds, an action at law will lie for damages for breach of contract, or upon a *quantum meruit* for the reasonable value of the services rendered.

Emery v. *Wheeler*, 428.

EVIDENCE.

To sustain an allegation of fraud, surmise or conjecture, not raised to the dignity of fair inference, can not be substituted for proof.

Averill v. *Cone*, 9.

Perjured testimony offered at the trial is not a ground for a new trial when it is known at the time to be false but no effort is made to meet it, nor time requested, but the case is submitted with the false testimony at the risk of the judgment.

A jury, in awarding damages for an injury, may not be allowed to guess what caused it, but a cause may be inferred by the jury from proven facts.

Hamlin v. *Bragg*, 165.

Parol evidence of contemporaneous facts and circumstances may be received to show the connection between separate papers and that they constituted one instrument.

Sleeper v. *Littlefield*, 194.

See *Adams* v. *Ketchum*, 212.

In the construction of a will, parol testimony is frequently of some assistance for the purpose of identifying the beneficiary, or the subject-matter of the devise, or explaining the situation and circumstances surrounding the testator at the time of making the will to be construed, or for the purpose of throwing some light upon the sense in which words of doubtful and ambiguous meaning were used. But the testator's declarations of intention, whether made before or after the making of the will, are alike inadmissible.

The intention of the testator, collected from the whole will, and all the papers which constitute the testamentary act, are to govern; but the intent is to be sought in the will as expressed, and declarations of the testator before or after the will was made can not aid in interpretation.

Bryant v. *Bryant*, 251.

Whenever, from an examination of the writing itself, the intent with which it was executed can be clearly ascertained, that intent is to govern.

If the language of an assignment is susceptible of more than one meaning, it is always allowable to take into consideration the situation of the parties and the circumstances under which the writing was made, in order to ascertain the true meaning. This rule is not intended to enable the parties, however, to make a new contract. It is not applicable to assignments free from ambiguity.

Chemical Co. v. *Small*, 303.

A copy of a record in the Registry of Deeds, attested by the Register of Deeds, of a copy of a record to be found in the United States District Court, is not best evidence and its admission was a violation of the best evidence rule.

Admission of a deed given by a trustee in bankruptcy is not admissible in the absence of proof that the defendant in the case at bar and the bankrupt are *idem persona.*

A certified copy of a map or survey on file in the office of the Registry of Deeds is usually held admissible in evidence with the same effect as the original, provided the original has been so approved and recorded as to become a record of that office.

Jackson v. *Burnham*, 344.

EXCEPTIONS.

EXECUTORS AND ADMINISTRATORS.

An administrator can not maintain a Bill for the reconveyance to himself of land conveyed by his intestate without consideration and in trust for his own benefit.

Averill v. *Cone*, 9.

A sale of real estate of the deceased by an executor or administrator under a license of the Probate Court can only be lawfully made under the provisions of R. S., Chap. 76, Sec. 1.

Edwards v. *Packard*, 74.

A statement in a letter, "You have my husband's receipt it will be honored never fear," is not a memorandum of any promise to pay, and not such a memorandum as would justify the acceptance of a plaintiff claimant as a witness under the provisions of Par. IV, Sec. 117, Chap. 87, R. S.

Bowler v. *Merrill*, 142.

When an executor is also legatee, no formal act is necessary to vest title to the legacy in him as an individual if distribution in fact be otherwise manifested by the circumstances.

Mallett v. *Hall*, 148.

EXHIBITIONS.

See *Morrison* v. *Park Ass'n*, 88.

FAILURE OF CONSIDERATION.

See Actions — *Durham* v. *McCready*, 279.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Master and Servant — *Loring* v. *Railroad Co.*, 369.

FINDINGS OF FACT.

The decision, as to matters of fact, of a single Justice sitting in a case in equity should not be reversed, unless it clearly appears that such decision was erroneous. The burden to show the error falls upon the appellant.

Brickley v. *Leonard*, 94.

FORCIBLE ENTRY AND DETAINER.

FORECLOSURE.

FRAUD.

FRAUDULENT CONVEYANCES.

JUDICIAL NOTICE.

JURY.

LICENSES.

LOSS BY FIRE.

LEGACIES.

MARRIAGE.

Marriage in the legal sense, is a personal relation arising out of a civil contract, to which the consent of parties capable of making that contract is necessary.

It is an institution founded upon mutual consent. That consent is a contract, but it is one *sui generis*. It supersedes all other contracts between the parties, and with certain exceptions it is inconsistent with the power to make any new ones. It may be entered into by persons under the age of lawful majority. It can be neither cancelled nor altered at the will of the parties upon any new consideration. The public will and policy controls their will.

In the absence of any statute on the effect of cohabitation after discovery of the practised fraud, recourse may be had to the rules of equity, for annulment is a proceeding in equity on the theory that the marriage was void *ab initio*.

A marriage procured through fraud may be good at the election of the injured party, who, on being set free from the influence of the fraud or duress, may then give a voluntary consent — may ratify and confirm the contract.

A husband who was guilty of illicit sexual relations with a woman before marriage, can not, after marriage and more than four months' cohabitation with her, in equity and good conscience put her from him by annulment, even if she induced the marriage through fraud.

Whitehouse v. *Whitehouse*, 24.

To test the validity of a marriage a libel for annulment or affirmance is the appropriate procedure.

Ordinarily the motives behind the appearance of a consent which was clearly manifest will not be examined.

While the statute forbids the issuance of a license to a male minor having no consenting parents in this state, a marriage in violation thereof is not void.

Marriage is a status wherein public policy rises superior to mere sympathy.

Brooks-Bischoffberger v. *Bischoffberger*, 52.

MASTER AND SERVANT.

A railroad is not a guarantor or insurer of the safety of the place of work or of the machinery or appliances of the work of its employees.

It is not required to anticipate and guard against every possible danger which may befall its employees, but only such as are likely to occur and which by the exercise of reasonable care it could foresee and anticipate.

Its duty at common law, which measures its duty under the Federal Act, is to use reasonable care to furnish a reasonably safe place and reasonably safe tools and appliances for the use of its employees.

MISTRIAL.

MONEY HAD AND RECEIVED.

MORTGAGES.

In construing a clause of partial release in a mortgage when the provision renders the release demandable by the grantor of the mortgage or his assigns, the burden is on the grantee to release, and the benefit runs with the land.

But when the covenant is that the grantee will release to the grantor, with no mention of his assigns, the better rule seems to be that, in the absence of clear intention to the contrary, the covenant is personal and does not run with the land.

Gilman v. *Forgione*, 66.

See *Pokroisky* v. *Potter*, 70.

The mere fact that mortgaged property was conveyed to one who assumed payment of the mortgage debt would not, of itself and apart from the effect of subsequent dealings between the original mortgagee and the grantee of the mortgagor, in any way affect the liability of such mortgagor, even if the mortgagee knew of the arrangement, unless he assented to it.

If, however, a mortgagee with knowledge of the conveyance and assumption by the grantee of the mortgage debt extends the time of payment by a valid agreement between him and the grantee, such extension operates to discharge the original mortgagor unless attested to by him or unless the rights of the mortgagee in this respect are expressly reserved.

It is an essential condition to the discharge of the original mortgagor from liability that there be a valid agreement for the extension, supported by a sufficient consideration.

The relation of principal and surety, so far as the mortgagor and his grantees are concerned, may be created and exist without necessarily disturbing the original contractual relations existing between mortgagor and mortgagee. In order to relieve his debtor from primary liability, it is necessary that the creditor should know of the arrangement and assent to it.

The mere record of a conveyance by a mortgagor, containing a clause that the grantee has assumed the payment of the mortgage, is not constructive notice of the transaction to the mortgagee. The registry of a deed is constructive notice only to after-purchasers under the same grantor.

Blumenthal v. *Serota*, 187.

One, who, at the request and for the benefit of a mortgagor and on his assurance that there are no other liens or incumbrances against the land and that the loan will be secured by a first mortgage, furnishes money to pay off the existing mortgage is not a mere volunteer, the loan having been negotiated for the purpose of paying such mortgage, and he is entitled to subrogation to the rights of the mortgagee whose mortgage is thus paid.

The weight of authority is that in the absence of some prejudice resulting to the junior lienor from the change of owners of the senior lien the record lien will

MOTOR VEHICLES.

MUNICIPAL CORPORATIONS.

mayor, and hence neither approved or disapproved by him, as in the case at bar, confers no authority on a purchasing committee, designated by such vote to bind the city by a contract entered into by it; involving an expenditure of money.

Motor Co. v. *Biddeford*, 331.

By R. S. (1916), Chap. 22, Sec. 2 (R. S. 1930, Chap. 25, Sec. 2) the authority to construct public drains or sewers along or across any public way is vested, not in the city or town of their location, but in the municipal officers.

Municipal officers, constructing a sewer pursuant to the statutory authority thus conferred upon them, act not as agents of the town but as public officers, for whose torts the municipality is not liable.

Arsenault v. *Anson*, 447.

The declaration in an action of debt brought by the collector in the name of the inhabitants of a town under the provisions of Sec. 64, Chap. 11, R. S. (1916) (R. S. 1930, Chap. 11, Sec. 64), must contain an averment that the direction by the selectmen to commence the action was in writing. Such written direction being necessary to the maintenance of the action, it must be alleged in the writ. It is a transversable fact, and is put in issue under the plea of the general issue.

Milo v. *Water Co.*, 463.

NEGLIGENCE.

For the negligence of his agent in demonstrating an automobile, to the injury of a prospective purchaser, an automobile dealer may be held liable.

Lobley v. *Penobscot Valley Motors*, 21.

The proprietor of a public exhibition or fair is charged with the duty of using reasonable care to see that the fair or exhibition grounds, in all their parts, are in reasonably safe condition for the use of invited guests and are so kept, and if races, games or exhibitions are of a character to jeopardize the safety of the guests, the duty is cast upon the proprietor to take due precautions to guard guests from injury.

The measure of the duty of a Fair Association is the same whether the horses racing upon its track are managed by it or its officers, or with their permission, by licenses, independent contractors, or lessees or invitees.

It is the duty of the Association to take due precautions against dangers which it should reasonably foresee or anticipate as well as those of which it has actual knowledge.

Ignorance of dangers which could have been discovered or anticipated in the exercise of reasonable care does not excuse it. Negligent ignorance in law is the equivalent of actual knowledge.

Horse races are of necessity attended with some risks and dangers and those which are well known, or ought to be, must be anticipated by those who conduct races and reasonable care taken that no injury result to invited guests.

Proprietors of a fair are not insurers of the safety of their guests.

They are not required to exclude from their grounds all sports or exhibitions which involve risks of injury to their guests.

The general rule seems to be that if such risks or dangers are safeguarded by such location, stands, barriers, or guards and warnings as the situation reasonably demands, the duty of the proprietors is performed.

Morrison v. *Park Ass'n*, 88.

If the operator of an automobile is blinded by the lights from another approaching vehicle so that he is unable to distinguish an object in front of him, reasonable care requires that he bring his vehicle to a stop and a failure to do so justifies a charge of negligence. When the driver's vision is temporarily destroyed by a glaring light it is his duty to stop his car.

The care to be exercised by him who drives an automobile upon the public street must be commensurate with the danger to be avoided.

When an automobile approaches a street car in the night time, both having bright headlights, a condition arises which is fraught with danger to pedestrians lawfully upon the street and may be doubly so as to passengers alighting from the street car. The degree of care required by law in such circumstances must be commensurate with the existing danger.

The law requires increased care on the part of the motorist on meeting or passing a street car which has stopped to take on or land passengers. Not only must he expect passengers on the side of the car from which they alight, but he must anticipate that some passengers may pass behind the car to the other side.

If the motorist seeks to avoid the charge of negligence on the ground that, because of the glare of the light on the street car, or for other reasons, he is unable to know whether the street car has stopped to accommodate passengers, he must not recklessly proceed upon his way under circumstances of doubt, he must know, or failing to know should bring his car to a stop as in other cases where his vision is blinded by a glare.

House v. *Ryder*, 135.

Mere parental or filial relation between the owner and the borrower of an automobile is not sufficient to bar the owner from recovery of damages from a negligent third party.

In bailments other than for carriage the contributory negligence of the bailee is not imputable to the bailor where the subject of bailment is damaged by a third party. The bailor under the ordinary contract of bailment may recover, despite the occurrence of contributory negligence on the part of the bailee.

The mere fact that such a safety device does not always work is not an excuse for the failure to install it, and obtain the benefit of such protection as it does afford.

The mere failure of the company to inspect the system of each taker is not a waiver by it of the requirements of its rules.

In the case at bar, it did not appear that the defendant had actual knowledge of the conditions in the plaintiff's house. The company was therefore under no obligation to guard against the consequences of the plaintiff's negligence in not installing the check safety valve required by the company's rules.

DeRochemont v. *Water Co.*, 421.

While the question of contributory negligence is ordinarily for the jury, where on uncontradicted testimony a want of due care on the part of an injured party is apparent, it is the duty of the Court to set aside a verdict in his favor.

McDonald v. *Pratt*, 434.

The fact that the driver of an automobile has the technical right of way does not relieve him from the exercise of ordinary care.

Ritchie v. *Perry*, 440.

The driver of an automobile, encountering a fog, is not bound, as a matter of law, to stop and wait for the fog to lift.

It is common knowledge that the fogs from the sea and from the inland are usually penetrable to the eye and, while visibility may be low, if the driver proceeds with due care, progress may be made through them with reasonable safety.

The degree of care to be exercised must vary with conditions of fog, of roadway and of traffic.

The driver of a car in a fog must exercise a degree of care consistent with existing conditions.

When dangers which are either reasonably manifest or known to an invited guest confront the driver of the vehicle and the guest has an adequate and proper opportunity to control or influence the situation for safety, and sits by without warning or protest and permits himself to be driven carelessly to his injury, his negligence will bar his recovery.

Peasley v. *White*, 450.

The proprietor of a place of amusement, in maintaining such, is bound to exercise only the degree of care that would be expected of an ordinarily careful and prudent person in his position.

If the visitor is present for the benefit of the host, the latter should be held liable for the want of any ordinary care in respect to the condition of the property.

The proprietor of a place of public amusement is not an insurer against accident occurring because of the condition of the building, but, so far as the exercise of ordinary care will assure it, he is bound to provide and maintain a structure that will not, because of any insecurity or insufficiency for the purpose for which it is used by him, injure any person rightfully within it.

It can not be said that decorations of inflammable crepe paper above a dance floor is evidence of negligence *per se*.

Nor is it evidence of negligence that the paper decoration of the ceiling extended down on the faces of certain posts to the top of the mirrors, and around their margins.

In this state there is no statute regulating means of exit to be provided in places of amusement, below a second floor.

One is not liable in an action of tort for mere nonfeasance by reason of his neglect to provide means to obviate or ameliorate the consequences of the act of God, or mere accident, or negligence or misconduct of one for whose acts towards the party suffering he is not responsible.

The common law gives a remedy to a servant who is injured by the wrongful or negligent act of the master; the liability arising upon the doing of the act. But the common law goes no further; it does not provide a remedy when the master is not responsible for the act, on the ground that he has omitted to provide means to avoid its consequences.

In the case at bar, the record showed that at the beginning of the season of 1929 the electric wiring in the building was fully inspected and pronounced in proper condition by a wiring inspector.

Testimony also showed that smoking was forbidden in the building, and placards to that effect maintained.

The condition of the ceiling and post decorations were not latent or hidden, and it appeared from the evidence that the plaintiff had visited the hall and noticed the decorations during the summer of 1928.

The case presented the further condition that direct and positive evidence, entirely uncontradicted, was advanced that the fire was deliberately set by a person over whose sudden action the proprietor and his agents had no control.

However grievous plaintiff's hurts, under existing statutes he had no remedy.

Cloutier v. *Amusement Co.*, 454.

NEW TRIAL.

After careful examination of all the evidence bearing on a general motion, such a motion must be overruled where no error is discovered which would warrant the Court in disturbing a verdict.

Where a special motion for new trial on the ground of alleged perjury of the plaintiff is filed, the weight of authority appears to be that where there is no reason to suspect certain testimony to be perjured, and no laches shown, the courts will generally grant a new trial, if, after the trial, satisfactory evidence of its perjured character is discovered, and it is as to a material issue, or the verdict is based principally on such testimony.

Perjured testimony offered at the trial is not a ground for a new trial when it is known at the time to be false but no effort is made to meet it, nor time requested, but the case is submitted with the false testimony at the risk of the judgment.

One who has paid a claim sued on and knows that a judgment can be obtained only on false testimony, which he is able to rebut, but fails to produce the evidence, is not entitled to a new trial.

Ordway v. *Cluskey*, 13.

NOTICE.

See *Land Bank* v. *Smith*, 233.

PERJURY.

See *Ordway* v. *Cluskey*, 13.

PLEADING AND PRACTICE.

A motion to quash is addressed to the sound discretion of the court. On refusal to quash, the accused may be put to plea or demurrer, or left to motion in arrest of judgment. If abuse of authority is not evident, the refusal of a motion to quash is no ground for exception.

In charging a sale of intoxicating liquor, the information need not give the purchaser's name. It is, however, better practice to name the buyer or allege that his name is to the complainant unknown.

In matters of form, it has been permissible to amend criminal process, at any stage before final judgment. Chapter 133, Laws of 1927, permits amending complaints in matters of substance, if thereby the nature of the charge is not changed.

State v. *Haapanen*, 28.

The use of account annexed as a substitute for the common count of *quantum meruit* is unobjectionable.

A variance requires a real difference between allegation and proof. If the proof corresponds to the substance of the allegation, there is no variance.

No variance between pleading and proof will be deemed material if the adverse party is not surprised or misled to his prejudice in maintaining his action or defense on the merits.

Emery v. *Wheeler*, 428.

Whether or not to order a mistrial is a matter of discretion and no exceptions lie to refusal to so order unless discretion is abused.

Evidence that defendant in negligence case carries liability insurance has no bearing on liability or damages. Such evidence is not only immaterial but prejudicial, and when introduced either directly or by inference through interrogations may properly be cause for mistrial.

Such evidence improperly and deliberately introduced constitutes misconduct on the part of an attorney; introduced by inadvertence, it is less reprehensible but still prejudicial. The most careful and emphatic instructions by the presiding Justice may fail to remove prejudice from the minds of jurors. The situation is best cared for by ordering a mistrial when such a course is requested by opposing counsel.

Ritchie v. *Perry*, 440.

The declaration in an action of debt brought by the collector in the name of the inhabitants of a town under the provisions of Sec. 64, Chap. 11, R. S. (1916) (R. S. 1930, Chap. 11, Sec. 64), must contain an averment that the direction by the selectmen to commence the action was in writing. Such written direction being necessary to the maintenance of the action, it must be alleged in the writ. It is a transversable fact, and is put in issue under the plea of the general issue.

A cause of action is neither the circumstances that occasioned the suit, nor the remedy employed, but a legal right of action. If a person have a legal right to sue, he has a good (that is legally sufficient) cause of action. If he have no legal right to sue, he has not merely a bad cause of action, but no cause, so that good cause of action can never mean more than cause of action.

If one has a cause of action and in his writ fails to state it, he has no better standing in court than as if he had in fact no cause of action whatever.

And where no cause of action is stated, such a defect is not, in any case, cured by the verdict.

When any particular fact is essential to the validity of the plaintiff's cause of action, if such fact is neither expressly stated, in the declaration, nor necessarily implied from those facts which are stated, the cause of action must be considered as defective, and judgment must be arrested; but if such fact,

PRINCIPAL AND AGENT.

When a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business uses and the nature of the particular business, is justified in assuming that such an agent is authorized to perform in behalf of his principal the particular act in question, and such particular act has been performed, the principal is estopped to deny the agent's authority.

Frye v. *DuPont deNemours & Co.*, 289.

The general rule is well established that when an agent names his principal, the principal is responsible, not the agent.

When an agent contracts in behalf of a foreign principal, if the language of the contract is ambiguous, so as to leave it doubtful to whom credit is given, the agent or the principal, the circumstance that the principal resides abroad may be taken into consideration, in determining that question.

If the contract is in writing and its terms clearly manifest to bind the principal, though a foreigner, its construction and effect should not be varied so as to charge the agent.

When an agreement to purchase real estate fails because of the inability of the owner to complete the trade and the purchaser has made a partial payment to a broker, an action for money had and received will not lie against the broker, in favor of the purchaser, if the broker, before receiving notice of the purchaser's claim, has paid the money to his principal.

But if he has not so paid it, he is so liable, even though he has disclosed his principal and regardless of his right to commissions.

When money has been paid to an agent for his principal, under such circumstances that it may be recovered back, the agent is liable as principal so long as he stands in his original position and until he has paid the money to his principal or performed some equivalent act.

After proof of the receipt of money by an agent under circumstances which give the plaintiff a right to have it returned to him, the burden of proceeding with the evidence is on the defendant who may relieve himself of liability by proof that, prior to notice of plaintiff's claim, he had paid the money to his principal.

Unless such payment to his principal is shown, an action may be sustained against the agent.

McKeen v. *Boothby*, 324.

PROBATE COURTS.

Probate appeals are statutory and there must be a strict compliance with the statutory requirements or they will be dismissed. A failure to comply with the conditions imposed by the statute can not be cured by amendment.

PUBLIC FAIRS.

PUBLIC HALLS.

PUBLIC UTILITIES COMMISSION.

PUBLIC UTILITIES.

See *Gilman* v. *Telephone Co.*, 243.

RAILROADS.

A railroad company, the real estate of which is taxable under the provisions of Sec. 4, Chap. 10, R. S. 1916, has the status of a non-resident taxpayer.

It is, therefore, not obliged to file a list of its taxable property with the local assessors as a condition precedent to applying for an abatement.

Land within the located right of way of a railroad company is exempted from taxation even though, as in the case at bar, temporarily used for other than railroad purposes.

Terminal Co. v. *City of Portland*, 264.

A railroad is not a guarantor or insurer of the safety of the place of work or of the machinery or appliances of the work of its employees.

It is not required to anticipate and guard against every possible danger which may befall its employees, but only such as are likely to occur and which by the exercise of reasonable care it could foresee and anticipate.

Its duty at common law, which measures its duty under the Federal Act, is to use reasonable care to furnish a reasonably safe place and reasonably safe tools and appliances for the use of its employees.

Loring v. *Railroad Co.*, 369.

While it is a well established rule in this state that a conveyance of land bounded on a highway, of which the grantor owns the fee, carries title to the center unless a contrary intent appears, and the like rule prevails in conveyances bounded on non-navigable streams, and on tidewater to low water mark, the same principle does not apply in conveyances bounded by a railroad right of way.

The ownership of the fee in a railroad right of way is of no benefit to the abutting owner. He is excluded from all use of such right of way and the reasons which exist in the case of highways for extending the lines of an abutting owner to the center, are not present. Considerations of public policy do not require this extension of the rule.

Stuart et al v. *Fox et als*, 407.

REAL ACTIONS.

Real estate conveyed by a debtor, for the purpose of defrauding his creditors, may be attached, seized, and sold on execution by a creditor as if no conveyance had been made.

RECOUPMENT.

RESCISSION.

REMAINDERS.

RES ADJUDICATA.

RESTRICTIONS.

RULES OF COURT.

SHERIFFS AND DEPUTIES.

Deputy sheriffs are public officers. They owe to the aggregate public, and not alone to a single member of the body of the people, the impartial performance of official duties.

The act of a deputy sheriff, in getting evidence in a criminal cause, must be regarded as that of a party adverse to the respondents.

In the case at bar the giving of each ride by the deputy sheriff to the juror, whether with ulterior motive, in mere courtesy or civility, or in thoughtless indiscretion, was improper conduct.

State v. *Brown*, 169.

SHERIFFS' SALES.

On a real estate attachment made on a writ in which the account annexed uses the following form of consecutive months, namely, "To groceries and provisions for the month of ————, 1920, $————," no lien under the provisions of Sec. 60, Chap. 86, R. S. (1916) (Sec. 63, Chap. 95, R. S. 1930), is created.

But under the provisions of Sec. 32, Chap. 81, R. S. (1916) (Sec. 31, Chap. 90, R. S. 1930), "seizure and sale pass to the purchaser, all the right, title and interest that the execution debtor has in such real estate at the time of such seizure, or had at the time of the attachment thereof on the original writ, subject to the debtor's right of redemption" and where there are no hostile or intervening rights it is immaterial that the levy or seizure is not recorded.

If the court in which the proceedings take place has jurisdiction to render the judgment on which an execution levy and sale is based, such judgment can not be collaterally attacked.

Under the provisions of Sec. 9, Chap. 80 (Sec. 9, Chap. 89, R. S. 1930), R. S. (1916), a wife can not by sole deed release her "right and interest by descent" until after the expiration of the time provided by law for redemption by the husband from a sale on levy on execution, and a sole deed of such "right and interest" given by a wife before such redemption period expires, conveys nothing. And if a sole deed so given is a quitclaim deed, without covenants of any kind, a grantee purchaser can not recover back the purchase money paid for it, nor is the vendor estopped from setting up a subsequently acquired title, "unless by so doing he is obliged to deny or contradict some fact alleged in his former conveyance."

Crockett v. *Borgerson*, 395.

STATE DEPARTMENT OF HEALTH.

The Legislature, by the delegation to the State Department of Health of general power to make and publish reasonable rules and regulations for the protection

of life and health and the successful operation of the health laws of this state, did not assume to authorize the repeal of general statutes.

In localities having either water or sewerage systems, it is for local ordinance to prescribe plumbing regulations, office of the State Department of Health, in such cases, being to approve plans. Only in localities other than those with water or sewerage systems can rules and regulations of the State Department of Health have force and effect.

State v. *Prescott*, 239.

STATUTE BONDS.

See Bonds.

SUBROGATION.

One, who, at the request and for the benefit of a mortgagor and on his assurance that there are no other liens or incumbrances against the land and that the loan will be secured by a first mortgage, furnishes money to pay off the existing mortgage is not a mere volunteer, the loan having been negotiated for the purpose of paying such mortgage, and he is entitled to subrogation to the rights of the mortgagee whose mortgage is thus paid.

The weight of authority is that in the absence of some prejudice resulting to the junior lienor from the change of owners of the senior lien the record lien will not defeat the right of subrogation even though there was constructive notice from the record.

Subrogation, itself a creature of equity, must be enforced with due regard for the rights, legal or equitable, of others. It should not be invoked so as to work injustice, or defeat a legal right, or to overthrow a superior or perhaps an equal equity, or to displace an intervening right or title, nor can the right of subrogation prevail against bona fide purchasers or those who occupy a like position.

Land Bank v. *Smith*, 233.

SURETYSHIP AND GUARANTY.

The relation of principal and surety, so far as the mortgagor and his grantees are concerned, may be created and exist without necessarily disturbing the original contractual relations existing between mortgagor and mortgagee. In order to relieve his debtor from primary liability, it is necessary that the creditor should know of the arrangement and assent to it.

Blumenthal v. *Serota*, 187.

SURVIVAL OF ACTIONS.

TAXATION.

TELEPHONE AND TELEGRAPH COMPANIES.

TENANCY AT WILL.

The rights of a vendee, in possession of real estate under an agreement for its conveyance, not of higher dignity than a personal obligation, and conveying no interest in the land, are similar to those of a tenant at will.

Bennett v. *Casavant*, 123.

TITLE BY DESCENT.

See Descent.

TOWNS.

See Municipal Corporations.

TREATS OR GRATUITIES.

See Criminal Law — *State* v. *Brown*, 169.

TROVER.

See *Chemical Co.* v. *Small*, 303.

TRUSTS.

Technical language is unnecessary in the creation of a trust. If an expressed equitable obligation rests on the donee by reason of the confidence imposed in her by the donor of the trust, to apply and deal with the property for the benefit of herself and others according to the terms of the will expressing this confidence there is a trust.

The estate of a trustee is measured not by words of inheritance or otherwise, but by the object and extent of the trusts upon which the estate is given. To effect the intention of the testator, the Court will imply an estate in the trustee sufficient for the purposes of the trust, though in words, no estate is given.

Edwards v. *Packard*, 74.

See *Brickley* v. *Leonard*, 94.

See *Penley* v. *Edwards*, 156.

VERDICTS.

WAGES.

WAIVER.

WATER COMPANIES.

WILLS.

Technical language is unnecessary in the creation of a trust. If an expressed equitable obligation rests on the donee by reason of the confidence imposed in her by the donor of the trust, to apply and deal with the property for the benefit of herself and others according to the terms of the will expressing this confidence there is a trust.

The estate of a trustee is measured not by words of inheritance or otherwise, but by the object and extent of the trusts upon which the estate is given. To effect the intention of the testator, the Court will imply an estate in the trustee sufficient for the purposes of the trust, though in words, no estate is given.

Edwards v. *Packard*, 74.

As the law permits a man to dispose of his own property at his pleasure, he may make a valid agreement for its disposition by will to a particular person or for a particular purpose. Such an agreement, where, in reliance upon it, the promisee has changed his condition and relation so that a refusal to complete would be a fraud upon him, and where the courts of law afford no adequate remedy, may be enforced in equity, if not within the statute of frauds, or if oral and by part or full performance removed from its operation, if there is present no inadequacy of consideration and there are no circumstances or conditions rendering the claim inequitable. In such cases the court does not act on the ground that it has the power to compel the actual execution of a will carrying out an agreement to make a bequest, or a devise, as this can be done only in the lifetime of, and by him, who makes such an agreement, and no breach can be assumed as long as he lives. The theory on which the court proceeds is to construe the agreement as binding the property of the testator or intestate so as to fasten or impress a trust on it in favor of the promisee.

Brickley v. *Leonard*, 94.

The following clause in a will — "I give and bequeath to my grandson, my homestead farm after myself and wife decease, and if he don't leave any children at his decease, my wish is that my heirs shall have two-thirds of the above property." — creates, by fair implication, a life estate in the widow, subject to which the grandson took one-third in fee and two-thirds in fee tail in remainder, which became an estate tail in possession at her death, with remainder over to the heirs of the testator.

The word "children" has never been held to be equivalent to the word "heirs" in a conveyance, but has frequently been so regarded when appearing in a will.

A devise to one and his children, he having no children at the time, is equivalent to a devise to him and his issue, and creates an estate tail.

The remainder to the heirs of the testator, being limited upon an estate tail, is a vested remainder, subject to being devested by a surviving child of the tenant in tail.

Such a remainder may be effectively conveyed by quitclaim deeds and grantors and their heirs are estopped from setting up any claim to the property thereafter, even though the tenant in tail die without issue.

Gould v. *Leadbetter*, 101.

Any person of legal age, having a mental capacity to understand the nature of the transaction, may be the donor of property of which he is the legal or equitable owner.

A gift consistent with the law will not be set aside because of the donor or his privy in interest regrets the transaction or the Court may regard the gift improvident or undeserved.

The relation of a life tenant to his remainderman is that of a *quasi* trustee.

The relation is the same if a power of disposal is annexed to the life estate.

The life tenant holds the corpus of the estate in trust in the sense that he must exercise reasonable precautions to preserve the property intact for transmission to the remainderman at the termination of the life estate, and may not injure or dispose of it to his detriment.

No such fiduciary relation exists as to preclude a life tenant from acquiring by gift or purchase from the remainderman his estate in remainder.

The burden of proving the fairness of the gift is not, as a matter of law, upon the tenant for life in a suit to set aside a gift to him from his remainderman. To shift this burden to him, a confidential relation in fact must be established.

Mallett v. *Hall*, 148.

Documents or papers not directly made a part of a will can only be incorporated by reference in the will when the papers or documents sought to be incorporated are complete, are in existence at the time of the drafting of the will and are clearly described in the will.

Loose leaf wills may be admitted to probate and sustained as valid when one of at least three essential conditions has been met . . . either the various sheets are physically attached, or connected by their internal sense by coherence or adaptation of parts, or identified by admissible oral evidence as being present at the time of execution.

Parol evidence of contemporaneous facts and circumstances may be received to show the connection between separate papers and that they constituted one instrument.

Sleeper v. *Littlefield*, 194.

The controlling rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator, expressed in his will, shall prevail, provided it is consistent with the rules of law. The entire will should be considered with a view to giving effect, so far as the law allows, to its every

provision. The intention, as to any particular item, is often aided and sometimes deduced, from other provisions and from the general scope and trend of the instrument.

The words, "personal property" are susceptible to two meanings; one, the broader, including everything which is the subject of ownership, except lands and interests in lands; the other, more restricted, oftentimes embracing only goods and chattels; and it is in the latter sense that the expression is ordinarily and popularly used.

In ascertaining the real intention of a testator there is a rule, applicable in the construction of wills, that where certain things are enumerated, and a more general description is coupled with the enumeration, that description is commonly understood to cover only things of a like kind (*ejusdem generis*) with those enumerated. This is because it is presumed that the testator had only things of that kind in mind.

Personal property in a "home" is naturally construed to include books, pictures, furnishings, furniture, and all such things as are generally found in and contribute to the enjoyment and utility of one's abode. To extend the meaning of the words "personal property" so as to include rights and credits is neither easy nor natural.

In the construction of a will, parol testimony is frequently of some assistance for the purpose of identifying the beneficiary, or the subject-matter of the devise, or explaining the situation and circumstances surrounding the testator at the time of making the will to be construed, or for the purpose of throwing some light upon the sense in which words of doubtful and ambiguous meaning were used. But the testator's declarations of intention, whether made before or after the making of the will, are alike inadmissible.

The intention of the testator, collected from the whole will, and all the papers which constitute the testamentary act, are to govern; but the intent is to be sought in the will as expressed, and declarations of the testator before or after the will was made can not aid in interpretation.

Bryant v. *Bryant*, 251.

A demonstrative legacy partakes of the nature of both a general and a specific legacy. It is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund, or to evince an intent to relieve the general estate from liability in case the fund fails. A specific legacy is liable to ademption, but that is not true of a general or demonstrative legacy.

Whether a legacy is demonstrative or specific must be decided by the intent of the testator as it appears from the will.

Courts are averse to construing legacies as specific and will do so only when the intent of the testator to make them such is clear and plain.

In the case at bar the Court holds that the testator, irrespective of the note,

from the proceeds of which he directed the legacies to be paid, intended to make an unconditional gift of a specific sum in the nature of a general legacy and that therefore the several bequests were demonstrative legacies. The collection of the note prior to the testator's death did not adeem the legacies and they were therefore payable out of other available assets of the estate.

Maxim v. *Maxim*, 349.

Within statutory meaning, the beneficial interest, which disqualifies one from subscribing a will as an attesting witness, is of present appreciable pecuniary value, so that the witness may reasonably be said to gain financially under the will, even though the interest which the will gives him be indirect, uncertain, and contingent.

But not every interest disqualifies.

An interest of a guardian, by judicial appointment, of an orphan ward devisee of real estate, is not a beneficial interest within the prohibition of the statute.

Look, Appellant, 359.

A person may make a valid contract for the disposition of property by will to a particular person or for a particular purpose.

Where services are performed pursuant to such a contract and the promissor fails to comply with the agreement, it may be enforced by a bill in equity to impress and declare a trust; or if recovery is not barred by the statute of frauds, an action at law will lie for damages for breach of contract, or upon a *quantum meruit* for the reasonable value of the services rendered.

Emery v. *Wheeler*, 428.

WORDS AND PHRASES.

"Employee" — *Higgins* v. *Bates Street Shirt Co.*, 6.

"Children" — *Gould* v. *Leadbetter*, 101.

"Heirs" — *Gould* v. *Leadbetter*, 101.

"Fiduciary or confidential relation" — *Eldridge* v. *May*, 112.

"Lewd" and "lascivious" — *State* v. *Tuttle*, 125.

"Cohabit" — *State* v. *Tuttle*, 125.

"Personal property" — *Bryant* v. *Bryant*, 251.

"Book value" — *Davis* v. *Coshnear*, 334.

"Care" — *Emery* v. *Wheeler*, 428.

"Nurse" — *Emery* v. *Wheeler*, 428.

WORKMEN'S COMPENSATION ACT.

Under the Workmen's Compensation Act payments made to those partially dependent upon the employee for support at the time of his injuries are based on the wages of the deceased instead of the amount of injury caused to such dependents.

In determining the amount "contributed to dependent," no deduction of the cost of the deceased employee's board, while living at his parents' and paying no board, should be made.

Heughan's Case, 1.

The president of a corporation, acting only as such and performing no other duties than those pertaining to his office, is not an employee of the corporation within the meaning of the Workmen's Compensation Act.

He is not precluded from becoming an employee within the meaning of the Act. A corporation may hire its president to perform services for it under circumstances which will make him an employee. But the burden rests on the petitioning president to prove such a relation with the corporation.

The fact that the Workmen's Compensation Act, in defining the term "employee," expressly excludes "officials of the state, county, town or water district," does not by implication include in the term "employee" the officers of a private corporation.

Higgins v. *Bates Street Shirt Co.*, 6.

Under the provisions of Section 14 of the Workmen's Compensation Act in force October 14, 1924, a widow may maintain her petition for permanent impairment after the death of her husband, the injured employee, who had been paid, under an open end agreement, compensation for total disability from the date of injury to the date of his death.

An employee's right to compensation for total incapacity under Sec. 14, Chap. 238, R. S., is a different and distinct right from that given under Section 16 for compensation for permanent impairment to the usefulness of his legs.

A natural and reasonable construction of Section 14, in connection with the other correlated Sections of the Act, leads to the conclusion that the clear intent was to give to the dependent the right, which a living employee would have had, to petition for determination of permanent impairment.

A denial by the Commission of a dependent widow's petition for compensation, brought under Section 12 of the Act, will not take away or affect her right to bring her petition for determination of the extent of permanent impairment under Section 16, a right distinct and separate from the right to petition under Section 12.

Where it is found that the total permanent impairment was attributable to the injury by way of acceleration or aggravation of a pre-existing condition, the

Commission has the right to order payment by the employer or insurance carrier of compensation for permanent impairment for a specified period without a determination by the Commission of the extent to which the pre-existing condition and injury each contributed to the total percentage of the permanent impairment.

In interpreting statutes the first consideration is to ascertain and give effect to the intention of the legislature, but when the language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion to resort to the rules of statutory interpretation or construction, and the statute must be given its plain and obvious meaning.

There is practically an agreement of authority to the effect that the provisions of the Workmen's Compensation Laws, which are remedial statutes, should be liberally construed in order that they carry out the general humanitarian purpose for which they were enacted.

Estabrook v. *Steward Read Co.*, 178.

Aside from those who are by Statute conclusively presumed to be dependent upon an injured employee, there may be those who are so dependent in fact.

In cases involving the latter class, dependency is to be determined as of the time of the accident or injury.

Subsequent changes in condition are not to be taken into consideration. Compensation is not to be denied to one who was in fact dependent at the time of injury and became independent prior to the death of the injured employee; nor does it cease when dependent reaches the age of eighteen, provided that some portion of the award remains unpaid at that time.

The right to receive compensation is not a vested right. The dependent may not assign it nor would it pass by descent. It is wholly created by statute and may neither be enlarged nor limited other than by legislative enactment.

Brochu's Case, 391.

Where death results from injury, after weekly compensatory payment to the employee, compensation to his dependents begins from the date of the last payment, if within three hundred weeks of the day of the employee's injury, and thence continues to the expiration of such three hundred week period.

The proof, to establish compensable status for a dependent, must show not alone death of the employee from injury, but death within three hundred weeks from the date of the injury.

In Section 14 of the Act there is not the qualification that death result from injury.

Comstock's Case, 467.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF MAINE.

STATUTES OF THE UNITED STATES.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES.

ERRATA.

Substitute "1917" for "1927" in the sixth line from bottom of page 38.

Substitute "defendant" for "plaintiff" in last line of page 159.

Substitute "R. S. 1930, Chap. 14, Sec. 64," for "R. S. 1930, Chap. 11, Sec. 64," pages 463 and 464.