MAINE REPORTS

130

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

JANUARY 1, 1931, TO DECEMBER 31, 1931

EDWARD S. ANTHOINE

REPORTER

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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. FRANK G. FARRINGTON

HON. SIDNEY ST. F. THAXTER

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HON. HERBERT T. POWERS

ATTORNEY GENERAL

HON. CLEMENT F. ROBINSON

REPORTER OF DECISIONS

EDWARD S. ANTHOINE

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

MIKE CROWLEY'S CASE.

Penobscot. Opinion January 5, 1931.

WORKMEN'S COMPENSATION ACT. EXPERT OPINION EVIDENCE.

An Agreement between an employer and employee in regard to compensation under the Workmen's Compensation Act, having been approved by the Commissioner of Labor, has the force of a judgment and is final and binding to the extent of the facts agreed upon and the conditions covered by them as a basis for the compensation to be paid.

Such an Agreement having been made, on a Petition for Review of Incapacity under Section 37 of the Workmen's Compensation Act, the question open is whether such incapacity, if it continues, has subsequently increased or diminished, or has it ended.

Medical opinions, based upon assumptions, not grounded on facts but mere speculation, surmise or conjecture, have no probative value.

Expert medical opinion evidence is not always essential to the making of sound findings of fact.

The Commissioner's conclusion in a compensation case, if rational and natural, and based on facts proven or inferences logically drawn therefrom, must stand even though it lacks the support of expert opinion.

The receipt of inadmissible conjectural opinion does not alone require reversal of findings if there is sufficient competent evidence otherwise in the case on which the Commissioner's finding may rest.

In the case at bar, the conclusion of the Commissioner, based upon a full history showing the sequence of events and the sudden transition of the claimant from health to weakness with progressive and increasing disability beginning at the time of the accident, was rational and supported by some evidence notwithstanding the uncertainty of the medical testimony.

On appeal from decree of a single Justice affirming the decision of the Industrial Accident Commission, awarding compensation to the petitioner. Appeal dismissed. Decree below affirmed. The case fully appears in the opinion.

G. G. Jenkins, for employer.

Ryder & Simpson, for claimant.

Fellows & Fellows, for Insurance Company.

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

STURGIS, J. The claimant, Mike Crowley, was poisoned by carbon monoxide gas on February 18, 1929, while in the employ of the New England Camp & Cabin Company. An open end Agreement for compensation for temporary total incapacity, entered into between the employer and employee on April 8, 1929, on the basis of eighteen dollars per week, was approved by the Commissioner of Labor on April 10, 1929.

Having paid compensation for fourteen weeks, the Insurance Company, on June 5, 1929, claiming the employee's incapacity had diminished or ended, filed a Petition for Review of Incapacity under Section 37 of the Workmen's Compensation Act. Hearings were continued from time to time to permit medical and pathological examinations until, on September 2, 1930, the Commissioner ordered compensation paid the claimant at the rate fixed in the Agreement — for total incapacity from the date of the last payment made to August 15, 1929, and from October 19, 1929, to June 20, 1930, and for partial incapacity for the interim between August 15, 1929, and October 19, 1929. Compensation after June 20, 1930, was ordered to be made in accordance with the Act. The Insurance Company filed and perfected its appeal.

The pending Petition is not an original petition for compensa-

tion under the Workmen's Compensation Act. The Agreement between the employer and the employee, having been approved, has the force of a judgment and is final and binding to the extent of the facts agreed upon and the conditions covered by them as a basis for the compensation to be paid. The Agreement specifies the accident and injury as "carbon monoxide poisoning to the point of collapse" and provides for compensation "during present period of temporary total incapacity beginning February 25, 1929, due to this injury."* The poisoning, and at least temporary total incapacity due to that injury, appears to be practically *res judicata. Foster's Case*, 123 Me., 27. The question open on this Petition is whether such incapacity, if it continues, has subsequently increased or diminished, or has it ended.

At the hearing before the Commissioner, the evidence included the incidents of the accident and the history of the claimant's physical condition before and after it, together with reports of examinations and diagnoses of physicians. Pronouncing the claimant an arteriosclerotic suffering from mitral murmur, the physician called by the Insurer expressed the opinion that carbon monoxide poisoning was temporary only in its effects and the claimant's incapacity since a few weeks after the accident was due to other causes. Other physicians, including the impartial examiner called by the Commissioner, confirmed the diagnosis of arteriosclerosis and mitral murmur and found leukemia present, a disease of the blood characterized by an increase in the number of white corpuscles. Whether or not the plaintiff had leukemia before the accident these physicians did not know. Nor could they state the cause of that disease. But upon the assumption that leukemia did exist before the claimant was poisoned, they expressed the opinions that carbon monoxide poisoning would aggravate the disease, and, upon the history of the claimant's case, it is consistent that leukemia "aggravated his trouble and it is possibly one of the causes." Obviously, these opinions, in so far as they purport to show causal connection between leukemia and the accident, have little, if any, probative value. Sound deductions can not be drawn from mere speculation, surmise, or conjecture. *Swett's Case*, 125 Me., 389.

In a compensation case, however, as in a common law action, expert opinion evidence is not always essential to the making of sound findings of fact. The Commissioner's conclusion, if rational and natural, and based on facts proven or inferences logically drawn therefrom, must stand even though it lacks the support of expert opinion. *Syde's Case*, 127 Me., 214; *Swett's Case*, supra. Nor can the receipt of inadmissible conjectural opinion alone require reversal of the findings if there is sufficient competent evidence otherwise in the case on which the Commissioner's findings may rest. *Larrabee's Case*, 120 Me., 242; *Ross's Case*, 124 Me., 107.

The claimant testified without contradiction that, before the accident, he had worked for years without lay off or illness other than a slight headache or cold. On the night of the accident, after working four hours or more around a gasoline engine, he suddenly became dizzy and fell. He recovered consciousness about noon but was confined to his bed for three weeks. When he got up, his legs were weak and he walked with difficulty. It has become increasingly hard for him to travel upgrade or upstairs. August 14, he began doing light work around a mill, but was unable to do heavy lifting, used his legs with difficulty, and worked only part time. On the 19th of October, following, he was obliged to give up his job and has been unable to do even light work since that time. He has lost twenty-five pounds in weight and the normal strength of his legs and arms.

The decree in the present case is not based upon the medical testimony alone, nor upon the causal connection between the claimant's accident and leukemia. The Commissioner notes the difficulty, if not impossibility, of determining that leukemia existed prior to the accident. The fact remains, however, that Crowley had the accident and was incapacitated thereafter — reduced to a weakened and enfeebled condition of disability which continued up to the date of the decree and became more serious except for the period of improvement and partial incapacity noted by the Commissioner. Nor does it appear that leukemia was the sole cause of the claimant's incapacity for the period covered by the Petition.

The finding of the Commissioner is that it is reasonable, in view

of Crowley's ability to labor prior to the accident and his condition since, that the injury brought about his incapacity or aggravated a preëxisting condition, and the decree states that, "the testimony seems to clearly indicate" that Crowley was totally incapacitated on the date compensation was last paid and has so continued up to June 29, 1930, except for the period of partial incapacity already considered.

With the full history of the case before him, showing the sequence of events and the sudden transition of the claimant from health to weakness and progressive and increasing disability beginning at the time of the accident, as in *Swett's Case*, supra, it can not be said that the conclusion of the Commissioner as to the facts here in issue was not rational or supported by some evidence notwithstanding the uncertainty of the medical testimony.

Appeal dismissed.
Decree affirmed.

FRED WILKINS, ADM'R *vs.* WALDO LUMBER COMPANY.

Franklin. Opinion January 9, 1931.

PRINCIPAL AND AGENT. ESTOPPEL. EVIDENCE.

Where the principal receives the benefits of an unauthorized act of his agent, when he is apprised of the facts, if he has suffered no prejudice and can make restitution, he must elect whether to ratify or disaffirm, and if he decides not to ratify, he must return the fruits of the unauthorized act within a reasonable time.

If he retains, uses or disposes of what he has received, he will be held to have ratified the act of his agent unless restoration would be of no practical value to the other party.

This rule applies if the principal retains the benefits of the contract notwithstanding his denial of the agent's authority or his express disapproval or repudiation of the agent's acts.

In the case at bar, the evidence warranted a finding that, with full knowledge of all material facts, the defendant Company through its General Manager took and retained a part of the benefits of the unauthorized contract made by its salesman.

It must be held in law to have impliedly ratified the transaction in part and that binds it for the entirety.

Even though the Manager of the defendant Lumber Company did not intend to bind his corporation, his acts and statements rather than his professions must determine the question of ratification.

The doctrine of estoppel denied the defendant the right of repudiating the contract made by its salesman with the plaintiff.

A letter from the defendant Company to F. C. Metcalf dated November 19, 1928, referring to a shipment of the lumber here involved to N. L. Page & Son Co. of Auburn, Maine, was not inadmissible. It shed light upon the subsequent acts and declarations of the General Manager.

There was no error in the admission of the contract made by the salesman. If foundation therefor was lacking at the time of its admission, the necessary connection was later made and the order of proof lies within the discretion of the presiding Justice.

On exceptions and general motion for new trial by defendant.

An action on a contract alleged to have been made by plaintiff with defendant in writing, under date of November 24, 1928, and signed on behalf of the defendant, by one Daniel F. Adams, purporting to act as agent of defendant. Trial was had at the February Term, 1930, of the Superior Court for the county of Franklin.

To the ruling of the presiding Justice, excluding certain testimony offered for the defendant, defendant seasonably excepted, and after the jury had rendered a verdict for the plaintiff in the sum of $5,481.64, filed a general motion for new trial. Motion overruled. Exceptions overruled. The case fully appears in the opinion.

Cyrus N. Blanchard,
Frank W. Butler, for plaintiff.
George F. Eaton, for defendant.

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

STURGIS, J. Action of debt on a contract under seal signed on behalf of the defendant by its salesman. Plea of general issue with brief statement denying that the execution of the contract was authorized. The case comes to this court on the defendant's motion and exceptions.

MOTION:

The following are the important material facts which the evidence tends to prove and from which the rights of the parties must be determined. Other facts disclosed, if pertinent to the issue, are cumulative only.

In the late summer or early fall of 1928, Daniel F. Adams, a salesman for the Waldo Lumber Company of Bangor, Maine, began negotiations for the purchase by the Company of a lot of sawed hard wood lumber then on the sticks at Temple, Maine, and for sale by the plaintiff as administrator of the estate of George W. Staples.

Mr. Adams examined the lumber and, upon an interview with the administrator, obtained a price of $15.00 per M on the sticks. He also arranged with one F. C. Metcalf of West Farmington to haul and mill the lumber if it was purchased, and incidentally learned that the Gem Crib & Cradle Co. of Gardner, Mass., was in the market for finished hard wood lumber.

Reporting these facts to Irving G. Stetson, the general manager of the Waldo Lumber Co., Mr. Adams was directed to obtain an order from the Gem Crib & Cradle Co., if possible, and to arrange with Mr. Metcalf for hauling and tallying the lumber at a price of $5.50 per M and for milling it at $12.00 per M.

Mr. Adams obtained an order from the Gem Crib & Cradle Co. for 180 M feet of hard wood squares with the stipulation that "above order may be increased to take care of lot at Temple, Maine," went to Wilton, directed Mr. Metcalf to begin hauling and milling the lumber, and, on November 24, 1928, signing for the Waldo Lumber Co. as agent, joined the plaintiff in the execution of a written contract, under seal, for the sale to and purchase by

the Waldo Lumber Co. of all sawed lumber belonging to the Staples Estate then on the sticks in Temple. The price fixed for the lumber was $15.00 per M on the sticks and the contract was signed by Mr. Adams subject to confirmation by the Waldo Lumber Co.

Within a few days, the order of the Cradle Company and the contract made by Mr. Adams and Mr. Wilkins was submitted to Mr. Stetson, the general manager, for confirmation. On November 27, 1928, Mr. Metcalf, pursuant to the orders given him by Mr. Adams, began hauling the Staples lumber from the sticks to his mill, tallying it as it came in, and milling it to the specifications of the Crib & Cradle Company order.

It appears, however, that Mr. Stetson did not formally confirm the lumber contract. Although he had directed Mr. Adams to get the order from the Cradle Company and undoubtedly knew that the lumber was being moved to the Metcalf mill on Mr. Adams' orders, he withheld confirmation while he attempted to work out a more advantageous and profitable arrangement. He wrote the Crib & Cradle Company asking for a modification of its order. On December 6, 1928, he wrote the plaintiff asking for more detailed information than appeared in the contract, noting lack of confirmation but not repudiating the instrument executed by Mr. Adams. On the same day he wrote Mr. Adams expressing a doubt as to the profits to be made on filling the Cradle Company order, closing his letter with this paragraph:

> "We wish that you would figure this over in view of the requirements stated in this letter, check up on the thickness of the plank and talk it over with Mr. Metcalf. It would surely be better to back out now, which we *can* do, but naturally do not want to do if there is a reasonable chance of going through with a whole skin."

Relying upon and reiterating the fact that the contract signed by Mr. Adams had not been confirmed, he attempted to get the plaintiff to sign a new contract of a modified tenor and more advantageous to the Lumber Company. He sought and obtained an agreement from Mr. Metcalf to mill the lumber at a reduced cost. He endeavored to get Mr. Metcalf to take over the purchase from

the plaintiff and the order of the Crib Company, and finally on January 2, 1929, wrote the plaintiff repudiating the contract signed by Mr. Adams with the statement that the plaintiff must look to Mr. Metcalf, the mill man, for his pay for the lumber belonging to the Staples Estate. The plaintiff did not reply nor did he accept Mr. Metcalf as paymaster.

All this time, upon the authority of the orders originally given by Mr. Adams and with the knowledge of the general manager of the Lumber Company, Mr. Metcalf had been hauling the lumber from the lot where it lay, was milling it upon the specifications of the Cradle Company order, and had begun shipments.

In December, the exact date not appearing, the Lumber Company arranged to finance the transaction through the People's National Bank of Farmington, Maine, and although Mr. Stetson called his remittances advances, checks therefor payable to Mr. Metcalf's order were turned over to him from time to time to cover his hauling and milling charges. Through January, February, and March, 1929, Mr. Metcalf, with Mr. Stetson's knowledge, kept on hauling and milling or piling up the lumber, and during the same period four more cars were shipped to the Crib & Cradle Company on orders sent to Metcalf from the Waldo Lumber Co., which billed the cars direct from its Bangor office and made collections in due course. April 9, 1929, Mr. Stetson ordered Metcalf to stop milling on this order.

Mr. Adams was at all times in touch with the milling operations. He testifies that he was at the Metcalf mill frequently, checking the milling with specifications of the Crib & Cradle Company order. In January, he was there a week sorting the lumber as the result of a complaint as to the quality of the squares already shipped. And it must be inferred that his contact with Mr. Metcalf and the milling was fully known to Mr. Stetson, who writes Mr. Metcalf on January 14, 1929, as follows:

> "It is not fair to us to expect that Mr. Adams give any more of his time to this matter. He has done practically no business since this hard wood proposition started nearly eight weeks ago, and it should not be necessary to give it any further time or attention whatever. We can not have him doing so."

Until the snow left in the spring, Mr. Metcalf kept on hauling the plaintiff's lumber from Temple to the mill, and, when on April 9, 1929, the Lumber Company directed him to stop milling, 324,969 feet had been hauled, leaving 20,000 feet still at Temple.

The lumber having been attached under a lien claim, Mr. Stetson demanded a discharge of the attachment by the plaintiff, received it and caused it to be recorded. Reassured by the local Register of Deeds that the lumber was not encumbered by a mortgage on the land, he nevertheless prepared a bond against such title defect and sent it, together with a check covering the lumber then hauled as reported by Metcalf, to the People's National Bank, for delivery to the plaintiff. By reference to correspondence, it would appear that this check went forward on March 26, 1929, and, from the testimony of the bank officials, it is disclosed that, although the plaintiff came to the bank and offered to sign the receipt and bond, payment of the check had been stopped by wire from Mr. Stetson almost immediately after it reached the bank.

The plaintiff's contention is that he at all times insisted that his rights were measured by the contract which he had signed on November 24, 1928, and that he never accepted Metcalf as his paymaster or standing in any contractual relation with him. He points out that, although through December, 1928, the manager of the defendant Company held up formal confirmation of the contract the plaintiff had signed, and questioned the authority of Mr. Adams to make it, nevertheless, from November 27, 1928, the lumber was being hauled from the land of the plaintiff's intestate and milled at West Farmington, upon orders authorized by and with the full knowledge of the manager of the defendant Company. And he says that, when the new contracts were sent to be substituted for the original, a substantial part of the lumber had already been moved, more than 196,000 feet before December 15, 1928, as on that date billed to the Lumber Company by Metcalf, and as much more as the interim to December 29, 1929, permitted, so that it may well be assumed that a substantial part of the lumber was at the mill, and the plaintiff's statements were not gross exaggeration when he wrote:

"Gentlemen:

I regret that you do not feel that the first contract is sufficient to cover our transaction. I feel that it is and can see no reason why, after the lumber has been practically all moved from Temple to the mill, I should sign another contract and I am therefore again returning them unsigned."

The defendant's claim is that, because of the failure of its manager to confirm the contract in controversy, including his notifications to the plaintiff to that effect, it is not bound to pay the plaintiff for the lumber taken from his intestate's property. Its position is that the plaintiff must look for his pay to Metcalf, who milled the lumber. It even asserts through the testimony of its manager and its bookkeeping that it only sold the lumber on commission for Metcalf.

From the evidence, including the somewhat disconnected and confusing correspondence introduced as exhibits, the jury found for the plaintiff for the full amount of lumber covered by the contract with interest from the date of demand by the plaintiff's attorney. We can not find in the record evidence which justifies a conviction that the verdict was manifestly wrong.

The evidence warranted a finding, we think, that, with full knowledge of all material facts, the defendant Company through its general manager took and retained a part at least of the benefits of the unauthorized contract which its salesman, Mr. Adams, made. It directed and acquiesced in the hauling of the lumber from the Staples lot to the Metcalf mill and the finishing of enough of it to fill the order of the Gem Crib & Cradle Company until five cars had been shipped. It must be held in law to have impliedly ratified the transaction in part at least, and that binds it for the entirety. *Bryant* v. *Moore*, 26 Me., 84; *Goss* v. *Kilby*, 112 Me., 323, 328; *Gilman* v. *Carriage Co.*, 127 Me., 91; *Drug Co.* v. *Lyneman*, 10 Colo. Ap., 249; *Sartwell* v. *Frost*, 122 Mass., 184; *Russell* v. *The Machine Co.*, 17 N. D., 248; *Box Co.* v. *Winter*, 144 N. Y. S., 269; Mechem on Agency, Sec. 148; 2 C. J., 501; 21 R. C. L., 932.

Even though the manager of this defendant Lumber Company did not actually intend to bind his corporation, his acts and state-

ments, rather than his professions, must determine the question of ratification.

In *Smith* v. *Fletcher*, 75 Minn., 189, 193, it is said:

"Ratification, like authorization, is generally the creature of intent; but that intent may often be presumed by the law from the conduct of the party, and that presumption may be conclusive even against the actual intention of the party where his conduct has been such that it would be inequitable to others to permit him to assert that he had not ratified the unauthorized act of his agent."

In Mechem on Agency, Secs. 146 and 148, we read:

"Ratification, like authorization of which it is the equivalent, is generally the creature of intent, but that intent may often be presumed by the law in cases where the principal, as a matter of fact, either had no express intent at all, or had an express intent not to ratify."

"If the principal has knowingly appropriated and enjoyed the fruits and benefits of an agent's act, he will not afterwards be heard to say that the act was unauthorized. One who voluntarily accepts the proceeds of an act done by one assuming, though without authority, to be his agent, ratifies his act and takes it as his own, with all its burdens as well as all its benefits. He may not take the benefits and reject the burdens, but he must either accept them or reject them as a whole."

And in *Advertising Co.* v. *Wanamaker & Brown*, 115 Mo. Ap., 270, 280, that Court says:

"The real ground on which the principal is held liable under such circumstances is that of estoppel; though it is often said that the principal ratified what was done by his agent by remaining silent.* In its genuine sense, ratification depends on intention. It is the voluntary assumption, on full knowledge, of an unauthorized act or agreement by the party in whose behalf it was done or made. The intention to ratify may be manifested by express words or by conduct. Either may es-

tablish that the principal elected to adopt the act or agreement as his own; and the election once made, with knowledge of the facts, becomes irrevocable. Besides a true ratification intentionally made, the law recognizes a constructive one where none was intended. The latter sort of ratification is a legal presumption raised against the principal because he has behaved in such a way that the party dealt with by the agent would be injured if the transaction was repudiated. It is really an equitable estoppel and is regulated by the law of estoppel. * * *"

The doctrine of estoppel based upon the acceptance of the benefits of a contract is stated in *Belfast* v. *The Belfast Water Co.*, 115 Me., 234, 239, in these words:

"When a party has accepted the benefits of a contract, not *contra bonos mores*, he should not be permitted to question the validity of it,* he is estopped."

One more branch of the rule of ratification needs mention. Where the principal receives the benefits of an unauthorized act of his agent, when he is apprised of the facts, if he has suffered no prejudice and can make restitution, he must elect whether to ratify or disaffirm, and if he decides not to ratify, he must return the fruits of the unauthorized act within a reasonable time. If thereafter he retains, uses or disposes of what he has received, he will be held to have ratified the act of his agent unless restoration would be of no practical value to the other party. *Crooker* v. *Appleton*, 25 Me., 131; *Furniture Co.* v. *Baptist Inst.*, 113 Ga., 289; *Bank* v. *Bank*, 49 Neb., 379, 381; *Beecher* v. *Grand Trunk R. Co.*, 43 Vt., 133; *Andrews* v. *Robertson*, 111 Wis., 334; 2 C. J., 496. It is held that this rule applies if the principal retains the benefits of the contract notwithstanding his denial of the agent's authority or his express disapproval or repudiation of the agent's acts. *Perkins* v. *Boothby*, 71 Me., 91, 94; *Pike* v. *Douglass Co.*, 28 Ark., 59; *Furniture Co.* v. *Inst.*, supra; *Wright* v. *M. E. Church*, 72 Minn., 78; *Hatch* v. *Taylor*, 10 N. H., 538, 553, et seq.

Under the rules stated, the verdict must stand. If the distinctions of the law bar a finding of ratification in the strict sense of

that term, the doctrine of estoppel denies the defendant the right of now repudiating the contract with the plaintiff.

EXCEPTIONS:

The defendant objected to the introduction of a letter from the manager of the defendant Lumber Company to F. C. Metcalf, dated November 19, 1928, referring to and accompanied by an order for a car load of the lumber here involved to be shipped to N. L. Page & Son Co. of Auburn, Maine. The ground of objection was that the letter antedated the contract in suit. It was admitted to show that the manager "acquiesced in the making of the contract." This was not error. The order inclosed with the letter was foreign to the later appropriation of the lumber to the Gem Crib & Cradle Company order, but the general text of the letter indicated knowledge and acquiescence on the part of the manager in the preliminary negotiations for the contract and sheds light upon his subsequent acts and declarations. The letter is not outside the rule of relevancy, nor was it prejudicial.

The contract made by the plaintiff and Mr. Adams was properly admitted. It was within the discretion of the presiding Justice to determine the order in which evidence should be introduced and evidence brought in later made the necessary connection.

To justify the failure of the manager of the defendant Company to communicate with the plaintiff from November 24, 1928, when the contract in suit was executed, until December 6, following, counsel for the defendant inquired:

> "Q. Whether or not you interviewed men familiar with the manufacturing of lumber there in Bangor?"

The only proper answer to this question was "Yes!" or "No!" With no prior or subsequent testimony enlarging the value of such answer, no prejudice results from its exclusion. If there had been, it was removed by the introduction of the same evidence in letters between the parties.

Motion overruled.
Exceptions overruled.

PHILIP BRANNEN *vs.* ATLAS PLYWOOD CORPORATION.

Aroostook. Opinion January 13, 1931.

LOGS AND LOGGING. EVIDENCE.

Before a so-called head scaler may accept as accurate the findings of an assistant, he must have more knowledge of such assistant's work than would be conveyed by a report submitted by another who is a stranger to the operation. He must be satisfied of the accuracy of the report presented.

The head scaler must have seen the assistant at work, in the same or a like operation, in order to satisfy himself that the method of scaling is his own, or what he can approve. The data obtained by his assistants in their measurements and scale of the logs, and the entries and memoranda thereof made by them, acting under his direction, and inspected, corrected and adopted by him, may be used by the scaler in the determination of the quantity of logs scaled.

In the case at bar, the paper admitted as Exhibit B was not identified as an accurate scale bill.

Its author was not called for that purpose, even though it was testified by the ostensible author that the man who could swear to the assembling of its total could be produced in court that day.

Exhibit B was but hearsay, and as such, admission of it for the consideration of the jury was reversible error.

On exceptions by defendant. An action in assumpsit, to recover for cutting and delivery of logs in excess of amount paid under scale of the vendee.

To the admission of certain hearsay testimony, exception was seasonably taken by defendant, and after the jury had rendered a verdict for the plaintiff in the sum of $1,345.05, a general motion for new trial was filed by the defendant. Exceptions only were considered by the court. Exceptions sustained. The case fully appears in the opinion.

R. W. Shaw,
A. S. Crawford, Jr., for plaintiff.
Herbert T. Powers,
Cook, Hutchinson, Pierce & Connell, for defendant.

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

BARNES, J. On exception to the admission of a scale bill and on general motion by defendant, after verdict for plaintiff in a suit on account annexed for work and labor in cutting and delivering logs.

The contract was oral, for delivery of not less than 500,000 feet of logs; and delivery of more than 500,000 feet of logs acceptable to defendant was admitted.

There was dispute as to price per M, as to quantity delivered, as to percentage of the total delivered which might scale less than twelve inches at the top, and as to the scale to be used as the basis for settlement.

Two agents of defendant agree that the timber was to be paid for according to the scale at the mill. One testifies that the name of the scaler at the mill was given when the contract was made. This the plaintiff denies; and he insists that, with full knowledge he must pay to the owners of the land where the logs were to be cut for all merchantable logs he should cut, it was agreed on the part of defendant, by one of the agents, at the office of the latter, in New Limerick, that the land owners' scale, the stumpage scale, would be considered in settlement.

Plaintiff testified to the following conversation on this point, "Speaking about the scale, I think just before I went the last time he said, 'What about the scale?' I said that I didn't care who scaled it as long as I got ten hundred feet for a thousand; that I couldn't buy 500,000 and sell it for 400,000. And he said 'I know it, and I'll stand between you and the stumpage scale.' "

In the course of the trial, examination was had as to the stumpage scale.

Under plaintiff's license to cut the logs in question, as shown by the license, or permit, admitted as an exhibit, scale which was to be final between land owners and operator was to be made by a person to be appointed by the land owners. Plaintiff called and examined a man who testified that he scaled the first 159 logs of the 4,000 and more that were delivered to defendant, and this witness testified that he saw no more of plaintiff's operation, after

scaling these few logs. He testified that the land owners sent another scaler, a Mr. Griffin, to complete the scale.

Plaintiff's counsel offered as Exhibit B a scale bill signed by the witness, tallying 616,008 feet, board measure, as the scale of plaintiff's entire operation.

But the witness testified that at the time of signing this scale bill he knew nothing as to its accuracy; that the figures were given him by a man interested in the business of one of the land owners, and not by any of the scalers who might be considered as under the supervision of the witness as the "head scaler."

At the insistence of this other man, witness testified, "I checked his (the third party's) figures and signed my name to it, which I should not have done."

Said he, "I will say that I didn't know anything about that lumber."

The witness admitted that he set Mr. Griffin to work as scaler for the land owners and told him what to do. But before a so-called head scaler may accept as accurate the findings of an assistant, he must have more knowledge of such assistant's work than would be conveyed by a report submitted by another who is a stranger to the operation. He must be satisfied of the accuracy of the report presented.

Generally speaking his assistants must be of his choice; certainly they must be workmen approved by him.

Generally the head scaler must have seen the assistant at work, in the same or a like operation, in order to satisfy himself that the method of scaling is his own, or what he can approve. Then, "The data obtained by his assistants in their measurements and scale of the logs, and the entries and memoranda thereof made by them, acting under his direction, and inspected, corrected and adopted by him, may be used by the scaler in the determination of the quantity of logs scaled." *Bank* v. *H. & W. Co.*, 106 Me., 326.

But the paper admitted as Exhibit B was not identified as an accurate scale bill.

Its author was not called for that purpose, even though it was testified by the ostensible author that the man who could swear to the assembling of its total could be produced in court that day.

Exhibit B was but hearsay, and as such, admission of it for the consideration of the jury was reversible error, as stated recently by this court in *Edwards* v. *Goodall*, 126 Me., 254.

Not only was the exhibit inadmissible; it seems to be assumed its consideration was prejudicial, for counsel for plaintiff in his brief argues, "The jury evidently took the stumpage scale and deducted 10% . . . and also made other deductions and found for the plaintiff, as the verdict shows."

Some argument for the admission of this exhibit and another is adduced because the Court, in ruling on defendant's objection, said, "They are admitted for what they are worth." This expression is unfortunate.

The question raised by the objection was whether or no, under the rules of evidence prevailing in this jurisdiction, the paper presented was to be read by the jury or to them.

Defendant urges that it was aggrieved by the ruling of the Court, and defendant's contention is sustained.

Exceptions sustained.

J. OLIVER TILLEY *vs.* HERMAN L. JOHNSON.

Penobscot. Opinion January 13, 1931.

DAMAGES. PROVINCE OF COURT AND JURY.

While it is the duty of the jury, in an action brought to recover damages for personal injuries, to compute just compensation for pain and suffering, in the event that such compensation is not confined within reasonable limits, it is the province of the Law Court to set the verdict aside and to assess damages in a reasonable sum.

In the case at bar, the jury award of $4,250.00 was clearly excessive. Damages should have been assessed at not more than $2,500.00.

On general motion for new trial by defendant. An action on the case to recover damages for personal injuries sustained by the plaintiff, a pedestrian, who was struck by an automobile driven by

the defendant. The jury rendered a verdict for the plaintiff in the sum of $4,250.00. General motion for new trial was thereupon filed by the defendant.

Remittitur of all in excess of $2,500.00 ordered; otherwise new trial upon the question of damages only. The case fully appears in the opinion.

C. J. O'Leary,

George E. Thompson, for plaintiff.

George F. Eaton, for defendant.

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

BARNES, J. This case, an action for damages for injuries to the person of a pedestrian crossing the mouth of a street, and alleged to have been caused by defendant's Ford runabout, driven by defendant and striking plaintiff, comes up on appeal from a verdict awarding $4,250 as the damages, on the general motion that the verdict is against law, against evidence and the weight of evidence, and that the damages are excessive.

At the time of the accident the margin of Main Street at the mouth of Broad, the strip that pedestrians traverse in passing along Main Street, differed in no respect from the street surface on either hand. The surface of the crosswalk, so-called, was of concrete, and like the surface of the streets adjacent. The distance to be covered in crossing the mouth of Broad Street is a few inches more than 132 feet.

The accident occurred between 5 and 6 o'clock in the afternoon of October 17, 1929, in the mouth of Broad Street, City of Bangor.

An ordinance then and there in force reads, "Every driver approaching an intersection, crosswalk, corner or curve, not protected by a signal system or police officer, shall sound a signal in such a way as to give warning to other vehicles and pedestrians of his approach"; and it is admitted that this intersection was not then protected by a signal service system nor a police officer.

At the time of the accident visibility was lessened by the approach of night, and by precipitation variously termed, "a slight

rain," "raining a little," "misty," "just a little fine mist," "misting a little, kind of lowery."

Plaintiff was a barber, forty-seven years of age. He testified he left his place of employment at twenty minutes after five, reached Sweet's corner, the upper corner of Broad and Main Streets, and started on the crosswalk to cross the mouth of Broad Street at about five-thirty; that when he started over the crosswalk he did not notice any automobile approaching; that when he was "about three-quarters of the way across," without hearing any sound of horn or other signal he was hit and rendered unconscious.

A witness testified he came down Main Street to Sweet's corner, stepped off the sidewalk onto the crossing from six to ten feet behind plaintiff and followed him until plaintiff had passed over half or three-quarters the length of the crosswalk, when the witness saw a car, which proved to be that of defendant, enter Broad Street from Main; heard a crash and saw what looked like a bag of potatoes roll from the right front fender of the car, along its running-board and along Broad Street till it stopped, and he found it was the plaintiff, unconscious but moaning.

Defendant testified that he did not "have any difficulty in seeing the objects in front," as he made the crossing, that he "Never saw a thing" in his way, and that he felt no jar or shock, but a "rub," as of "two automobile tops that would be rubbing by each other."

It must have been the contention of defendant that his car did not come in contact with plaintiff, as evidenced by the following question and his answer.

Q. "Well, Mr. Johnson, from the testimony you have heard today, aren't you satisfied in your own mind that you did run against or over Mr. Tilley that day and injure him, or that your car did?"

A. "No, Sir."

Again, when asked why he didn't see plaintiff and the witness who testified to following plaintiff to the place of the accident, defendant replied:

"They wasn't in my vision on the crosswalk in the course I was taking."

From the testimony we conclude that no other vehicle was in the immediate vicinity at the time, save a taxicab near Sweet's curb,

and a truck that arrived just before or just after the accident and stood near another curb of the wide street.

There is as expected, a great variance in estimates of defendant's driving, from 14 to 25 miles per hour; but it is not controverted that he made the turn into Broad Street at or to his left of its median line.

Decision as to the care exercised by plaintiff and defendant respectively was for the jury.

As to many details there is differing testimony in the record, but we assent to the jury's decision that defendant caused the injuries complained of and negligently caused them, while plaintiff was in the exercise of due care.

It seems equally clear that the damages are excessive.

As to the just and appropriate amount of damages recoverable its determination is difficult.

"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." *House* v. *Ryder*, 129 Me., 135, 150 A., 487.

Except for a condition of one leg, which plaintiff terms "nervous," troubling him some at night, at the time of trial, his injuries seem to have been superficial.

His head was covered with bruises and abrasions, his right ear appearing to one of the surgeons who attended him "ground to bits."

The upper portion of that ear is gone, and the mutilation is permanent and disfiguring.

Granted that he ached in every limb and muscle for a time, his recovery, at time of trial, except for the disfigurement, seems to have been very complete.

The monetary loss, from sixteen weeks of enforced idleness and all charges presented for aid and treatment during seven weeks in hospital and for some time thereafter, amounts to $838.92.

To compute compensation for pain and suffering is a perplexing problem. It was, however, the duty of the jury. Dispassionately done, under the rule that the injured suitor is entitled to compensation within reasonable limits only, it is our opinion that compensation should have been not more than $2,500.

So that, if remittitur of the excess above that sum is entered, judgment may be had for $2,500; otherwise new trial upon the question of damages only.

So ordered.

S. PARKER FOSS

vs.

CHARLES GUY HUME AND TICONIC NATIONAL BANK, TRUSTEE.

Kennebec. Opinion January 17, 1931.

TRUSTEE PROCESS. EQUITY. TRUSTS. BANKS AND BANKING.

R. S. 1916, CHAP. 91, SEC. 79. (R. S. 1930, CHAP. 100, SEC. 79.).

In a trustee process equitable considerations must prevail as fully as possible. Such a process, though in form an action at law, is in substance an equitable proceeding to determine the ownership of a fund in dispute, especially where a claimant has appeared and become a party to the suit.

Where money or other property is delivered by one person to another to be by the latter paid or delivered over for the benefit of a third person, the party receiving the money or other property holds it upon a trust necessarily implied from the nature of the transaction and in favor of the beneficiary.

In the case at bar, the Ticonic National Bank was not holding as a bailee for the principal defendant the money left with it by him, nor was it holding it as his agent, nor as his debtor on the basis that it was a general deposit. It was holding as a trustee for the benefit of the check holders, of whom the claimant was one, money left with it for the particular and specific purpose of paying their checks. Under these circumstances at the time of the service of the trustee process there was no money or other thing due absolutely and without contingency from the Ticonic National Bank to the principal defendant, with the exception of a sum slightly in excess of $5.00.

On exceptions by plaintiff to the ruling and decision of single Justice as to the liability of a trustee, the case being brought to the

Law Court under the provisions of R. S. 1916, Chap. 91, Sec. 79, (R. S. 1930, Chap. 100, Sec. 79).

The case was heard by the presiding Justice without jury, resulting in a judgment for the Augusta Trust Company claimant, for $1,550.00 against the trustee, and a judgment for the claimant for costs against the plaintiff. Exceptions sustained. Case remanded for further proceedings in accordance with the opinion.

The case fully appears in the opinion.

Robert Randall,

James L. Boyle, for S. Parker Foss.

Harvey D. Eaton, for Charles G. Hume.

McLean, Fogg & Southard, for Augusta Trust Company.

Cyril M. Joly, for Ticonic National Bank.

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

FARRINGTON, J. On exceptions. S. Parker Foss, the plaintiff, holder of several dishonored checks drawn by Charles Guy Hume, sued Hume for the amount of the checks under a trustee writ, with an *ad damnum* of $1,500.00, in which the Ticonic National Bank of Waterville, Maine, was named as trustee. The Augusta Trust Company on petition duly filed was permitted to appear as third party claimant and was awarded judgment in the sum of fifteen hundred fifty dollars ($1,550.00). The case was heard by the presiding Justice, without jury, docket entries showing "Principal defaulted and continued for judgment," "Trustee discharged with costs against plaintiff." "Judgment for claimant for $1,500. against trustee." "Judgment for claimant for costs against plaintiff." With the exception of these entries the record discloses no findings. The case is before this court on exceptions to the ruling and decision as to the liability of the trustee.

Under Sec. 79 of Chap. 91, R. S. (1916), "whenever exceptions are taken to the ruling and decision of a single Justice as to the liability of a trustee, the whole case may be reëxamined and determined by the Law Court, and remanded for further disclosure or other proceedings, as justice requires."

Stated briefly the facts are as follows: On January 28, 1930, the principal defendant drew a check for fifteen hundred fifty dollars ($1,550.00) on the Ticonic National Bank of Waterville, Maine, and cashed it at the Oakland Branch of the Augusta Trust Company. This check was forwarded in due course and was, on January 31, 1930, presented for payment at the drawee bank. At the close of business on January 30, 1930, Mr. Hume's balance was eighty-two cents. About eleven o'clock in the forenoon of January 31, 1930, Hume went to the Ticonic National Bank to see what checks had been presented and to ascertain what sum he would need "to take care of them." Mr. Wilmot, one of the tellers at the bank, gave him, in his own handwriting, a slip with the amounts of three checks which were at that moment in the bank for payment, one of them being the $1,550.00 check cashed at the Oakland Branch of the claimant bank, the other two being for $185.00 and $63.50 respectively, and all totalled by the teller as $1,798.50. Hume then went to the collection department to see what he "had in there for collection" and the clerk gave him the several amounts of $11.55, $59.50, and $3.20, to which he added $19.65 to cover a check to Mrs. Hume, making a total of $1,892.40 covering all checks then in the bank and to be paid. When Mr. Hume, late in the afternoon, went in to leave this amount, he was told by one of the bookkeepers that he needed a little more and he states that he added $5.00 to the amount he had for the purpose of covering the various checks, which was entirely in bills with the exception of fifty cents in silver, and the bookkeeper said, "All right, that takes care of you very nicely." He evidently added ten cents more than the $5.00 to account for fifty cents instead of forty. Almost immediately after this money was left with the bank by Mr. Hume, the trustee process was duly served on the bank by the plaintiff at 2.31½ m. P. M. January 31, 1930, the head bookkeeper testifying that "the trustee was served during the transit from the time the deposit was received until it got to me." The evidence shows that the bookkeeper was informed of the service of the trustee process before she had knowledge that Mr. Hume had left the money with the bank so that it is clear there intervened no time during which any bookkeeping entries could have been made. In

fact, none of the checks had actually been accepted, nor had any entries relating to them been made on the books of the bank.

The testimony is conflicting but, taking into consideration all the evidence in the case, together with all inferences reasonably and properly drawn from such evidence, we are convinced that the money left with the Ticonic National Bank on January 31, 1930, was not a general deposit, the result of which would have been to constitute the bank a debtor to Mr. Hume, the depositor. We are fully satisfied that it was a special deposit and left with the bank for the specific purpose of being applied to the checks then in the bank, and for no other purpose, and that it was so understood by the bank as well as by the depositor and that it was received by the bank with that understanding.

The knowledge of the teller must be regarded as the knowledge of the bank. *Hale et al* v. *Windsor Savings Bank et al* (Vt.), 98 Atl., 993; *American Lumber Sales Co.* v. *Fidelity Trust Co.*, 127 Me., 65, 71.

This Court has frequently said that as between the plaintiff and a claimant in a trustee process equitable considerations must prevail as fully as possible. *Howe* v. *Howe et als*, 97 Me., 422, 425; *Jenness* v. *Wharff*, 87 Me., 307; *Haynes* v. *Thompson*, 80 Me., 125.

"A process of this kind, though in form an action at law, is in substance an equitable proceeding to determine the ownership of a fund in dispute, especially when a claimant has appeared as in this case and become a party to the suit." *Harlow* v. *Bartlett and City of Bangor, Trustee*, 96 Me., 294, 296; *Jenness et al* v. *Wharff*, supra.

When a deposit is made for a specific purpose and for the benefit of a third person a trust relation is created in favor of that third person. *Woodhouse* v. *Crandall* (Ill.), 64 N. E., 293.

Where money or other property is delivered by one person to another to be by the latter paid or delivered over for the benefit of a third person, the party receiving the money or other property holds it upon a trust necessarily implied from the nature of the transaction and in favor of the beneficiary. *Stockard* v. *Stockard's Admr.*, 7 Humphrey's, 303, 46 Am. Dec., 79.

In our opinion, the bills and silver left with the bank just before

the close of its banking hours on the afternoon of January 31, 1930, constituted a trust for the benefit of the various holders of the checks presented and in the possession of the bank, including that of the Augusta Trust Company, beneficiary to the extent of the $1,550.00 check cashed by it, and that they were so held by Ticonic National Bank as trustee for the check holders.

We do not regard it as important, or as affecting the trust relation created between the bank and the Augusta Trust Company, and other check holders, that Mr. Hume may have realized that the money left by him was to go into the bank's general funds, or that it did actually go there.

This money or its equivalent belonged in equity and good conscience to the holders of the checks in the bank for whom it was left. Mr. Hume knew it and intended it to be theirs. The bank, as we read the evidence, knew it also and knew that Mr. Hume so intended it, and accepted it with that understanding.

The Ticonic National Bank was not holding as a bailee for Hume the money left with it by him, nor was it holding it as Hume's agent, nor was it holding it as his debtor on the basis that it was a general deposit. It was holding as a trustee for the benefit of the check holders money left with it for a specific purpose and for the benefit of third persons of whom one was the claimant in this case.

Because of this trust relation, the most simple form, perhaps, in which such an implied trust can be presented, we are unable to see that, at the time of the service of the trustee process on the bank, any money or other thing was due, absolutely and without contingency, from the Ticonic National Bank to Mr. Hume, the principal defendant, with the exception of the eighty-two cents, old balance on general deposit, plus the $5.10 thrown in by Hume as good measure on January 31, 1930, and for that amount alone the bank, as trustee in the plaintiff's writ, should be charged.

In determining the question of the relative rights of the plaintiff and claimant in this case there has been and need be no discussion or consideration of Section 189 of the Maine Uniform Negotiable Instruments Act. Prior to the Act there was a division of opinion in the courts as to whether or not a check operated as an assignment. Since its general adoption there has been and still is a

lack of accord, but the pronounced weight of authority is in favor of the view that a check, as such, does not operate as an assignment. In view of this opinion that, under the existing facts and circumstances, a trust relationship was created, further comment on the Act itself would be unnecessary and futile.

From what appears in the record of the case we feel that the Augusta Trust Company was properly permitted to become a party to the proceedings, and that there was no error on the part of the presiding Justice in rendering the judgment for $1,550.00 in favor of the claimant, and that the exceptions as far as they relate to the order of judgment for the claimant are, because of this opinion, without force, and the judgment must stand.

Exceptions, however, must be sustained, as the Ticonic National Bank must be charged as trustee under plaintiff's writ with the sum of $5.92, the sum of eighty-two cents, the old balance on general account, and the $5.10 left by Mr. Hume with the bank over and above the amount of checks to be cared for, and this sum the bank is entitled to apply to the costs of its disclosure as such trustee, and, if said amount is not sufficient to discharge the costs taxed in its favor, it shall have judgment against the plaintiff for the balance of said costs, after deducting $5.92, the sum disclosed as subject to plaintiff's claim. If said sum of $5.92 is in excess of its disclosure costs, the balance, after deducting such costs, is to be paid to the plaintiff.

Exceptions sustained. Case remanded for further proceedings in accordance with this opinion.

IN RE CENTRAL MAINE POWER COMPANY.

Kennebec. Opinion January 21, 1931.

CORPORATIONS. CAPITAL STOCK. INTEREST. PUBLIC UTILITIES.

The Public Utilities Commission of Maine is not authorized to permit the issuance of stock or bonds, the face value of which exceeds the utility's investment in capital assets.

A sale of bonds at a price less than face value is not only legitimate but frequently desirable from the standpoint of practical business.

The difference between the face value of bonds so sold and the proceeds of the sale is usually denominated bond discount.

Bond discount is deferred interest. Interest is payable out of earnings, not out of capital, and neither bond discount nor short term notes given to cover bond discount may properly be capitalized.

To permit the issuance of stock to take up such notes would be to capitalize future earnings. This is not permissible under our statutes.

In the case at bar the investment, $19,066,500, stood as security for the issue of bonds of equal face value. The corporation received, however, from the proceeds of the sale of the bonds the sum of $17,747,475. It then issued short term notes for $1,319,025. It sought to issue capital stock for that amount. To permit the corporation to issue 13,190 shares of stock of the par value of one hundred dollars, without any offsetting investment other than bond discount, would leave such stock represented by not a single dollar of capital assets.

It was to prevent inflation of that kind that the Commission was given authority to supervise within the limits of the statute the issuance of securities by public utilities. The act of the Commission in denying petitioner's request was justified. It could not have legally pursued any other course.

On exceptions to order of Public Utilities Commission. The case comes before the Law Court under Sec. 55, Chap. 55, R. S., as amended by Chap. 28, P. L. 1917 (R. S. 1930, Chap. 62, Sec. 63), upon exceptions to an order of the Public Utilities Commission entered January 4, 1930, denying and dismissing an application of the petitioner for authority to issue common stock for the pur-

pose of refunding the exact amount of its notes issued to pay bond discount. Exceptions overruled. The case fully appears in the opinion.

E. H. Maxcy,
L. A. Burleigh, Jr.,
N. W. Wilson, for petitioner.
Clement F. Robinson, Attorney General, for the State.

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

PATTANGALL, C. J. On exceptions to order of Public Utilities Commission. The Central Maine Power Company, a subsidiary of the New England Public Service Company, is the largest public utility of its kind operating in Maine. On February 14, 1928, it filed with the Public Utilities Commission a petition asking approval for the issuance of not exceeding 7,913 shares of common capital stock of the Company "for the purpose of the discharge and lawful refunding of its obligations, to-wit: Its obligations incurred in providing the necessary funds for the acquisition of property used for the purpose of carrying out its corporate powers, and for the construction, completion, extension and improvement of its facilities, and the improvement and maintenance of its service, to the amount of $791,386.61, which is the amount of unamortized discount on the several bond issues of Central Maine Power Company."

The petitioner also alleged that:

> "Central Maine Power Company has issued, from time to time, its bonds in manner as shown in this petition . . . The bonds so issued have been sold by the Company at a price less than the par value of said bonds. All of said bonds were sold for the purpose of acquiring funds for the acquisition of property for the carrying out of the Company's corporate powers, for the construction, completion and extension of its plants and properties, and for the improvement and maintenance of its service to the public. In each case of the acquisition of property and the construction of plants and properties, the Com-

pany has issued securities in principal amount sufficient only to pay for the actual cost, or a proportionate part thereof, of such properties. The sale of such bonds at a discount has made necessary the raising of funds by other means to provide the difference between the cost of the property or a proportionate part thereof, and the proceeds realized from the sale of bonds. This difference in money required, usually denominated as bond discount, has been secured by the Company by borrowing the same from various banks or others in the form of loans, maturing not more than twelve months from the respective dates thereof. The Company has necessarily been compelled to renew such loans from time to time. The notes of the Company securing such loans, whether issued originally or in renewal, are the obligations of the Company which it proposes to discharge and refund by the proceeds of common stock, the authorization for which is requested in this petition."

Satisfactory evidence was offered that between March 28, 1910, and December 1, 1927, petitioner, by permission of the Commission, issued bonds of the face value of $19,066,500; that these bonds were sold at prices which yielded to the petitioner total proceeds of $17,747,475; that the discount suffered on these sales was, therefore, $1,319,025; that of this amount there had been amortized $527,638.39 under orders of the Commission; and that the balance unamortized at the date when this petition was filed was $791,386.61.

The petitioner had issued temporary notes for this amount. The suggested stock issue was for the purpose of taking up these notes.

The Commission denied the petition. Exceptions were taken to this denial.

Such authority as the Commission has concerning the issuance of securities is found in Sec. 41, Chap. 62, R. S. 1930.

"Any public utility now organized and existing or hereafter incorporated under and by virtue of the laws of the state of Maine and doing business in the state may issue stocks, bonds which may be secured by mortgages on its property, franchises, or otherwise, notes or other evidences of indebtedness,

payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of property to be used for the purpose of carrying out its corporate powers, the construction, completion, extension or improvement of its facilities, or for the improvement or maintenance of its service, or for the discharge or lawful refunding of its obligations, or to reimburse its treasury for moneys used for the acquisition of property, the construction, completion, extension, or improvement of its facilities, or for the discharge or lawful refunding of its lawful obligations, and which actually were expended from income or from other moneys in the treasury of the corporation not secured by, or obtained from the issue of stocks, bonds, notes, or other evidences of indebtedness of such corporation, or for such other purposes as may be authorized by law; provided and not otherwise, that upon written application, setting forth such information as the commission may require, there shall have been secured from the commission an order authorizing such issue and the amount thereof and stating that in the opinion of the commission the sum of the capital to be secured by the issue of said stocks, bonds, notes, or other evidence of indebtedness is required in good faith for purposes enumerated in this section; but the provisions of this chapter shall not apply to any stocks or bonds or other evidences of indebtedness heretofore lawfully authorized and issued; provided, however, that the commission may at the request of any public utility approve the issue of any stocks or bonds heretofore authorized but not issued. For the purpose of enabling the commission to determine whether it shall issue such an order, the commission shall make such inquiries for investigation, hold such hearings and examine such witnesses, books, papers, documents, or contracts as it may deem of importance in enabling it to reach a determination."

The sole issue in the case is whether or not, under the provisions of this statute and on the admitted facts, the Commission was obliged, as a matter of law, to grant the petition.

Petitioner's position is that the proceeds of the notes which it desires to replace with stock were actually invested in property

necessary for the carrying out of the company's corporate purposes and, therefore, specifically within the scope of the provisions of the statute.

The notes were, as already stated, given to fill the gap between the face value of the bonds authorized and the price which the utility received from them; in other words, to cover the bond discount. Petitioner claims that it is its right to issue securities, regardless of face value, which will when sold, whether at a discount or otherwise, produce the amount of money in good faith required to make an authorized investment and that if, in pursuing that course, a disparity between the face of the securities issued and the amount of the investment exists at the inception of the transaction, the difference may be provided for by an amortization fund so that the final result will produce a sound foundation for all outstanding securities.

The Commission on the contrary takes the position that when, to provide for an investment of $19,066,500, it authorized an issue of $19,066,500 par value of bonds, it exhausted its authority; that the utility was not obliged to sell the bonds below par; that no necessity existed for its so doing; that it was done for the convenience of the utility and in order that it might be enabled to market its bonds at a low rate of interest; that bond discount is in reality deferred interest, must be financed out of earnings, and may not properly be capitalized. It asserts that there is no distinction between securities issued directly to cover bond discount and those issued to take up notes given to cover bond discount, and that neither comes within the scope of the purposes enumerated in the statute.

The questions thus raised are not only novel in this jurisdiction but have never, so far as our information goes, been passed upon by any court. They have been discussed somewhat by text writers and have been considered by several public service commissions, the provisions of our statute being generally similar to those enacted in several other states.

The decisions of the Commissions are neither uniform nor consistent. In our own state, *In re Central Maine Power Company*, 1919, U 329, the view here expressed by petitioner was sustained by

the Commission; but *In re Penobscot Power Company*, 1922, E 866, it reconsidered the matter and adopted the policy evidenced by its decision in the instant case.

The Commissions of Indiana, Montana, Georgia, and Wisconsin have refused to permit the capitalization of bond discount, as did that of Illinois until it reversed its position in a divided opinion *In re Southern Illinois Gas Co.*, 1916, C 704. The Maryland Commission, on the contrary, like that of Maine, was at first favorable to this petitioner's theory, but *In re Baltimore County Water and Electric Co.*, 1918, F 565, came to the opposite conclusion.

In Arizona, Nebraska and New Hampshire, utilities have been permitted to issue securities based on payments of bond discount. The California Commission *In re Nevada, California and Oregon Tel. & Tel. Co.*, 1927, B 662, decided that "any expense incurred in connection with the issue of bonds should be paid out of earnings."

In the absence of any authoritative precedent and because of the lack of uniformity in the decisions of the Commissions of other states, accounted for in part by slight differences in statutes but more largely because of differences in the views of the members of the Commissions as shown by frequent reversals of opinion in certain states as the personnel of the Commissions changed, we are obliged to reach our conclusion from a study of the provisions of our own statute and an analysis of the exact situation presented here.

The statute imposes upon the Commission certain duties and confers upon it certain authority with respect to the issue of securities and obligations other than those maturing within twelve months from the date of their issue, prescribing the conditions and defining the purposes for which such securities may be issued.

These purposes are: (1) for the acquisition of property to be used in carrying out its corporate purposes; (2) for the construction, completion, extension or improvement of its facilities; (3) for the improvement or maintenance of its service; (4) for reimbursing the treasury for actual expenditures for these purposes; (5) for discharging or refunding these liabilities.

The utility must provide for the payment of current business

expense out of earnings. Salaries, taxes, insurance, depreciation and interest are among the items which must be thus taken care of, and short time notes given for the purpose of procuring funds to meet any bills of this sort would not be obligations which could properly be refunded by the issue of permanent securities. *People ex rel Binghampton Light, Heat & Power Co.* v. *Stevens*, 203 N. Y., 7.

If stock is to be substituted for the notes in question, it must be because the proceeds of the notes were used for one or more of the first four purposes enumerated above. Petitioner claims that such is the case. In order to determine whether or not its position is correct on this point, it may be well to reëxamine and restate the exact situation and the exact facts concerning the issue of the notes.

An investment of $19,066,500 in capital assets was proved to have been made or was in contemplation by the utility. For the purpose of reimbursing its treasury for actual expenditures in the acquisition of this property or for the purpose of furnishing funds with which to acquire it or both, permission was given to issue bonds of the face value of $19,066,500.

Had these bonds been sold at par, the incident would have been closed. The utility undoubtedly could have sold them at par but in order to do so would have been obliged to pay a comparatively high rate of interest. It decided, in the exercise of good business judgment, to issue bonds bearing a lower rate of interest and sell them at a discount. The proceeds of the bonds amounted to $17,747,475. It then issued short term notes of $1,319,025, the amount of the discount, and proceeded to apply sufficient of its earnings each year to the payment of these notes so that, if the payments were continued, the notes would be fully paid at the maturity of the bonds.

Negotiating these notes did not add anything to the assets of the utility. The proceeds were used to pay the difference between the face of the bonds and the price at which they were marketed or what is usually denominated bond discount.

Our inquiry, therefore, is whether or not bond discount may properly be capitalized. There is obviously no difference between

issuing stock for the purpose of paying bond discount and issuing stock for the purpose of taking up notes, the proceeds of which were used to pay bond discount.

It is perfectly legitimate for a utility to sell its bonds at less than their face value. Indeed, experience has proved that a saving in interest is effected by so doing and that such bonds are more easily marketable. But if a thousand dollar bond which could be sold at par provided it bore interest at six per cent sells for nine hundred dollars when paying five per cent, it is apparent that the obligor pays for the use of the nine hundred dollars which it receives, not only fifty dollars annually during the life of the bond, but one hundred dollars additional at its maturity. Bond discount is, therefore, only another term for deferred interest.

Milton B. Ignatius, in "Financing Public Service Corporations," discusses the point as follows:

> "Similarly, a corporation may discount its bonds. It can offer to accept an amount less than the par value, although it will be obliged to pay par upon maturity. The discount will represent an advance payment for the use of money, and since the bonds are currently interest-bearing, to the nominal interest rate must be added the rate prepaid by discount, and the result will be the effective interest rate.
>
> "There may be a number of conditions warranting the issue of bonds at a discount. The prospective purchaser may consider himself entitled to a greater than the nominal rate of interest, either because of the terms and conditions of the bonds or because of the risk of the enterprise. He takes that extra interest by discounting the loan."

Whitten and Wilcox, in their work on "Valuation of Public Service Corporations," Vol. 2, page 1137, say:

> "At first the cost of money was put forward chiefly in the form of bond discount, but analysis soon made it clear that bond discount is merely deferred interest, and therefore that the capitalization of bond discount as a part of construction cost would be a recognition of the incorrect practice of paying interest or operating expenses out of capital."

It could not be seriously argued that interest should be paid out of capital. It must be paid out of earnings and any attempt to capitalize a deferred interest charge or a note given to cover such a charge is an attempt to capitalize future earnings.

The plain intent of Sec. 41, Chap. 42, R. S. 1930, and a fair interpretation of its language, is that the permanent securities issued by a utility shall be balanced by its investment in capital assets.

In the instant case, the investment of $19,066,500 stood as security for the issue of bonds of equal face value. If the theory of petitioner is correct, it could have insisted, at the time the bonds were authorized, upon a permit to issue in addition to the bonds 13,190 shares of stock of the par value of one hundred dollars, without disclosing to the Commission any offsetting investment other than bond discount, the stock not being represented by a single dollar of capital assets.

It was to prevent inflation of that kind that the Commission was given authority to supervise within the limits of the statute the issuance of securities by public utilities. The Commission was justified in denying petitioner's request. It could not have legally pursued any other course.

Exceptions overruled.

FREDERICK F. TUSCAN ET ALS *vs.* CLYDE H. SMITH ET ALS.

Somerset. Opinion January 23, 1931.

EQUITY. MUNICIPAL CORPORATIONS. TOWN OFFICERS.

R. S. 1916, CHAP. 4, SEC. 42, 43, 44. R. S. 1916, CHAP. 82, SEC. 6, XIII.

By the act passed in 1874, *giving general equity powers to the Supreme Judicial Court, the equitable remedies of taxable inhabitants of cities and towns were extended, and they now have a right to enjoin a town or city from the*

performances of illegal acts. Such equitable remedies are confined to applications for preventive relief.

Town officials are in a position of trustees for the public. A contract in which such an official is pecuniarily interested and which places him in a situation of temptation to serve his personal interests to the prejudice of the interests of the town is illegal.

In the case at bar, neither the provisions of R. S. 1916, Chap. 4, Sec. 42, 43, and 44, nor the provisions of Chap. 82, Sec. 6, XIII, providing for remedies in certain cases in equity against cities and towns on application of ten taxable inhabitants, applied, but the remedies were under the act of 1874 giving general equity powers to the Supreme Judicial Court on petition of taxable inhabitants of a city or town.

The indebtedness of Myron E. Smith to Clyde H. Smith, which the former had no means of paying except through the successful operation or sale of his moving picture business, created a pecuniary interest in the latter in the granting of the lease by the board of selectmen of the town. The lease in this case was therefore void.

On appeal. A bill in equity brought by ten taxable inhabitants of the town of Skowhegan against Clyde H. Smith and others, praying that a certain lease dated October 19, 1929, from the said town to Myron E. Smith of that part of the municipal building used for moving pictures, and the assignment of said lease from said Myron to Priscilla Theatres, Inc., be declared void.

The Court upon hearing, made certain findings of fact, and rendered a final decree sustaining the bill and declaring the lease and assignment void, from which decree all of the defendants with the exception of Priscilla Theatres, Inc., appealed. Appeal dismissed with additional costs. Decree to be modified in accordance with the opinion. The case fully appears in the opinion.

Harry R. Coolidge, for plaintiffs.

Gower & Eames, for Blin W. Page.

Merrill & Merrill,

Belleau & Belleau,

George C. Wing, Jr., for defendants.

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

THAXTER, J. This case is before this court on appeal by certain defendants from a decree of a sitting Justice sustaining the plaintiffs' bill in equity.

The bill is brought by ten taxable inhabitants of the Town of Skowhegan seeking cancellation of a lease given by the town to the defendant Myron E. Smith, and by him assigned to the defendant Priscilla Theatres, Inc., and among other prayers asks for an injunction against the lessee or his assignee taking possession of the demised premises. Joined as defendants with the lessee Myron E. Smith are his assignee, Priscilla Theatres, Inc., J. Nazaire Theriault, who received an assignment of the lease from the theatre company as security for his endorsement on certain notes, Clyde H. Smith, a brother of Myron and chairman of the selectmen of the Town of Skowhegan, Frances Smith, wife of Myron, the remaining two selectmen of the town, and the town itself. The claim of the bill as amended is that a lease dated October 19, 1929, of a portion of the municipal building to Myron E. Smith is void, because knowingly made for a less rental than could have been obtained from other parties and because Clyde H. Smith, one of the selectmen, was pecuniarily interested in the granting of the lease and in the assignment of it. The bill sets forth the following circumstances as evidence of such interest, that Clyde H. Smith was a part owner with his brother in the picture business to be conducted on the premises, that he was liable on guarantees given by his brother to one from whom his brother had purchased an outstanding interest in the business, and that he was a creditor of his brother in a substantial amount. The bill charges that the assignees of the lease had knowledge of these facts. The answers of the various defendants deny these allegations with the exception that they admit the guarantee and an indebtedness of Myron E. Smith to his brother, which was paid by notes received from Priscilla Theatres, Inc., as part of the price for the assignment of the lease and the sale of the business. The answers also set forth that the form of the lease had the approval of the voters of the town, that a request for bids was suitably advertised, and that only one bid was received, that of Myron E. Smith and Rexford St. Ledger.

The evidence shows the following facts. Prior to March, 1929,

Myron E. Smith and Grace St. Ledger were the lessees of a portion of the municipal building of the Town of Skowhegan. In the leased premises they operated a moving picture business. This lease expired February 20, 1930. At the annual town meeting in March, 1929, the town ordered its selectmen to prepare a blank form for a new lease and submit it to the town for approval, and directed the selectmen to award the lease to local parties if they would meet the terms of outsiders. On June 8 this draft of a lease was submitted to the town voters and approved. It provided for the letting of that part of the municipal building used as a moving picture theatre, for a term of ten years at a rental of twelve dollars a year. The lessee was, however, to heat and light the whole building, and to furnish janitor service for it and for the surrounding grounds. The lease provided in considerable detail how this work should be done. All of these services were to be performed to the satisfaction of the selectmen of the town. In addition, the standard and quality of the pictures to be shown were subject to the approval of a board of five censors to be chosen by the selectmen. There were numerous other covenants to be performed by the lessee, which it is unnecessary to mention. Proposals for bids were duly published and but one bid was received, a joint bid from Myron E. Smith and Rexford St. Ledger, the son of Grace St. Ledger, lessee with Myron of the existing lease. The new lease was to run for ten years from February 20, 1930, the date of the expiration of the old lease. For some reason not satisfactorily explained the new lease was not actually executed till October 19, on which day also Rexford St. Ledger, with the approval of the selectmen, assigned his interest under the bid to Myron E. Smith. That very day negotiations started between Myron E. Smith and Priscilla Theatres, Inc., for the purchase by the latter of Myron's business. Ten days later Myron bought out Mrs. St. Ledger's interest in the balance of the old lease and her interest in the business, and gave her an agreement to save her harmless on any partnership debts. Clyde Smith guaranteed his brother's performance of this obligation. The negotiations were finally closed with Priscilla Theatres, Inc., about the middle of November. The purchaser received from Myron E. Smith an assignment of the

balance of the old lease, an assignment of the new lease which was approved by Clyde Smith and Joseph Butler, two of the three selectmen, a bill of sale of certain of the equipment, and an assignment of Myron Smith's interest in certain motion picture contracts. For this ten thousand dollars was paid, two thousand dollars in cash and the balance by four notes payable in one, two, three, and four years, with interest at five per cent. These notes were endorsed by Mr. Theriault, the treasurer of the purchasing company. The evidence does not show that Clyde Smith was an owner in the business, but at the time of this sale and for a long period of time prior thereto, Myron Smith had been indebted to his brother in the sum of four thousand dollars, and shortly after the sale this indebtedness was discharged by Myron turning over to Clyde notes of the Priscilla Theatres, Inc., to the amount of three thousand dollars. One of the notes was split to enable this to be done. It is important to bear in mind that Clyde Smith took an important part in the negotiations between his brother and the purchaser. His brother was nervous and in ill health. Clyde advised him as the deal progressed. When misunderstandings arose, it was on Clyde's suggestion that his brother gave in. Clyde insisted on the indorsement of the notes. He was present at the first interview, October 19, between his brother and Mr. Dam, the representative of the purchaser, and was a participant in the discussion of the terms of the sale. It is a fair inference from the evidence that he was his brother's confidant and advisor in business matters. Clyde Smith had been for many years a member of the board of selectmen of the Town of Skowhegan, and at the time of these negotiations and the filing of the bill in this case was chairman of the board.

The question before this court now is whether on these facts the sitting Justice was warranted in sustaining the plaintiffs' bill, and in holding void the lease given by the town to Myron E. Smith. A question of jurisdiction should be settled at the outset.

At the time that Maine became a separate state in 1820 the Supreme Judicial Court was not granted general equity powers. The first laws on the subject passed in 1821 followed the Massachusetts acts, and gave jurisdiction in certain specified cases. From time to time this was enlarged, but this court has always

held that it had no equity powers except in so far as they may have been given by legislative enactment. Among such statutory extensions of jurisdiction were acts giving a remedy in equity in certain cases involving unauthorized doings by cities and towns. These are found in the R. S. 1916, Chap. 4, Secs. 42, 43, 44, and Chap. 82, Sec. 6, XIII.

Chap. 82, Sec. 6, XIII, reads as follows:

"XIII. When counties, cities, towns, school districts, village or other public corporations, for a purpose not authorized by law, vote to pledge their credit or to raise money by taxation or to exempt property therefrom, or to pay money from their treasury, or if any of their officers or agents attempt to pay out such money for such purpose, the court shall have equity jurisdiction on petition or application of not less than ten taxable inhabitants thereof, briefly setting forth the cause of complaint."

This provision was first enacted in 1864, Chapter 239, Public Laws 1864, and has come down to us today in practically its original language with the exception that the words "or to exempt property therefrom" were not included in the original act. These first appear in the revision of the statutes of 1883.

Chap. 4, Secs. 42, 43, and 44, R. S. 1916, read as follows:

"*Sec.* 42. *Town officers not to act when pecuniarily interested. R. S. c.* 4, *sec.* 38. No member of a city government or selectmen of a town, shall in either board of such government, or in any board of selectmen, vote on any question in which he is pecuniarily interested directly or indirectly, and in which his vote may be decisive; and no action of such government or board taken by means of such vote, is legal.

"*Sec.* 43. *Interests in municipal contracts prohibited. R. S. c.* 4, *sec.* 39. No member of a city government shall be interested, directly or indirectly, in any contract entered into by such government while he is a member thereof; and contracts made in violation hereof are void.

"*Sec.* 44. *Enforcement of secs.* 42 *and* 43. *R. S. c.* 4, *sec.* 40. The supreme judicial court in equity, by writ of injunction or otherwise, may restrain proceedings in any town in violation of the two preceding sections, upon application of ten or more taxable citizens."

These provisions were originally passed in 1868. Chapter 162, Public Laws 1868. In substance they are identical with the original enactments. In place of the words used in Section 42 of the 1916 Revision "no action of such government or board taken by means of such vote is legal" the original act reads as follows: "no action of any city government or board of selectmen hereafter taken by means of a vote forbidden by the provisions of this act shall be legal." The meaning of these two provisions is, however, the same. Section 43 is practically identical with Section 2 of the original act. Section 3 of the original enactment, which relates to the remedy, provides that it shall be the same as in Chapter 239 of the Public Laws of 1864 above referred to. In the Revision of 1871 this section received its present form. R. S. 1871, Chap. 3, Sec. 30. Counsel for the defendants in their very able discussion of the history of this legislation comment on the fact that an inference might be drawn from the use of the word "town" in Section 44 that both of the preceding sections apply equally to towns. We quite agree with them, however, that this is not so, and that Section 43 has reference merely to cities. The use of the word "town" in the section relative to the remedy is general and is intended to include both cities and towns. R. S. 1916, Chap. 1, Sec. 6, Paragraph XIX.

The discussion of the history of this legislation is important in order to determine what, if any, remedy these plaintiffs may have apart from these express provisions of the statutes providing for relief in equity against cities and towns, for, contrary to the contention of plaintiffs' counsel, none of these statutory provisions is in our opinion applicable to the instant case. Sec. 42, Chap. 4, does not apply because the action taken by the board of selectmen of the Town of Skowhegan was not taken by means of the vote of the defendant, Clyde H. Smith. The vote was unanimous and he was but one of three. *Marshall* v. *Ellwood City*, 189 Pa. St., 348. Section 43

is inapplicable because Skowhegan is a town and not a city, and this section applies only to city governments. It is likewise obvious that the attempted action of the town is not within the prohibitions of Section 6, XIII, of Chapter 82.

Counsel for defendants contend that, even assuming the contract in this case might have been void at common law, yet the statute, passed in 1868 referred to above, removes such common law restriction, except in so far as the prohibitions of the statute may apply. With this contention we do not agree. At the time of the passage of this act and likewise of the act of 1864, the general equity power of this court was still limited. Only in so far as the statutes authorized it did it have equity jurisdiction. It was not until 1874 that general equity jurisdiction was given. Public Laws 1874, Chapter 175. The statutes of 1864 and 1868 did not therefore in any sense purport to enumerate those acts of cities and towns which were illegal and void to the exclusion of all others, but merely extended a remedy in equity for the acts therein prohibited. What had theretofore been unlawful at common law was still unlawful.

In 1874 the Supreme Judicial Court was given full equity powers, and since that time equitable remedies have been available to taxable inhabitants against cities and towns, except in so far as considerations of public policy and the discretionary powers of the courts may restrict them. It has always been conceded that the attorney general in the name of the state or on the relation of interested parties could bring a bill in equity in a case properly within the equity jurisdiction of the court to set aside illegal acts of municipal corporations. Dillon: Municipal Corporations, 5 ed., Sec. 1577. Some cases have held that the attorney general is a necessary party and that a taxable inhabitant in his own name has no right to institute an action, where the act complained of is one which affects the entire public equally. *Davis* v. *New York*, 2 Duer (N. Y.), 663; *Miller* v. *Grandy*, 13 Mich., 540. It must be conceded that there is reason back of such a restriction. Municipal officers should not be subjected to litigation at the suit of every dissatisfied taxpayer. By the weight of authority today, however, taxable inhabitants are not barred from maintaining a bill in their

own names in a proper case. *Crampton* v. *Zabriskie*, 101 U. S., 601. In this case the Court said, page 609:

> "Certainly in the absence of legislation restricting the right to interfere in such cases to public officers of the State or county, there would seem to be no substantial reason why a bill by or on behalf of individual tax payers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of process in such cases."

Our court has very clearly defined the limits of such right. It has held that it should be restricted to an application for preventive relief, and that individual taxpayers have not the right to apply for remedial relief after the commission of an illegal act, where the act is one which affects the entire community and not specifically the individual bringing the bill. *Eaton* v. *Thayer*, 124 Me., 311.

We are aware that Massachusetts has held that the statute conferring general equity powers on its courts did not give the right to the individual taxpayer to file a bill. *Baldwin* v. *Inhabitants of Wilbraham*, 140 Mass., 459; *Steele* v. *Municipal Signal Co.*, 160 Mass., 36; *Prince* v. *Crocker*, 166 Mass., 347. It is perhaps sufficient to say that this court has construed our own statute differently. *Blood* v. *Beal*, 100 Me., 30; *Reynolds* v. *Waterville*, 92 Me., 292; *Eaton* v. *Thayer*, supra.

If therefore the action of the selectmen of the Town of Skowhegan in giving the lease here in question to Myron E. Smith was void under the principles of the common law, this court has jurisdiction in equity to enjoin the wrongful use by the lessee of the town property, to declare such contract void, and as incidental to such preventive measures to give such affirmative relief as may be appropriate.

The testimony in this case shows that Myron Smith had been indebted to his brother Clyde for a long period of time; and it is a reasonable inference from all that went on between them that this indebtedness he was unable to pay except through the sale or successful operation of his moving picture business. He was a victim of

misfortune, of physical and mental illness. It was Clyde Smith who apparently prevented the deal between Myron and the Priscilla Theatres from falling through, and he assumed an active role in the negotiations. Conceding with defendants' counsel that mere indebtedness does not necessarily create an interest in fact in the business transactions of the debtor, yet it may do so; and in view of the circumstances of this case, we feel that Clyde Smith's pecuniary interest in the outcome of this affair was obvious. In determining whether or not a contract such as this is against public policy and illegal the court is not concerned with the technical relationships of the parties, but will look behind the veil which enshrouds the matter to discern the vital facts.

The inevitable consequence of the form of the lease here in question was to limit the number of bidders for it. The rent was payable not in money but in services, and one of the judges as to whether those services should be properly rendered was the chairman of the selectmen of the town. Tolerance there meant more profit to the lessee, and more money with which to pay his brother's debt. Moreover, the standard and quality of the pictures were subject to the decision of a board of censors appointed by the selectmen, who were themselves a final board of appeal. The conflict of interest between Clyde Smith as a town official and Clyde Smith as his brother's creditor is apparent, and the approval of the lease by the voters of the town can not alter the fact. When we consider the control which the selectmen had over the business of the lessee, their wide latitude in determining whether he had or had not performed the covenants of his lease, that they held a practical censorship over the pictures which he might show, that in fact they had it in their power to decree whether his business should run at a profit or at a loss, we can well understand that there might be some hesitation by interested parties in bidding for that lease against the brother of the chairman of the board.

The bid for this lease was accepted July first, but it was not until October nineteenth that the lease was executed. On that same day Myron Smith bought out the interest of Rexford St. Ledger in their joint bid, and negotiations started for the sale of the business and the assignment of the lease to Priscilla Theatres, Inc. It is

difficult to believe that there was no causal connection between these three incidents or that their concurrence on that day was mere chance. The deal was finally closed and Myron Smith received ten thousand dollars in notes for the assignment of the lease, for his equipment, and for an assignment of certain picture contracts. Whatever may have been the value of the picture contracts, Mr. Dam testified that Myron valued the equipment at a thousand dollars. Clyde Smith received three thousand dollars in notes of the purchaser in payment of his brother's debt.

It is unnecessary to discourse on the duties of public officials. Their obligations as trustees for the public are established as a part of the common law, fixed by the habits and customs of the people. Contracts made in violation of those duties are against public policy, are unenforcible, and will be cancelled by a court of equity. No definite rule can be given indicating the line of demarcation between that which is proper and that which is unlawful. In the words of this court in the case of *Lesieur* v. *Inhabitants of Rumford*, 113 Me., 317, 321, the question really is whether the town officer by reason of his interest is placed "in a situation of temptation to serve his own personal interests to the prejudice of the interests of those for whom the law authorized and required him to act in the premises as an official." See as authority for the same general principle the following. *Bay* v. *Davidson*, 133 Ia., 688; Dillon: Municipal Corporations, 5 ed., Secs. 772-773; *Lesieur* v. *Inhabitants of Rumford*, supra.

Gauged by the common and accepted standards defining the obligations of public officials, the lease given by the Town of Skowhegan to the defendant, Myron E. Smith, was unconscionable and unlawful. To hold otherwise would be to repudiate the doctrine that he who holds public office is in a position of public trust.

The decree of the sitting Justice sustaining the bill and declaring the lease void was properly entered. There is, however, no evidence controverting the fact that Priscilla Theatres, Inc., was an innocent party to this transaction. The decree should be modified to require the surrender and cancellation of the outstanding notes given by Priscilla Theatres, Inc., to Myron E. Smith, and to include a declaration that the two thousand dollars paid in cash shall be pay-

ment in full for all rights and property conveyed other than the lease.

Appeal dismissed with additional costs. Decree to be modified in accordance with this opinion.

MRS. R. L. BEAN *vs.* MARK W. INGRAHAM AND J. W. INGRAHAM.

Knox. Opinion January 27, 1931.

PLEADING AND PRACTICE. EXCEPTIONS. TRUSTEE PROCESS.

To remedy a defective execution, a motion to quash should properly be brought in the very court from which the execution was issued.

Exceptions must be seasonably taken in order to be considered by the Law Court.

In the case at bar, it appeared that Mark W. Ingraham was aware of the payment of $3,285.85, made by Camden Lumber & Fuel Company for the benefit of his account, and that he ratified the same by making interest payment to the bank on the balance of his note and likewise payment on account of the principal. He was therefore chargeable as trustee of Camden Lumber & Fuel Co. in the above sum.

On report. An action of *scire facias* against the defendants jointly as trustees of the Camden Lumber & Fuel Company, which came to the Law Court on report to be decided on so much of the evidence as was legally admissible.

Judgment charged Mark W. Ingraham as trustee of Camden Lumber & Fuel Company in the sum of $3,285.85. The case sufficiently appears in the opinion.

F. A. Tirrell,
O. H. Emery, for plaintiff.
J. H. Montgomery,
A. L. Miles,
Frank H. Ingraham, for defendants.

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

BARNES, J. This is an action of *scire facias* against the defendants jointly as trustees of the Camden Lumber & Fuel Company.

It is here on report with stipulation that it may be finally decided on so much of the evidence as is legally admissible.

It was brought for the purpose of recovering on the judgment in an earlier action in assumpsit, entitled *Mrs. R. L. Bean* v. *Camden Lumber & Fuel Company*, Mark W. Ingraham and J. W. Ingraham, Trustees.

By the stipulation in the report we learn that the entries on the dockets of the Supreme and Superior Courts of Knox County in both the earlier and the present action are part of the case, and that they are to be accepted by us as proof of the facts stated therein.

Counsel having thus agreed that the date of judgment in the earlier case was September 28, 1927, the demurrer is in effect withdrawn.

Demand on them, under date of October 15, therefore held the trustees.

Attempt is made now to attack further proceedings on the writ of execution because after a mandate from this court was received in due course by the clerk of courts of the county, in February, 1927, and within the vacation period between terms in that county, action was taken on the case at the next April term, and, by continuance by order of court, at the September term, the term of execution.

Attack is further directed to the execution as irregular because at said April term an alias execution was issued.

But here, in the very court whence the execution was issued, a motion to quash would have properly brought consideration of remedy, if remedy were to be had. *Flint* v. *Phipps*, 20 Or., 340, 25 Pac., 725; *Marks* v. *Stephens et al*, 38 Or., 65, 63 Pac., 824; *Bryant* v. *Johnson*, 24 Me., 304; *Folan* v. *Folan*, 59 Me., 566; *Staples* v. *Wellington*, 62 Me., 9.

We now recur to the *scire facias* case, served subsequent to return of the execution "unsatisfied." After hearing by a Justice of this court, J. W. Ingraham was discharged as trustee and Mark

W. Ingraham charged as trustee for the sum of $3,285.85. Defendant Mark W. Ingraham's exceptions to the judgment were filed and allowed.

Whether or no J. W. Ingraham joined in the bill of exceptions we need not decide.

The latter had been discharged by order of court, and plaintiff should then have taken exceptions if she had desired our ruling on that point. L. R. A. (1917 D), 674; 2 R. C. L., 56.

There remains for consideration the question whether or no Mark W. Ingraham is to be charged as trustee.

We have before us the evidence presented.

From this it appears that in March, 1921, this defendant, in exchange for his note then payable to the Megunticook National Bank for a like amount, gave to this bank his sixty days negotiable promissory note for $5,000.00, the Camden Lumber & Fuel Company, later made principal defendant, in what we have termed the earlier action, having endorsed the note by "J. W. Ingraham Treas."; that in April, 1923, principal not having been reduced, Mark W. Ingraham paid the interest due to that day; that on June 11, 1923, the president of the Camden Lumber & Fuel Company paid to the Megunticook Bank, for Mark W. Ingraham, $3,285.85.

It is argued that this payment was not authorized, was not known of by Mark W. Ingraham, but we find that he paid the interest on this note ninety-two days after the indorsement of payment of practically two-thirds of its principal sum and within the six months following made seven payments toward the balance due.

We therefore hold that Mark W. Ingraham ratified the payment of the Fuel Company in his behalf, and he stands before us in the same clear light as if he had authorized the payment, either personally or by his attorney, of which latter procedure there is some evidence.

Judgment will be, Mark W. Ingraham charged as trustee of the Camden Lumber & Fuel Company for goods, effects and credits of said Company, in his hands for the sum of three thousand two hundred eighty-five dollars and eighty-five cents.

So ordered.

DANIEL RYAN *vs.* ISADORE V. MEGQUIER ET AL.

Penobscot. Opinion January 27, 1931.

PLEADING AND PRACTICE. LAW COURT.

In the absence of a full transcript of all evidence, the Law Court will not pass upon the merits of an appeal in equity.

On appeal. A bill in equity seeking specific performance of a contract to convey real and personal estate. A final decree sustaining the bill was filed by the sitting Justice. Appeal was thereupon taken by the defendant. Appeal dismissed. Decree below affirmed with costs. The case sufficiently appears in the opinion.

Gillin & Gillin,
Fellows & Fellows, for plaintiff.
Butterfield & Weatherbee,
C. J. O'Leary,
D. F. Snow,
B. W. Blanchard, for defendants.

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

BARNES, J. This, a cause in equity, originated in 1927. Final decree is dated May 8, 1930. The bill asks for specific performance of an executed contract of barter of plaintiff's farm and personal property for a dwelling and lot, the record title to which has, during the process of the case been in Isadore V. Megquier and defendant Byers, and for personal property of the former, and it may be of her husband, also a defendant.

The Justice having jurisdiction conducted a variety of proceedings, and issued many interlocutory decrees, and from his final decree appeal was taken by the defendants.

The case reached this court barren of any evidence except what was taken out at the first hearing and a brief supplement at a continuation thereof.

The case index records eleven, and docket entries include nine interlocutory decrees.

By appeal defendants challenge the correctness as to both fact and law of the Justice who heard the evidence and authorized the decrees.

Such challenge the court will meet and dispose of when the record presented furnishes to the court evidence for determination and conclusion.

But it has been invariably held that this court can not pass upon the merits of an appeal in equity in the absence of a full transcript of all the evidence.

Stenographer Cases, 100 Me., 271; *Caverly* v. *Small*, 119 Me., 291; *DePietro* v. *Modes*, 124 Me., 132; *Sawyer* v. *White*, 125 Me., 206; *Foss* v. *Maine Potato Growers' Exchange*, 126 Me., 603.

This is in harmony with R. S. 1916, Chap. 82, Sec. 32.

Entry will therefore be,

Appeal dismissed.
Decree below affirmed,
with costs.

ELIZABETH BEAULIEU *vs.* HERMENGILDE TREMBLAY.

JOSEPH BEAULIEU *vs.* SAME.

Androscoggin. Opinion January 29, 1931.

PLEADING & PRACTICE. MISTRIAL. EXCEPTIONS. NEGLIGENCE. MASTER AND SERVANT. DAMAGES.

The discretionary power of the presiding Justice to refuse to order a mistrial upon the introduction of evidence that the defendant was insured, unless clearly shown to have been abused, is not subject to exception.

In the case at bar the duty rested upon the defendant's servants to so conduct their master's work that no lack of due care on their part caused injury to the plaintiff.

Directing and procuring the turn of the beam towards the sidewalk, under the circumstances, was clearly negligence on the part of the foreman, for which the defendant was chargeable. It was no defense that the driver of the truck participated in the turn of the beam. The evidence was sufficient to justify a finding that the driver was working under the specific directions and control of the foreman, Blanchette, and was temporarily at least the defendant's servant.

There was no convincing proof that Mrs. Beaulieu was guilty of contributory negligence. It did not appear that she knew the beam was to be moved until the blocking hit her. She stood back to the street engaged in conversation. Her user of the street was lawful.

The damage award to the plaintiff was clearly excessive. It evidently included compensation for losses resulting from the development of a severe cold which the plaintiff attributed to her perspiring freely while walking home after the accident with her coat unbuttoned. No causal connection between this cold and its results and the tort of the defendant's servants appears. The damages awarded the husband, Joseph Beaulieu, in his action included compensation for losses resulting from his wife's cold. To this extent, his award was excessive.

The verdicts below were sound upon the question of liability, but clearly wrong in the amounts awarded the plaintiffs. A new trial on the question of damages should therefore be granted in each case.

On exceptions and general motion for new trial by defendant.

Two actions on the case, tried together, brought against the defendant to recover damages for personal injuries, sustained by the plaintiff Elizabeth Beaulieu and for expense and loss of services by plaintiff Joseph Beaulieu, husband of said Elizabeth Beaulieu, by reason of said injuries.

Trial was had at the June Term, 1930, of Superior Court for the County of Androscoggin. To the denial of his motion for a mistrial by the presiding Justice, defendant seasonably excepted, and after the jury had rendered a verdict for the plaintiff Elizabeth Beaulieu in the sum of $5,000.00 and for the plaintiff Joseph Beaulieu in the sum of $1,250.00, filed a general motion for new trial in each case.

New trial on the question of damages only. The cases fully appear in the opinion.

L. J. Brann,

P. A. Isaacson, for plaintiffs.

F. A. Morey, for defendant.

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

STURGIS, J. These actions of negligence to recover for personal injuries received by the plaintiff Elizabeth Beaulieu and for the resulting damages to her husband resulted in verdicts for the plaintiffs. The cases were tried together below and come to this court on motions and exceptions.

MOTIONS:

A reading of the evidence convinces the court that the jury were warranted in finding that, as the plaintiff, Elizabeth Beaulieu, on February 24, 1930, meeting an acquaintance, Mrs. Graham, stopped on the sidewalk of Main Street in Lewiston in front of the Bauer Building, she was struck from behind by wooden blocks thrown against her by the impact of a steel beam, swung around in the street, under the direction of the defendant's foreman.

The beam, fifty-four feet long and weighing more than five tons, lay close to and parallel to the sidewalk, with one end held up by blockings and the other down on the street. Without warning to the women, the defendant's foreman, one Blanchette, ordered the driver of a truck, belonging to W. E. Cloutier and Co. but then hired by the defendant, to pull the beam around. A cable had been run from the truck to the end of the beam held up by the blockings, and when the truck started, the lower end of the beam swung towards and over the sidewalk knocking some blocking, lying alongside, against the plaintiff's feet or legs. She was thrown backwards down on the blocks with her companion on top of her. The nature and extent of her injuries will be considered later.

The plaintiff, Elizabeth Beaulieu, was at the time of her injuries exercising her rights as a traveler upon a public highway. Her stop upon the sidewalk did not change her status. *Silverman* v. *Usen*, 128 Me., 349. Assuming that the defendant's servants were using the highway lawfully, and the contrary does not appear, the duty rested upon them to so conduct their master's work that no lack of due care and caution on their part caused injury to the plaintiff.

Common sense and common knowledge of the elementary laws of physics would have warned a reasonably prudent man that the traction applied by the truck to the steam beam, as it was blocked up, might turn the beam as upon a pivot. And with knowledge on the part of the defendant's foreman of the presence of the women on the sidewalk and of the blocking just inside the lower end of the beam, which is admitted, we think the jury were warranted in the conclusion that a reasonably prudent man would have anticipated the results effected. A warning would have sent the women out of the danger zone. A barrier would have barred them from it. Delay until they passed on would have prevented the accident.

Directing and procuring the turn of the beam towards the sidewalk, under the circumstances, was clearly negligence on the part of the foreman, for which the defendant is chargeable. It is no defense that the driver of the truck participated in the turn of the beam. The evidence is sufficient to justify a finding that the driver was working under the specific directions and control of the foreman, Blanchette, and was temporarily at least the defendant's servant. *Pease* v. *Gardner*, 113 Me., 264; *Wilbur* v. *Construction Co.*, 109 Me., 521.

There is no convincing proof that Mrs. Beaulieu was guilty of contributory negligence. It does not appear that she knew the beam was to be moved until the blocking hit her. She stood back to the street engaged in conversation. Her user of the street was lawful. The verdict can not be disturbed on the ground that, as a matter of law, she failed to exercise due care.

The damages awarded Elizabeth Beaulieu by the jury, however, are clearly excessive. Accepting the reading of X-ray photographs as showing a slight fracture of the left transverse process of the fifth lumbar vertebra and the opinion of an attending physician that a slight hernia exists in the region of the scar of an earlier operation, a just compensation for these injuries and all complications involved does not justify the award below to the full amount of the *ad damnum* of the writ. Sufficient reasons for this error, however, appear in the record.

The plaintiff was allowed to introduce evidence tending to show that, almost immediately after her accident, she developed a severe

cold which caused an abscess in her right ear and permanent impairment of her hearing. If, as the plaintiff says, her cold and its unfortunate results is to be attributed to her perspiring freely while walking home from the scene of her accident with her coat unbuttoned, no causal connection between this disability and the tort of the defendant's servants appear. The inclusion of compensation for this plaintiff's losses from her cold is indicated by her verdict.

The fact that the defendant was insured also appears in the plaintiff's case, and the amount of the damage award may well be charged in part to its prejudicial influence. The recent discussion by this Court, in *Ritchie* v. *Perry*, 129 Me., 440, of the prejudicial effect of such evidence and the consideration to be given it under a general motion needs no repetition. The application of the rule of that case to the verdict here rendered, emphasizes the necessity for the rule.

In the action of Joseph Beaulieu for loss of his wife's services and consortium, and for expenses incurred as a result of her injuries, the verdict rendered involves the same erroneous considerations and prejudicial influences which dominated his wife's action. Our conclusions as to the defendant's liability, already stated, determine this plaintiff's right of recovery. But, upon the record, a part of his expenses and much of his wife's incapacity appear to have been due to her cold and the resulting abscess and loss of hearing of the ear. That element of damage, as also the fact of the defendant's insurance against liability, must be removed from consideration and another determination of just compensation for this defendant's losses must be made.

The single exception reserved in each case is directed to the refusal of the presiding Justice to order a mistrial upon the introduction of evidence of the fact that the defendant was insured. This exception can not be sustained. The discretionary power of the presiding Justice to attempt to correct the error in his charge to the jury and not order a mistrial does not appear to have been abused. *Ritchie* v. *Perry*, supra.

Upon this record, this court is unable to determine with exactness the amount of damages which justly and properly should be

recovered by these plaintiffs. The elements, improperly considered at the trial below, can not be clearly segregated from proper items of loss. Upon a rehearing of damages on a correct basis and free from prejudice, a more just result can be effected.

The verdicts below appearing to be sound upon the question of liability, in each case a new trial on the question of damages only is granted.

So ordered.

MABELLE R. LANG *vs.* LURA B. CHASE ET ALS.

York. Opinion February 3, 1931.

PLEADING AND PRACTICE. LAW COURT. R. S. 1930, CHAP. 91, SECS. 56 AND 63.

In an equity cause reported to the Law Court, under the provisions of R. S. 1930, Chap. 91, Sec. 56, additional newly discovered evidence may be presented upon such terms as the Law Court deems proper.

Motion to take additional testimony discovered after hearing in an equity cause reported to the Law Court. Motion granted. The case sufficiently appears in the opinion.

Willard & Willard, for petitioner.

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

PATTANGALL, C. J. Plaintiff in the above entitled cause in equity, pending before this court on report, presented motion for leave to supplement the record by adding thereto certain evidence set forth in substance and declared to be newly discovered. The motion is verified under oath.

Sec. 56, Chap. 91, R. S. 1930, provides:

"Upon a hearing in any cause in equity, the justice hearing the same may report the cause to the next term of the law

court, if he is of the opinion that any question of law is involved, of sufficient importance or doubt to justify the same, and the parties agree thereto. The cause shall be entered and copies furnished by the plaintiff and shall be heard and decided by said Law Court in like manner and with like results as is herein provided in case of appeals."

Sec. 63, Chap. 91, R. S. 1930, provides that:

"All evidence before the court below, or an abstract thereof, approved by the justice hearing the case, shall on appeal be reported. No witnesses shall be heard orally before the law court as a part of the case on appeal, but the court may, in such manner and on such terms as it deems proper, authorize additional evidence to be taken when the same has been omitted by accident or mistake, or discovered after the hearing."

A fair construction of these provisions leads to the conclusion that the Court has authority to grant plaintiff's request, and such action appears to be warranted in this cause.

It is therefore ordered that the testimony referred to in the motion, together with evidence sufficient to satisfy the rule governing its admissibility as being newly discovered, be taken in the form and manner prescribed for the taking of depositions, that these depositions be filed with the clerk of the court in which the cause originated, and that a transcript hereof, properly certified, be filed with this court to be considered in connection with the evidence already filed.

Motion granted.

BERNES O. NORTON, ADM'R *vs.* HENRY SMITH.

Waldo. Opinion February 13, 1931.

PLEADING AND PRACTICE. BILLS AND NOTES. BURDEN OF PROOF.

On report, nothing to the contrary appearing, all technical questions of pleading are deemed waived and the single question is whether, upon all the evidence, the plaintiff is entitled to judgment.

If the holder of a promissory note intentionally destroys it, he thereby discharges the debt evidenced by it and can not maintain an action based on the instrument.

In a suit on a note, the burden of proving its destruction and a discharge of the debt is on the maker.

In the case at bar, upon the facts proven or admitted, the only inference is that the note in suit was cancelled by its intentional destruction by the testatrix.

On report. An action brought by the administrator of the estate of Elmer E. Bradbury to recover on a promissory note. The issue involved the discharge by intentional destruction, on the part of the testatrix, of a promissory note given by defendant to the testatrix. Judgment for the defendant. The case fully appears in the opinion.

Clyde R. Chapman,
McLean, Fogg, and Southard, for plaintiff.
Buzzell & Thornton,
Frederick W. Hinckley, for defendant.

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

STURGIS, J. Action of assumpsit by the plaintiff as administrator c. t. a. of the estate of Alma E. Bradbury, late of Belfast, to recover a balance claimed to be due on a note given to the testatrix by the defendant. The plaintiff relies only on the last two counts of his declaration: (4) on a promissory note dated June 1,

1925, for thirteen thousand five hundred dollars payable on demand with interest, and (5) on the same note alleged to have been lost.

The defendant pleads the general issue with a brief statement that on June 1, 1925, for valuable consideration, he gave the testatrix a note for fifteen thousand dollars and subsequently, fifteen hundred dollars having been paid thereon, the testatrix discharged the note by intentionally destroying it.

The case is reported to the Law Court for determination of the legal rights of the parties upon so much of the evidence as is legally admissible. On report, as a general rule, nothing to the contrary appearing, all technical questions of pleading are deemed to be waived and the single question before the court is whether, upon all the evidence giving it the effect a jury ought to give it, the plaintiff is entitled to judgment. *Power Co.* v. *Foundation Co.*, 129 Me., 81; *Callinan* v. *Tetrault*, 123 Me., 302; *Pillsbury* v. *Brown*, 82 Me., 450, 455. This rule applies to the case at bar, except as the stipulation of the parties obviates the necessity of certain findings of fact, and limits the issues.

The plaintiff, through his counsel, admitted that, under his pleadings, he relied solely on a note for fifteen thousand dollars given by the defendant to the testatrix during her lifetime, on which fifteen hundred dollars had been paid. He introduced the following stipulation and rested:

> "It is stipulated and agreed that the plaintiff relies on the last two counts in the declaration and that the note declared on in said counts is due and payable in the sum of $13,500. ($1,500 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."

It is well settled law that, if the holder of a promissory note intentionally destroys it, he thereby forgives and discharges the

debt evidenced by it and can not maintain an action based upon the instrument. In a suit upon a note the burden of proving its destruction and a discharge of the debt is upon the maker. *Dist. of Columbia* v. *Cornell*, 130 U. S., 655, 658; *Sullivan* v. *Shea*, 32 Cal. App., 369; *Darland* v. *Taylor*, 52 Iowa, 503; *McDonald* v. *Loomis*, 233 Mich., 174; *Vanauken* v. *Hornbeck*, 14 N. J. L., 178; *Gardner* v. *Gardner*, 22 Wend. (N. Y.), 525; *Henson* v. *Henson*, 151 Tenn., 137; Negotiable Instruments Act, R. S., Chap. 164, Sec. 119 (3); 8 C. J., 614; 3 R. C. L., 1270; 37 A. L. R., 1148.

The defendant called Mrs. Rosanna B. Odiorne of Augusta to the stand. This witness, unrelated to any of the parties and apparently disinterested, testified that, following an intimate acquaintance of eight or ten years, Mrs. Bradbury spent the month of March, 1926, with her in St. Petersburg, Florida, and, while there, told Mrs. Odiorne that she had loaned the defendant money to go into business, taken his note for it and later destroyed it. Omitting colloquy and objection, the material testimony of this witness is:

Q. And while she was visiting at your home did she have any discussion with you in regard to a note given by Henry Smith?

A. Yes, she did.

Q. Will you state the conversation that she had in regard to the matter?

A. Mrs. Bradbury asked me first what I would think —

Witness continuing — She asked me what I would think of her having Henry and Ellen Smith come into her home to live with her. They had planned it.

Q. All right, Mrs. Odiorne?

A. Shall I go on?

Q. Yes.

A. For a moment I did not answer Mrs. Bradbury because I thought it rather an unusual thing to do and I thought that anybody —

Q. I wouldn't go into that. Just what she said to you.

A. You mean from there on?

Q. Yes. What she said to you.

A. She had planned — Shall I say it?

Q. Yes.

A. She had planned about the future of the house, the running of the house and that sort of thing, and how easy she hoped to make it for Mr. and Mrs. Smith; that when Mr. Smith went into business she had loaned him some money and she had his note for it. She said: "I could not have that hanging over those children; so I said to Henry Smith, 'Child, I never will need that and we will destroy it.' We did destroy it and that ended it."

Q. (The Court) Those last words, "That ended it," were those words of Mrs. Bradbury or your words now?

A. Those were Mrs. Bradbury's words.

Q. (The Court) She used the words "That ended it"?

A. "We destroyed it and that ended it."

Q. In that discussion in regard to destroying the note, did she express to you her feeling in regard to Mr. and Mrs. Smith, giving that as a reason why she was doing it, or anything like that?

A. She certainly did.

Q. What did she say in regard to Mr. and Mrs. Smith, either or both of them, in connection with her talk about destroying the note?

A. She said, "I love Ellen Smith as a sister. Henry Smith is the salt of the earth."

An examination of the testimony of other witnesses, discloses that, when on June 8, 1925, the defendant purchased a half interest in a local garage business conducted by the firm of Gordon & Rogers, he borrowed $15,000 from Mrs. Bradbury. She raised the money by selling Central Farm Loan bonds through the Merrill Trust Co. of Bangor, Maine, directing the proceeds to be sent to the defendant in the form of a check for $13,500 payable to M. L. Gordon and $1,500 in currency. The check was used to purchase a half interest in the garage business. The currency was deposited in the defendant's bank account.

Although the note here sued upon has never appeared among the assets of Mrs. Bradbury's estate, the defendant admits giving the testatrix a note for $15,000 at the time she loaned him the money to purchase an interest in the garage business. His claim that payments amounting to $1,500 were made to the testatrix and the note reduced accordingly is not controverted, but admitted by the stipulation in the case. The plaintiff not waiving the bar of the statute, the defendant gave no further admissible testimony directly supporting his evidence. R. S., Chap. 96, Sec. 119.

The defendant never purchased or engaged in any business on his own account other than the garage business acquired from M. L. Gordon. From boyhood he had been employed in clerical work, formerly at Bangor and in later years at Belfast. He was treasurer of the Waldo Trust Co. when he went into the garage business. This was his only business venture.

Counsel for the plaintiff argues, however, that earlier acts and declarations of the defendant raise a question as to the destruction of a note by the testatrix and, assuming such destruction, whether the note sued upon and admittedly given by the defendant was the one destroyed.

On the first point, he introduced evidence showing that the defendant was special administrator of Mrs. Bradbury's estate and, although admonished by the Judge of Probate when he was appointed not to open the safety deposit box of the deceased except in the presence of a representative of the residuary legatee under the will, he went to the box accompanied only by his personal attorney, who also represented the Surety Company furnishing his official bond. There is no proof, however, that the note in suit was then in the box or that the defendant then or afterwards had it in his possession. The incident is noted because counsel argued it. It has no probative value.

As casting doubt upon the identity of the note destroyed, the plaintiff calls attention to inconsistencies and uncertainties in the testimony given by the defendant in a series of examinations, before the Probate Court and the Supreme Court, wherein his transactions with the testatrix and his special administration of her estate were in issue. The statements claimed to have been made by

the defendant at these hearings were included in the report as admissions against interest.

Witnesses say, that on his first examination before the Probate Court, the defendant stated "he had not borrowed any money of" Mrs. Bradbury and "was not indebted to" her. The defendant insists, however, that, having in mind the destruction and discharge of his note for $15,000 admittedly given Mrs. Bradbury, when he was asked if he owed her estate any money, he said, "I do not." He denies saying he had not borrowed any money from her. No stenographic report was made of this examination and the sharp conflict in the testimony must be weighed by the usual rules.

Examined at later hearings as to the note here in suit, the transcript of the defendant's testimony shows that he repeatedly referred to the note as one for $13,500 and in one answer spoke of it as a note for $11,000. The defendant's explanation of this is that he, at all times, intended to refer to the note of $15,000 in controversy and spoke of it as for $13,500 because that was its unpaid balance. He denies intentional reference to a note for $11,000 and charges typographical error.

Carefully analyzing these earlier statements by the defendant, we are of opinion that they do not show the existence of more than one note. The inclusion of brief excerpts, only, from the defendant's former testimony furnish an incomplete and doubtful basis for sound judgment as to the true force and effect to be given his utterances. But his examination in each case, so far as appears, was directed to the existence of a single note and that given for the money loaned for his purchase of the Gordon interest in the garage business. His answers seemed to be responsive only to this inquiry despite his misstatements of the amount of the note. We can not base our conclusions on conjectures to the contrary.

If we exclude from consideration all testimony given by the defendant bearing on the issues involved, the facts, proven otherwise or admitted, leave only the inference that the note in suit was canceled by its intentional destruction by the testatrix. The only business that the defendant ever went into was the garage business. Mrs. Bradbury undoubtedly loaned him $15,000 for that purpose. Admittedly he gave her a note for that amount therefor. The exist-

ence of the note since her death is not shown. It clearly appears that she said that she loaned him money to go into business, had his note for it, destroyed it and ended it. The chain of circumstances connecting the note in suit with that destroyed is unbroken.

Judgment for defendant.

BREEN'S CASE.

Penobscot. Opinion February 24, 1931.

WORKMEN'S COMPENSATION ACT. INDEPENDENT CONTRACTOR.

One who engages in work under the direction, control, and with the coöperation and assistance of another, is not, with respect to that party, an independent contractor.

A Workmen's Compensation Case. Appeal from decree of the Superior Court affirming decision of the Industrial Accident Commission, awarding compensation to the petitioner. The question at issue was whether or not petitioner was an independent contractor. The court finds not. Appeal dismissed. Decree affirmed, with costs. The case sufficiently appears in the opinion.

Charles P. Conners, for petitioner.

Hinckley, Hinckley & Shesong, for respondents.

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

BARNES, J. An action under the Workmen's Compensation Act, on appeal from decree of the Superior Court affirming decision of the Industrial Accident Commission.

Respondents denied each allegation of the petition and defended on the allegation that petitioner was an independent contractor.

From the reported testimony it appears that petitioner left the work of unloading his produce, and for the going rate of wages

proceeded, with his horses, to plow snow from ways between piles of wood or lines of skids for woodpiles to be designated by an agent or servant of the respondent.

While the horses were being hooked, by petitioner and such agent or servant, to the plow furnished by respondent, the accident complained of happened. It is clear that the Commissioner was justified in finding from the evidence that the work engaged in was being prosecuted under the control, coöperation, and assistance of respondent.

There is no contention that the rate of wages fixed by the Commissioner is unfair or improper.

We see no grounds for reversal.

Appeal dismissed.
Decree affirmed, with costs.

TORSEY'S CASE.

Kennebec. Opinion February 25, 1931.

WORKMEN'S COMPENSATION ACT. SPECIAL EMPLOYMENT.

The servant of a general employer may, with respect to a particular work, be transferred with his own consent or acquiescence to the service of another so that he becomes the servant of the special employer.

Consent or acquiescence of a servant to such change of employment may be inferred from his acceptance of or obedience to orders given by the special employer or his representative.

In determining whether a servant is an employee of his original master or of the person to whom he has been furnished, the test is whether, in the particular service in which he is engaged or requested to perform, he continues liable to the direction and control of his original master or becomes subject to that of the party to whom he is lent or hired.

If men are under the exclusive control of a special employer in the performance of work which is a part of his business, they may be, for the time being, his employees although they remain general servants of their regular employer.

In the case at bar, applying these tests, the conclusion of the Commission that the acts as presented reasonably indicated that the petitioner was an employee of the respondent when injured was supported by competent evidence.

Appeal from decree of a single Justice affirming decree of the Industrial Accident Commission awarding compensation to petitioner. The question at issue was whether the petitioner was at the time of his accident an employee of Purinton Brothers Co. The court so finds. Appeal dismissed. Decree affirmed. The case fully appears in the opinion.

L. T. Carleton, Jr., for petitioner.

William B. Mahoney,

Theodore Gonya, for respondent.

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

STURGIS, J. Appeal from the decree of the Industrial Accident Commission. The only question presented and argued in this case is whether the petitioner, at the time of his accident, was an employee of the respondent, Purinton Brothers Company.

There is no substantial dispute as to the material facts. The evidence supports a finding that Cyrus L. Torsey was regularly employed by one Paul Audette as a teamster. While Purinton Brothers Company were harvesting ice at Winthrop, Maine, its foreman asked Audette to help move a small building. Declining to go himself, on the morning of January 16, 1930, Audette sent Torsey over with a pair of horses.

When Torsey arrived where the building sat, it had already been jacked up ready to load on a sled. Three men in the sole employ of the Company were there to assist in the work, one of whom, Fortier, acting as foreman, gave orders to the others, including Torsey, as to what they should do and how they should do it. In compliance with an order from Fortier to "go and take the jacks out," Torsey went under the building and, as the jacks slipped, it came down on him.

Although when this accident happened Torsey had not been transferred to the Company's pay roll and his hours of labor were

still fixed by Audette, who alone could discharge him, after he arrived at the site of the building, his work, outside the actual care and driving of Audette's horses, was under the control and direction of the Company's foreman. This is obviously true of the particular service in which he was engaged at the time of the accident.

It is well settled law that the servant of a general employer may, with respect to a particular work, be transferred, with his own consent or acquiescence, to the service of another so that he becomes the servant of the special employer. *Gagnon's Case*, 128 Me., 155; *Scribner's Case*, 231 Mass., 132; *Chisholm's Case*, 238 Mass., 412; *Matter of Schweitzer* v. *Thompson & Norris Co.*, 229 N. Y., 97; *De Noyer* v. *Cavanaugh*, 221 N. Y., 273; *Sgattone* v. *Mulholland et al*, 290 Pa., 341 (58 A. L. R., 1463); *Lasky Corp.* v. *Ind. Accident Comm.*, 194 Cal., 134 (58 A. L. R., 765). Consent or acquiescence in the change of employment may be inferred from the servant's acceptance of or obedience to orders given by the special employer or his representatives. *Scribner's Case*, supra; *Murray* v. *Railway Co.*, 229 N. Y., 110.

And in cases where one lends his servant to another for a particular employment, in determining whether the servant is an employee of his original master or of the person to whom he had been furnished, the test is whether, in the particular service in which he is engaged or requested to perform, he continues liable to the direction and control of his original master or becomes subject to that of the party to whom he is lent or hired. If men are under the exclusive control of a special employer in the performance of work which is a part of his business, they may be, for the time being, his employees, although they remain general servants of their regular employer. *Gagnon's Case*, supra; *Scribner's Case*, supra; *Chisholm's Case*, supra; *Pease* v. *Gardner*, 113 Me., 264.

Applying these tests, Torsey, at the time of his injury, may be found to be an employee of the Purinton Brothers Company. He was on that Company's premises, engaged in its business and doing its work under the direction and subject to the orders of its foreman in respect to the particular matter in hand. He was not then driving his general employer's team nor engaged in its care or management.

Gagnon's Case is distinguishable from the case at bar. There, the injured employee was working on the premises of his general employer and, when injured, was under the direction and control of its foreman. Engineers, employed by the concerns selling the equipment being installed, supervised the foremen, but gave no orders to the employee.

Nor is *Wilbur* v. *Construction Co.*, 109 Me., 521, controlling. In that case, a general employer loaned his team and teamster to the defendant to haul rock from an excavation. The teamster, driving the team against a ladder supporting the plaintiff, threw him to the ground. It appearing that the accident arose out of the handling of the team with which the special employer had neither interfered nor given directions, it was held that the teamster was a servant of the general employer. Disclosing no transfer to the special employer of the control and direction of the servant's management of the team, the case is within the principle of *Pigeon's Case*, 216 Mass., 51; *Clancy's Case*, 228 Mass., 316; and *Hogan's Case*, 236 Mass., 241.

The conclusion of the Commission that "the facts, as presented, reasonably indicate that Mr. Torsey was an employee of the respondent when injured" is supported by competent evidence. The decree must be affirmed.

Appeal dismissed.
Decree affirmed.

SALMON LAKE SEED COMPANY ET AL *vs.* FRONTIER TRUST COMPANY.

Aroostook. Opinion February 25, 1931.

PLEADING AND PRACTICE. CONTRACTS. SALES. DAMAGES.

On report of a case to the Law Court, where the certificate signed by the presiding Judge does not state to the contrary, technical questions of pleading are deemed to be waived.

In construing a written contract, actual intention, as expressed in the writing, is the chief thing to be looked to and ascertained. The subject matter of the contract, and the situation of the parties when the contract was made, are to be considered in determining the meaning of the language used. Words are to be understood in their common and everyday sense, and all parts of the contract construed so as to be given effect.

An agreement to deliver goods is usually assignable by the person to whom the goods are to be delivered, but all rights under contracts may not be assigned.

One party to a contract can not have another person thrust upon him without his consent.

An executory contract for personal services, or a contract otherwise involving personal credits, trust or confidence, can not be assigned by the sole act of one of the parties thereto.

In the case at bar, the undertaking to sell the potatoes was personal to the defendant. It was a material ingredient of the contract, and manifested the intention of the parties that the contract should not be assignable.

On delivery of the potatoes the market price was $3.00 a barrel. The defendant allowed but $1.90 a barrel. For the difference the defendant was liable in damages, the figure arrived at being $4,993.96 with interest.

On report, on an agreed statement of facts. An action of assumpsit to recover the balance due under a contract of sale made by defendant with plaintiffs for the purchase of 4,600 barrels of potatoes.

Judgment for plaintiffs for $4,993.96, and interest from October 29, 1929. The case fully appears in the opinion.

J. Frederic Burns,

Donald C. O'Regan, for plaintiffs.

Cook, Hutchinson, Pierce & Connell, for defendant.

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

DUNN, J. The Superior Court Judge presiding in Aroostook County reserved this case, the parties consenting, for final decision by this court, on a report of so much of the evidence as is legally admissible.

Where, as here, the certificate signed by the judge does not state to the contrary, technical questions of pleading are deemed to be waived. *Pillsbury* v. *Brown*, 82 Me., 450. The initial inquiry of the present report is whether, giving the permissible and relevant evidence the weight and consequence that would be exacted if a jury were trying the facts, the plaintiffs are entitled to recover. *Tatro* v. *Railroad Co.*, 108 Me., 390; *Cullinan* v. *Tetrault*, 123 Me., 302.

Nonperformance of a contract in writing is alleged as the cause of action. The contract, omitting signatures, reads as follows:

"This memorandum made this 6th day of May, 1929, between Salmon Lake Seed Company, a corporation, and Arthur R. Gould, hereafter called the parties of the first part, and Frontier Trust Company, a corporation, party of the second part, witnesseth: That the said parties of the first part have sold and agree to deliver to the party of the second part at such loading point on the Aroostook Valley Railroad or on the Bangor and Aroostook Railroad, south of Caribou, as the parties of the first part may elect, Four Thousand and Six Hundred barrels of Green Mountain variety, U. S. Grade No. 1 potatoes, during the digging season of 1929 in lots of not less than Two Thousand barrels each.

"In consideration of the aforesaid agreement the said Frontier Trust Company agrees that upon performance of said agreement it will forever release and discharge said Salmon Lake Seed Company from all liability upon the notes signed by the said Salmon Lake Seed Company and now held by it amounting to the principal sum of $8,500.

"The said Frontier Trust Company further agrees that in the event that it shall receive from said potatoes when sold by it a net amount, after payment of expenses incurred in han-

dling said potatoes, in excess of the sum which may be due on said notes with interest thereon that it will pay over to the said Salmon Lake Seed Company such surplus."

The breach declared was that defendant did not sell the potatoes at the best market price, within a reasonable time after they had been delivered, and pay to the Salmon Lake Seed Company, one of the plaintiffs, the difference in money between what that company owed defendant on certain promissory notes and the net proceeds that there would have been from a sale at that time, but disposed of the potatoes for a wholly inadequate sum, and only credited the company with $66.04.

The defense is based upon the general contention and theory that nowhere, by the words and symbols employed in the statement of the contract, did defendant agree to await delivery of the potatoes before selling them, and that, even inferentially, such intent does not appear.

Opposite counsel agree that, in its first and second paragraphs, the written instrument evidenced, not a present sale of potatoes for future delivery, but an executory agreement to barter potatoes for notes.

Plaintiffs' counsel contends that the third paragraph of the contract imposed on the defendant, in respect to selling the potatoes, an undertaking personal in nature, inhibiting assignment of the contract. Counsel for the defendant argue that the practical interpretation and construction of the contract by the parties thereto, as shown by their acts and declarations during its performance and before this controversy arose, is inconsistent with the ground on which plaintiffs now claim to maintain their action.

The issue turns, the briefs concede, upon the interpretation afforded the third paragraph of the contract, read, of course, in connection with the rest of the writing. Actual intention, as expressed in the writing, is the chief thing to be looked to and ascertained. The subject-matter of the contract, and the situation of the parties when the contract was made, are to be considered in determining the meaning of the language used. Words are to be understood in their common and everyday sense, and all parts of

the contract construed so as to be given effect. 1 Chitty on Contracts, 103 *et seq.*

When the contract which covers this action was entered into, the Federal Land Bank had a mortgage on the farm of the Salmon Lake Seed Company. The unsecured liabilities of that company totaled $36,500. Defendant had asked for payment of promissory notes, one maturing in August, and the other in September, aggregating the principal sum of $8,500, from that season's potato crop. "Futures," the term which applies in Aroostook county to transactions in potatoes to be grown, or acquired, prior to delivery in the following fall, were quoted at $1.10 a barrel. Embarrassed by debts, and without available assets, plaintiff company, unless it were aided financially, could not operate its farm. Indeed, the institution of receivership proceedings seemed not unlikely.

The individual plaintiff, Mr. Arthur R. Gould, a man of pecuniary responsibility, came to the aid of the company, and the contract in suit was made.

The joint promise of the plaintiffs that, during the digging season of 1929, they would deliver to defendant a given quantity of a specified variety of potatoes in minimum lots, is expressed in not very difficult words. It is impossible to read the language without becoming convinced of the idea which it was intended to convey.

In consideration of that promise, to analyze the second paragraph of the instrument, defendant promised that it would, on performance by plaintiffs of their part of the contract, forever release and discharge the company from its notes. Otherwise stated, regardless of the market price, defendant would credit, taking interest on the notes into consideration, approximately $1.90 for every barrel of potatoes delivered by plaintiffs, or 80 cents more than the market price for futures at the time of the contract. The meaning of the words employed is not open to reasonable doubt.

One day, later in the month of the contract, the persons who had represented the respective corporations in the execution of that instrument, together went to a storage house to engage space for the potatoes to occupy when they should be brought there.

Late in June, or early in July, the testimony is indefinite which, these two men met again. Said one, addressing his speech to the

other, "If potatoes keep on going we will soon be able to sell the contract for enough to get the bank out whole." The one addressed replied, "I hope you will," or "I hope you can."

On July 13, defendant agreed in writing "to sell and convey . . . (the) contract" to one F. H. Vahlsing of New York City, for $1.90 a barrel. Of this, Mr. Sands, the seed company representative, had notice by letter, but did not reply. No notice appears to have been given the other plaintiff.

Instructed by defendant to deliver the potatoes to Mr. Vahlsing, or his firm, plaintiff company proceeded accordingly. From time to time the company advised defendant as to the number of wagon loads delivered. On check up, full delivery was two barrels short, whereon a check for $4.00 was sent defendant by plaintiff company. When the check was in hand, on October 29, 1929, defendant cast up the account, stamped the last note paid, and credited the company with $66.04.

The plaintiff, Mr. Gould, never had actively to do with performance of the contract. He spoke, after the contract, and for the first time, in December, to insist the want of complete performance by defendant.

None of the testimony is in dispute. Fair market value of the potatoes, when and where delivered, stipulation fixes at $3.00 per barrel.

What Mr. Sands said, on being told that defendant was looking forward to selling the contract without loss, was but tantamount to the expression of gratification that there was chance of such a result. No other inference can reasonably be drawn therefrom.

The assignment to Mr. Vahlsing was only of the benefit of the contract, and not of the conjoined obligations. From defendant's letter, Mr. Sands may have had reason to understand that the whole contract had been assigned, but not to understand that the assignment was inclusive of but part of it. The words communicated to him, as testified to, (the letter itself having been lost or destroyed), did not say so. On the contrary, those words told him, and only told him, for plaintiff company, to deliver the potatoes to Mr. Vahlsing, or his firm. The company stood jointly obligated

to make delivery of the potatoes to the defendant, or, what is the very same thing, to its nominee, in pursuance of the contract. Plainly, in the circumstances, the silence of Mr. Sands did not preclude the parties to the contract from recovering thereon.

There was, by and between the parties, no substitute agreement. Nor was a new party introduced into a new contract, by novation, as it is usually called, with consent of all the parties. The contract in suit never was extinguished. Plaintiffs never could have required, on delivery of the potatoes to the nominee, that that nominee surrender the promissory notes. The nominee does not appear to have had, or to have been entitled to, possession of the notes. The notes, which plaintiffs introduced into the evidence, were discharged by the defendant.

An agreement to deliver goods is, speaking broadly, assignable by the person to whom the goods are to be delivered, but all rights under contracts may not be assigned. Williston on Contracts, Sec. 413. In private affairs everybody has a right to choose with whom he will contract. *Coast Fisheries Co.* v. *Linen Thread Co.*, 269 Fed., 841. In the phrase of Lord Denman, "You have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract." *Humble* v. *Hunter*, 12 Q. B., 310, 317. One party to a contract cannot have another person thrust upon him without his consent. *Arkansas Valley, etc., Company* v. *Belden Mining Company*, 127 U. S., 379, 32 Law ed., 246. "When rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to the original contract." *Delaware County* v. *Diebold Safe Company*, 133 U. S., 473, 33 Law ed., 674.

An executory contract for personal services, or a contract otherwise involving personal credit, trust, or confidence, cannot be assigned by the sole act of one of the parties thereto. Pollock on Contracts, 4th ed., 425; Page on Contracts, Sec. 1262; *Johnson* v. *Vickers* (Wis.), 120 N. W., 837; *Edison* v. *Badka* (Mich.),

69 N. W., 499; *Sloam* v. *Williams* (Ill.), 27 N. E., 531; *King* v. *Batterson*, 13 R. I., 117, 120; *Swarts* v. *Narragansett, etc., Company*, 26 R. I., 388; *Wooster* v. *Crane & Company*, 73 N. J. E., 22; *Coast Fisheries Co.* v. *Linen Thread Co.*, supra; *Thomas-Bonner Company* v. *Hooven, etc., Co.*, 284 Fed., 377; *Winchester* v. *Howard*, 97 Mass., 303; *Boston Ice Company* v. *Potter*, 123 Mass., 28; *New York, etc., Company* v. *Kidder Press, etc., Company*, 192 Mass., 391, 405; *Arkansas Valley, etc., Company* v. *Belden Mining Company*, supra; *Delaware County* v. *Diebold Safe Company*, supra; *Burck* v. *Taylor*, 152 U. S., 634, 38 Law ed., 578.

The contract here sued was one by which the defendant not only agreed that, on delivery of the potatoes, it would discharge the promissory notes, but defendant further agreed, in the third paragraph, that, in the event there were received, not from a sale of the contract, but from a sale by defendant of the potatoes (impliedly with reasonable prudence and within a reasonable time subsequent to delivery), an amount of money over and above what would be requisite to pay the notes and defray incidental expenses, defendant would account for the excess to that party to the contract the corporate name of which is the Salmon Lake Seed Company. Performance on the part of the assignor, by the terms of the original contract, was to follow the performance on the other side. Williston on Contracts, Sec. 419.

The undertaking to sell the potatoes was personal to the defendant. Williston on Contracts, supra. It was a material ingredient of the contract, and manifested the intention of the parties that the contract should not be assignable. The security for the performance of the promise of the defendant was its character, ability, honesty, and financial stability. *Humble* v. *Hunter*, supra. Plaintiffs have the right to the benefit they anticipated therefrom. *Arkansas Valley, etc., Company* v. *Belden Mining Company*, supra.

Decision has been indicated already. Judgment goes for the plaintiffs. Justice so requires. Williston on Contracts, supra.

On delivery of the potatoes, the market price was $3.00 a barrel. Defendant allowed therefor, by discharging the notes, as accurately as the record shows, $1.90 a barrel. The difference is $1.10. Four thousand five hundred and ninety-eight barrels of potatoes were

actually delivered; compensation made for two other barrels, thus filling the contract quota. Incident to delivery and sale, defendant incurred no expense. Defendant had credited plaintiff company, before action was begun, with $66.04. Damages, thus far, figure $4,993.96. In addition, plaintiffs, as compensation for delay in payment, are entitled to interest from the date of the breach of the contract. *New York, etc., Company* v. *Kidder Press, etc., Company*, supra. From the stipulation, it is deducible by inference that the date of the breach was October 29, 1929.

Judgment for plaintiffs for $4,993.96, *and interest from October* 29, 1929.

COOPER & COMPANY *vs.* AMERICAN CAN COMPANY.

Waldo. Opinion February 27, 1931.

NEGLIGENCE. MOTOR VEHICLES. PEDESTRIANS.

In the protection of his person or property when about to emerge from a position of security and step onto a travelled highway a pedestrian must exercise due care.

In determining the proximate cause of an injury the elements of natural and probable result and that the result ought to have been foreseen by a person of ordinary intelligence and prudence in the light of the attending circumstances are controlling facts.

Whether one's negligence is a proximate cause of an accident depends on whether he exercises due care under the attending circumstances.

While full determination of facts is for the jury, a verdict can not be allowed to stand unless based on testimony and evidence, and on reasonable inferences logically drawn from the testimony and physical facts duly proven to have existed.

In the case at bar, the injured person was a man of sixty-five years, in the full possession of his faculties. In the light of all the circumstances, the jury verdict was not based on sound premises. The pedestrian was negligent, even to the degree of exercising no care for his safety. His negligence continued up to the moment of impact, and recovery is barred.

On general motion for new trial by defendant. An action in subrogation brought by employer, Cooper & Company, Inc., against the American Can Company to recover for injuries causing death of one of its employees, John M. Crosby. Trial was had at the October Term, 1930, of the Superior Court for the County of Waldo. The jury rendered a verdict for the plaintiff in the sum of $4,358.33. A general motion for new trial was thereupon filed by defendant.

Motion sustained. New trial granted. The case fully appears in the opinion.

Hinckley, Hinckley & Shesong, for plaintiff.

William B. Mahoney,

Theodore Gonya, for defendant.

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

BARNES, J. Plaintiff, by virtue of the Workmen's Compensation statute in behalf of the dependent widow, recovered a verdict in the Superior Court, after a collision that resulted in the instant death of John M. Crosby.

The appeal is on the general motion. Mr. Crosby was, at the time of the accident, an employee of plaintiff and his work was to accompany his son, the driver of plaintiff's motor truck conveying a load of lumber from Belfast to Searsport over the main highway.

The accident occurred about nine in the morning of January 8, 1929, in a sparsely settled section, on a modern country road.

The truck was loaded with 2 x 4 lumber, piled about a foot wider than the cab on each side, and four and a half feet high, the top of the load being from six to seven feet above the surface of the road.

The accident occurred a bit more than a mile easterly from the bridge at Belfast, at a point where the road runs on a right line,

except that it swerves slightly to the right. The slope, if any, is downward toward Searsport.

The road here was of gravelled construction, about thirty-two feet wide, a twenty-foot strip in its center being surfaced with tarvia.

The day was fair and the surface of the highway free from snow or ice.

As plaintiff's truck proceeded engine trouble became apparent and the driver pulled over to his right and brought it to a stop.

It stood with its left tires on the very margin of the tarvia.

The brake did not hold the truck motionless, and, while in his seat in the cab, the driver bade Mr. Crosby get a stone to trig its wheel. When the latter failed to loosen a stone from the gravel to which it was frozen, the driver suggested that he go round the truck to the tool box under its left side and get a hammer or other tool to loosen the stone.

At this time the agent of defendant, driving its Chevrolet coupe, was coming from the rear and as he approached the truck had a clear view, unobstructed by any obstacle or vehicle, except plaintiff's stationary truck.

In acting on the suggestion of the truck driver that he get a tool, Mr. Crosby went round the front of the truck, took two steps on the tarvia and was struck and killed by defendant's automobile. Up to this point there is no dispute.

The only persons near enough to him to testify to Mr. Crosby's last steps were the two motor drivers.

Plaintiff's driver testified that he took two steps beyond the truck's left front bumper, flinched back, though his feet did not move, and was struck by the automobile that flashed by the truck. He did not state whether Mr. Crosby was moving out at right angles with the road or in the direction of the tool box, nor is he definite and certain that two steps were taken, saying that his position when struck was not more than "two or three feet by the bumper." He testified that he heard no sound of horn.

Defendant's driver testified that he was proceeding "around thirty miles an hour"; that he sounded his horn when about sixty feet behind the truck; that he was going by the truck, "within

passing distance," when the man appeared a pace or two in front of his car and was struck.

There is no evidence that Mr. Crosby was seen by defendant's driver before he stepped out by the bumper, and from testimony as to the truck, its load, and the situation as the driver approached, it is likely he was not seen until then.

Another man, driving a bus from Searsport came on the straightaway, with unobstructed view for about a quarter of a mile as he approached the truck, arriving to assist in caring for the injured man before defendant's driver had turned his car and returned. This man's testimony is not helpful, but we are satisfied that his first glimpse of Mr. Crosby was as his body rebounded after the impact.

On the facts as we believe the jury must have found them we have the case of a pedestrian presenting himself from a position of complete obscurity, on that part of a highway which both he and defendant's driver may lawfully occupy, provided each is in the exercise of due care. Around a motor vehicle temporarily halted on its right-hand margin of a way, for inspection or minor repairing, in the daytime and on a country road, it may be thought there should be a zone of safety for its occupants, as there is about a trolley car when stopped in a city street, the so-called humanitarian doctrine, but our court has not yet attempted to delimit such a zone.

There is no evidence that defendant's driver saw the truck in motion, or any persons about it. It may be a negligent act to drive so near an apparently abandoned truck as to strike its cab door, should it be opened. We do not know how near the cars were when the automobile went by. The only testimony before us is that it went by the truck "within passing distance." Whether the clearance was inches or feet we do not know.

There can be no recovery unless there was negligence on the part of defendant's driver. But, since no willful or wantonly reckless act is claimed, there can be no recovery if Mr. Crosby stepped out by the bumper from a position of safety and obscurity, without taking the precautions that due care for his own protection demanded.

In the protection of his person or property when about to emerge from a position of security and step onto a travelled highway a pedestrian must exercise due care. The decisions are unanimous on this point.

He must do what the ordinarily intelligent and prudent person in like situation would do.

Usually when about to step from a city curb or country road margin on a highway, to cross or to traverse it, a pedestrian is not charged with the duty to look and listen. *Shaw* v. *Bolton*, 122 Me., 232, 119 A. 801.

But the case at bar is specific and is not ruled exclusively by general principles.

In this case, both parties, of right might claim to occupy the side of the highway where the accident occurred. If both present themselves to occupy the same spot at a given instant there may be peril for either. This would seem apparent to the man of ordinary intelligence. What, under like circumstances would the ordinarily prudent man do? What the latter would do, Mr. Crosby must do, or, failing in this, if injured, his injury must be suffered without lawful recovery from the person liable for the acts of one who may collide with him.

The testimony shows that, so far as defendant's driver was concerned, Mr. Crosby was unseen as he approached that driver's course walking by the front of the truck. The closely-piled lumber shut off from the driver any glimpse of the moving man, until he stepped on the tarvia of the road. Brakes were set but the unfortunate man stepped into the path of the swiftly moving car, and the result was inevitable.

It may be helpful in determining liability of the automobile driver to discuss the question of proximate cause of injury.

For, if it be assumed that defendant's driver were guilty of negligence, because operating without due care for other occupants of the highway (which we do not decide), it would be necessary under circumstances in many points resembling those here considered, to determine what was the proximate cause of the injury.

If the jury, in this case, determined the proximate cause, and failed as they decided they found it, their verdict may not stand.

It is claimed by the pleadings in this case that the proximate cause of the injury was contributory negligence on the part of Mr. Crosby.

The proximate cause of an injury must be referred to negligence when it appears that such injury was the natural and probable consequence of such negligence, and should have been foreseen by a person of ordinary intelligence and prudence, in the light of the attending circumstances.

The elements of *natural and probable result*, and that the result ought to have been foreseen by a person of ordinary intelligence and prudence *in the light of the attending circumstances*, are distinguishing characteristics when the acts of the injured one are studied.

Whether his negligence was a proximate cause of this accident depended on whether he exercised due care under the attending circumstances.

True this was a question for the jury. But if decision of this question was not made by the jury; or if its decision by them was contrary to that at which reasonable men, fully informed of the conditions under which the accident occurred, and of the legal rights of passing automobilists, and fully cognizant of the duty incumbent on the deceased to safeguard his own person as he passed from a position of safety and obscurity to the open roadway and into the path of automobiles lawfully on his side of the street, would have arrived, injustice may have been done to the owner of the automobile.

A verdict can not be allowed to stand unless based on testimony and evidence, and on reasonable inferences logically drawn from the testimony and physical facts duly proven to have existed.

"Testimony to sustain a verdict must be credible, reasonable, and consistent with probabilities and with the circumstances proven by uncontradicted testimony." *Page* v. *Moulton*, 127 Me., 80.

If the evidence would satisfy men of average intelligence and qualified for jury duty, under proper instructions from the Court, that Mr. Crosby was negligent in approaching the tarvia of the road as he did, and stepping out on it, such men must find him guilty of negligence which proximately contributed to his injury.

This precludes recovery of damages. *Lord* v. *Stacy*, 68 Cal. App., 517, 229 Pac., 874; *Cullinan* v. *Tetrault*, 123 Me., 302.

A man of extreme prudence would have passed the truck, in search for its tool box, by going round its rear. But extreme prudence is not the requirement. Such an one would have halted as his eyes caught the first glimpse of the road toward Belfast, and would then have seen the on-coming car.

In the circumstances attending Mr. Crosby as he sought the tool box, what would the ordinarily careful and ordinarily prudent man do? That was the test that the jury met. *Sturtevant* v. *Ouellette*, 126 Me., 558. They failed, either in considering all the attending circumstances or in determining what the man of ordinary prudence in Mr. Crosby's stead would have done.

Under the rule requiring every user of the highway to exercise reasonable care for his own safety and protection (42 C. J., 1133, 1135), a pedestrian crossing or about to cross a street or highway when his view of an approaching motor vehicle is obstructed, is usually required to exercise a greater degree of care than would under other circumstances be necessary, *Moss* v. *Boynton Co.*, 44 Cal. App., 474, 186 Pac., 631; and is negligent if he fails to take proper precautions to discover and observe the approach of such vehicle before placing himself in a position of danger. *Goodwin* v. *Miller*, 210 Ky., 407, 276 S. W., 117; *Winter* v. *Van Blarcom*, 258 Mo., 418, 167 S. W., 498; *Harder* v. *Matthews*, 67 Wash., 487, 121 Pac., 983.

And the question of contributory negligence must be determined without regard to any negligence on the part of defendant. Giving to plaintiff's evidence all the value to which it is legally entitled, and resolving every reasonable inference which may be drawn therefrom in favor of plaintiff, the inevitable conclusion must be that Mr. Crosby negligently left his place of safety in the obscurity of the loaded truck and stepped directly into the path of the moving automobile.

As said in *Moss* v. *Boynton*, supra, "This was particularly true if his (plaintiff's) view was to any extent obstructed by the jitney bus."

Under circumstances closely like those set up in the evidence in

this case many courts have found the injured person guilty of negligence. And we quote their expression of the law applicable here.

"If a person walks into a danger that the observance of due care would have enabled him to avoid, and is thereby injured, he would be guilty of contributory negligence. A pure accident, without negligence on the part of the defendant is not actionable." *Simeone* v. *Lindsay*, 22 Del., 224, 65 Atl., 778.

"A six year old boy was riding in the end of a wagon . . . at a point near his school building he suddenly jumped off the wagon and started east . . . direction of wagon and defendant's auto was toward the south. The boy was struck by the fender . . . the time allowed the driver to set the brakes and stop the automobile after the boy had climbed to the pavement was very brief, and distance from the rear end of the wagon to the point of collision could not have exceeded a few feet. Judgment for plaintiff reversed." *Klink* v. *Bany* (Iowa), 224 N. W., 540; *Brekke* v. *Rothermal*, 196 Iowa, 1288, 196 N. W., 84; *Gavin, Adm'r* v. *Jacobs*, 259 Mass., 23; *West* v. *City of Medford*, 255 Mass., 266, 151 N. E., 295. Appellant stepped immediately in front of defendant's automobile from between two parked automobiles. Judgment for defendant affirmed. *Goodwin* v. *Miller* (Ky.), 276 S. W., 117; *Collier* v. *Varino & Co.*, 153 La., 636, 96 So., 500.

Where the driver of a motor truck turned to his left to pass a cracker wagon at the right curb and after passing same and swinging again to his right, without blowing horn came in collision with an 8⅓ years old boy, who had left the sidewalk near the horse's head and had walked or run into the street five or six steps to fatal collision with the truck, *held*:

"In these circumstances no one else could reasonably forsee the sudden presence of the plaintiff's intestate in the path of the automobile, or prevent a collision with him. The direction of the verdict for the defendant was clearly right." *Lovett, Adm'r* v. *Scott*, 232 Mass., 541, 122 N. E., 646.

Where plaintiff, after alighting from a street car went to the rear of the car, started to cross the adjoining track and was struck by an automobile, and testified the automobile was pretty close to

the street car . . . that he had just taken one step . . . before he was hit; that before he got out free and clear there wasn't any chance to see anything coming in the tracks; that he could have seen a little, not much more than halfway down the side of the street car; that he looked; that he saw the automobile when he first looked and it was then not more than three feet away from him, *held*: "On the evidence most favorable to the plaintiff the rational inference to be drawn is that his own lack of reasonable care contributed to his injury and that a verdict was rightly directed for the defendant on that ground." *Gibb* v. *Hardwick*, 241 Mass., 546, 135 N. E., 868.

"There is nothing in the evidence to support a finding that any negligence of the defendant had causal relation to the plaintiff's injury. The mere happening of the accident was not evidence to that end. The plaintiff must have come into the pathway of the defendant's automobile by first passing through a procession of automobiles moving on the same street in the opposite direction. There is nothing to indicate that he could have been seen by the defendant for more than an instant, if at all before the injury." Directed verdict for defendant sustained. *Rizzittelli* v. *Vestine*, 246 Mass., 391, 141 N. E., 110; *Goetze* v. *Dominick*, 246 Mass., 310, 140 N. E., 802.

Plaintiff's "testimony was that he alighted from the automobile into the pathway of the trolley car, without looking to see if any car was coming; that he did not hear or see the car or know anything about it until it struck him.

"It is manifest that the slightest attention to his own safety would have prevented his injury. While he might depend to a reasonable extent on the expectation that the motorman would not be negligent, he was not justified in abandoning all precautions for self protection. The plaintiff was in a place of entire safety within the automobile. He voluntarily and without exigency moved into a danger zone by getting in front of an on-coming trolley car, which must have been in plain sight and very near when he opened the door of the automobile and got out." Judgment was for the defendant. *Will* v. *Boston Elevated Ry. Co.*, 247 Mass., 250, 142 N. E., 44.

Where a man sixty years old, of good health, hearing and eyesight, while crossing a city street was hit by a motor truck and killed, the court say: "There was no evidence of the defendant's negligence. The intestate was not seen by anyone until the instant he was struck. Where he came from, what he was doing, whether walking or running, in what direction he was moving, is entirely a matter of conjecture; there is nothing to show how the accident happened. The burden of proof to show the defendant's negligence was upon the plaintiff, and such negligence can not be inferred, in a case like this, merely from the happening of the accident. The fact that when the witness saw the truck it was going 'fast' is too indefinite, without anything to indicate the rate of speed, to warrant a finding of negligence. There was no evidence to prove that the driver of the truck saw the plaintiff's intestate, or in the exercise of proper care could have seen him until the moment of the collision; it could not have been found that the failure to blow the horn contributed to the accident." *Whalen* v. *Mutrie*, 247 Mass., 316, 142 N. E., 45.

Where a boy ran into the street, "without looking either way." No recovery. *Foster* v. *Rinz*, 202 Mich., 601, 168 N. W., 420; *Havermale* v. *Houck*, 122 Md., 82, 89 Atl., 314.

Or where pedestrian waited in the street for an automobile to pass and then stepped in path of defendant's automobile immediately following. Judgment for defendant. *Ward* v. *Fessler* (Mo.), 252 S. W., 667.

Where a boy, stealing a ride on a trolley car, jumped to street in front of a truck moving in direction opposite to trolley: *Held*, error to have submitted case to jury. *Boyer* v. *Grt. A. & P. Tea Co.*, 99 N. J. L., 451, 124 Atl., 778.

Where plaintiff "took no precautions," nonsuit was proper. *Gahagan* v. *Rd.*, 70 N. H., 441, 50 Atl., 146; *Collins* v. *Hustis*, 79 N. H., 446, 111 Atl., 286; *Magee* v. *Cavins* (Tex. Civ. App.), 197 S. W., 1015.

Where young woman steps from position in front of stalled car into the path of on-coming automobile; judgment for defendant affirmed. *Grein* v. *Gordon*, 280 Pa., 576, 124 Atl., 737.

Where boy ran out between two wagons and into collision;

plaintiff negligent; verdict for defendant. *Curley* v. *Baldwin* (R. I. *per curiam*), 9 Atl., 1; *Whalen* v. *Dunbar*, 44 R. I., 136, 115 Atl., 718.

Where no evidence from which inference of due care can be drawn: not entitled to verdict. *Wellman, Adm'r* v. *Wales*, 97 Vt., 245, 122 Atl., 659.

Where a woman "emerged from behind an express wagon into the path of vehicles, without looking for approaching vehicles"; held negligence bars recovery. *Harder* v. *Mathews*, supra.

Failure to make an observation prior to entering zone of danger is negligence. *Mertens* v. *Lake Shore Transfer Co.*, 195 Wis., 646; *Brickell* v. *Trecker*, 176 Wis., 557, 186 N. W., 593.

"If a man starts . . . although he has a right to do so . . . to cross a street without looking for vehicles passing across his path or likely to cross his path as he goes across the street, that man may be found negligent because he has neglected a duty which both the law and common sense casts upon him, namely, to take reasonable precaution to avoid dangers reasonably to be anticipated." *Tiffany & Co.* v. *Drummond*, 168 Fed., 47.

The rules heretofore announced by this court in cases most closely analogous to this as showing the degree of care to be exercised by a pedestrian crossing a main travelled highway in *Rent* v. *Candy Co.*, 122 Me., 25; *O'Malia* v. *Thomas*, 123 Me., 286; *Sturtevant* v. *Ouellette*, 126 Me., 558, were stated clearly and fully in the recent opinion in *Clancey* v. *Cumberland Power & Light Co.*, 128 Me., 274, and they point out that the one who suffered injury in the case at bar failed to exercise the requisite care.

In only one case in this state, *Levesque* v. *Dumont*, 116 Me., 25, do we find a ruling on the act of a plaintiff suddenly emerging from a position of obscurity and presenting himself directly in the path of an approaching automobile, so near it that collision is inevitable. In that case the injured party was a child of nine years and two months. The court held, "that the action of the deceased in heedlessly running in front of the automobile is a bar to recovery."

In the case at bar the injured person was a man of sixty-five years, in the full possession of his faculties.

In the light of all the circumstances, and with the law as expressed herein we can not predicate the jury verdict on sound premises. The pedestrian was negligent, even to the degree of exercising no care for his safety. His negligence continued up to the moment of impact, and, as in *Levesque* v. *Dumont*, recovery is barred.

The only allegations of negligence on the part of defendant on which any testimony appears in the record, are that its automobile was driven at a reckless and unusual rate of speed, and too close to the truck.

Of the latter there is no testimony or evidence except the statement of defendant's driver that he drove by the truck, "within passing distance," and of the former, his testimony that he had been driving "around thirty miles an hour."

In *Whalen* v. *Dunbar*, supra, the Court well said, "If it should be conceded that the defendant's automobile at the time the emergency was created was proceeding at a rate of speed in excess of the statutory limit there was no testimony of probative value showing or tending to show that the accident would not have happened if the defendant's automobile had been proceeding at the rate of twenty-five miles per hour or even at a much less rate of speed, or that the speed of defendant's automobile in any way entered into the cause of the collision. As the speed of defendant's automobile in no wise contributed to the accident the rate of speed is immaterial and liability can not be predicated upon the speed of said automobile."

However, we decide the case wholly upon the utter lack of due care upon the part of the injured man, in the situation evidenced in the record.

The verdict is against the law.

Motion sustained.
New trial granted.

LILLIAN M. RYAN *vs.* J. H. COGAN COMPANY.

Kennebec. Opinion February 28, 1931.

LANDLORD AND TENANT.

The giving by the landlord to the tenant of a notice of an increase in rent does not comply with the statutory requirement relative to termination of tenancies at will.

The relation of landlord and tenant arises by contract, and so long as the tenancy continues the obligation to pay rent at the agreed and existing rate remains in force. A consent by the tenant to a modification of his obligation can not be based on his exercise of his legal right to occupy the premises.

On exceptions by defendant. An action of assumpsit to recover a balance claimed to be due for rent. To the charge of the presiding Judge that a tenancy at will was terminated and a new tenancy created by landlord's letter to tenant increasing the rental, and tenant's continued occupation after the date named, defendant seasonably excepted.

Exceptions sustained. The case fully appears in the opinion.

Samuel Titcomb, for plaintiff.

Locke, Perkins & Williamson, for defendant.

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

THAXTER, J. This case is before this court on exceptions. The defendant was a tenant at will of the plaintiff under a contract either express or implied to pay rent at the rate of $16.66 a month. On May 28, 1927, while such relation was still subsisting, the plaintiff wrote to the defendant a letter to the effect that commencing July 1, 1927, the plaintiff would charge the defendant as rent $30.00 per month, payable monthly at the end of each month. The tenant, without any affirmative acceptance of the proposition, continued to occupy the premises. This is an action of assumpsit for the rent at thirty dollars a month from July 1, 1927, to Janu-

ary 1, 1928. The defendant duly excepted to the following portion of the charge of the presiding Justice.

"And the plaintiff has further shown by testimony in the form of a letter introduced in evidence, dated May 28, 1927, that she sent notice to the defendant corporation that after July 1, 1927, she would demand $30 a month rent for the land.

"Now being the owner of the land, she has the right to fix the rate, and if the defendant saw fit to occupy it for the period stated, the law would imply a promise on his part to pay the rent demanded. He is not obliged to occupy the land, and if he did so, after receiving notice from the plaintiff that a certain amount of rent would be demanded, the law would imply a promise on the part of the defendant to pay such rent.

"So in the face of the evidence, you would be justified in finding that the plaintiff was the owner of the land, that she gave notice to the defendant company that the rent after July 1, 1927, would be at the rate of $30 a month, and you would be justified in finding, irrespective of what the land was actually worth, that the defendant promised, — there was an implied promise to pay the rent demanded."

Except by operation of law, an example of which would be an alienation of the premises by the landlord, *Seavey* v. *Cloudman*, 90 Me., 536, and by mutual consent, tenancies at will can only be terminated by either party giving to the other thirty days notice in writing for that purpose, excepting in cases where the tenant, if liable to pay rent, shall not be in arrears at the expiration of the notice, in which case the thirty days notice shall be made to expire on a rent day. R. S. 1916, Chap. 99, Sec. 2.

In this case there was no termination of the tenancy by operation of law or by mutual consent. Nor can the giving of the notice of the increase in rent be held to comply with the statutory requirement. Counsel for the plaintiff does not even so contend, but maintains that the landlord may, during the tenancy, raise the amount of rent, at least if sufficient notice of the purpose so to do be given, so that the tenant may, within the time required by the statute, terminate the tenancy himself.

The relation of landlord and tenant arises by contract, either express or implied. *Little* v. *Libby*, 2 Me., 242; *Seavey* v. *Cloudman*, supra. One of the incidents of such contract in this case was the obligation of the tenant to pay rent at the rate of $16.66 a month. So long as the tenancy continued that obligation remained in force and it could not be modified, except by mutual consent. *Duley* v. *Kelley*, 74 Me., 556, 560; *Lamson* v. *Dirigo Fish Co.*, 128 Me., 364, 367. No such consent can be implied by the tenant's exercise of his legal right to occupy the premises.

The plaintiff's counsel has cited numerous authorities in support of his contention that occupation by a tenant at will after notice of an increase in rent raises an implied promise to pay the additional amount. These cases either do not involve tenancies at will with the incidents that attach to them under our laws, or they are cases of occupants holding over after the termination of their tenancies. The decisions are not opposed to the principle which we here announce.

Exceptions sustained.

WILLIAM L. BYRON *vs.* MINNIE C. O'CONNOR.

Androscoggin. Opinion February 28, 1931.

NEGLIGENCE. MOTOR VEHICLES.

The law imposes upon one confronted by an emergency that degree of care which an ordinarily prudent person would use under the same or similar circumstances. Extraordinary care is not required.

A verdict can not be based on sympathy, but must be grounded in evidence justifying it.

In the case at bar, the majority opinion holds that the defendant used the care required of an ordinary prudent person and was not negligent.

On exceptions and general motion for new trial by defendant. An action on the case to recover damages for personal injuries sustained by plaintiff in an automobile accident. Trial was had at

the March, 1930, Term of the Superior Court for the County of Androscoggin. To certain instructions given by the presiding Judge, defendant seasonably excepted, and after the jury had rendered a verdict for the plaintiff in the sum of $2,240.00, filed a general motion for new trial. Motion sustained. The case fully appears in the opinion.

Benjamin Berman,
David Berman,
Jacob Berman,
Edward Berman, for plaintiff.
Frank T. Powers, for defendant.

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

STURGIS, J., BARNES, J., DISSENTING.

FARRINGTON, J. The case is before us on general motion and on exceptions to certain instructions given by the presiding Justice in an action of negligence in which a verdict was rendered for the plaintiff.

On January 31, 1929, the plaintiff was driving in his automobile from Lewiston to Augusta. On the surface of the highway, some three miles from Augusta, there was for a little distance a thin coating of ice and snow. The plaintiff's car skidded at this point, on account of a sudden application of brakes to avoid collision with a car just ahead, and stopped in the ditch headed back toward Lewiston, having completely turned around. Edwin R. Small, the driver of the car ahead, attempted with his car to pull the plaintiff's automobile out of its position, and, failing in his first attempts, started to put on chains. While assisting Mr. Small the plaintiff was struck by the defendant's car and received the injuries for which the suit was brought.

The plaintiff and Mr. Small on the one side, and the defendant and her mother on the other side were the only persons whose testimony related to the question of liability.

The only knowledge which the plaintiff had as to how the accident occurred was derived from what the defendant told him. Mr. Small testified that he saw the defendant's car from two to four

hundred feet distant toward Lewiston as it approached the scene of the accident but that he did not pay very much attention to it; that he "was partially turned away" from defendant's car and that the next that he remembered "was hearing a crash." He does testify, however, that as the defendant drew near she slowed up considerably and that when she was about fifty feet from the point where the accident occurred she was moving "around fifteen miles an hour." There is nothing in the record to show that he observed the car during the last fifty feet before the collision. On the contrary, according to his own testimony, the "crash" was next in the order of events. As to that phase of the case his information, like that of the plaintiff, came from the defendant.

Given the utmost weight to which it is entitled, the testimony of the plaintiff and that of Mr. Small, as to what they say the defendant said to them as having any possible bearing on the question of liability, amounts to nothing more than that the defendant expressed sorrow and regret over the accident, that the car was new, that she applied the brakes "a little too suddenly," or too heavily, and admitted knowledge that sudden application of brakes is likely to cause skidding.

Assuming its truth, the only force in their testimony lies in the claim that the cause of the accident was the fact that the defendant made a too quick and too hard application of the brakes.

The defendant's testimony as to what happened just before the accident, uncontradicted by that of witnesses or by physical facts, is briefly as follows: That after coming up the grade she saw two automobiles on her left-hand side of the road, one in the ditch and the other about a third in the road; that as she approached the two automobiles she was moving at the rate of from ten to fifteen miles an hour; that she further slowed down as she approached nearer to the two automobiles and that when she arrived almost at the cars she "came almost to a dead stop" because her car began to jump and she had to shift into low gear; that she "struck some kind of a slippery spot" and her car "slid forward a little" and she immediately "put on her brakes, thinking that was the best thing to do"; that her car came alongside of Mr. Small's car and the injury to plaintiff took place. Under cross examination she testi-

fied that up to the time she started to shift into low she "hadn't started to skid or slide"; that she was going ahead until she "slowed right down almost to a stop to change"; that she just got it "shifted in" when she swung her car a little to the right and it skidded; that she went five or six feet after shifting into low before her car skidded; that the car slid down and that, although she could see it was going, she could not stop it though she tried to do so by putting on the brakes after the car started to slide.

Under the facts disclosed by the record, if there were negligence to be found, such finding could be based on no other ground than the application of the brakes. On the facts disclosed in this record, we feel that the jury was not justified in finding that the defendant was negligent. Under the circumstances with which she found herself confronted it was a question of judgment whether or not she should apply the brakes or to increase speed and go ahead. If she used that degree of care which an ordinarily prudent person would have used under the same circumstances and in the same emergency, and in our opinion she did, she was not guilty of negligence and we see nothing in the case to warrant a finding that there was prior negligence on the part of the defendant which continued and brought her into the situation of the emergency.

We are not concerned with consideration of what might have happened or might not have happened if parties had exercised extraordinary care, because such a degree of care is not required. The law does impose a degree of care which is required of the reasonably prudent man, and we feel that the defendant in this case fulfilled that requirement. A verdict can not be based on sympathy, but must be grounded in evidence justifying it.

In this case we are of the opinion that the evidence did not justify the finding of the jury and that the verdict ought not to stand.

In view of this opinion, it becomes unnecessary to consider any other phases of the case.

Motion sustained.

BARNES, J. DISSENTING.

I hesitate to file an opinion in disagreement with a major portion of the court, but I am constrained to dissent in this case because,

as I view it, the questions for determination were questions of fact, and, considered as such, they are not unusually intricate or involved.

The jury found for the plaintiff. They must have agreed that plaintiff was not chargeable with contributory negligence.

The sole issue, therefore, was that of negligence on defendant's part.

On this issue there is conflicting evidence, hence, in determining the point, the jury were to decide on which side lay a fair preponderance of the evidence, which to them seemed to have probative value.

When the jury is furnished full narration of the acts of defendant, and description in detail of the physical features of the place where the accident occurred, together with the attending circumstances, it is for them to settle the issue of defendant's negligence.

After verdict, not predicated on fraud, manifest error, delinquency, sympathy, bias, prejudice, or any other false notion that renders reversal necessary, it is not for this court to set aside the verdict because a majority feel they would have arrived at the contrary conclusion if they had been the jury. *Knight* v. *Railroad Co.*, 56 Me., 245.

"We cannot substitute our own impressions for any findings which the jury were authorized to make." *Coombs* v. *King*, 107 Me., 380; *Daughraty* v. *Tebbetts*, 122 Me., 400.

It is also elementary that the jury, and not the court, is to pass upon the credibility of witnesses.

Further, it can not be successfully controverted that as to the condition of a highway at a given time of year, men of the vicinity, otherwise qualified for jury duty, are the finders of fact.

Nor is it probable that a present day jury is not competent to decide what an ordinarily intelligent and admittedly experienced driver of a Ford car must foresee would be the course of his car, when all conditions of roadway and speed are set before them.

The case at bar is not one of a class wherein the corrective power of the court is to be more than ordinarily exercised, typified by cases, collected in Lawrence, Maine Digest, "Evidence," 161.

Before being set aside the verdict in a case such as we have be-

fore us must be shown to be clearly wrong. *Weeks* v. *Parsonsfield*, 65 Me., 286.

It seems to me that in arriving at their conclusion my brethren have overlooked evidence that is uncontradicted; evidence that points unwaveringly to negligence of the defendant.

The jury knew that to a man of ordinary intelligence a thick growth of large pine standing on the southerly margin of a highway that runs eastward, and extending for rods along the way, on the thirty-first of January may be skirted at its foot by ice extending across the roadway; that defendant ran her car for 150 feet on this shaded roadway before reaching plaintiff.

They heard her story and it is not for the Appellate Court to say they must accept as truth all that she stated. They also heard the recital of witnesses as to what the defendant said of her acts and the performance of her car at the time of the accident.

To reject as incredible portions of her testimony, if they did, was within their rights. The opinion presents that defendant's car "slid down" on plaintiff, as though he were below it, on descending ground, but the testimony before the jury was that the road by the spot of the injury was "practically level"; and the slope of the roadway from its right side as defendant travelled was not more than six inches in twenty-two feet, not more than produced by ordinary crowning under good construction, and defendant testified that her car "slid forward a little."

The opinion states, "there was for a little distance a thin coating of ice and snow." But the jury heard a witness state the ice extended "about fifty feet from the western edge of the woods," and it is probable they were not mystified by that language.

I can not concur in the taking from the jury the determination of what occurred or in rejecting their finding of absence of the care that should be exercised under circumstances ordinarily encountered every day on a country road, or to be confronted on any winter day.

STURGIS, J. ALSO DISSENTS.

HARRY GOLDBERG ET AL

vs.

NEW YORK, NEW HAVEN & HARTFORD R. R. Co.

Androscoggin. Opinion March 3, 1931.

CARRIERS. RAILROADS. DAMAGES.

In order to recover on account of delivery to a consignee by a carrier of merchandise in damaged condition, it is necessary for the consignee to prove that the merchandise was, at time of its receipt by carrier, in at least a better condition than when it reached its destination.

When it appears that a shipment was in good condition at time of its delivery to carrier for transportation and was delivered to consignee in damaged condition, it will be presumed that the damage was caused by the delivering carrier.

The primal element in the presumption is the delivery for shipment of a commodity then in good condition, and without evidence of this primal element, the presumption can not attach.

To recover damages to shipment during transportation by carrier, consignee must prove good condition at time of delivery to carrier and this may be proved by a receipt from carrier acknowledging the fact. But such a receipt is not conclusive and no presumption is raised as to the condition of merchandise not open to inspection.

A bill of lading signed by a carrier acknowledging the receipt of merchandise in good order or in apparently good order is prima facie *evidence that as to external appearance and in so far as its condition could be ascertained by mere inspection, the goods were in good order and the burden of going forward with the evidence and rebutting the presumption raised by such an admission falls on the carrier.*

The authorities are not in conflict when the distinction is noted between those in which the damaged condition of the goods is apparent from external appearance and those in which it is concealed. A carrier is not only not obligated to open cases and wrappings for the purpose of examining the interior contents but he is not permitted to do so.

In the case at bar, the condition of the bales when the cars reached Gardiner was plainly apparent and if they had been in like condition when defendant accepted them for carriage, the fact should have been noted in the bill of lading.

That it was not so noted raises the presumption that the condition complained of did not exist at that time.

An issue of fact was thus raised, with the burden of proof resting upon the plaintiffs to satisfy the jury, on consideration of the entire evidence, that the damage to the goods occurred after they were received by defendant.

On this issue, plaintiffs prevailed. The direct evidence on the point was meagre and conflicting, but it can not be said that the verdict lacked sufficient support to be taken as the unbiased decision of intelligent triers of fact. As such it must stand.

On motion for new trial by defendant. An action brought by the plaintiffs under the Carmack Amendment (U. S. C. A., Title 49, Transportation, Section 20, Subsection 11) to recover for damage done to thirty bales of rags shipped by the plaintiffs from Boston to Gardiner, Maine, the defendant being the initial carrier.

Trial was had at the October Term, 1930, of the Superior Court for the County of Androscoggin. The jury rendered a verdict for the plaintiffs in the sum of $1,517.34. A general motion for new trial was thereupon filed by the defendant. Motion overruled. The case fully appears in the opinion.

Benjamin Berman,
David Berman,
Jacob Berman,
Edward Berman, for plaintiffs.
Dana S. Williams, for defendant.

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

PATTANGALL, C. J. On motion. Action brought to recover damages for injury to merchandise shipped over defendant's line. Verdict for plaintiffs.

Plaintiffs purchased thirty bales of linen rags and forty-eight bales of thread in Italy and caused them to be shipped to Boston where they were landed on defendant's dock and a few days later loaded in two freight cars, consigned to plaintiffs at Gardiner, Maine. On their arrival, it was discovered that the bales containing rags were so damaged by water as to be worthless. Plaintiffs

called this fact to the attention of the freight agent who noted on the bills of lading of both cars, "Wet. Bad order." The entire shipment was then taken to plaintiffs' storehouse, where the damaged bales, thirty in number, were separated from the others, and a claim filed with the carrier for the amount of the loss.

One car contained thirty bales of rags and three bales of thread; the other, forty-five bales of thread. None of the thread was damaged, although plaintiffs testified that the three bales which were in the car containing the rags were damp.

The condition of the damaged bales was described by several witnesses, among whom were two employees of the Maine Central Railroad. They all agreed that a considerable number of the bales were fairly described by the words noted on the bills of lading, and that that condition was apparent from observation without removing the burlap covering. One bale was broken open. The others were intact. The contents of the broken bale were wet.

Water was plainly noticeable on that portion of the floor of the car on which the wet bales stood. There was testimony that the rags were so wet that it required four men to handle each bale in loading, while a bale of dry rags of the same size could be handled by two men.

There was a conflict of testimony as to whether or not the damaged merchandise was all in one car. Plaintiffs contended that the bales in the car in which thread only had been loaded were absolutely dry. Defendant claimed that wet and dry bales were scattered through both cars. In support of plaintiffs' theory, it appears that none of the thread was unsalable and that the rags were absolutely worthless. It was in evidence that two witnesses made careful examination of the roof and sides of each car and found them tight and dry.

Regardless of differences as to matters of detail, the evidence is overwhelming that the shipment of rags was rendered valueless by having been, at some time, in some way, damaged by water.

It was incumbent on plaintiffs to prove more than this, however. They must also prove that the goods, when delivered to the carrier, were in at least better condition than was found to be the case on their arrival in Gardiner. *Smith* v. *N. Y. Central R. R. Co.*, 43

Barb. (N. Y.), 225; *Perkett* v. *R. R. Co.* (Mich.), 157 N. W., 388; *Shore* v. *N. Y., N. H. & H. R. R. Co.* (Conn.), 121 Atl., 344.

When it appears that a shipment was in good order at the time of its delivery to a carrier for transportation and was delivered to the consignee in a damaged condition, it will be presumed that the damage was caused by the delivering carrier. This rule applies equally to a case of transportation by initial and connecting carriers and to the case of transportation by a single carrier who is the initial, transporting and delivering carrier. The primal element in the presumption is the delivery for shipment of a commodity then in good condition. In the absence of evidence of this primal element, the presumption can not attach. *Willett* v. *R. Co.* (S. C.), 45 S. E., 93; *Copeland Co.* v. *Davis* (S. C.), 119 S. E., 19; *Gramling Electric Refrigeration, Inc.* v. *Southern Ry. Co.* (S. C.), 152 S. E., 670; *Ohio Galvanizing & Manufacturing Co.* v. *Southern Pacific R. R.*, 39 Fed., 2nd Ser., 840.

In support of the proposition that the damaged property was delivered to defendant in good condition, plaintiffs offered the bills of lading covering the shipment. They were in the regular form prescribed by the Interstate Commerce Commission, containing the statement that the merchandise was received "in apparent good order." On one of them appeared the notation, "One bale loose in bulk put in car."

The recitals in the bills of lading constituted an admission on the part of the carrier that, so far as external appearance was concerned, the shipment was in good condition when received by it. This, coupled with proof of the condition in which the goods were received in Gardiner, a condition readily observable from the most casual inspection, made out a *prima facie* case for the plaintiffs.

To recover for damages to shipment during transportation by carrier, shipper must prove good condition of goods at time of delivery to carrier or a receipt from carrier acknowledging receipt of goods in good condition. *McMahon et al* v. *American Railway Express Co.* (N. J.), 141 Atl., 566. But such a receipt is not conclusive and no presumption is raised as to the condition of merchandise which is not open to inspection. *Gramling Electric Re-*

frigeration, Inc. v. *So. R. R. Co.*, supra; *Meyers* v. *The Cunard Steamship Co.*, 244 N. Y. Supp., 114.

A bill of lading signed by a carrier acknowledging the receipt of merchandise in good order or in apparently good order is *prima facie* evidence that as to external appearance and in so far as its condition could be ascertained by mere inspection, the goods were in good order and the burden of going forward with the evidence and rebutting the presumption raised by such an admission falls on the carrier. *O'Brien* v. *Gilchrist*, 34 Me., 554; *Tarbox* v. *Eastern Steamboat Co.*, 50 Me., 339; *The T. A. Goddard*, 12 Fed., 174; *Barrett* v. *Rogers*, 7 Mass., 297; *Hastings* v. *Pepper*, 11 Pick., 43; *Shepherd et al* v. *Naylor et al*, 5 Gray, 591; *Ill. Central R. R. Co.* v. *Cowles*, 32 Ill., 121; *Sprotte* v. *Del. L. & W. R. R. Co.* (N. J.), 101 Atl., 518; *Saliba* v. *N. Y. Central R. R. Co.*, 101 Vt., 435; *So. Railway Co. et al* v. *N. W. Fruit Exchange* (Ala.), 98 So., 382; *The Dondo*, 287 Fed., 239.

The authorities are not in conflict when the distinction is noted between those in which the damaged condition of the goods is apparent from external appearance and those in which it is concealed. A carrier is not only not obligated to open cases and wrappings for the purpose of examining the interior contents but he is not permitted to do so.

In the instant case, the condition of the bales when the cars reached Gardiner was plainly apparent and if they had been in like condition when defendant accepted them for carriage, the fact should have been noted in the bill of lading. That it was not so noted raises the presumption that the condition complained of did not exist at that time. This, defendant sought to rebut and offered considerable evidence in support of its position.

An issue of fact was thus raised, with the burden of proof resting upon the plaintiffs to satisfy the jury, on consideration of the entire evidence, that the damage to the goods occurred after they were received by defendant.

On this issue, plaintiffs prevailed. The direct evidence on the point was meagre and conflicting. But we can not say that the verdict lacks sufficient support to be taken as the unbiased decision of intelligent triers of fact. As such it must stand.

Motion overruled.

HARLEY J. GILMAN *vs.* ANTONIO FORGIONE.

Cumberland. Opinion March 3, 1931.

ACTIONS. MONEY PAID.

Plaintiff's misconstruction or misunderstanding of the effect of covenants in conveyances of real property was a mistake of law, not of fact.

Money paid under a mistake of law can not be recovered, either in law or equity, even though defendant benefited by the payment, provided no fraud exists.

On report on an agreed statement of facts. An action for money had and received. Judgment for defendant. The case fully appears in the opinion.

Gerry L. Brooks, for plaintiff.

Bernstein & Bernstein, for defendant.

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

PATTANGALL, C. J. On report. Action for money had and received. The facts are agreed upon.

Defendant was the owner of a tract of land which he divided into building lots, offering the same for sale. On November 20, 1923, he mortgaged the entire tract to the Gorham Savings Bank, the mortgage containing the following provision:

> "It is hereby made a matter of agreement that the mortgagee, his 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."

On December 15, 1923, he conveyed the land, subject to the above mentioned mortgage, to the Cape Elizabeth Land Company, taking from the grantee a mortgage which contained this provision:

> "Provided, also, that it shall be lawful for the grantor herein 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 as are situated in Oakhurst Park are so sold and a release thereof is given by the first mortgagee under the terms of said first mortgage, the grantee herein will furnish a release of said part or parts from this second mortgage; and when said first mortgage shall have become paid in full, but not before, the grantee herein shall continue to furnish releases from said second mortgage and shall receive therefor the sum of four cents per square foot for the part or parts of said premises so released, until said second mortgage shall have become paid in full."

The Cape Elizabeth Land Company defaulted in payment, foreclosure proceedings were instituted, and on May 11, 1926, previous to the expiration of the time of redemption from said mortgage, foreclosure proceedings and mortgage were cancelled and a new mortgage given by said Cape Elizabeth Land Company to defendant, containing the same release clause.

On November 9, 1927, Cape Elizabeth Land Company sold to one Foster a portion of the land, subject to the mortgages held by defendant and by the Savings Bank, Foster giving back to the company a third mortgage securing the payment of the purchase price of the lot. This latter mortgage was assigned to plaintiff on March 2, 1928.

On March 29, 1928, defendant again began foreclosure proceedings on his mortgage against Cape Elizabeth Land Company. On March 18, 1929, plaintiff paid to Gorham Savings Bank the amount due on the mortgage from Foster to the company and procured a release from the bank of its claim on the land. He then demanded a like release from defendant which was refused. Whereupon he brought a bill in equity to compel such release, which bill

was finally dismissed on the ground that the language in the conveyances, quoted above, must be construed as a personal covenant and did not run with the land. *Gilman* v. *Forgione*, 129 Me., 66.

Foreclosure proceedings on defendant's part having been perfected, the title to the property rested in him, subject only to the claim of the bank. These proceedings are brought to recover back the money paid by plaintiff to the bank, on the theory that the payment inured to the benefit of the defendant and that it was paid under a mistake of fact.

Unfortunately for plaintiff, his mistake was not of fact but of law. He was fully conversant with the facts. He misunderstood the effect of the covenants referred to. Money paid under such circumstances can not be recovered even though defendant is benefited by the payment, provided that no fraud is shown to have been exercised by him and none is claimed. This is true both in law and equity. *Freeman* v. *Curtis*, 51 Me., 140; *Bragdon* v. *Freedom*, 84 Me., 431; *Houlehan* v. *Kennebec County*, 108 Me., 397.

Judgment for defendant.

LENORA BUNKER *vs.* GEORGE F. BUNKER ET ALS.

Hancock. Opinion March 3, 1931.

WILLS. TRUSTS. DESCENT. R. S. 1916, CHAP. 80, SEC. 14.

Where there is no plain intention to the contrary expressed in a will, and a trust created therein is an active one, trustees are entitled to possession of the trust estate during the term of the trust and are chargeable with its care and administration for the benefit of a Cestui Que Trust.

By implication, sufficient estate is vested in the trustees for a proper execution of their trusts.

A beneficiary, who is one of the trustees, has a common and undivided authority and power in the administration of the trust and can not rightfully be excluded from possession of the trust property.

Where no express or implied intention appears on the part of a testator to make an outright gift of income to a life tenant, unexpended income remaining at the death of the life tenant which can be traced and identified must be included in the residuary estate to be then distributed as intestate property.

A widow who voluntarily accepts provisions made for her benefit by her husband in his will, is barred from any right by descent in his real estate remaining undisposed of.

Where no intention appears in the will to the contrary, a widow, who accepts the provisions of the will for her benefit, may in addition thereto be entitled to her distributive share of the personalty remaining undisposed of after her life estate.

In the case at bar, the complainant's survival of her husband satisfied the contingency of paragraph 2 of his will and gave full force and effect to the provisions there made for her benefit, subject to the trust created in paragraph 5, and created an equitable estate in her for life with the legal title vested in the trustees.

The will was left without residuary provision and the remainder of the testator's property, after the estate of the complainant, passed as intestate property.

No express provision in R. S. 1916, Chap. 80, Sec. 14, in effect when this will was made, barred a widow from taking both the distributive share of her husband's personal estate and any provision in this will made for her benefit.

All real estate, therefore, and one-half of the personalty remaining at the death of the widow would pass to the testator's heirs and personal representatives, as of the date of his death. The other half of his personalty, then unexpended, will be paid to the widow's personal representative or her assigns.

On report, on Pleadings, Docket Entries and an Agreed Statement of Facts. A Bill in Equity for the construction of the will of James W. Bunker.

Bill sustained. Decree in accordance with opinion. The case fully appears in the opinion.

Deasy, Lyman, Rodick & Rodick, for plaintiff.

William B. Blaisdell, for defendants.

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

STURGIS, J. Bill in Equity for the construction of the will of James W. Bunker, late of Gouldsboro in Hancock County. The

case is reported on Pleadings and Docket Entries supplemented by an Agreed Statement of Facts.

After providing for the payment of his debts, funeral charges, and expenses of administration, and the perpetual care of family burial lots, the testator included the following paragraphs in his will:

"2. In the event of my wife living at my decease I give all the rest, residue and remainder of my property, real, personal and mixed of whatsoever the same may consist and wheresoever situated to her for and during her natural life. The income to be used for her support with the express provision that she shall have the right to use any part of or the whole of the principal if necessary for her comfort, enjoyment or support and that she and Rubie J. Tracy, one of the Trustees of my Will hereinafter named are to be the sole judges of what is necessary."

"3. In the event that my said wife, Lenora Bunker, shall not be living at my decease, I give, devise and bequeath all said rest, residue and remainder mentioned in paragraph 2 above as follows, to wit: To my brother, George B. Bunker of Brighton, Mass., or his issue by right of representation, one-fourth (1/4) part; to my nephew, Harry E. Hooper of Winter Harbor, Maine, or his issue by right of representation, one-fourth (1/4) part; to my wife's sister, Abbie Bunker of South Gouldsboro, Maine, or her issue by right of representation, one-fourth (1/4) part; and to the children of Rubie J. Tracy, being the children of my wife's brother, the late Bedford T. Tracy, or the survivors or survivor of them, one-fourth (1/4) part; Should any of the persons named in this paragraph (3) not be living at my decease, his or her share shall be regarded as a lapsed legacy, and said share shall be divided among the survivors named in this paragraph in the same proportion that the share of each bears to the whole of said rest, residue and remainder."

"5. Having confidence in the integrity and business ability of the above-named Rubie J. Tracy and Harry E. Hooper,

> and desiring that my wife shall have assistance in taking care of the property hereinabove bequeathed and devised to her, I hereby appoint the said Rubie J. Tracy and Harry E. Hooper and my wife, Lenora Bunker, to the Trustees of whatever property comes to my said wife under Paragraph '2' hereinabove. I direct that no bond be required of either of my Trustees in said capacity."

Executors were named in the fourth paragraph and the will concludes with the usual attestation clause.

The testator died without issue. Lenora Bunker, the complainant, was the "wife" referred to in the several paragraphs of the will. The provisions of the third paragraph were dependent for testamentary operation on her dying before the testator. This contingency did not happen and the residuary gifts there made lapsed. The will is left without residuary provision and the remainder after the estate of the complainant must pass as intestate property.

The complainant's survival of her husband satisfied the contingency of the second paragraph of the will and gave full force and effect to the provisions there made for her benefit, subject, however, to the trust created in the fifth paragraph.

Standing alone, the second paragraph gives the complainant a life estate with power of disposal as her necessary comfort, enjoyment and support may require and her judgment and that of Rubie J. Tracy, referred to as a trustee, may dictate. *Mallett* v. *Hall*, 129 Me., 148; *Loud* v. *Poland*, 126 Me., 45; *Young* v. *Hillier*, 103 Me., 17. This provision is qualified, however, by the trust created in the later paragraph, and the estate of the complainant must be construed to be an equitable estate for life with the legal title vested in the trustees named.

This is the expressed intention of the testator. Indicating a desire that his wife should have assistance in "taking care of the property" bequeathed and devised her for life, the testator, in the fifth paragraph, appoints Rubie J. Tracy and Harry E. Hooper co-trustees with the complainant and exempts each from giving bond. The will indicates a purpose to insure to the complainant a full and certain enjoinment of her husband's estate, measured only

by her comfort, enjoyment, and support, and free from the risks of possible improvidence or mismanagement.

The trust is not dry or passive merely. The trustee, Rubie J. Tracy, is charged with the duty of assisting the complainant in the determination of her necessary use of the principal of the trust property. The three trustees are expressly charged with its proper care. The testator made his trustees something more than mere depositaries of title and created an active trust. *Hinds* v. *Hinds*, 126 Me., 527; *Dixon* v. *Dixon*, 123 Me., 470; *Sawyer* v. *Skowhegan*, 57 Me., 500.

There being no plain intention to the contrary expressed in the will, the trustees are entitled to possession of the trust estate and for the life of Mrs. Bunker are chargeable with its care and the administration of it for her benefit. Sufficient estate is vested in them by application for a proper execution of the trust. *Edwards* v. *Packard*, 129 Me., 74; *Slade* v. *Patten*, 68 Me., 380.

The *Cestui Que Trust* is one of the trustees and in that capacity she has a common and undivided authority and power in the administration of the trust. She can not be rightfully excluded from possession of the trust property. *Cox* v. *Walker*, 26 Me., 504; *Church* v. *Stewart*, 27 Barb. (N. Y.), 553; 39 Cyc., 307.

It is expressly provided in the second paragraph that the income of the trust property accruing during the complainant's life is "to be used for her support." Immediately following this provision, however, the testator directs that so much of the principal of the trust property as is necessary may be used for the complainant's comfort, enjoyment and support. Read together, these two provisions indicate an intention that the complainant may use both income and principal for comfort and enjoyment as well as her bare support. When income is exhausted, principal may be used as necessary.

While it would appear that the testator anticipated that his widow would require the entire income of his estate for her support, we do not find an express or implied intention on his part to make an outright gift of income to her, making unexpended balances her own property and assets of her estate at her decease. The income was to be "used for her support." If not so used, we think,

unexpended income remaining at the death of the complainant in the possession of the surviving trustees or otherwise traced and identified must be included within the residuary estate to be then distributed as intestate property.

As already stated, the testator, by the appointment of his widow as one of his trustees, placed her in common possession of the corpus of the estate. His language in the second paragraph of the will indicates an intention that the widow should personally use income and necessary principal for the purposes specified. The trustees are warranted, we think, in paying over to the complainant all of the income after payment of proper trust expenses chargeable thereto and so much of the principal as Rubie J. Tracy and the complainant may approve. At the complainant's decease, her estate will be accountable for any part of such money so paid to her which is not spent for the purposes specified in the will.

Conceding that the remainder of the testator's estate, after her equitable estate for life, is intestate property, the complainant claims an interest therein under the Rules of Descent and the law of distribution of this state. Of record she has not waived the provisions of her husband's will. She here claims both under the will and under the statutes.

By R. S. (1916), Chap. 80, Sec. 1, in effect when this testator died, one-half the real estate of a person deceased intestate, subject to certain payments and certain exceptions, descends, if he has no issue, to his widow. By Section 13 of the same Chapter, when a specific provision is made in a will for the widow of a testator, such legatee or devisee may within six months after probate of the will and not afterwards, with certain exceptions not here involved, make election and file notice thereof in the Registry of Probate whether to accept said provision or claim her right and interest by descent under Section 1. This Section then contains this provision:

> "But is not entitled to both, unless it appear by the will that the testator or testatrix plainly so intended."

By Section 14 of the same Chapter, when a provision made in a will for a widow is waived or no such provision is made, the widow, upon election and notice, shall have and receive the same share of

the real estate and the same distributive share of the personal estate of such testator as is provided by law in intestate estates. And Section 20 provides that the personal estate of an intestate, except that portion assigned to his widow by law and the Judge of Probate, shall, after payment of his debts, funeral charges and charges of settlement, be distributed by the rules providing for the distribution of real estate.

Section 13 of Chapter 80 relates only to a widow's right by descent in the real estate of her husband upon her waiver of the provisions of his will for her benefit or his failure to so provide for her. It is a reënactment of Sec. 13, Chap. 77, R. S. 1903, which is a restatement of Sec. 5, Chap. 157, P. L. 1895, the Act by which the right of dower was abolished in this state and the widow given a right by descent in the lands of her husband.

In *Cheney* v. *Cheney*, 110 Me., 61, this Court says that the sole purpose of Chap. 157, P. L. 1895, was to

> "change dower from a life interest to an estate in fee. It did not pretend to affect the quantity of the estate nor the nature of the right, * * . * *
>
> "Section 4 (5) provides for the waiver of the specific provision of the will, which is also identical with the right under the rule of dower * * . It, therefore, appears from an analysis of the Statute of Descent, touching the widow's rights, that the properties and characteristics of the new estate are practically the same as those of the dower estate. All the bars and releases are identical in meaning although changed in phraseology in condensing. * *
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> "It would appear then that, when the Statute of 1895 became a law, the only change the Legislature intended to make, or in the use of the language employed did make, was to enlarge the interests of the widow by giving her an estate for life. In all other respects, whether there was a will or no will or a will with no provision for her, her interest in the lands of her husband was not affected, nor were her rights in the personal estate of her husband altered in the least or even referred to in this act."

And in *Clark* v. *Trust Company*, 116 Me., 450, 452, in a construction of Sec. 13, Chap. 80, R. S. 1916, it is held:

> "When the right of dower was abolished and the widow given a right by descent in the estate of her husband, the same statutory provisions for waiving the provisions of the will and accepting the rights given to her by law were retained. In all the Courts in which the subject has been discussed, it has been held that the privilege of waiving the provisions of the will and accepting the provisions made by law are the same whether it is a dower right or a right by inheritance."

Given the right to waive the provisions made for her in her husband's will and claim dower by the first statutes of this state (Sec. 15, Chap. 38, Laws of 1821), by the Revision of 1840, Chap. 95, Sec. 13, a widow was expressly required to make her election whether to accept the provision made for her in her husband's will or claim her dower, but was barred from taking both by the restriction "but shall not be entitled to both unless it appears by the will that the testator plainly so intended." This statute was reënacted verbatim in subsequent Revisions and appears as Sec. 5, Chap. 65, R. S. 1883, in force when the Act of 1895 abolished dower.

Under these earlier statutes, by acceptance of the provisions of her husband's will, the widow was deemed to have waived her right of dower. *Hastings* v. *Clifford*, 32 Me., 132; *Bubier* v. *Roberts*, 49 Me., 460, 464. The provision in her husband's will operated as an offer to the widow which she might accept or refuse. If she accepted it, she lost her dower, not by the testamentary act of her husband, but by her voluntary acceptance of a substitute. 9 R. C. L., 601. The language of these statutes does not indicate an intention to exclude intestate lands from their operation. Neither reason nor precedent so dictates.

The "properties and characteristics" of the dower estate, so far as a widow's privilege of waiving the provisions of a will and accepting the provisions made by law are concerned, being retained and attaching to the estate by descent given her in the Act of 1895 and carried through the Revisions into Sec. 13, Chap. 80, R. S.

1916 (*Cheney* v. *Cheney*, supra; *Clark* v. *Trust Co.*, supra), a like construction must be given to Section 13 and the complainant here held to be barred from any right by descent in the real estate of her husband. No contrary intention plainly appearing in the will, her apparent voluntary acceptance of the equitable life estate, which he provided for her, effects this result.

Section 14 of Chapter 80 is a reënactment of Chap. 260, P. L. 1909, which amended that part of Sec. 13, Chap. 77, R. S. 1903, which was a restatement of Chap. 221, P. L. 1897. The Amendment of 1909 did not modify or enlarge the scope of the Act of 1897, its only purpose and effect being to remove existing ambiguities in the Revision of 1903. *Cheney* v. *Cheney*, supra.

Prior to 1897, a widow, upon waiver of her husband's will, had no right to a distributive share of his personal estate except as an allowance was made to her by the Judge of Probate. R. S. 1893, Chap 65, Sec. 21, and earlier statutes. A new right in her husband's personalty additional to and independent of her right of descent in his realty was given the widow by Chap. 221, P. L. 1897.

The term "dower," as used in the statutes, had reference to real estate, and the widow's election between dower and her husband's will did not involve her right to share in his personal estate. *Chase* v. *Alley*, 82 Me., 234, 236; *Dow* v. *Dow*, 36 Me., 211, 216; *Brackett* v. *Leighton*, 7 Me., 383; *Perkins* v. *Little*, 1 Me., 148. And, although a widow elected to accept her husband's will and thereby was barred from her claim of dower, it was held, under similar statutes, that she might share in his intestate personalty. *Kempton, Appellant*, 23 Pick. (Mass.), 163; *Nickerson* v. *Bowly*, 8 Metc. (Mass.), 424; *Dole* v. *Johnson*, 3 Allen (Mass.), 364; *Johnson* v. *Goss*, 132 Mass., 274; *Wood* v. *Mason*, 17 R. I., 99.

There is no express provision in the Act of 1897 nor in any of its reënactments barring a widow from taking both the distributive share of her husband's personal estate there given and any provisions in his will made for her benefit. The Act of 1897 had no relation to Chap. 157, P. L. 1895, or to the subject matter of it. *Cheney* v. *Cheney*, supra, p. 66. And, through the Amendment of 1909 and its subsequent reënactments as Sec. 14, Chap. 80, R. S. 1916, it appears to have retained a like independence.

In 1902, when the Acts of 1895 and 1897 referred to were in full force and effect, this Court, in *Torrey* v. *Peabody*, 97 Me., 104, held that, where a testator gave his wife a life estate in his entire property with power of disposal and made no other disposition of his estate, if not appearing in the will that the testator intended to give his undisposed-of personalty to the heirs of his body, the widow took her distributive share of the personalty remaining after her life estate, although she accepted the provisions of the will. We find nothing in subsequent legislation inconsistent with the application of this rule in the case at bar.

The intention of the testator, as expressed in his will, must prevail. His primary purpose, as there disclosed, is to preserve the principal of his entire estate intact during the lifetime of his widow to the end that no risk may attach to her enjoyment of it. A merger of the widow's equitable estate and statutory right of distribution in intestate personalty would thwart the plain mandate of the testament. The widow's present enjoyment of her husband's personalty is measured by her equitable life estate and her power of disposal within the terms of the Trust, except as she may in her lifetime alienate her statutory interests therein by will or other assignment effective at her decease.

When the widow dies, the real estate and one-half the personalty then remaining will pass, respectively, to the testator's heirs and personal representatives as of the date of his death. The other half of the personalty then unexpended must be paid to the widow's personal representatives or her assigns.

Bill sustained with one bill of costs for plaintiff and one bill of costs for the defendants. Reasonable counsel fees shall also be allowed by the sitting Justice to attorneys on both sides, to be paid from the estate and allowed to the executors in their account.
Decree accordingly.

JOHN HERON *vs.* FRANK T. YORK.

Androscoggin. Opinion March 4, 1931.

PLEADING AND PRACTICE. CONTRACTS.

In an action to recover damages for breach of a contract, one must show performance of the terms of the contract as declared upon.

In the case at bar, there was a total lack of evidence that the plaintiff assisted the defendant in selling the bureau or that the defendant ever sold it.

There was no performance of the contract set forth in plaintiff's declaration.

On exceptions by plaintiff. An action in assumpsit on an alleged verbal contract for services to be rendered. To the direction of a verdict for the defendant by the presiding Justice, plaintiff seasonably excepted.

Exceptions overruled. The case sufficiently appears in the opinion.

Frank A. Morey, for plaintiff.

Waterhouse, Titcomb & Siddall, for defendant.

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

BARNES, J. Defendant is a resident of Freeport and a dealer in antique furniture.

Plaintiff, a resident of Lewiston, described to defendant an old bureau in the town of Monmouth, and defendant was interested as a prospective buyer.

Plaintiff declares on two counts, the first in assumpsit, wherein he sets out a verbal agreement, by the terms of which he alleges he bound himself to assist the defendant in selling the bureau, and defendant, on his part, promised to give to plaintiff when sale by defendant was effected the sum of three hundred dollars. The second is the usual omnibus count with specifications limiting the right to recover, to such, if any, as the preceding count would justify.

At the close of the evidence counsel moved for and secured a directed verdict for defendant, and plaintiff brings the case up on exceptions to the judge's ruling.

The parties to the suit went together to the house of the owner of the bureau where defendant attempted to purchase it, and plaintiff tried to assist him, but purchase was not made.

Later, defendant described the bureau to a Boston dealer in antiques, and at a subsequent date was engaged by the dealer to take the bureau and transport it to the dealer.

There is uncontradicted evidence that the owner sold the bureau to the Boston dealer and received his check in payment therefor.

There is total lack of of evidence that plaintiff assisted defendant in selling the bureau, or that defendant ever sold it.

Having shown no performance of the contract declared upon, plaintiff could not recover. *Dufour* v. *Stebbins*, 128 Me., 133.

The ruling of the Court was inevitable, and right.

Exceptions overruled.

BEAUCAGE *vs.* HUGH ROAK, AS GEORGE M. ROAK & CO.

Androscoggin. Opinion March 4, 1931.

NEGLIGENCE. PEDESTRIANS.

In the protection of his person when about to emerge from a position of security and step onto a travelled highway, a pedestrian must exercise that degree of due care and precaution which is demanded of the reasonably prudent man.

In the case at bar, a full consideration of all the evidence and of all the reasonable inferences favorable to the plaintiff disclosed clearly that the plaintiff negligently left a place of safety behind his truck and stepped directly into the moving truck of the defendant.

On general motion for new trial by defendant. An action to recover damages for personal injuries sustained by plaintiff when he came in contact with an automobile belonging to the defendant.

Trial was had at the March Term, 1930, of the Superior Court for the County of Androscoggin. The jury rendered a verdict for the plaintiff in the sum of $664.83. A general motion for new trial was thereupon filed by the defendant.

Motion sustained. New trial granted. The case fully appears in the opinion.

Jacob H. Berman,
Edward J. Berman,
Benjamin L. Berman,
David V. Berman, for plaintiff.
Verrill, Hale, Booth & Ives, for defendant.

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

FARRINGTON, J. On general motion after verdict for $666.83 returned in favor of the plaintiff in an action to recover for personal injuries received on October 12, 1928, by reason of contact with a truck belonging to the defendant, which was being driven by one Philip S. Roak, admittedly the agent of the defendant. The accident occurred in Auburn, Maine, near the entrance to the Norris-Hayden Laundry on the easterly side of a street known as Mechanics Row. The plaintiff, a salesman of Maine Baking Company, was driving a Dodge delivery truck with panel body and open on the sides with a load of six wooden boxes and fifteen pasteboard boxes piled up on the truck to a height of about five feet from the floor. Having occasion to procure laundry at the Norris-Hayden plant, the plaintiff parked his truck about a foot from the Laundry building, the truck being headed northerly and its rear end being at the northerly end of the entrance to the Laundry.

The defendant was driving a Dodge panel truck in a southerly direction on Mechanics Row and, the street at his right toward the westerly curb being somewhat rough and muddy, he was travelling at a distance estimated by the plaintiff as from eight to ten inches and by the defendant himself as from fifteen to eighteen inches from the plaintiff's truck. The defendant stated that he first saw the plaintiff when he stepped out from behind his truck and that

at that time the plaintiff was looking over his left shoulder toward the Laundry building. There is nothing in the evidence to indicate that the defendant was driving at a rapid rate of speed; on the contrary, it clearly appears that he had his car under control, as the evidence shows that after the impact the truck moved only about four feet before it was stopped.

From the plaintiff's testimony it appears that he came out of the Laundry building, with a package of laundry, and started towards the rear of his parked truck. He testified that as he came out of the Norris-Hayden building he glanced back, asserting that before he came to the end of his truck his head was turned to the front and that he then put out his leg about eight or nine inches beyond the truck "to look out" and that "by the time I went to look out this truck came back close to my truck, and hit me in the knee, . . ." On cross examination the plaintiff said that as he came from the building into the street toward his truck he would not say that he was running but stated, "I should say trotting down there. . . . A little faster than a regular walk." In reply to this question, "You kept on at that same way down there out of the building onto the level of the street?", he answered, "I did.", and in reply to the question, "And out by the rear of your truck toward the middle of the street?", he answered, "I did." The plaintiff having stated that his own truck completely obscured his own vision of anything coming down from the northerly direction, also admitted that nobody coming from that direction could see him, because he was hidden behind his truck. Plaintiff admitted looking back over his left shoulder at Perry W. Hayden, who was in a window in the Laundry building south of the entrance, saying that he was three or four feet from the building when he did this, but said that when he was about a couple of feet from the end of his truck he looked to the front but that he was "still going," "just a little faster than regular walking." In answer to the question, "You were still in motion, going forward, around the corner of your truck, when you hit something?", plaintiff replied, "Somebody hit me; yes." And in reply to the question, "You were still in motion forwards when you and the automobile hit each other?", he replied, "Yes, I put out my leg to look."

Harlan R. Proctor, who was employed at the Laundry on the day of the accident, said that he saw the plaintiff come out of the Laundry office and start down the stairs and testified that the plaintiff "was hurrying." He watched him only to the point where he went through the doors onto the street, his attention being then called in another direction and next he heard Mr. Hayden "holler" and he looked out and saw the plaintiff "sitting on the ground."

Perry W. Hayden, the proprietor of Norris-Hayden Laundry, testified that he was sitting in a window at the left of the door out of which the plaintiff passed to the street; that the window was open and he said, "I could see everything that happened in the street." He testified that the plaintiff was about three feet out from the door when he first saw him and that the plaintiff was walking fast and that he looked back at the witness and "kind of nodded and waved his hand" and that the plaintiff's head was turned toward him; that the plaintiff was looking over his left shoulder and "was going"; that the plaintiff "deliberately walked into the truck." The witness positively states that the plaintiff was looking at him at the time he struck the automobile of the defendant and in reply to the question, "Had he up to that time turned around to look into the street, from the time you first saw him looking until the time he ran into the car?", the witness replied, "No." The witness also testified that the first he saw of the Roak truck was when the plaintiff was waving to him and that because he saw the danger he "hollered" and said "Look out!"

In our opinion it is unnecessary to consider the question of whether or not the defendant was guilty of negligence. Careful scrutiny of the testimony of the plaintiff himself not only fails to satisfy us that he was free from contributory negligence but lends added weight to the testimony given by the defendant and by Mr. Hayden to the effect that the plaintiff was looking toward the Laundry building when the accident happened. We are unable to escape the conclusion that the plaintiff was not using that degree of care which a reasonably prudent man should have used with due regard for his own safety when he came out from behind his truck. The testimony of Mr. Hayden, who must in all fairness be regarded as a disinterested witness, is entitled to most serious con-

sideration and to our minds clearly shows that the plaintiff was guilty of negligence.

After full consideration of all the evidence and giving to the plaintiff's testimony all the weight to which it is legally entitled, and resolving in favor of the plaintiff all reasonable inferences which may be drawn therefrom, we can not escape the conclusion that the plaintiff negligently left a place of safety behind his truck and stepped directly into the moving truck of the defendant.

In the case of *Cooper & Company* v. *American Can Company*, recently decided by this Court, 130 Me., 76, the Court says, "There can be no recovery if Mr. Crosby stepped out by the bumper from a position of safety and obscurity, without taking the precautions that due care for his own protection demanded. In the protection of his person or property when about to emerge from a position of security and step onto a travelled highway a pedestrian must exercise due care."

In the opinion of the Court, it is unnecessary to give consideration to the paper signed by the plaintiff in which he made certain statements as to his conduct at the time of the accident, as the evidence outside of that statement satisfies us that the jury erred in finding a verdict for the plaintiff. With full recognition of the fundamental rule applying to jury findings, we feel that in this case the verdict was not justified by the facts appearing in evidence.

Without deciding the question of the defendant's negligence, we find that the plaintiff's own negligence is a bar to his recovery and the entry must therefore be,

Motion sustained.
New trial granted.

FRED I. CLARK *vs.* ASA L. YOUNG.

Oxford. Opinion March 16, 1931.

SALES. DAMAGES.

Under the provision of the Uniform Sales Act (R. S. 1930, Chap. 165, Sec. 64) when a buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

In such case if there is an available market for the goods in question the measure of damages is, in the absence of special circumstances, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted.

In the case at bar, the instruction to the jury that the measure of damage, if recovery was to be had, was the full contract price of sixty cents for each tie, was error.

On exceptions and general motion for new trial by defendant. An action of assumpsit to recover the balance alleged to be due under an oral contract made by plaintiff with defendant for the sale and delivery of ship knees and railroad ties.

Trial was had at the May, 1930, Term, of the Superior Court, for the County of Oxford. To certain instructions given by the presiding Justice, defendant seasonably excepted, and after the jury had rendered a verdict for the plaintiff in the sum of $780.00, filed a general motion for new trial.

Exceptions sustained. The case fully appears in the opinion.

H. H. Hastings, for plaintiff.

Seth May, for defendant.

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

FARRINGTON, J. This case, after verdict for $780.00 in favor of the plaintiff, is before this court on general motion, on exceptions to the refusal of the presiding Justice to direct a verdict for the defendant and to give certain requested instructions, and also

on exceptions, seasonably reserved as to the measure of damages, to the following instruction given by the presiding Justice to the jury.

"You will return a written verdict if you come to a conclusion. If you find for the plaintiff you will use the blank which reads, The Jury find for the plaintiff and assess damages for the plaintiff in the sum of blank dollars and cents, inserting therein the damages which you find, which should be the amount that was to be paid for these ties. You will remember what it was, according to the evidence, so much. Sixty cents, was it? Sixty cents apiece for the ties, not to exceed in number thirteen hundred, — whatever the evidence was. The plaintiff can not recover for more than he stated in his claim. As I told you he had to state accurately what his claim was, and he is bound by that. As I say, if you find for the plaintiff you will insert those figures, what that comes to, — thirteen hundred ties at sixty cents apiece, and the foreman of the jury will sign that blank, and the other blank will not be used."

The declaration in the writ is as follows: "In a plea of the case, for that the said plaintiff in the fall season of 1928, contracted and agreed orally with the said defendant to dig out and hew the ship knees on the D. S. Hastings lot, so-called, and to cut out and face the railroad ties on said lot to five inches at the top end inside the bark, tamarack knees and ties, and deliver the same loaded on board the cars at the Bethel station of the Canadian National Railway, during the said fall and the following winter season, the said knees so dug out and hewed and delivered at the following prices, viz: three and four inch knees at the rate of 50c, five inch knees at the rate of 75c, six inch knees at the rate of $1.50, seven inch knees at the rate of $2.00, and eight inch knees at the rate of $3.00, each, and the ties all at the rate of sixty cents each. Said defendant promised to pay the said plaintiff for said knees at said rates, and for said ties at said rate, as the same were in due course of the operation made ready for shipment, and to market said knees and said ties that season.

"And the said plaintiff says that in consequence of said contract and agreement he proceeded to dig and hew said knees and to cut out and face said ties, and as snow came hauled the same to said

station, and piled them in a vicinity close to said station, that the same might be loaded upon the cars as ordered and directed by the said defendant; and that from time to time as the same were ordered loaded on the cars by the said defendant, he loaded and shipped all of the knees, but that to the present time the said plaintiff says that none of the ties have been ordered loaded by the said defendant but remain where they were piled in the early winter of 1929, though the said plaintiff has repeatedly requested the said defendant to take them as agreed or to pay for them and to hold them at his own expense, or in short to complete the said defendant's part of the contract; and has repeatedly assured the said defendant that he stood ready and was ready to load the same on the cars according to the contract, thereby completing his part of said contract.

"Further, the plaintiff avers and says, under said contract with the said defendant, he dug and hewed and hauled to the station and loaded on the cars one hundred and seventeen knees of the following sizes, 46 three and four inch knees, 21 five inch knees, 34 six inch knees, 9 seven inch knees and 7 eight inch knees, and that he cut and faced and landed near said station thirteen hundred ties of the dimensions specified in said contract.

"The plaintiff further avers and says that there was due him from said defendant for said knees, and for said ties not yet loaded on the cars for the reason above said, the sum of nine hundred eight dollars and seventy five cents ($908.75), that the said defendant though often requested has not paid the same but only a part thereof, namely the amount due for the knees shipped, to wit one hundred twenty-eight dollars and seventy five cents ($128.75), but neglects and refuses so to do."

For the purposes of this opinion, it seems unnecessary to make any particular recital of the evidence in the case. There would appear to be no question but that the defendant refused to take the ties, claiming that a large portion of them were not of the size agreed upon between the parties to the suit, and that they were all intermingled. It also appears undisputed that the plaintiff was ready to ship the ties when directed by the defendant and that the defendant did not accept them and that he did not give any direc-

tions as to their being loaded on cars for purposes of shipment and that there was never any delivery on cars.

While from a careful reading of the printed record in the case the Court is of the opinion that there may be a serious question as to whether there is shown such meeting of the minds of the parties to the alleged contract as would give rise to contractual rights or obligations, we do not attempt to decide that point, as we feel that the case, on other grounds, must go back to the trial court.

The charge of the presiding Justice does not contain any instructions as to the brief statement of the defendant that "there has been no delivery, receipt & acceptance of the goods, part payment or earnest or other compliance with the Statute of Frauds" and the defendant did not request any instructions on this point. This phase of the case, in view of this opinion, requires no consideration by this court.

The plaintiff in his argument maintains that his suit was brought to recover a balance due on a special contract covering certain specially manufactured articles. Whether or not ship knees and ties are to be so regarded it is not necessary for this court to make decision. The suit, as evidenced by the declaration, was one clearly brought to recover damages for breach of a single oral contract and the measure of damages to be recovered in such an action is different from that which was given to the jury in the instructions of the presiding Justice, which were in effect that the measure of damages was the full amount of sixty cents for each tie. The verdict rendered by the jury was exactly $780.00, based on the thirteen hundred ties, the number fixed in the declaration.

Sec. 64 of the Uniform Sales Act, Chap. 191, P. L. 1923 (Sec. 64, Chap. 165, R. S. 1930), provides, "(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

"(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

"(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circum-

stances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

It is unnecessary to consider the general motion or the other exceptions in the case, as the portion of the charge by which the jury was instructed as to damages was, in effect, that recovery, if any, must be for the full value of each tie and was error, and the entry must be,

Exceptions sustained.

STATE OF MAINE *vs.* FIRST NATIONAL BANK OF BOSTON.

Cumberland. Opinion March 17, 1931.

CORPORATIONS. INHERITANCE TAX. CONSTITUTIONAL LAW.

Jurisdiction for the purpose of imposing a succession tax exists when the exercise of some essential privilege incident to the transfer of the title depends for its legality upon the law of the state levying the tax.

Shares of stock in a corporation organized and existing by virtue of the laws of the State of Maine are within its jurisdiction and there subject to an inheritance tax, even though the owner was a non-resident decedent, regardless of whether the certificates of stock were at the time of the death in the state of the domicile or in this state, and such a tax does not violate any provision of the Fourteenth Amendment of the Constitution of the United States.

On report on an agreed statement of facts. An action of debt under R. S. 1916, Chap. 69, Sec. 11, on a judgment embodied in a decree of the Androscoggin County Probate Court against the executor of the estate of a non-resident in the course of ancillary administration. The issue involved the right, constitutional and otherwise, of the State of Maine, to levy an inheritance tax on

shares of stock of a corporation organized and existing under the law of the State of Maine when the owner was a non-resident decedent.

Judgment for the State of Maine. The case fully appears in the opinion.

Clement F. Robinson, Attorney General, for the State of Maine.

Franklin Fisher,

Leonard F. Pierce, for defendant.

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

FARRINGTON, J. This case comes up on report on an agreed statement of facts. Edward H. Haskell, a resident of Massachusetts, died testate January 8, 1924. The largest part of the property of the deceased consisted of shares of stock in the Great Northern Paper Company, a corporation organized and existing under the laws of the State of Maine. The will of the deceased was duly probated in the County of Middlesex, Massachusetts, and the above mentioned shares of stock were there subjected to an inheritance tax, of like character to the inheritance tax in Maine, and a tax thereon, amounting to $32,190.53, was paid to the Commonwealth of Massachusetts on legacies and distributive shares, in greater part made up from the proceeds of said stock. Ancillary administration having been taken out in the County of Androscoggin in this state, an inheritance tax of $62,350.41 was assessed by the Probate Court in that county on the property passing by the will of the deceased, and an appeal was taken by the executor from the assessment of this tax by the Androscoggin County Probate Court on the ground that the assessment was unconstitutional, and in violation of Article 4, Section 2, of the Constitution of the United States of America and Article 14 of the Amendments to the Constitution and that the provisions of Chap. 69, Sec. 4, of the Revised Statutes of Maine (1916) were not applied in assessing said inheritance tax because Edward H. Haskell was not a resident of the State of Maine.

After this case was, on an appeal, argued in this court and while

there pending, the parties thereto made the following agreement:

"First: That the following decree be entered in the Probate Court of Androscoggin County, —

'STATE OF MAINE

'Androscoggin, Probate Court

'Amended Decree

'Whereas, the executors of the will of the late Edward H. Haskell have appealed from the decree of this court assessing a gross inheritance tax of sixty two thousand three hundred and thirty dollars and forty one cents ($62,330.41) and,

'Whereas said appeal was pending before the Law Court for decision and determination, and

'Whereas, the State of Maine, represented by Clement F. Robinson, its Attorney General, and the executors represented by Franklin Fisher, have arrived at the following agreement, namely: that said executors be allowed a credit of thirty two thousand one hundred and ninety dollars and fifty three cents ($32,190.53) being the amount of the inheritance taxes paid by these executors to the Commonwealth of Massachusetts.

'It is therefore ordered, adjudged, and decreed that the gross tax as computed by the court in its original decree determining said inheritance tax to be sixty two thousand three hundred and thirty dollars and forty one cents ($62, 330.41) be and hereby is reduced by granting to the estate of Edward H. Haskell credit for inheritance tax paid to the Commonwealth of Massachusetts amounting to thirty two thousand one hundred and ninety dollars and fifty three cents ($32,190.53) leaving a balance of inheritance taxes assessed by the State of Maine of thirty thousand, one hundred and thirty nine dollars and eighty eight cents ($30,139.88).

'February 19th, 1930.

'B. L. Berman, Judge.'

Second: That the attorney general under the statute would bring an action of Debt for the collection of the amount of tax decreed in the amended decree of the Judge of the Probate Court of Androscoggin County.

Third: That the executors of the will of Edward H. Haskell would avail themselves of any defense possible in said action of debt.

Fourth: That an entry should be entered in the Law Court, — 'Appeal Dismissed. Settled below.' "

In accordance with this agreement the decree as quoted above was duly entered on February 19, 1930, and from that decree there has been no appeal and the decree has not been modified, reversed, annulled or satisfied.

Following this the attorney general, under the statute, brought an action of debt for the collection of the tax against the executors of the estate of Edward H. Haskell, the writ being dated April 19, 1930, returnable at the May Term, 1930, of the Superior Court in Cumberland County.

The writ, service of which was accepted by the attorneys for the defendant, was duly entered in court with general appearance on the part of the defendant through its attorneys.

Under the general issue the defendant also filed a brief statement as follows:

"The inheritance tax provided for by Chapter 69 of the Revised Statutes of Maine and additions thereto and amendments thereof is an excise or duty upon the right or privilege of taking property by will or descent under the law of the State of Maine and is assessed on transfers from the dead to the living in those cases where it is by virtue of the laws of the State of Maine that the right or privilege of taking by will or descent at all exists.

"The transfer of the stock in the Great Northern Paper Company owned by Edward H. Haskell and transferred by his will is not so transferred as right or privilege of taking by will or descent by virtue of the laws of the State of Maine and it is not by virtue of the laws of this State that the right or privilege of such transfer to the Legatees at all exists. The assessment of an inheritance tax on the transfer of stock in the Great Northern Paper Company owned by Edward H. Haskell is wholly beyond the power of the State of Maine and an attempt to tax something not within the jurisdiction of the State of Maine contrary to the provisions of the Fourteenth Article of the Articles in Addition to and in Amendment of the Constitution of the United States of America.

"An assessment of an inheritance tax by the Commonwealth of Massachusetts amounting to thirty two thousand one hundred and ninety dollars and fifty three cents ($32,190.53) was paid by the executors of Edward H. Haskell. As Edward H. Haskell was domiciled in Massachusetts, the situs of his stock in the Great Northern Paper Company for inheritance tax purposes was in Massachusetts. An inheritance tax on the transfer of the stock in the Great Northern Paper Company owned by Edward H. Haskell is beyond the jurisdiction of the State of Maine and constitutes double taxation of intangible property contrary to the provisions of the Fourteenth Article of the Articles in Addition to and Amendment of the Constitution of the United States of America.

"The benefit or privilege conferred by the State of Maine in assisting in the transfer of the stock in the Great Northern Paper Company owned by Edward H. Haskell is so small compared with the tax claimed by the State of Maine that it clearly results in such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation, — to spoliation under the guise of exerting the taxing power contrary to the provisions of the Fourteenth Article of the Articles in Addition to and Amendment of the Constitution of the United States of America."

It was further agreed that substantially all of the Great Northern Paper Company's property, including its real estate and mills, are located within the borders of the State of Maine and that, as appears of record in Androscoggin County Probate Court in these proceedings, all the property of the defendant testator with respect to which the decree sued on was based consisted of shares of stock in the Great Northern Paper Company.

On the facts and pleadings as given above the case has come to this court for determination as to the liability of the defendant for the sum sued for, judgment to be entered for the plaintiff or defendant as this court may find proper.

It is the contention of the State that the decree of the Probate Court of Androscoggin County was final, no appeal or further direct proceedings having been taken in that court after entry of the decree, and that the question of unconstitutionality of the

statute, or its administration by the Probate Court, could not be raised collaterally in the statutory action of debt to collect the tax, but only in a direct proceeding. The State in any event maintains that no constitutional rights have been invaded.

We do not feel that it is necessary to discuss the claim of the state that the judgment upon which the action of debt in the instant case was brought can not be attacked collaterally, under the usual rule as to collateral attack, because of our strong conviction that the cases which are cited below as sustaining the right to tax were properly considered and decided on an entirely different basis from that on which consideration and decision were given to cases involving bonds, certificates of indebtedness, credits for cash on deposit, promissory notes, and advances to and dividends due from corporations created by the taxing state, which latter classes of cases have recently been ruled upon by the Supreme Court of the United States, as will be noted.

The contentions of the administrators of the estate are clearly and fully stated in the brief statement above quoted.

The Supreme Court of the United States in the case of the *The Farmers Loan and Trust Company* v. *Minnesota*, 280 U. S., 204, has held that negotiable bonds and certificates of indebtedness, issued by the State of Minnesota and the cities of Minneapolis and St. Paul, were not subject to an inheritance tax in the State of Minnesota, the owner having died testate, domiciled and residing in New York.

In the case of *Baldwin et al* v. *Missouri*, 281 U. S., 586, the same Court has decided that credits for cash deposited in Missouri banks, U. S. coupon bonds and certain promissory notes, largely secured by liens on Missouri lands and given by Missouri citizens, and all physically within the State of Missouri, were not subject to transfer tax in Missouri, the owner having died testate and domiciled in Illinois.

So also under the same circumstances in the case of *Beidler, II et al, Exrs.* v. *South Carolina Tax Commission*, decided by the Supreme Court of the United States on November 24, 1930, indebtedness for advances to and dividends due from a South Carolina corporation were held by the same Court as not subject to tax

in the State of South Carolina, under the laws of which the debtor corporation was organized. In this case an effort was made to sustain such a tax by South Carolina on the ground that the indebtedness had a "business situs" in that state but the court held there was insufficient or no evidence upon which such a claim could be based.

In the case of *Beidler, II et al, Exrs.* v. *South Carolina Tax Commission*, supra, the deceased testate, domiciled in Illinois at the time of his death, owned 8,000 shares of stock in the Santee River Cypress Lumber Company, the same corporation against whose indebtedness to the deceased the tax in question was imposed. Payment of the succession tax to South Carolina with respect to the shares of stock was made without any question being raised as to its validity. The Court in the opinion says, "The interest of the decedent as a stockholder was a distinct interest, and the estate of the decedent has been taxed by South Carolina upon the transfer of his stock according to its agreed value."

Recognizing and being necessarily bound by the three foregoing decisions, as far as they relate to the classes of property therein involved, we feel that the rule there applied does not, and should not, in the case before us, control as to a tax on shares of stock in a corporation organized under the laws of the taxing state and owned by a non-resident decedent.

Farmers' Loan and Trust Company v. *Minnesota*, supra, denies the right to impose a succession tax on bonds and certificates of indebtedness, and *Baldwin et al* v. *Missouri* follows *Farmers' Loan and Trust Company* v. *Minnesota* as to the right to tax bank deposits, coupon bonds and promissory notes, but those cases and the case of *Beidler, II et al* v. *South Carolina Tax Commission*, supra, which denies the right to tax advances and dividends, do not stand for, and we do not believe they were intended to stand for, the proposition that the state in which a corporation is organized can not impose a tax on the transfer of the shares of stock in such a corporation owned by such non-resident decedent.

Jurisdiction for the purpose of imposing a succession tax exists when the exercise of some essential privilege incident to the transfer of the title depends for its legality upon the law of the state

levying the tax. *Welch et al, Admr.* v. *Treasurer and Receiver General*, 223 Mass., 87; *Walker, Admr.* v. *Treasurer and Receiver General*, 221 Mass., 600, 602.

Shares of stock in a corporation organized under the laws of the state levying the tax and belonging to a non-resident decedent are property within the jurisdiction of the taxing state and there subject to an inheritance tax. *Bliss et als* v. *Bliss et als*, 221 Mass., 201, citing *Greves, Exr.* v. *Shaw et als*, 173 Mass., 205. See also *Moody, Exr. et als* v. *Shaw*, 173 Mass., 375; *Kingsbury et als, Exrs.* v. *Chapin*, 196 Mass., 535; *Welch et al, Admr.*, and *Walker, Admr.* v. *Treasurer and Receiver General*, both supra.

The statutory provisions in Massachusetts were, with unimportant variation of language, identical with those of Sec. 1 of Chap. 69, R. S. of Maine (1916), as amended and in force at the death of the testator in the instant case, which were as follows, "All property within the jurisdiction of this State, and any interest therein whether belonging to inhabitants of this State or not, and whether tangible or intangible, which shall pass by will, by the intestate laws of this state, . . . shall be subject to an inheritance tax for the use of the State . . . ." And in the cases cited below the provisions of law relating to the imposition of inheritance taxes, as far as the principle involved is concerned, were essentially the same.

In *State ex rel Graff et al* v. *Probate Court of St. Louis Co.* (Minn.), 150 N. W., 1094, the Court says, "It is usually true that the right to succeed to the ownership of the personal property of a decedent is governed by the law of the domicil of the decedent, and is subject to taxation at the place of such domicil; yet, if the one who succeeds to such ownership must invoke the law of another state before he can reduce such property to possession, or secure the beneficial enjoyment thereof, it is generally, although not universally, held that such other state also has power to exact a tax upon the privilege of taking over and securing the beneficial enjoyment of such property."

Other cases holding that shares of stock in corporations organized under the laws of the taxing state are subject to the tax in the case of non-resident decedent owners are, *Douglas County* v.

Kountze, 84 Neb., 506, 121 N. W., 593, in which the Court says, "The complete devolution of said title must take place under the protection, and according to the laws of Nebraska, and that succession is subject to the inheritance tax"; *McDougald, Co. Treas., Applt.* v. *Lilienthal et al* (Cal.), 164 Pac., 387, L. R. A., 1917 F, 267; *In re Bronson*, 150 N. Y., 1, 34 L. R. A., 238, re-affirmed in the case of *In re Palmer*, 183 N. Y., 238; the principle is also recognized in *Gardiner et al, Exrs.* v. *Carter, State Treasurer*, 74 N. H., 507; *Commonwealth* v. *Taylor's Executor* (Pa.), 147 At., 71; *Northern Central Railway Co., Applt.* v. *Fidelity Trust Co. et al, Exrs.*, 152 Md., 94, 136 Atl., 66; *In re Culver's Estate, State Treasurer* v. *Gould*, 145 Iowa, 1, 123 N. W., 743, in which the Court says, "It is a general and familiar rule that a corporation is under the jurisdiction and control of the state of its domicile. The State directs the manner and form of its organization. It exercises supervisory power over it during its existence, and finally directs the manner of its dissolution." *Carr* v. *Edwards* (N. J.), 87 Atl., 132; *Security Trust Co.* v. *Edwards* (N. J.), 101 Atl., 384, and cases cited.

In the case of *Neilson et al* v. *Russell et al*, 69 Atl., 476, an earlier New Jersey case reversed on another point and quoted with approval in *Carr* v. *Edwards, Comptroller*, supra, the Court says, "In this country, where the general doctrine of the State Courts is that the situs of property governs its liability to succession taxes, the weight of authority is that stock in a corporation is subject to the imposition of succession taxes by the State that created the corporation, and that in this regard the place of residence of the deceased stockholder is immaterial" and "the whereabouts of the certificates of stock is immaterial upon the question of the legal situs of the property represented by them."

The principle is also recognized in *Commonwealth et al* v. *Huntington et al*, 148 Va., 97, 138 S. E., 650, in which the Court says, "The tax here involved, being a transfer tax, is in its nature a privilege tax as distinguished from a tax upon property. Such a tax can be fairly justified only in consideration of some privilege accorded by the state, and if there is no such privilege accorded, the state can impose no tax. If there is a complete devolution of

title consummated by law, outside of the territorial jurisdiction of Virginia, without the necessity either of invoking any of its laws, or the judicial, or official machinery of the State, or the performance of any act by some person in Virginia, there is no basis for such a tax." . . . "The transfer of shares of stock in Virginia corporations owned by non-resident decedents is subject to the transfer tax because all such transfers are within the jurisdiction of the State. In order to be subject to the tax, as within the jurisdiction of the State, there must be some act of transfer, payment, or delivery, to be done or performed under the authority of the Virginia law." In this case no question was raised as to the validity of the tax on the stock and the court clearly recognizes the principle permitting such tax. Right to tax bonds of the non-resident decedent was denied on the ground that their transfer required no act to be done or performed by anyone in Virginia or within its jurisdiction.

The Statutes of Maine in force at the date of the testator's death in the present case provided, R. S. 1916, Chap. 51, Sec. 36, as amended by Chap. 49, P. L. 1919, as follows:

"Sec. 36. When the capital of a corporation is divided into shares, and certificates thereof are issued, they may be transferred by indorsement and delivery. The delivery of a certificate of stock of a corporation to a bona fide purchaser or pledgee for value, together with a written transfer of the same or a written power of attorney to sell, assign and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title against all parties. Certificates of shares with the seal of the corporation affixed, shall be issued to those entitled to them by transfer or otherwise, signed by such officer or officers as the by-laws shall prescribe. Such officer or officers shall not sign blank certificates, nor sign certificates without knowledge of the apparent title of the persons to whom they are issued, unless the corporation has a duly authorized transfer agent whose duty it is to countersign each certificate issued. In case of the absence or disability of either of the officers authorized by the by-laws to issue shares by transfer or otherwise, the signatures of a majority of the directors in his stead shall be sufficient."

They also provided, R. S. 1916, Chap. 51, Sec. 37, as follows:

"Sec. 37. No transfer shall affect the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact, until such transfer is recorded upon the books of the corporation or a new certificate is issued to the person to whom it has been so transferred."

Secs. 25 and 26 of Chap. 69, R. S. 1916, in force at the date of the testator's death in the instant case, provided as follows:

"Sec. 25. If a foreign executor, administrator or trustee assigns or transfers any stock in any national bank located in this state or in any corporation organized under the laws of this state, owned by a deceased non-resident at the date of his death and liable to a tax under the provisions of this chapter, the tax shall be paid to the attorney-general at the time of such assignment or transfer; and if it is not paid when due, such executor, administrator or trustee shall be personally liable therefor until it is paid. Subject to the provisions of said section a bank located in this state or a corporation organized under the laws of this state which shall record a transfer of any share of its stock made by a foreign executor, administrator or trustee, or issue a new certificate for a share of its stock at the instance of a foreign executor, administrator or trustee before all taxes imposed thereon by the provisions of this chapter have been paid, shall be liable for such tax in an action of debt brought by the attorney-general."

"Sec. 26. No person or corporation shall deliver or transfer any securities or assets belonging to the estate of a non-resident decedent to anyone unless authority to receive the same shall have been given by a probate court of this state, upon satisfactory evidence that all inheritance taxes provided for by this chapter have been paid, guaranteed or secured as hereinbefore provided. Any person or corporation that delivers or transfers any securities or assets in violation of the provisions of this section shall be liable for such tax in an action of debt brought by the attorney-general."

The foregoing statutory provisions state the law relating to transfers of stock generally and to stock held by non-resident decedents, and indicate the necessity of acts of transfer, payment and delivery to be done and performed under the authority of the

Maine law. They indicate and constitute a privilege accorded by the State of Maine and without that privilege there can be no complete devolution of title to the shares of stock involved in this case and the laws of Maine must of necessity be invoked.

In *Rhode Island Hospital Trust Co., Exr.* v. *Doughton*, 270 U. S., 69, Chief Justice Taft said, "In the matter of intangibles, like choses in action, shares of stock, and bonds, the situs of which is with the owner, a transfer tax of course may properly be levied by the State in which he resides. So, too, it is well established that the State in which a corporation is organized may provide in creating it for the taxation in that State of all its shares, whether owned by residents or non-residents."

If the state under whose laws the corporation comes into being has power and jurisdiction to levy a property tax on the shares of stock of that corporation, regardless of the residence of the owner of those shares, it is difficult to see any logical reason why it has not power and jurisdiction to subject those same shares to an inheritance tax whether owned by resident or non-resident decedents.

In *Jellenik* v. *Huron Copper Company*, 177 U. S., 1, it was held that shares of stock in a corporation had a situs in the state creating the corporation so that they were there subject to mesne process.

Believing that it is in accord with the overwhelming weight of authority indicated by the cases herein cited, we hold in the instant case that the shares of stock in the Great Northern Paper Company, a corporation organized and existing by virtue of the laws of this state imposing the tax, are within its jurisdiction and there subject to an inheritance tax even though the owner was a non-resident decedent, regardless of whether the certificates of stock were at the time of the death in the state of the domicile or in the taxing state, and that such a tax does not violate any provision of the Fourteenth Amendment.

Judgment for the State of Maine for $30,139.88, *with interest from February* 19, 1930.

Ralph W. Crockett, Appellant From Decree of Probate Court In re Estate of Horace Libby.

Androscoggin. Opinion March 20, 1931.

Payment. Receipt. Executors and Administrators. Evidence.

The acceptance of money, though without words of assent, by one to whom it is offered upon certain terms and conditions, as a general rule binds the acceptor. The assent of the creditor to the conditions and terms proposed by the debtor will be implied and words of protest will not affect the result.

The law is well established in the state that a receipt is prima facie *evidence of the payment therein stated. It is, nevertheless, open to explanations and contradictions by parol testimony.*

In the case at bar, the legatee was perfectly familiar with the situation and had ample time before signing the receipt to fully consider the matter and could not have misunderstood the fact that her signature was an acknowledgment that she had received the equivalent of the $800.00, even though she had claimed title to the coal which was reckoned as a part of the amount for which the receipt was given. No explanation or contradiction of the receipt was made. The ruling of the presiding Justice that, though the receipt was signed with full knowledge of all its terms and conditions, the one signing the same could later recover the sum represented by the money value of the coal credited in the receipt, was error.

Whether or not "coal" is comprehended within the meaning and intent of "household furniture and furnishings," the court does not in this case determine.

On exceptions by appellant to certain rulings of the Justice of the Superior Court in a Probate appeal. The issue involved the legal effect of a receipt given by the legatee to the executor.

Exceptions sustained. The case fully appears in the opinion.

Ralph W. Crockett, for appellant.

George C. Webber, for appellee.

Sitting: Pattangall, C. J., Dunn, Sturgis, Barnes, Farrington, Thaxter, JJ.

FARRINGTON, J. One Horace Libby of Lewiston, Maine, died April 17, 1924. His will, drawn April 2, 1924, contained the following provision: "Fourth: — I give and bequeath unto Mrs. Blanche H. Smith now of Industry, Maine, the sum of Eight Thousand Dollars, together with all my household furniture and furnishings contained in my residence at No. 544 Main Street, in said Lewiston, with the exception of my slate top table and old fashioned tall standing clock hereinafter mentioned provided she be living at my death." A few days before his death he had ordered and had put into his cellar ten tons of coal billed on April 11, 1924, at $167.00. This bill was paid by the executor, Ralph W. Crockett, May 15, 1924, and the full amount of coal was included in the inventory at that figure. Mrs. Smith used all of this coal after the death of the testator, making no payment to the executor for the same, and in argument before this court claims it was a part of "household furniture and furnishings" bequeathed to her under the fourth item of the will. In that connection it is to be noted that in Item Twentieth of the will Mrs. Smith was bequeathed the "free use and occupancy of the Southwesterly tenement in said dwelling house at No. 544 Main Street, as long as she shall be living."

On May 29, 1924, the executor wrote as follows to Mrs. Smith, who had been the testator's housekeeper: "You will remember that he (Mr. Libby) had eight tons of nut coal and two tons of pea coal put in just before he died. I have paid the bill and it amounts to $167. This coal, as you will understand, is not included in your legacy of household furnishings, but must be accounted for as a part of the Estate. As you doubtless intend to live in the house, I presume you will want this coal, and we can arrange to have you take it over at the cost price, $167.00."

On May 31, 1924, Mrs. Smith wrote the following in reply: "Regarding the coal, I think you must have overlooked the fact that Mr. Libby ordered the coal himself before he died and told me to present the bill to you for payment. He afterwards said to me, 'Well, Blanche, you've got coal enough to keep you warm next winter.' I said, 'Yes, Horace, and I hope we'll all be here to enjoy it as we have this winter,' and he said, 'Well, I don't know about myself, but I got this coal for you.' "

There being insufficient personal property to pay specific cash legacies in full, an installment of fifty per cent was paid to Mrs. Smith, among other legatees, on April 10, 1925.

On March 18, 1927, ten per cent more was paid and from Mrs. Smith's $800.00 was deducted by the executor $167.00, the appraised value of the coal, and a check for $633.00 was sent to her with the following letter: "I inclose herewith check for $633.00 being ten per cent of your cash legacy under the Will of Horace Libby, late of Lewiston, less coal to the amount of $167.00. . . . Please sign and return to me at once the enclosed receipt."

On the back of the check was the following: "This check is in full of a payment of 10% of cash legacy to payee under will of Horace Libby late of Lewiston, Me., less the amount of $167.00 due the Horace Libby Estate for coal taken by the payee at the inventory value as follows: —

10% of legacy	$800.00
Less coal	167.00
	$633.00"

The following receipt was sent with the check: "Received of Ralph W. Crockett, Executor of the Will of Horace Libby late of Lewiston, Maine, Six Hundred and Thirty three Dollars, being ten per cent of the amount of my cash legacy under said Will less one hundred and sixty-seven dollars due the Horace Libby Estate from me for coal taken at the inventory value as follows: —

Ten per cent of legacy	$800.00
Less amount due for coal	167.00
	$633.00

An amount representing fifty per cent of said legacy has previously been paid me by said Executor."

This check dated March 18, 1927, was returned by Mrs. Smith to the executor, the date of return not appearing of record, but was finally accepted by her August 19, 1927, when she called at the office of the executor, took the check and signed the receipt referred

to above. There is nothing in the bill of exceptions, and we can not look outside of what is recorded therein, to show that Mrs. Smith did not voluntarily relinquish and waive any rights she had to the coal, if any right she did have. Certainly the receipt which she signed was intended to be a receipt for $800.00 and she must have signed it with full knowledge of this fact.

In the second account filed by the executor, the Judge of Probate refused to allow the item which showed payment of $800.00 "on account of specific cash legacies" to Blanche H. Smith. The executor appealed to the October Term, 1930, of the Supreme Court of Probate for Androscoggin County. At the December Term, 1930, the presiding Justice affirmed the decree of the Judge of Probate.

The case comes to this court on exceptions to the following rulings by the presiding Justice:

"1. I rule that the coal in question did pass to Blanche H. Smith under the will. 2. I rule that Blanche H. Smith was not estopped to claim title to the coal by reason of signing the receipt and cashing the check presented to her by the executor."

It appears from the bill of exceptions that witnesses were permitted to testify, without objection on the part of the executor, that just prior to his death the testator told several persons that he had provided the coal for Mrs. Smith's use. The presiding Justice, however, specifically found that there was not sufficient evidence to show a gift during the lifetime of the testator.

The Justice presiding in the Supreme Court of Probate based his decree on his finding that the coal was included within the scope of the testamentary provision of the testator as to "household furniture and furnishings" and that for that reason the executor could not be allowed the credit of $800.00, which represented a ten per cent installment payment on Mrs. Smith's $8,000.00 legacy. The decree contained no finding of fact, but stated, "It is familiar law that a creditor may by acceptance of a smaller sum than the amount legally due lose his right to assert a claim for the balance." The decree goes on, "In my opinion an executor is a trust officer who is bound to administer the estate in his charge in accordance with the terms of the will and that he has not fulfilled his trust by

virtually compelling a legatee to go without a much larger sum bequeathed to her unless she assents to his illegally withholding a portion of the fund."

With the first paragraph of the portion of the decree above quoted we are in entire accord. With the general statement contained in the second quoted portion as above we also agree, but whatever may have been the facts in this case, we find within the bill of exceptions nothing to indicate bad faith on the part of the executor, no act of concealment of facts, no misrepresentation, nor any attempt to take unfair advantage of Mrs. Smith. In the complete absence of any of these elements, this court is not concerned with what might have been included in the bill of exceptions which would or might tend to indicate their presence. There well may have been an honest dispute as to ownership in or the title to the coal, a difference of opinion between the executor and Mrs. Smith as to the legal right to the coal. Certainly the executor who, under the inventory, was charged with the coal at the appraised value of $167.00 was under the obligation and duty of protecting the estate to that extent. After receiving the check, letter, and receipt on March 18, 1927, Mrs. Smith had five months within which to fully consider the matter, and she well may have felt it was not worth while to lay further claim to the coal and that the wise course was to waive and abandon any rights she may have felt she had and to sign the receipt and thereby acknowledge the payment to her of the $800.00, representing the ten per cent of her $8,000.00 legacy. This act was necessarily an admission on her part that the coal belonged to the estate. She certainly could not have misunderstood the fact that her signature on the receipt was an acknowledgment that she had received the equivalent of $800.00. We are unable to see why this court, under this bill of exceptions, can do anything except to say that the credit of $800.00 on the second account should have been allowed as representing the intent and understanding of the executor and Mrs. Smith, there being nothing before us indicating anything but good faith and fair business dealings. We do not feel it necessary to consider whether or not coal is comprehended within the intent and meaning of "household furniture and furnishings" because, even if it were, Mrs. Smith could

have, when she signed the receipt, waived and abandoned any rights she may have had to the coal, as we believe she did, and, by so doing, in our opinion she acknowledged that she had received payment of $800.00 with which the executor seeks to be credited. The second account is dated February 17, 1930, about two years and a half after Mrs. Smith signed the receipt. The coal was not in existence then, nor was it in existence in 1927 when the receipt was signed. It was not a question of title to coal in 1927. It was a question of adjusting a dispute as to money values and after ample time for reflection and with all the facts before her Mrs. Smith decided to adjust the differences between herself and the executor and, by signing the receipt, to acknowledge payment to herself of the $800.00. In our opinion she at that time definitely and finally settled with the executor as far as the $800.00 payment was concerned. By signing the receipt, she must have realized that she was thereby placing herself in the position of a purchaser of the coal with the price of which she was credited as a portion of the $800.00 payment to her. With all the facts she was perfectly conversant. While the actual ownership of the coal may have been a matter of law, she chose, on her own judgment as far as the record discloses, to conclude that it belonged to the estate and she settled on that basis. She should not now be heard to say that the coal belonged to her, or that she receipted for anything less than the $800.00.

With no other facts than those disclosed under the present bill of exceptions, if this $800.00 payment to Mrs. Smith had been the final payment on her $8,000.00 bequest and she had later sued for $167.00 claiming that as a balance due her on the ground that she had been paid only $633.00, even with her concomitant claim that the coal belonged to her, she could not have recovered on the record before this court.

"If an offer of money is made to one, upon certain terms and conditions, and the party to whom it is offered takes the money, though without words of assent, the acceptance is an assent *de facto* and he is bound by it. The acceptance of the money involves the acceptance of the condition. Under such circumstances, the assent of the creditor to the terms proposed by the debtor will be implied, and no words of protest even can affect this result."

Anderson v. *Standard Granite Company*, 92 Me., 429, 432; *Richardson* v. *Taylor, Admr.*, 100 Me., 175; *Fuller* v. *Smith*, 107 Me., 161, 165; principle recognized in *Chapin* v. *Little Blue School*, 110 Me., 415, 420, and in *Price* v. *McEachern et al*, 111 Me., 573; also in *Bell* v. *Doyle*, 119 Me., 383; *Viles* v. *American Realty Company*, 124 Me., 149, 153.

We can see no reason why this well recognized principle should not apply to the case at bar. The payment of a specific legacy by an executor does not require an order of Probate Court as does a distributive share. The executor and Mrs. Smith were dealing with each other as to the payment of a ten per cent installment on her entire legacy. Certain facts perfectly well known to both existed. A receipt was signed acknowledging payment of the full amount of the installment. There is no evidence before us showing any attempt to explain the receipt or indicating any reason why she should not be bound by her apparently well considered act of signing which carried with it the acceptance of the attendant conditions.

The law is so well established in this state and elsewhere that a receipt is *prima facie* evidence of the payment therein stated, and that it is open to explanation and contradiction by parol testimony, that no citation of cases is necessary.

In *Borden* v. *Sandy River and Rangeley Lakes R. R. Co.*, 110 Me., 327, at page 329, the Court said, "The burden resting upon the plaintiff, to escape the legal effect of a release such as this, is a heavy one. Written documents duly signed are not to be lightly disregarded and set aside. Unless fraud exists, or such misrepresentations or suppression of truth as amount to fraud, or unless the parties are so situated that an unconscionable advantage is taken through lack of mental appreciation of the nature of the transaction or otherwise, such settlements stand; and they should stand. The law favors settlements, and, in the absence of the elements above stated, will enforce them."

While this was a case involving a release given in a suit for personal injuries, the reasoning may well be applied to the case at bar. In the case just cited there was an effort to set aside the release, but in the instant case the record discloses no testimony indicating any effort to rebut the *prima facie* case established by the receipt

so that, as a natural sequence, it must stand as conclusive of that which it purports to state. "In the strict legal sense a receipt is merely a written admission of the existence of a fact, either prior to or at the date of the receipt. It is *prima facie* evidence of such fact, and when uncontradicted establishes it as a matter of law, but, like any other admission, it is not conclusive evidence of the fact admitted and may be explained, modified, or even contradicted by parol evidence." *Alexander et al* v. *Meredith et al* (Tex.), 262 S. W. at page 112. To the same effect are *Cunningham, Admr.* v. *Batchelder*, 32 Me., 316; *Wherely* v. *Rowe et al*, 106 Minn., 494, 119 N. W., 222, 223; *Gleason* v. *Sawyer*, 22 N. H., 85; *New Jersey Flax Cotton Wool Co.* v. *Mills*, 26 N. J. Law, 60; *Riley, Applt.* v. *City of New York*, 96 N. Y., 331.

The presiding Justice, having made no findings of fact, ruled that Mrs. Smith was "not estopped to claim title to the coal by reason of signing the receipt and cashing the check presented to her by the executor." As far as this record is concerned, we regard this language, and so treat it, as equivalent to saying that, although she signed a receipt for $800.00 with full knowledge of all its terms and conditions, she can later claim and recover the $167.00 represented by the coal value which was included in the receipt, even though she fails to explain or contradict that receipt. We regard this as exceptionable error, and the entry must be,

Exceptions sustained.
Appeal sustained.
Case remanded to
Probate Court for
further proceedings.

JAMES W. JOHNSON

vs.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY.

Cumberland. Opinion March 23, 1931.

WAIVER. ESTOPPEL. RELEASE.

A waiver is the voluntary relinquishment of some known right, benefit or advantage and which, except for such waiver, the party otherwise would have enjoyed. It is primarily based on the intent of the person possessing it to forego its benefits.

Estoppel differs from waiver in that, regardless of intention, one may lose a benefit, because under a particular state of facts it would be inequitable to permit an advantage to be taken of it.

In the case at bar, the payment of the illness indemnity, if it showed any intent with respect to the release for accident liability, indicated a purpose not to waive it. The insured was not estopped from setting up a release because there was no representation which induced the plaintiff to do that which he would otherwise not have done, so that his position was changed to his detriment.

On exceptions and general motion for new trial by defendant. An action brought to recover under a contract of insurance for loss resulting from bodily injuries occasioned by an accident to the plaintiff, wherein plaintiff broke a bone in his left ankle. Plaintiff's policy covered both disability from accident and from disease. Suit was brought to recover for accident disability and not under the health provisions. The issue involved the effect of a release given by the plaintiff. To the refusal of the presiding Justice to direct a verdict in its favor and later to give certain instructions and to instructions given, defendant seasonably excepted. The jury rendered a verdict for the plaintiff. Defendant thereupon filed a general motion for new trial. Motion only considered. Motion sustained. New trial granted. The case fully appears in the opinion.

Coombs & Gould,
Hinckley & Hinckley,
Sherman I. Gould,
Frederick W. Hinckley, for plaintiff.
Verrill, Hale, Booth & Ives,
Robert Hale, for defendant.

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

THAXTER, J. The plaintiff was the holder of a policy of the defendant insurance company, which provided in certain clauses for indemnity for disability caused by accident and in certain other clauses for indemnity for disability caused by disease. Though combined in one policy the two contracts are entirely distinct. On June 8, 1928, while this policy was still in force, the plaintiff suffered an accidental injury to his ankle. He was absent from work for six days, and then continued at his occupation till about the middle of July. His ankle, however, bothered him and from that time on he appears to have done no work. July 13, 1928, the defendant's agent, Cronkite, called at the plaintiff's house to collect a premium and learned of the accident. He had the plaintiff fill out a report and subsequently a proof of loss. On July 16 the plaintiff received a check for $8.57 for indemnity due him for the six days that he had lost immediately following the accident. On the back of this check over the endorsement of the plaintiff was a general release in these words — "In consideration of the payment of this draft, I hereby discharge and release The Columbian National Life Insurance Company from all claims that I myself, my Executors, Administrators, Assigns or Beneficiaries now have or may have on policy No. 381861 on account of Injury received on or about June 15, 1928." There was an error in giving the date of the accident as June 15, but this is entirely immaterial. There is no contention that this release was obtained by fraud or duress, or was invalid when given. About the first of September Cronkite again called at the plaintiff's house, and learned that the plaintiff's ankle was still bothering him. He appears to have suggested to the

plaintiff that he make application for indemnity under the health provisions of the policy on the ground that he had an arthritis. The plaintiff claimed that his condition was due to the accident, but finally signed the application for illness benefits and received payments of ten dollars a week for a period of twelve weeks. X-rays taken October 19 showed that there had been a fracture of one of the bones of the plaintiff's foot, and that there was a condition of arthritis in the ankle. The testimony of the doctors and of those who had treated the plaintiff also indicates that he had a general arthritic condition, which may have been of long standing. Whether the trouble with his ankle was due to this, or to the fracture, or to a combination of the two is in our opinion immaterial. The defendant certainly elected to treat the disability as due to disease.

This suit was brought to recover, not under the health provisions of the policy, but for accident disability. The defendant sets up the release as a bar, and the plaintiff answers that, by making the subsequent payments for illness, the defendant has waived the release. The plaintiff's assumption is that the defendant knew or should have known that the plaintiff was still suffering from the effects of the accident; and he contends that the payments subsequently made to him reopened the question of liability for the accidental injury. The issue is a very simple one — whether the defendant's election to pay illness benefits is evidence of a waiver of the release given to discharge it from liability for accident indemnity, or estops the defendant from setting up such release.

The defendant excepted to the refusal of the trial Justice to direct a verdict in its favor and to the refusal to give certain requested instructions, and also filed exceptions to certain instructions as given. These exceptions have been duly certified to this court together with a general motion for a new trial. As the motion brings before us the same question as the exceptions, we shall consider only the motion.

A waiver of a right is primarily based on the intent of the person possessing it to forego its benefits. This court has defined a waiver as "the voluntary relinquishment of some known right, benefit, or advantage, and which, except for such waiver, the party otherwise would have enjoyed." *Peabody* v. *Maguire*, 79 Me., 572, 585. A

right may likewise be lost by an estoppel. Estoppel is quite different from waiver in that, regardless of intention, one may lose a benefit, because under a particular state of facts it would be inequitable to permit advantage to be taken of it.

In the case which we are here considering, the payment by the defendant of illness indemnity was not a waiver or even evidence of a waiver of its rights under the release. If such payments showed any intent at all with respect to the accident portion of its policy, it was of a purpose to regard that obligation as discharged. The mere fact that the plaintiff claimed that his condition was due to the accident is entirely immaterial. The important consideration is did the defendant intend to give up its rights under the release. This court has held that evidence of such intention must be clear and convincing. *Berman* v. *The Fraternities Health and Accident Association*, 107 Me., 368, 373.

Nor is the plaintiff any better off in seeking to rely on the doctrine of estoppel. To estop the defendant from asserting its rights under its release, it must by some representation have induced the plaintiff to do that which he otherwise would not have done, so that his position with respect to the accident provision of the policy was changed to his detriment. *Allum* v. *Perry*, 68 Me., 232. By accepting the illness indemnity, however, the plaintiff lost no rights which he had previously possessed; his position was in no way changed to his disadvantage.

The defendant may have made the subsequent payments on the policy because it considered that it was legally liable to do so. If so, there is no reason why any of its rights should thereby be prejudiced. Furthermore, it may have been actuated by sympathy, or even by a desire to favor one who had held a policy for some years; but neither the insurer's motives, nor even its belief that the plaintiff's trouble might have been due to the accident, are material except in so far as they indicate an intent to waive its rights under the release.

The jury, which has rendered a verdict for the plaintiff, quite obviously believed that for some reason the payment of the illness indemnity reëstablished the defendant's obligation to pay for in-

juries caused by the accident. There is no evidence on which such a verdict can be sustained. It is manifestly wrong.

Motion sustained.
New trial granted.

AMEDEE KIROUAC

vs.

THE ANDROSCOGGIN AND KENNEBEC RAILWAY CO.

Androscoggin. Opinion March 23, 1931.

MOTOR VEHICLES. NEGLIGENCE. "LAST CLEAR CHANCE."

In an action to recover for injuries sustained in a collision, one may recover in spite of his negligence, if there came a time prior to the collision when he could not, and the defendant could, by the exercise of due care, have prevented the accident.

If, however, the negligent operation by the plaintiff continued to the moment of the collision or for such a period of time that the defendant could not thereafter, by the exercise of due care, have stopped his car before the crash, there can be no recovery.

In the case at bar, these issues of fact were for the jury to determine. They heard and saw the witnesses, and were competent to determine their credibility and to weigh their testimony. The evidence does not disclose that their conclusions were manifestly wrong, or the result of bias or prejudice.

On general motion for new trial by defendant. An action on the case to recover damages for personal injuries sustained by plaintiff, and occasioned by a collision between automobile of the plaintiff and street car of the defendant. Trial was had at the October Term, 1930, of the Superior Court for the County of Androscoggin.

The jury rendered a verdict for the plaintiff in the sum of $1,210.00. A general motion for new trial was thereupon filed by defendant. Motion overruled. The case fully appears in the opinion.

Brann & Isaacson, for plaintiff.
W. B. & H. N. Skelton, for defendant.

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

THAXTER, J. This suit was brought to recover for personal injuries, and after a verdict for the plaintiff is before this court on the defendant's motion for a new trial.

The plaintiff was a passenger in a Ford truck owned by him but driven by his son, who was his agent in so doing. They were proceeding northerly on Russell Street Extension, a private way in the City of Lewiston, which, after making a wide loop, enters Sabattus Street, a main highway, almost at a right angle. On the southerly side of Sabattus Street, and close to its junction point with such private way, is the street railway track of the defendant. Russell Street Extension, as it enters the highway, was on the day of the accident practically level. Both father and son were well acquainted with this neighborhood, and had used this road a number of times. As they approached Sabbatus Street their view on the right was obstructed by two houses, but it is conceded that, from a point thirty-three feet from the car track, they had an unobstructed view of the track easterly for nine hundred feet. The testimony of the plaintiff is that, as they came out by the first house and when about twenty feet from the track, he saw the street car of the defendant about four hundred feet away, coming on his right from the east at a fast rate, that he shouted to his son to stop, who put on his brakes and stalled his engine, that the truck in that condition slid on the ice and snow and finally stopped on the car track. Both father and son assert that at this time the street car was at the third post from them, a distance of one hundred and seventy-one feet, that while the boy was ineffectually trying to start his motor, they were struck by the oncoming car and carried in their truck down the track a distance subsequently determined as eighty-two feet from the point of the collision. The two occupants of the truck were corroborated to some extent by Jeannette Lessard, a passenger on the car, although her testimony is not altogether con-

vincing. The evidence of the motorman and of three passengers in the street car is to the effect that the plaintiff's truck had not stopped on the track for any appreciable time prior to the collision, but was in fact moving at the time of the contact or immediately prior thereto. This conflicting evidence raises a clear issue of fact, the determination of which was within the province of the jury.

The driver of the truck was clearly negligent. He approached a crossing, over which he had passed many times before, and he did so without even looking for electric cars and with his car under imperfect control. It is contended, however, that the plaintiff is still entitled to recover in spite of such negligence of his agent, because it is claimed that, after the truck had stopped on the track with its engine stalled, the motorman had ample time to have stopped his car, and thus might have avoided the consequences of the negligent act of the truck driver. This is the only issue in the case which we intend to discuss, because there is evidence of the negligence of the motorman clearly sufficient to justify the jury's finding of his want of due care.

The question is whether the operator of the trolley car or of the truck had the "last clear chance" to have avoided the accident. The plaintiff may still recover in spite of his agent's negligence, if there came a time prior to the collision, when his driver could not, and the defendant's motorman could, by the exercise of due care, have prevented the accident. *Atwood* v. *Bangor, Orono & Old Town Railway Co.*, 91 Me., 399; *Dyer* v. *Cumberland County Power & Light Co.*, 120 Me., 411. If the negligent operation of the truck continued to the moment of the collision, or for such a period of time that the motorman could not thereafter by the exercise of due care have stopped his car before the crash, there can be no recovery. *Butler* v. *Rockland, Thomaston & Camden Railway Co.*, 99 Me., 149.

If we accept the plaintiff's version of what happened, it may well be true that his son, after the truck had stopped on the track or even after it had started to slide on the icy ground, was powerless to have prevented the accident. Whether or not the motorman could by the exercise of due care have brought his car to a stop,

after he should have realized the perilous situation of the plaintiff, is a matter not free from doubt. Assuming that the jury accepted the plaintiff's version of the occurrence, the truck came to rest on the track when the street car was at the third post easterly from the crossing, a distance of one hundred and seventy-one feet. The motorman testified that at the speed he was going, he could have stopped his car within two or two and a half car lengths or within a distance of ninety-six or one hundred and twenty feet. At his outside estimate this would be at a point at least fifty feet from the truck. Whether the plaintiff's truck did stop on the track with its engine stalled, when the street car was at the third post, whether the motorman had a sufficient interval of time to have realized the danger, and whether thereafter he used due care to stop his car were, we think, questions for the jury.

Counsel for the defendant raises an interesting point. He contends that the issue, whether the motorman had the last clear chance to prevent the accident, must be determined in the light of the conditions existing at the time when he discovered or should have discovered the plaintiff's dangerous situation on the track. In other words, his excessive speed at the time of such discovery might have been the very reason why he could not have stopped, and the defendant would thereby be in a better position to defend this action, than if the trolley car had been travelling more slowly. The view which we have taken — that the jury may have been warranted in finding that the motorman could have stopped his car in time — renders it unnecessary that we discuss this question.

Though this court might reach a different conclusion on all the evidence, the jury are the triers of fact. They heard and saw the witnesses, and were more competent to determine their credibility and to weigh their testimony than we here with nothing but the printed record before us. The issue raised by this motion is whether the jury's verdict is manifestly wrong, or the result of bias or prejudice. *Sawyer* v. *Hopkins*, 22 Me., 268, 284; *Glidden* v. *Dunlap*, 28 Me., 379, 382; *Hatch* v. *Dutch*, 113 Me., 405, 411. We can not so hold.

Motion overruled.

EDMUND D. NOYES *vs.* JULIUS LEVINE.

Kennebec. Opinion March 25, 1931.

PRESCRIPTION. EVIDENCE.

Acquiescence on the part of the owner of the servient estate is a necessary element in obtaining title by prescription.

The absence of acquiescence on the part of the owner of the servient estate may be evidenced by verbal protest alone.

In the case at bar, the defendant having set up title by prescription, the burden of proving its essential elements was upon him. Acquiescence on the part of the owner of the servient estate was not proven and the granting of a non-suit was error.

On exceptions by plaintiff. An action of trespass for the use of land. A prescriptive right of use was claimed by defendant.

To the ruling of the presiding Justice, granting a non-suit at the close of the plaintiff's testimony, plaintiff seasonably excepted. Exceptions sustained. The case fully appears in the opinion.

Harvey D. Eaton, for plaintiff.

Ernest L. Goodspeed, for defendant.

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

BARNES, J. This case comes up on exceptions to the grant of a non-suit at the conclusion of plaintiff's testimony in an action for trespass on real estate.

Plaintiff testified he owned a parcel of land on the south side of Chaplin Street in the City of Waterville and that defendant, the adjoining owner on the west, had an easement of way over a strip of plaintiff's lot, twenty feet wide, extending southerly as far as defendant's lot extended and contiguous to defendant's east line.

Plaintiff further testified that for twenty or thirty years before the bringing of this suit defendant had piled "wood and stuff like

that . . . anything he wanted to" on the strip over which he had only the right of passage.

Against such use of the "passway" plaintiff testified he had made many and ineffectual protests. He testified that defendant claimed to own the land over which plaintiff asserts defendant had only right of passage.

The particular act of trespass complained of in the writ is that on July 7, 1930, defendant deposited on the passageway six cords of cordwood and sawed and split it thereon.

In defense, the general issue was filed, and with it, in brief statement, "That the defendant has for over twenty years, to wit for thirty-nine years, openly, continuously, notoriously, visibly, uninterruptedly, adversely, under a claim of right, and with the acquiescence of the plaintiff or his predecessors in title exercised the right of piling wood, iron and other materials on plaintiff's land as described in plaintiff's writ, and has exercised the right to remove the same from time to time, to saw the wood and do other things in connection with the wood and iron so piled there, and defendant claims a right by prescription to do the acts complained of in plaintiff's writ."

At the conclusion of plaintiff's evidence defendant moved for a non-suit, and it was granted; plaintiff claiming and filing exceptions thereto.

This was error, for one of the essential elements of securing title by prescription is acquiescence on the part of the owner of the servient estate. *Rollins* v. *Blackden*, 112 Me., 459; *Dartnell* v. *Bidwell*, 115 Me., 227.

That absence of acquiescence on the part of the latter may be evidenced by verbal protest alone, see cases cited above and note, 5 A. L. R., 1325, 19 C. J. 883, note 14.

Having set up the defense of title by prescription the burden of proving its several essential elements was on the defendant, and the trial should not have been interrupted as it was.

Exception sustained.

JACOB MILLER *vs.* WILLIAM LEVINE ET AL.

Kennebec. Opinion March 30, 1931.

ALIENATION OF AFFECTIONS. HUSBAND & WIFE. JURY FINDINGS. EVIDENCE. NEW TRIAL. VERDICTS.

To warrant a recovery of damages in an action by a husband against his wife's father and mother for alienation of the wife's affections it must be proven that the parent caused the separation complained of without justification. In such a case the plaintiff must establish a case of aggravated interference or detention.

A parent may use proper and reasonable argument in counseling his child and if it later appears that the parent acted upon mistaken premises or upon false information or that his advice and interference may have been unfortunate, nevertheless if he acts in good faith for the child's good, upon reasonable grounds of belief, he is not liable to the husband.

It must appear clearly that the plaintiff maliciously alienated the daughter's affection.

Malice will not be presumed but must be proven by evidence of wrongful and unjustifiable conduct, prompted by wicked or malicious intent.

The findings of a jury will not be set aside unless manifest error is shown, or unless it appears that a verdict rendered by them was the result of bias or prejudice.

Where a verdict is substantially right no new trial will be granted although there may have been some mistakes committed in the trial, but a verdict will be set aside as against the evidence when it is not such as reasonable minds are warranted in believing, or is inconsistent with the proved circumstances of the case, or when the evidence to the contrary of the verdict is so overweighing as to induce the belief that the jury were led into mistake, or were so moved by passion or prejudice as not to give due consideration and effect to all the evidence.

In the case at bar, the court finds that the plaintiff failed to make out a case against either of his wife's parents, and that the verdict of the jury was not warranted by the evidence.

On general motion for new trial by defendant. An action brought by the husband against his wife's parents for alienation of the

wife's affections. The jury rendered a verdict for the plaintiff. A general motion for new trial was thereupon filed by defendant.

Motion sustained. The case fully appears in the opinion.

Merrill & Merrill, for plaintiff.

F. Harold Dubord,

Perkins & Weeks, for defendant.

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

BARNES, J. Plaintiff, a resident of Boston, Mass., in suit for alienation of his wife's affections, recovered a verdict against that wife's parents; and this court is to determine, on a motion for a new trial, whether the verdict is founded on the law or, if so, is recoverable on the evidence, and, if recoverable, whether or not the damages are excessive.

In considering the law applicable to this case, the jury was limited to a narrow field.

Though actions of this sort are becoming more numerous as the years go by, the law justifying a husband's recovering damages of his wife's father is the same today as when first announced in this country in *Hutcheson* v. *Peck*, 5 Johns., 96, tried in 1808. Today, as then, before assessing damages, the jury must find, under the rules of law announced by the trial judge, that the defendants, or one of them, caused the separation complained of; that the interference, if any, was not justified; that since the parent's house is from causes of natural affection an asylum to which a daughter, married or unmarried, may at any time flee, and since under circumstances commonly arising parents, if able, may be compelled by law to contribute to the support of a daughter and her children, a parent, sued as here, stands in different footing than would a stranger; that the animus actuating the parent must be first and most diligently sought.

In marshaling the evidence the jury must bear in mind that the burden is upon the plaintiff to make out a case of aggravated interference or detention; that it is a parent's right, so long as they both shall live, to give advice and counsel to his child; that there

is a strong presumption that in counseling his child a parent's motives are pure and right; thus that the procuring of a separation was an unlawful procuring; that if on reasonable grounds a parent believes the further continuance of the marriage relation tends to injure his daughter's health, or to destroy her peace of mind, so that she would be justified in leaving her husband, he may, in such case, persuade his daughter. He may use proper and reasonable arguments. If it turns out that the parent acted upon mistaken premises or upon false information, or that his advice and his interference may have been unfortunate; still if he acts in good faith, for the daughter's good upon reasonable grounds of belief, he is not liable to the husband.

The jury must be satisfied, within the law, that the parent maliciously alienated the daughter's affections.

They must remember that malice is not to be presumed, but must be proved by evidence of wrongful and unjustifiable conduct, prompted by wicked or malicious intent.

These principles, recognized before Maine became a state, have been accepted and held controlling, so far as we are able to discover in all our states, and have recently been affirmed in *Oakman* v. *Belden*, 94 Me., 280, 47 Atl., 553; *Wilson* v. *Wilson*, 115 Me., 341, 98 Atl., 938; *Shalit* v. *Shalit*, 126 Me., 291, 138 Atl., 70; *McCollister* v. *McCollister*, 126 Me., 318, 138 Atl., 472.

Guided by the law, as above, the jury listened to evidence artfully produced, in manner and with intimation to color every word of either defendant attempted to be reproduced.

It is our duty to review the record and determine whether under their oath the jurors made a right finding on the primal question of actionable wrong on the part of either defendant.

We are aware that "The credibility of witnesses and the weight to be given to their testimony is particularly within the province of the jury and we should not set their finding aside unless manifest error is shown or unless it appears that the verdict was the result of bias or prejudice. . . .

"Upon a motion for a new trial after verdict the whole evidence is to be examined with minute care, and the inferences which the jury might properly draw from it are adopted by the court.

"If therefore upon the whole case justice has been done between the parties and the verdict is substantially right no new trial will be granted although there may have been some mistakes committed in the trial. The granting of a new trial is not a matter of absolute right in the party but rests in the judgment of the court and is to be granted only when it is in furtherance of substantial justice." *London* v. *Smart*, 127 Me., 377, 143 Atl., 466.

Now what are the facts?

The evidence is voluminous and on many minor points conflicting, but it has been thoroughly examined.

Regard for proper length of an opinion forbids quotation.

Defendants are aged people, residents of Waterville for more than forty years, the father a merchant. They have nurtured nine children, their house has been their children's home as needs required. Plaintiff was twenty-seven years old, his wife some three or four years younger when they were married on December 13, 1917.

For the first year after marriage they lived with defendants, in their house in Waterville. While here plaintiff served as clerk in the store of his father-in-law, working for wages, or as he claims, for the support of himself and wife.

Later plaintiff embarked in the pickle business in Boston, and defendants furnished twenty-five hundred dollars in money to set up a home, and by endorsing notes aided in establishing and maintaining the business until, early in 1927, an assignment for the benefit of creditors brought a pause in his business career. In the meantime two children had been born, and the summer season had been spent by plaintiff's family each year in the home of defendants, to whom, as plaintiff admits, his indebtedness "kept increasing," until it had mounted to nearly if not quite $30,000.00 before the assignment, and out of the assignment none of the debt to defendants was paid.

A part of the indebtedness was due to indorsement of notes to purchase the equity in a three-family apartment house in Brookline, purchased in Mrs. Miller's name, and at time of trial the equity was worth not more than $800.00 to $1,300.00 unless real estate values there had increased.

After the assignment *hiatus*, plaintiff was incorporated, as he says, so that in 1928 Miller Brothers, Inc. was processing and marketing condiments and cereal food. It is in evidence on both sides that representations were repeatedly made by the young couple that money must be had to continue the business, and that the wife made frequent trips to Waterville to procure additional loans; and plaintiff admits that as late as February, April, and June, 1928, William Levine loaned him or them $4,000.00.

There is no claim of diminution of wifely affection until the summer of 1928.

In that season, after the younger grandchild had been taken to defendants' home for the summer, both defendants went to Boston to see an infant, born in July to their daughter Betty and, driving to the place of business of plaintiff, found it locked.

Next morning, at the place of business, whether by design or accident, plaintiff and wife met the defendants and plaintiff's father, David Miller, with his son, Samuel. A conference was held as to contributing further funds to the corporation, and plaintiff's father announced that he had given plaintiff $8,000.00 and "didn't give him any more," while Samuel testified he then told defendants that he had furnished plaintiff "from ten to twelve thousand dollars . . . not getting any notes and any interest."

The conference broke up, and it is claimed by plaintiff that defendants then threatened him that unless he paid his debt to them they would take his wife and children from him. This defendants deny.

The only witnesses produced by plaintiff to corroborate his claim, who are not related by blood, were two men and Mrs. Riley.

Neither of the men testified to being present at or within hearing of the conference, and we are satisfied Mrs. Riley's term of service at the pickle factory had ended before the conference, the day after the factory was found locked.

Plaintiff claims that his wife's love for him, abundant up to the time of the conference, decreased thereafter. From the fact that in the spring of 1930 she instituted proceedings for divorce from him, he argues that he has lost her affection.

And he charges acts of alienation beginning at the conference alluded to.

He further testified that during this visit of the parents to Boston, his mother-in-law and his wife leased to one Kaufman the apartment in which plaintiff was living, together with the furniture and furnishings, for which latter he testified that he had paid more than $8,000.00.

The wife and Mr. Kaufman give in detail a very different story which, if believed, shows that plaintiff not only was consulted in this move to reduce living costs and gain a substantial monthly rental, but that he acted in negotiating the lease.

The summer of 1928 was spent by Mrs. Miller, partly in Waterville and partly in Boston. Plaintiff testified his wife served then as treasurer of the business and was with him four or five months of the year in Boston, where the couple lived in conjugal intimacy at the homes of relatives, and in defendants' home when he visited there. He testified that his relations with defendants during that year "were very pleasant."

It is evident that they received him as a son, made him welcome, and that they did not interfere with his marital rights unless, as he says, they refused to allow the family to be returned to Boston.

Even so late as the Thanksgiving season of 1928 plaintiff visited for days in defendants' home and was accorded every courtesy as a son.

In July of that year he joined with his wife in conveying the Brookline apartment to Mrs. Sarah Levine, and while he denies that he owed defendants more than $8,000.00 at this time, we read in the record his debt to them was then more nearly $28,000.00; and this does not include an account against him at William Levine's store running from 1924 to 1927, amounting to $613.96, and two clothing bills paid by defendants for him in 1920 in the sum of $143.00.

An exhibit, William Levine's account book, shows, too, that from January 15, 1928, to date of trial, William Levine has paid in interest on plaintiff's notes, many of them doubtless renewal notes, the sum of $2,224.00.

Two letters of plaintiff were introduced, one under date of Oc-

tober 1, 1928, in which he sends regards to the "dear folks," and another undated, but written in the summer of 1929, in which he sends his "regards to the folks."

In the summer of 1929, plaintiff received and entertained his wife in Boston, enjoying full conjugal relations; and in rebuttal, at the end of the evidence, by his counsel, referring to that season, he was asked, "Were things pleasant and harmonious between you and Frieda?", and replied, "Yes, sir."

Stress is laid in argument upon plaintiff's testimony that the parents threatened to disinherit their daughter unless she would forsake him. But, their reception of their son-in-law, and their treatment of him, as he frequently visited them until the end of the year 1929, as testified to by him, is such that none but the most credulous would believe they threatened such dire proceedings.

After the fall of 1929, plaintiff wrote never a letter to his wife, and sent no messages to her in letters he wrote to his son. And he has not for long months sent her any money.

He has lost the affection of his wife.

It is not for us to speculate as to what quenched the flame.

While he maintained a home in Brookline, and while, as he testified, he was giving his wife from $50 to $80 a week, the gas supply for cooking was cut off for nonpayment, as he testified, "twenty times," the milk bill unpaid grew to proportions embarrassing to the housekeeper, the home was sold for unpaid taxes, and the prospect of a home since the last business venture had become drear, for as he testified, he didn't give a hurrah for the business; had quit keeping accounts; didn't give a darn for it.

He may not have said, "unless Mr. William Levine, my father-in-law, will furnish me with all the funds I need, I intend to park my wife, Frieda Miller, and the children on his front porch and go away." His denials in evidence would be more satisfying, if in matters of major importance his regard for his oath as a witness had prompted him to accuracy and readiness in answer.

The statements of both defendants that William would buy him a business in Waterville, are not denied.

After twelve years of wedded life, with a son and daughter, but

with no home, the wife prefers to face the future without obligation to plaintiff.

The question for us is, upon all the evidence for the plaintiff, including inferences logically drawn, are we satisfied that the defendants, or either of them, alienated this wife's affections? His testimony stands in the main, without corroboration.

As we have recently said, "The nature of the claims (on charges of alienation) is such that such suits furnish a most convenient weapon for extortion and the right to bring them is a constant temptation to the unscrupulous. Every such case should be subjected, therefore, to the most careful scrutiny not only by the jurors but by the appellate court. Especially is this true in cases in which parents are defendants." *McCollister* v. *McCollister*, supra.

A new trial is the right of a suitor when its granting will tend to effectuate justice.

"A verdict will be set aside as against the evidence when it is not such as reasonable minds are warranted in believing, as when it is unreasonable, or inconsistent with the proved circumstances of the case, or when the evidence to the contrary of the verdict is so overweighing as to induce the belief that the jury were led into mistake, or were so moved by passion or prejudice as not to give due consideration and effect to all the evidence." *Garmong* v. *Henderson*, 114 Me., 75, 95 Atl., 409.

We can not say there is a preponderence of evidence to sustain the verdict.

Nor does it appear to us that the scales of evidence balance.

It seems to this court that the plaintiff failed to make out a case against either of his wife's parents.

Verdict set aside.

STATE OF MAINE *vs.* ALTON A. GROSS AND BLANCHE GROSS.

AND

STATE OF MAINE *vs.* HAROLD I. GROSS AND BLANCHE GROSS.

Lincoln. Opinion April 3, 1931.

CRIMINAL LAW. CONFESSIONS. PLEADING & PRACTICE. LAW COURT.

In case of two or more respondents tried together, the confession of one may not be received as evidence against another; but a new trial will not be granted because the presiding Justice did not explain to the jury the limited effect of such evidence at the time of admitting it, no request to do so having been made, but clearly and fully instructed the jury on the point in his charge.

The Law Court has no authority in such case to set aside a verdict on general motion. Such a motion should be addressed to the presiding Justice. His decision, if adverse to the respondent, is subject to appeal and if not appealed from is final.

On exceptions and general motion for new trial by respondents. Two indictments for incest tried together by agreement, the male respondent in each case being found guilty. To the admission of alleged confessions by the male defendants, exceptions were seasonably taken. In addition to the exceptions a motion for new trial, addressed to the Supreme Judicial Court, was filed in each case by the convicted respondent.

Exceptions overruled, Motions dismissed, Judgment for the State. The cases sufficiently appear in the opinion.

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

George A. Cowan, for respondents.

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

PATTANGALL, C. J. Exceptions and motions. Indictments charging incest. Cases were tried together without objection. Ver-

dicts of guilty were rendered against Alton A. Gross and Harold I. Gross; not guilty as to Blanche Gross.

The apparent inconsistency in the findings of the jury is accounted for by the fact that the evidence against the male respondents included confessions made by each of them and that aside from these confessions, the case did not warrant a conviction.

The exceptions relied upon are identical in both cases and are set out as follows:

"Respondent objected to a certain exhibit numbered 'State 3' offered as a confession. The Court overruled the objection and admitted the exhibit without specifying as to which respondent it applied, no request therefor being made by counsel for respondent. And the respondent excepted.

"The respondent objected to a certain exhibit marked 'State 4' offered by the State. The Court overruled the objection and admitted the exhibit without specifying as to which respondent the exhibit applied, no request being made therefor by respondent's counsel. And the respondent excepted."

Even if it could be said that the matters complained of are sufficiently set forth in the above-quoted paragraphs so that this Court could intelligently act upon them, and if it be assumed that respondents are entitled to have the questions considered, though not raised at the time the exhibits were admitted, respondents have no cause for complaint because the presiding Justice in his charge to the jury carefully protected their rights in this respect.

The jury was instructed that "the confession of one has no effect upon the other. For instance the confession of Harold Gross has no tendency to prove the guilt of Alton Gross and it can not be used for that purpose nor can the confession of either or both of these respondents be considered as evidence against Blanche Gross." And this instruction thus given was later in the charge repeated and emphasized.

Motions for new trial, addressed to this Court on behalf of both respondents, accompany the exceptions.

We have no authority to pass on these motions. They should have been addressed to the Justice who presided at the trial below. Had this been done and had he refused to grant them, appeal would

lie. On such appeals, a single issue is raised, viz, whether in view of all the testimony the jury was warranted in believing beyond a reasonable doubt that respondents were guilty. *State* v. *Pietrantonio*, 119 Me., 18.

The procedure is governed by the provisions of Sec. 27, Chap. 146, R. S. 1930. *State* v. *Perry*, 115 Me., 203; *State* v. *Steeves*, 115 Me., 220; *State* v. *Googins*, 115 Me., 373.

Exceptions overruled.
Motions dismissed
Judgment for the State.

STATE OF MAINE *vs.* RICHARD RIST.

Penobscot. Opinion April 4, 1931.

CRIMINAL LAW. INTOXICATING LIQUORS. EXCEPTIONS. PLEADING & PRACTICE.

To sustain exceptions to the exclusion of evidence it is not sufficient to show that a technically admissible question was excluded. The excepting party must show affirmatively that he was prejudiced by such exclusion. It must appear in his bill of exceptions or in the record that the answer expected would have been in his favor, otherwise no harm is done.

It is not sufficient ground for reversal to raise the claim on mere exclusion of evidence without showing prejudice.

In the case at bar it does not appear that the respondent was in any way prejudiced by exclusion of the evidence to which exception was taken or that if the witness had been allowed to answer the question the answer would have been in respondent's favor.

On exceptions. The respondent, charged with having intoxicating liquor in his possession for sale, was found guilty. To the exclusion of evidence offered in his behalf exception was seasonably taken.

Exceptions overruled. The case sufficiently appears in the opinion.

A. G. Averrill,

James D. Maxwell, County Attorney, for State.

A. L. Thayer, for respondent.

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

FARRINGTON, J. On exceptions. The respondent on complaint issuing from the Bangor Municipal Court on July 7, 1930, was charged with illegal possession of intoxicating liquors and with intent to aid and assist in their sale. Having been there tried and found guilty, he appealed to the Superior Court for Penobscot County where, at the September Term, 1930, he was again found guilty. The exceptions on which the case comes to this court are three in number and will be considered in the order in which they appear in the bill:

1. During the course of cross examination of a deputy sheriff, a State witness, the following question was asked by respondent's attorney: "Are there houses on the other side of Patrick Street as you go up?" (Patrick Street was the street on which the respondent lived and on which the liquor was found) and the answer was, "Yes." At this point the following colloquy ensued:

"The Court: What is the object of this?"

"Mr. Thayer: The object is, Your Honor, to show there are many people living in that section who have access to this particular shed which is opposite a vacant tenement."

"The Court: Because there is a number of houses there is no evidence of access. I would not waste the time of going into the fact that this street has a lot of houses on it; nothing to do with this case."

"Mr. Thayer: I want to also show, Your Honor, that it not only has houses, but it has houses which have been searched."

"The Court: You will not be allowed to put that testimony in."

An exception was seasonably noted and allowed.

The respondent was not prevented from showing that other

people had excess to the shed. He did not attempt to show that fact, although the witness had already stated that there were houses on the other side of the street. To have permitted the respondent to show that houses on that side of the street had been searched could have had no bearing on the question of access or as to whether or not he was guilty of the crime with which he was charged and such evidence was properly excluded.

2. During the re-cross examination of another State's witness, the following question was asked by the respondent's attorney: "Down in the lower Court you testified previously you could not remember where that took place?", and the answer was, "No, you asked me where the arrest was made. I don't know as I know where it was made." Then the question followed, "I asked you in what court you were convicted in?", and the answer was, "I didn't remember at that time." The Court then said, "I don't think that is material.", and then the following:

"Mr. Thayer: It is material only, Your Honor, as to the credibility of this witness."

"The Court: You can only ask him if he has been convicted of crime, and he says he has."

"Mr. Thayer: I am now asking him if in his previous testimony, under oath, he hasn't denied knowing where he was convicted."

To the exclusion of this question exceptions were noted and allowed.

The witness had stated that in the lower Court he did not remember in what court he was convicted. This answer might well have been repeated to the question last asked. We can see no prejudice to respondent which could possibly have resulted from the exclusion of a question which, in practically the same form, had already been answered.

3. On cross examination of another witness for the State in an attempt on the part of the respondent's attorney to show that the officers, when they came to search the premises, believed that Mrs. Rist, the mother of respondent, was the owner of the premises and had possession of the key to the building in which the liquor was found and that the liquor belonged to her, the following question was asked: "Was there some remark made about taking Mrs. Rist

down to the Court, down to the jail, and having her searched in order to get a key?" The Court inquired, "What is the object of that?", and respondent's attorney replied, "To show the day these men made this search they were sure that Mrs. Rist had a key to this place." and, in reply to the Court's query, "Suppose they were?", then said, "Well, it makes a difference as to what their intentions were that day and who they thought owned this intoxicating liquor."

The question was excluded, and we think rightfully, as immaterial. Exceptions were noted and allowed, the respondent's attorney insisting that it was material "to show that at the date on which this search was made, these officers went to search the premises belonging to an entirely different person." In any event, we are unable to see how the respondent could have been prejudiced by the exclusion. The fact that Mrs. Rist at one time might have been suspected of illegal possession, even of the same liquors, could have no tendency to change the evidential facts which must have convinced the jury that the respondent was guilty. The exception on this point is without merit.

As to all three exceptions, the respondent as the excepting party had the burden of showing that he was prejudiced by the exclusion. It is not sufficient simply to show that a technically admissible question was excluded. An excepting party must go farther and show affirmatively that he is prejudiced by such exclusion. It must appear in his bill of exceptions or in the record that the answer expected would have been in the respondent's favor, otherwise no harm is done. It does not so appear in the instant case. The answers to the questions in the case at bar might have been in the negative and no advantage would have accrued to the respondent. As to what the answer might have been or would have been there is no right to conjecture. It is not a sufficient ground for reversal to raise the claim on mere exclusion without showing the prejudice. *State* v. *Dow*, 122 Me., page 448; *State* v. *Wombolt*, 126 Me., page 353.

The entry will be,

Exceptions overruled.

BLAISDELL AUTOMOBILE COMPANY *vs.* PERRY D. NELSON.

Penobscot. Opinion April 9, 1931.

ESTOPPEL. WAIVER. CONDITIONAL SALES. PLEADING & PRACTICE. WORDS AND PHRASES.

A conditional sale agreement is not binding upon a purchaser from the original vendee unless it is recorded in the office of the town clerk in the place where the original vendee resided. The burden of establishing a compliance with the requirement as to its record is on the vendor.

The phrase "duly recorded" means recorded according to law.

An estoppel arises when one party by some representation induces another to do that which he otherwise would not have done, so that his position is changed to his detriment.

A waiver, as distinguished from estoppel, is based on intention.

In a conditional sale, title remains in the vendor and a transfer of possession by the vendee to an intended purchaser without the consent of the vendor is a conversion by both the vendee and by such purchaser. If done with the vendor's consent, a demand would be a condition precedent to a recovery. In the case at bar, whether there was such consent was a question for the jury. The direction of a verdict for the defendant was error.

On exception by plaintiff. An action of trover for the value of an automobile truck. Defendant pleaded the general issue with brief statement setting up title in himself. To the direction of a verdict for the defendant by the presiding Justice, after the testimony of the plaintiff had been presented, plaintiff seasonably excepted.

Exception sustained. The case fully appears in the opinion.

Percy A. Smith, for plaintiff.

Edward P. Murray, for defendant.

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

THAXTER, J. This is an action of trover brought for the conversion of an automobile truck, and is before this court on an ex-

ception by the plaintiff to a directed verdict for the defendant. No defense was offered and there is no real dispute as to the facts.

January 21, 1926, the plaintiff sold to one Leighton a Chevrolet truck and a touring car, and in part payment thereof the purchaser gave to the plaintiff a Holmes note, which provided that the truck and the car should remain the property of the seller till payment of the purchase price. The note was security for two notes, one for two hundred dollars payable in five months and the other for five hundred eighty-one dollars and forty-six cents payable in six months. This note was recorded January 22, 1926, in the clerk's office of the Town of Dexter. Sometime in the first part of May, Leighton sold the truck to the defendant, who it appears inquired of the plaintiff whether the plaintiff had any claim on it and was informed as to the true facts. Whether this conversation took place just before or just after the resale of the truck does not appear. Subsequently the defendant again came to the plaintiff's place of business, and the treasurer of the plaintiff company made out a license for him for the truck. He was again told that there was a mortgage on it. The notes were not paid, and during the years 1927, 1928, 1929, and 1930, there was talk between the defendant and officials of the plaintiff company about payment for the balance due on the truck. The defendant at these interviews insisted that Leighton would take care of it. Leighton's notes were never paid, and March 1, 1930, this suit was brought for conversion of the truck.

The defendant seeks to sustain the ruling of the trial court in directing the verdict for him on the following grounds: first, that there is no evidence that the conditional sale agreement or Holmes note was recorded in the town where the purchaser resided; secondly, that the use of the truck by the defendant was with the consent of the plaintiff, and, therefore, the plaintiff is estopped to claim a conversion; thirdly, that the defendant purchased the conditional vendee's right of possession of the truck, and there was, therefore, no conversion till after a demand for possession by the original seller and a refusal to deliver by the defendant. We shall consider these contentions in their order.

First, the residence of the Mortgagor. It is true that the con-

ditional sale agreement is not binding on the defendant, unless it was recorded in the office of the town clerk in the place where the purchaser resided. R. S. 1916, Chap. 114, Sec. 8. The burden of establishing a compliance with this requirement as to its record is on the plaintiff. *Horton* v. *Wright*, 113 Me., 440. Furthermore, nothing appears in the record to indicate what was Leighton's residence at the time of the purchase of the truck. The following formal admission was, however, made:

> "By agreement it is admitted that Plaintiff's Exhibit 1 was received and recorded in the Clerk's Office, town of Dexter, Dexter, Maine, on the twenty-second day of January, 1926, and duly recorded in volume 14, page 386, of such town records."

Counsel for the defendant contends that the words "duly recorded" merely mean that the mechanical part of the recording was properly done, and that they do not admit that the mortgage was recorded in the proper place. We do not place this narrow construction on them. The phrase "duly recorded" means recorded according to law. *Brownell* v. *Town of Greenwich*, 114 N. Y., 518; *Dunning* v. *Coleman*, 27 La. Ann., 47, 49. We, therefore, interpret this stipulation as an admission that the town clerk's office of Dexter was the place where by law this mortgage should have been recorded.

Second, the estoppel of the plaintiff to claim a conversion. It is not altogether clear on just what grounds the defendant claims that the plaintiff is estopped. Apparently this contention is based on the fact that the plaintiff knew that the defendant had possession of the car and was using it, and made no protest. It is difficult to see why this fact alone creates an estoppel, which arises when one party by some representation induces another to do that which he otherwise would not have done, so that his position is changed to his detriment. *Allum* v. *Perry*, 68 Me., 232. The fact that the plaintiff permitted the defendant to use this car for a period of four years placed the defendant in no worse position than he was in before. The depreciation in the value of the truck while he used it was an incident of such use, and was in no way due to any representations made by the plaintiff. Its decreased value was compensated for by

the defendant's possession and use. The defendant may claim that the plaintiff's conduct amounts to a waiver of its right to sue for conversion. This court has clearly pointed out the distinction between waiver and estoppel, and has shown that they are often confused. *Colbath* v. *H. B. Stebbins Lumber Co.*, 127 Me., 406, 414. A person may waive his rights without an estoppel arising; and, furthermore, a waiver may be ineffectual to modify the rights of the parties without an estoppel, or in the absence of some consideration to support it. *Colbath* v. *H. B. Stebbins Lumber Co.*, supra. A waiver in its strict sense is based on intention. *Peabody* v. *Maguire*, 79 Me., 572, 585; *Smith* v. *Phillips National Bank*, 114 Me., 297. There was in the case, which we are here considering, no waiver by the plaintiff of its rights. The conversion by the defendant took place when he bought the truck of Leighton. The plaintiff's right to sue for that wrong was not lost by failure to retake the truck from the defendant, or because of requests made for payment of the balance of the purchase price. 38 Cyc., 2043; *Dixie* v. *Harrison*, 163 Ala., 304. In a case involving facts quite similar to these before us, this Court said: "The neglect of a party to proceed against one, who is known to have taken and used his property unlawfully, does not deprive him of his right to do so, until the statute of limitations interposes." *Porter* v. *Foster*, 20 Me., 391, 393.

Third. Was a demand and refusal necessary. The agreement here given was in effect a conditional sale. Title was to remain in the seller until the purchase price was paid. Though having some of the incidents of a chattel mortgage, such a transaction is different from a mortgage. The vendee is not the owner of the property. *Hartford Accident & Indemnity Co.* v. *Spofford*, 126 Me., 392. Until the payment of the price, title remains in the vendor; and a transfer of possession by the vendee to an intended purchaser without consent of the vendor is a conversion by both the vendee and by such purchaser. No demand is necessary by the vendor to permit him to maintain an action for such conversion. *Galvin* v. *Bacon*, 11 Me., 28; *Whipple* v. *Gilpatrick*, 19 Me., 427; *Porter* v. *Foster*, supra; *Crocker* v. *Gullifer*, 44 Me., 491; *Hotchkiss* v. *Hunt*, 49 Me., 213, 224; 38 Cyc., 2036; 26 R. C. L., 1122. The case of *Dean* v.

Cushman, 95 Me., 454, cited by counsel for the defendant is a case of a chattel mortgage, and is distinguishable from this of a conditional sale.

There was some talk between the plaintiff and the defendant in regard to the purchase by the defendant of the truck. It is a question for the jury whether this conversation took place just before or just after the transaction occurred. If the jury should determine that it happened before and was of such a nature that a consent by the plaintiff to the purchase of the truck by the defendant could be implied, a demand by the plaintiff for possession of the truck and a refusal to surrender it by the defendant would be conditions precedent to a recovery.

It is our opinion that this issue should have been submitted to the jury for decision.

Exception sustained.

GRACE M. HARMON

vs.

JOHN T. FAGAN, EXECUTOR OF THE WILL OF ELLEN E. BIBBER.

Cumberland. Opinion April 10, 1931.

EXECUTORS & ADMINISTRATORS. PROBATE COURTS. CLAIMS. LIMITATION OF ACTIONS. WORDS & PHRASES. R. S. 1916, CHAP. 92, SEC. 22 (R. S. 1930, CHAP. 101, SEC. 20).

When a disputed claim is committed to commissioners, jurisdiction over the claim is transferred from the Common Law Courts to the Probate Court.

The commitment of a disputed claim to commissioners is effective when service of the petition of the executor therefor is made upon or acknowledged by the claimant.

The commissioners' adjudication and report on a disputed claim are final and every item passed upon by them becomes res adjudicata *if no appeal is taken.*

Jurisdiction of the Probate Court does not attach to a disputed claim, however, if it is not committed to commissioners until action upon it is barred by the special statute of limitations.

The presentment of a disputed claim to commissioners is to be deemed the commencement of an action for its enforcement and the special statute of limitations applies to such a proceeding as well as to an action at law.

Unless a disputed claim, committed to commissioners, is presented to them in the manner and form required by law within twenty months after the executor or administrator is qualified, it is barred by the special statute.

A disputed claim not presented to commissioners within the statutory period is within the general rule that, in the absence of any statutory provisions excusing delay or otherwise extending the time for commencement of an action against an executor or administrator, the special statute bars the claim of a creditor who has failed to avail himself of his rights during the period of its limitations, whatever may have been the reasons therefor.

While Probate Courts are tribunals of special and limited jurisdiction, they may exercise the powers directly conferred upon them by legislative enactment and also such as may be incidentally necessary to the execution thereof.

When an executor or administrator elects to submit a disputed claim against an estate to commissioners, on service of the petition therefor upon the creditor. the latter becomes a party to the proceeding, entitled to be heard and to invoke the aid of the Probate Court to compel an adjudication of his claim.

If commissioners on disputed claims accept their appointment, the Probate Court has power to compel obedience to its decree and warrant, including the power to extend the time for the commissioners' action and report.

If such commissioners fail to accept their appointment by qualifying, the proceeding is not terminated, but remains unfinished, still pending and subject to completion. Upon petition of the executor, administrator, or creditor, after notice, new commissioners may be appointed.

By R. S. (1916) *Chap.* 92, *Sec.* 22 (*R. S.* 1930, *Chap.* 101, *Sec.* 20), *if the Supreme Judicial Court, upon a bill in equity filed by a creditor who is unable to present his disputed claim to commissioners within the statutory period, is of the opinion that justice and equity require it and that such creditor is not chargeable with culpable neglect in not so presenting his claim within the time so limited, it may give him judgment for the amount of his claim against the estate of the deceased person.*

Relief can be granted under this statute, however, only in those cases that are unmistakably shown to be within the express provisions of the statute strictly construed.

To hold otherwise would be to practically nullify the statute of limitations and indefinitely prolong the administration of estates.

The creditor must not only show that he has a valid claim against the estate, good in equity and justice, but he must also prove that he is not chargeable with "culpable neglect."

"Culpable neglect" is defined to be "censurable" or "blameworthy" neglect, which exists when the loss can be fairly ascribed to the creditor's own carelessness, improvidence, or folly, or that of another for whose acts or omissions he is chargeable.

In the case at bar, there was no evidence that the executor deceived or misled the complainant as to any facts incident to the enforcement of her claim.

The complainant failed to sustain the burden resting upon her to show that her failure to enforce her claim against the estate in the manner and within the time provided therefor by law was not the result of culpable neglect.

On report. A Bill in Equity brought under the provisions of R. S. 1916, Chap. 92, Sec. 22 (R. S. 1930, Chap. 101, Sec. 20), on a claim against the estate of the defendant's testatrix. After the evidence was taken out the case was by agreement of the parties reported to the Law Court for its determination on all matters of law and fact.

Bill dismissed. The defendant to have his costs to be taxed in the court below under the rules. The case fully appears in the opinion.

Hinckley, Hinckley & Shesong, for plaintiff.

Thomas L. Talbot, for defendant.

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

STURGIS, J. The complainant, having failed to prosecute her claim against the estate of the testatrix either at law or before commissioners on disputed claims within twenty months after the executor qualified, brings this action for equitable relief under R. S. (1916), Chap. 92, Sec. 22. The case comes forward on report.

The record discloses that March 1, 1927, John T. Fagan, Esquire, was duly appointed and qualified as executor of the will of Ellen E. Bibber, late of Portland, deceased. April 5, 1927, the complainant presented to the executor in writing a claim for $10,000 for services rendered the testatrix in her lifetime. March

26, 1928, the executor, disputing the claim, petitioned for the appointment of commissioners to determine what amount, if any, should be allowed on the claim. Notice to the claimant having been acknowledged, under order of April 2, 1928, the Judge of Probate, having jurisdiction over the settlement of the estate, appointed commissioners and issued his warrant ordering them to report on or before June 5, 1928, following.

R. S. (1916), Chap. 68, Sec. 55, as amended, in effect at that time, provides:

> "When one or more claims against the estate of a person deceased, though not insolvent, are deemed by the executor or administrator to be exorbitant, unjust or illegal, on application in writing to the judge of probate, and after notice to the claimants, the judge, if upon hearing, he is satisfied that the allegations in said application are true, may appoint two or more commissioners, who shall, after being duly sworn, and after notifying the parties as directed in their commission, meet at a convenient time and place, and determine whether any and what amount shall be allowed on each claim, and report to him at such time as he may limit. Sections five, six, seven, eight, twelve, thirteen, fourteen, sixteen and seventeen of chapter seventy-one, apply to such claims, and the proceedings thereon. No action shall be maintained on any claim so committed, unless proved before said commissioners; and their report on all such claims shall be final, saving the right of appeal."

For reasons that do not appear, the commissioners appointed in this case were never sworn, neither met nor gave the claimant notice of a meeting and made no report on or before the time limited therefor in their "warrant," as their commission of appointment is termed in our probate practice. Sometime in the following summer, the executor reached the conclusion that the time originally limited for the commissioners' report could not be extended, and the complainant's claim must be adjudicated by commissioners appointed on a new petition. October 3, 1928, the executor, having prepared such a petition, inclosed it in a letter to the complainant, informing her that the original appointment of commissioners had

expired on June 5, 1928, a new appointment must be made and that an acknowledgment of service of the inclosed petition and its return would result in prompt action on the claim.

The complainant referred this letter and the new petition to her attorney. Numerous conferences between the executor and the attorney followed, continuing until late into the fall. The executor insisted upon a new appointment of the original commissioners. The complainant's attorney demanded one new commissioner. At some time, the exact date not clearly appearing, the executor indicated his inability to consent to a change of commissioners without the consent of an heir then out of the state. Finally, on January 9, 1929, the attorney, having in the meantime held the second petition in his possession, delivered it to the executor and terminated conferences concerning it.

May 2, 1929, following, the executor not having presented the second petition for commissioners to the Probate Court, the complainant filed a petition in that court setting forth the facts and circumstances attending the original commitment of her claim to commissioners and their failure to act, with a prayer for an extension of the time limited for action and report in their original warrant. This petition was denied on June 6, 1929, and no appeal was taken. This Bill, dated June 17, 1929, followed.

Chap. 71, R. S. 1916, provides for the appointment of commissioners to pass upon claims against insolvent estates of deceased persons. The sections of this chapter, incorporated by reference into Chap. 68, Sec. 55, regulate the procedure to be followed upon commitment of claims to commissioners in both proceedings. Claims must be presented in writing, supported by affidavit of the claimant or of some person cognizant thereof, stating what security the claimant has, if any, and the amount of credit to be given according to his best knowledge and belief. Commissioners may require a claimant to be sworn and may examine him upon his claim. If the claimant refuses to submit to such an examination, his claim shall be rejected. The various other rules of procedure common to both proceedings are not here involved and need not be discussed.

Under R. S. (1916), Chap. 92, Sec. 15, no action can be maintained against an executor or administrator on a claim or demand

against the estate, with certain exceptions not here concerned, unless commenced and served within twenty months after his qualifications. In the instant case, the executor qualified March 1, 1927, and, unless this limitation was extended, action on the complainant's claim was barred November 1, 1928. At that time, she had neither commenced an action at law nor presented her claim to the commissioners.

It is well settled that, when a disputed claim is committed to commissioners, jurisdiction over the claim is taken from the Common Law Courts and conferred upon the Probate Courts. The commitment is effective when service of the petition of the executor therefor is made upon or acknowledged by the claimant. Thereafter, the claimant's only option is to submit the claim to the commissioners. *Shurtleff* v. *Redlon*, 109 Me., 62. The commissioners' adjudication and report on the claim are final and every item passed upon by them becomes *res adjudicata* if no appeal is taken. *Rogers* v. *Rogers*, 67 Me., 456.

It is equally well settled that the jurisdiction of the Probate Court does not attach to a disputed claim if it is not committed to commissioners until after action upon it is barred by the special statute of limitation. One having a disputed claim against an estate, may commence an action at law against the executor or administrator at any time within the period limited for such actions and before service of a petition for the appointment of commissioners on the claim. And, unless such petition is served within the time limited by the special statute, the jurisdiction of the Probate Court does not attach, and subsequent proceedings on the claim in that court are void. *Shurtleff* v. *Redlon*, supra; *Whittier* v. *Woodward*, 71 Me., 161.

In the case at bar, however, a new question arises. Here the creditor's claim, being disputed by the executor was committed to commissioners and the jurisdiction of the Probate Court attached within the twenty-month period allowed for the commencement and service of an action, but the commissioners failed to qualify or act thereon and the creditor failed to present her claim to them within that period. Is the limitation of the special statue thereby extended?

If an estate is represented insolvent, the special statute of limitations applies after the representation, as well as before. It is an absolute bar unless an action at law is commenced upon the claim within the statutory period and before representation, or, no action having been so begun, the claim is presented to the commissioners within that period. The insolvency statute changes the mode of commencing process for enforcing claims against estates but does not extend the time therefor. The presentation of his claim to commissioners of insolvency by the creditor is deemed the commencement of his action for its enforcement against the estate and the special statute of limitations applies to such a proceeding, as well as to a suit at law. *Jellison* v. *Swan*, 105 Me., 356; *Parkman* v. *Osgood*, 3 Me., 17; *Aiken* v. *Morse*, 104 Mass., 277; *Tarbell* v. *Parker*, 106 Mass., 347; *Blanchard* v. *Allen*, 116 Mass., 447.

We think the presentment of a claim to commissioners on disputed claims must be given a like construction. The manner and form of the presentment of claims and the procedure thereon to be followed are the same in the one proceeding as in the other. No statute excuses delay in or extends the time for presentation of a disputed claim to commissioners. Reason and analogy dictate that such a presentment is to be also deemed the commencement of an action to enforce a disputed claim. As such, it is subject to the special statute of limitations and within the general rule that, in the absence of any statutory provisions excusing delay or otherwise extending the time for commencement of an action against an executor or administrator, the special statute bars the claim of a creditor who has failed to avail himself of his rights during the period of its limitations, whatever may have been the reasons therefor. *Littlefield* v. *Eaton*, 74 Me., 516, 520; *Fowler* v. *True*, 76 Me., 43, 48; *Bank* v. *Fairbanks*, 49 N. H., 140.

It is true that, in *Shurtleff* v. *Redlon*, supra, this court, in discussing the effect of the commencement of an action at law on a claim against an estate, after the identical claim has been committed to commissioners on disputed claims, said, "If, before her claim is barred, service is made upon or acknowledged by the claimant under the statute process, the subsequent steps, it is unnecessary to state, are unaffected by the statute of limitations." This statement of opinion was not, however, necessary for the de-

cision of that case. But, giving to it the respectful consideration it merits, we do not think it can be read as a denial of the duty of the creditor to present his disputed claim against an estate to commissioners thereon within twenty months after the executor qualifies. The time within which the creditor may present his claim to commissioners, after they are appointed, was not in issue in that case, is not mentioned in the opinion and was not determined. The term "subsequent steps," as there used, was undoubtedly intended to refer only to the mode of proceeding after service of the statute process, that is before commissioners rather than at law, a rule of procedure which must be followed regardless of the statute of limitations.

It is urged, however, that the construction here adopted may leave a claimant wholly without remedy if, as in the case at bar, the commissioners failed to qualify under their appointment and warrant.

The law is not so impotent. While Probate Courts are tribunals of special and limited jurisdiction, they may exercise the powers directly conferred upon them by legislative enactment and also such as may be incidentally necessary to the execution thereof. *Smith* v. *Howard*, 86 Me., 203, 205. They have special statutory authority to issue any process necessary to the discharge of their official duty and to punish for contempt of their authority. R. S. (1916), Chap. 67, Sec. 1.

When an executor or administrator elects to submit a disputed claim against an estate to commissioners, on service of the petition therefor upon the creditor, the latter becomes a party to the proceeding, entitled to be heard and to invoke the aid of the Probate Court to compel an adjudication of his claim. If the commissioners accept their appointment, the Probate Court has the power to compel obedience to its decree and warrant as also, we think, the power to extend the time for the commissioners' action and report. The creditor then has an established tribunal to which he may present his claim. If the commissioners fail to accept the appointment by qualifying, the proceeding is not terminated, but remains unfinished, still pending and subject to completion. Upon petition of the executor, administrator, or creditor, after notice, new commissioners may be appointed. The power of the Probate Court to

make a new appointment in a proceeding over which it has acquired and still retains jurisdiction, where the first appointee fails to qualify, is recognized in *Thompson* v. *Hall*, 77 Me., 160.

If, however, the creditor is unable to present his disputed claim to commissioners within the statutory period and is not chargeable with culpable neglect therefor, if he can bring himself otherwise within the statute, he may have relief in equity. R. S. (1916), Chap. 92, Sec. 22, provides:

> "If the supreme judicial court, upon a bill in equity filed by a creditor whose claim has not been prosecuted within the time limited by the preceding sections, is of the opinion that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not prosecuting his claim within the time so limited, it may give him judgment for the amount of his claim against the estate of the deceased person; but such judgment shall not affect any payment or distribution made before the filing of such bill."

Relief can be granted under this statute, however, only in those cases that are "unmistakably shown to be within the express provisions of the remedial statute strictly construed." *Beale* v. *Swasey*, 106 Me., 35. "To hold otherwise would be to practically nullify the statute of limitations and indefinitely prolong the administration of estates." *Bennett* v. *Bennett*, 93 Me., 241. The creditor must not only show that he has a valid claim against the estate good in "equity and justice," but he must also prove that he is not chargeable with "culpable neglect," defined to be "censurable" or "blameworthy" neglect, which exists when the loss may be fairly ascribed to the creditor's own carelessness, improvidence or folly, or that of another for whose acts or omissions he is chargeable. *Beale* v. *Swasey*, supra; *Holway* v. *Ames*, 100 Me., 208; *Bennett* v. *Bennett*, supra.

There is no evidence in this case that the executor in any way deceived or misled the complainant as to any facts incident to the enforcement of her claim. She had knowledge of the appointment of the commissioners and was advised of the necessity of presenting her claim in the manner and form required by the statute. Although urged to employ an attorney to act for her in enforcing her

claim, she failed to do so until after October 3, 1928. So far as the evidence discloses, she allowed the time limited for the commissioners' report to expire and the summer months following to pass without any effort on her part to properly present her claim or obtain an adjudication of it.

When the complainant's letter from the executor of October 3, 1928, and his new petition were handed to her attorney, a little more than three weeks remained in which the claim could be presented. The executor was of the opinion that new commissioners must be appointed on a new petition. The complainant's attorney asserts in this report that he took the position and understood the law to be that the original petition for commissioners was still pending in the Probate Court and could be extended. Unfortunately, his opinion was not followed by prompt action. Until after November 1, 1928, when prosecution of the complainant's claim was barred, the time was spent in controversy as to the personnel of new commissioners. When, on May 2, 1929, the complainant's petition for extension of time for action and report by the original commissioners was filed, the bar of the statute had attached, the claim could not then be presented and an extension of time would have in no way benefited the complainant. The denial of that petition was obviously proper.

It is the opinion of the court that the complainant has not shown that her failure to enforce her claim against the estate in the manner and within the time provided therefor by law was not the result of want of diligence and lack of proper effort — that is "culpable neglect," for which she is chargeable. Failing to sustain this burden, she is not entitled to relief under the statute here invoked. The Bill must be dismissed with costs to the defendant to be taxed under the Rules.

Bill dismissed.
The defendant to have his costs to be taxed in the court below under the Rules.

MURRAY'S CASE.

Penobscot. Opinion April 11, 1931.

WORKMEN'S COMPENSATION ACT. "INDEPENDENT CONTRACTOR." "EMPLOYEE." BURDEN OF PROOF. APPEAL.

Where the facts presented with respect to the relation of an employer and employee are as consistent with the relation of agency as with that of independent contractor, one asserting the existence of the latter relation has the burden of proof.

When the facts are not in dispute and but one reasonable conclusion is inferable, the question of relationship is one of law and open on review.

In an action against an employer for injuries, a presumption arises that a person performing work on a defendant's premises and for his benefit is a mere servant; and if defendant seeks to avoid liability on the ground that such a person is an independent contractor, the burden is on him to show the fact.

An employee as defined in the Workmen's Compensation Act is a person in the service of another, under a contract of hire, express or implied, oral or written.

An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of his work.

The test of relationship is the right to control. It is not the fact of actual interference with the control but the right to interfere that makes the difference between an independent contractor and a servant or agent.

In applying the general principles of law governing the relation of master and servant to cases involving Workmen's Compensation, by explicit legislative mandate, the provisions of the Act are to be liberally construed.

Commonly recognized tests of the relationship in issue, although not necessarily concurrent or each in itself controlling, are (1) *the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price;* (2) *independent nature of his business or his distinct calling;* (3) *his employment of assistants with the right to supervise their activities;* (4) *his obligation to furnish necessary tools, supplies and materials;* (5) *his right to control the progress of the work except as to final results;* (6) *the time for which the workman is employed;* (7) *the method of payment, whether by time or by job;* (8) *whether the work is part of the regular business of the employer.*

The most important point in determining whether the relationship is that of contractor or employee is the right of either to terminate the relation without liability.

In the case at bar, no contract existed between petitioner and respondent for the performance by the former of a certain piece or kind of work at a stated price; all of the tools and appliances used on the job were furnished by the employer; petitioner was paid by the ton, not by the job; the work was a part of the regular business of the employer; petitioner was, at the time the accident occurred, subject to the employer's orders and instructions; respondent had the right to discharge him at will without incurring liability for breach of contract.

The petitioner was therefore not an independent contractor and the decree of of a verdict for the defendant was error.

A Workmen's Compensation Case. Appeal from decree of single Justice, affirming decree of the Industrial Accident Commission denying the petitioner compensation for an injury sustained by him while unloading coal. The Commission found that the petitioner was at the time of the accident an independent contractor.

Appeal sustained. Decree reversed. The case fully appears in the opinion.

A. L. Thayer, for petitioner.

E. F. Littlefield,

William B. Mahoney,

Theodore Gonya, for respondent.

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

PATTANGALL, C. J. On appeal from decree of single Justice, affirming decree of Industrial Accident Commission, dismissing petition under Workmen's Compensation Act.

It is agreed that petitioner sustained a serious injury, arising from an accident occurring while he was engaged in unloading coal for Oldtown Woolen Co., Inc., an assenting employer; that the injury was received in the course of his employment and arose out of his employment; and that the employer had due knowledge or notice of the facts.

The sole issue is whether petitioner was, at the time of receiving the injury, an employee of the Company within the meaning of the Act, or was an independent contractor.

Petitioner was at the time of the accident, and had been for many years, in the general employ of the respondent corporation. His work was not confined to any particular line. He is described as an "odd-job" man. He did not work steadily, although from early spring until the coming of winter he worked nearly every day. A portion of the time, the work was on property of the manager of the corporation but when this was the case, he was paid at the Company office and, so far as he knew, there was no distinction made with regard to who benefited by his labor.

There was one particular job that he always attended to. He participated in unloading the coal which came on cars to respondent's mill and supervised those who assisted in this work. It sometimes happened that he worked a portion of the day unloading coal and a portion of the day at other jobs. For his general labor, he received a wage of $3.50 per day, and at the beginning the unloading of the coal was paid for at the same rate. Later an arrangement was made by which he handled the coal on a basis of twenty cents per ton, out of which he paid the men who assisted him in unloading, and the Company paid those who did what was designated as "trimming," that is, levelling off the piles of coal after unloading.

The Company provided a machine used in unloading and shovels for the men. Petitioner engaged his helpers, fixed their wage scale and, presumably, could discharge them if and when he pleased.

The case shows that whenever coal arrived, regardless of what he was doing at the time, petitioner having been notified of the fact assembled his men and proceeded to unload the cars as rapidly as possible, in order to prevent demurrage charges from accumulating. The only orders he received from the Company with regard to the details of unloading were directions as to where in the yard the coal should be piled.

There was no agreement between petitioner and respondent fixing any definite period of employment. He assumed no obligation either to unload any number of cars or to unload all of the cars which arrived between particular dates. He could cease work at any time and the Company could discharge him at any time, with or without cause. In neither case could an action for damages for breach of contract have been maintained. The contractual rela-

tions between the parties with regard to the unloading of the coal appear to have consisted of nothing more than a mutual understanding that so long as he remained in respondent's employ, he would attend to that work, under the conditions already stated, no restriction being placed upon either party which would prevent the abandonment of the arrangement at any time on a moment's notice.

The Commission determined that petitioner was an independent contractor. We can not agree with that conclusion nor do we deem it one that can be said to be reasonably deducible from the evidence.

"Where the facts presented with respect to the relation of an employer and employee are as consistent with the relation of agency as with that of independent contractor, one asserting the existence of the latter relation has the burden of proof." *Dishman* v. *Whitney* (Wash.), 209 Pac., 12.

"In an action against an employer for injuries, a presumption arises that a person working on the defendant's premises and performing work for the benefit of the defendant was a mere servant; and if the defendant seeks to avoid liability on the ground that such person was an independent contractor, the burden is on him to show the fact." *Dobson's Case*, 124 Me., 309.

The facts are not in dispute. When such is the case and but one reasonable conclusion is inferable, the question of relationship is one of law and is open on review. *Clark's Case*, 124 Me., 50.

An employee as defined in the Workmen's Compensation Act is "a person in the service of another, under any contract of hire, express or implied, oral or written."

"An independent contractor is one who carries on an independent business and in the line of his business is employed to do a job of work in the doing of which he does not act under the direction or control of his employer but determines for himself in what manner the work shall be done." *McCarthy* v. *Second Parish*, 71 Me., 318; *Keyes* v. *Baptist Church*, 99 Me., 308; *Mitchell's Case*, 121 Me., 455.

"An independent contractor is one who exercising an independent employment contracts to do a piece of work according to his own methods and without being subject to the control of his employer

except as to the result of the work." 2 Words and Phrases, 2nd Ed., 1034.

"One who contracts with another to do a specific piece of work for him and who furnishes and has the absolute control of his assistants and who executes the work entirely in accord with his own ideas or with a plan previously furnished by the person for whom the work is done without being subject to the latter's orders as to the details of the work, with absolute control thereof, is not a servant of his employer but is an independent contractor." *Brown* v. *Smith* (Ga.), 22 Am. St. Rep., 463.

Authorities are numerous and uniform that the vital test is to be found in the fact that the employer has or not retained power of control or superintendence over the employee or contractor. "The test of the relationship is the right to control. It is not the fact of actual interference with the control but the right to interfere that makes the difference between an independent contractor and a servant or agent." *Tuttle* v. *Embury-Martin Lumber Co.* (Mich.), 188 N. W., 878. There is no conflict as to this general rule, but the results reached in its application to particular cases are most contradictory. It is often extremely difficult to distinguish between one who may properly be termed an independent contractor and one who is simply an employee. *Clark's Case*, supra; *Dobson's Case*, supra.

Allowing all possible latitude for the varying facts and circumstances which distinguish and characterize the reported cases, the decisions have often been in direct conflict and precedents may be found on both sides of almost every conceivable situation in which the question could arise.

"No hard and fast rule can be made as to when one undertaking to do work for another is an independent contractor or an employee within the meaning of a Workmen's Compensation Act, but each case must be determined on its own facts." *Ruby Arthur* v. *School District* (Ia.), 228 N. W., 70.

In applying the general principles of law governing the relations of master and servant to cases involving Workmen's Compensation, it should be kept in mind that by explicit legislative mandate the provisions of the Act are to be liberally construed. *Wardwell's Case*, 121 Me., 216.

Commonly recognized tests of the relationship in issue, although not necessarily concurrent or each in itself controlling, are (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or his distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies and materials; (5) his right to control the progress of the work except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer.

An independent contractor must have under the employment some particular task assigned to him which he has a right to complete and is under obligation to complete, and must be subject to no control in the details of its doing.

"Among the circumstances which bear strongly upon the question of whether one is an independent contractor or agent or servant, is the existence of a contract for the performance of certain work at a fixed price." *Mattocks* v. *Emerson Drug Co.*, 33 S. W., 2nd Series, 145.

"If the workman is using the tools or equipment of the employer, it is understood and generally held that the one using them, especially if of substantial value, is a servant." *Mallinger* v. *Webster City Oil Co.* (Ia.), 234 N. W., 254.

"The furnishing of tools by the employer is a circumstance denoting a contract of service rather than of independent employment." *Kelley's Dependents* v. *Hoosac Lumber Co.*, 95 Vt., 50.

"The measure of compensation is important, for where it is based upon time or piece, the workman is usually a servant; and where it is based upon a lump sum for the task, he is usually a contractor." *Industrial Comm.* v. *Hammond* (Colo.), 236 Pac., 1006.

In *Norton* v. *Day Coal Company* (Iowa), 180 N. W., 950, the Court says, "If I hire Smith to plow for me at $4.00 per acre, he is my servant. If Smith agrees to plow my twenty acres at $4.00 per acre, and I agree to pay him that sum for it, he is an independent contractor."

"The term 'independent contractor' presupposes the existence

of a binding contract between the parties, for the breach of which a cause of action arises. There can be no relationship of 'independent contractor' without the existence of such binding contract between the parties." *Snodgrass* v. *Cleveland Co-op. Coal Co.* (Ohio Ct. App., 1929), 167 N. E., 493, at 496.

One of the means of ascertaining whether or not the right to control exists is the determination of whether or not if instructions were given they would have to be obeyed. It was held in *Western Metal Supply Co.* v. *Pillsbury* (Cal.), 156 Pac., 491, "The real test by which to determine whether the person is acting as the servant of another is to ascertain whether at the time when the injury was inflicted he was subject to such person's orders and control and liable to be discharged by him for disobedience."

Our Court has said in *Dobson's Case*, supra, that the right to discharge the employee at will is not, taken alone, the decisive test as to whether or not he is an independent contractor, but that fact strongly tends to establish the relationship.

"The power of an employer to terminate the employment at any time is incompatible with the full control of the work usually enjoyed by an independent contractor." *Bowen* v. *Gradison Construction Co.* (Ky., Oct., 1930), 32 S. W., 2nd Series, 1016.

"No single fact is more conclusive as to the effect of the contract of employment, perhaps, than the unrestricted right of the employer to end the particular service when he chooses without regard to the final result of the work itself." *Cockran* v. *Rice* (S. Dak.), 128 N. W., 583.

"The power to discharge has been regarded as the test by which to determine whether the relation of master and servant exists. While it is not the sole test, it is the best test upon the question of control." *Messmer* v. *Bell* (Ky.), 117 S. W., 348.

"By virtue of its power to discharge, the company could at any moment direct the minutest detail and method of the work. The fact that it did not do so is immaterial. It is the power of control, not the fact of control, that is the principal factor in distinguishing a servant from a contractor." *Franklin Coal & Coke Co.* v. *Ind. Comm.* (Ind.), 129 N. E., 811.

"The most important point in determining the main question

(contractor or employee) is the right of either to terminate the relation without liability." *Industrial Comm.* v. *Hammond*, supra; *Ind. Com.* v. *Bonfils* (Colo.), 241 Pac., 735; *Barclay* v. *Puget Sound Lumber Co.* (Wash.), 93 Pac., 430; *Nyback* v. *Champagne Lumber Co.*, 109 Fed., 732; *Evans* v. *Dare Lumber Co.* (N. C.), 93 S. E., 430.

The only fact, in the instant case, which has the slightest tendency to uphold the contention that petitioner was an independent contractor is the hiring by him of the men who assisted in unloading the coal. In view of all the other circumstances of his employment, the conclusion of the Commission that this incident affected his status as an employee is unwarranted either by reason or law. The reasonable inference is that in that respect he acted as agent of his employer.

No contract existed between petitioner and respondent for the performance by the former of a certain piece or kind of work at a stated price; all of the tools and appliances used on the job were furnished by the employer; petitioner was paid by the ton, not by the job; the work was a part of the regular business of the employer; petitioner was, at the time the accident occurred, subject to the employer's orders and instructions; respondent had the right to discharge him at will without incurring liability for breach of contract.

In the light of these facts, it is impossible to resist the conclusion that the right to control any and every detail of the work rested absolutely with the employer.

Appeal sustained.
Decree reversed.
Court below to fix employee's expense on appeal.

GEORGE L. TOMLINSON *vs.* CLEMENT BROS., INC.

Cumberland. Opinion April 14, 1931.

MOTOR VEHICLES. NEGLIGENCE. VERDICTS.

The exercise of ordinary prudence requires the driver of a motor vehicle, suddenly and unexpectedly confronted with peril, although it arises from the fault of another, to seek to avoid a collision, if it is reasonably practicable to do so. Forbearance, rather than undue insistence upon the technical right of way, becomes the duty of every operator of a motor vehicle on the public ways.

Whether, in the presence of danger, the driver of an automobile has taken the proper course, depends upon all the circumstances of the individual case, having reference not to the highest degree of care, nor even the degree of care which a highly prudent person would use, but upon the average of reasonable care.

Where there is no dispute on the evidence as to the facts, the general rule is that it is for the court to apply a conclusion of law, or a canon of responsibility.

In negligence cases, except when the case is so palpably right or wrong that men of fair mind or ordinary intelligence could not reasonably disagree in their opinion about it, the question is for the jury and not for the court.

A verdict should not be directed for a defendant if, in any reasonable view of the testimony, under the law, the plaintiff can recover.

In the case at bar, the situation of danger arose when the truck was close to the roadster, then nearly across the bridge. This created an emergency. Whether the plaintiff in this emergency acted as an ordinarily careful and prudent man would reasonably act was to be decided, not by a careful calculation afterwards, nor by the conduct of a man under no excitement, with time to deliberate, but by what a man of average circumspection would have done under like surroundings in the like situation.

The question of whether plaintiff was negligent in extending his elbow, not beyond the handle of the roadster door, and whether this coöperated with negligence on the part of the defendant to bring personal injury to the plaintiff was for the jury to determine.

On exceptions and general motion for new trial by defendant. An action on the case for injuries sustained by the plaintiff through

the alleged negligent operation of a motor truck of the defendant by its agent. Trial was had at the November Term, 1930, of the Superior Court for the County of Cumberland. At the close of plaintiff's testimony defendant moved for a directed verdict. To the denial of this motion, defendant seasonably excepted, and after the jury had rendered a verdict for the plaintiff in the sum of fifteen thousand ($15,000.00) dollars, filed a general motion for new trial.

Motion overruled. Exceptions overruled. The case fully appears in the opinion.

Hinckley, Hinckley & Shesong, for plaintiff.

Charles L. Donahue,

Paul E. Donahue, for defendant.

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

BARNES, FARRINGTON, JJ. Concurring in result.

DUNN, J. The driver of an automobile brought this action in the Superior Court in Cumberland County to recover damages for personal injuries from being struck by a passing motor truck which, different counts in the declaration allege in differing ways, the owner's servant, in the course of his employment, negligently operated along a highway. The declaration also alleges property damage. The plea was the general issue.

At the close of the evidence for the plaintiff, the defense rested its case without offering evidence, and argued that a verdict be directed for defendant. The motion was denied. Defendant noted an exception. The case was committed to the jury. Plaintiff, who lost his left arm, and whose automobile was slightly damaged, had the verdict in the sum of fifteen thousand dollars. Defendant filed a motion, for consideration by this court, for a new trial. The motion assigns the usual grounds.

Apart from the assignment of the motion that damages are excessive, the bill of exceptions and the motion raise the same questions. The brief for defendant does not argue damages. Therefore, the ground that the award is inordinate, is regarded as waived. In view of this, the bill of exceptions will suffice to determine the con-

troversy. Accordingly, for the purpose of dismissing it as unnecessary, the motion is overruled.

On the twenty-second day of March, 1930, the plaintiff and two other young men, the three seated in a Ford roadster, each in contact with the one next him, plaintiff at the left and driving, were traveling in Maine. Between six and half after that hour of the clock, postmeridian, while there was yet daylight, they approached Donnell's bridge in the town of Wells, from a westerly direction.

The bridge was a masonry structure, approximately twenty-seven feet in length and seventeen feet in width, built on the principle of the arch, over the Ogunquit River. The block of concrete which formed the span of the bridge, and served as the roadway thereon, had a tarred surface, corresponding to that of the road on either side. Close to the bridge, on the north, was a rail fence. The fence was somewhat longer than the bridge, as a photograph shows. On the south, that side towards which it would have been for plaintiff to steer the course of his automobile to pass an approaching vehicle, a fence extended near the edge of the bridge for its length, and thence at an acute angle westerly, and a like angle easterly, the distance, bridge and all, as a witness estimates, of one hundred and twenty-three or one hundred and twenty-four feet. This fence, this opinion will hereafter, for convenience, call the "long fence."

The bridge was narrower than the rest of the highway. As plaintiff neared the approach to the bridge, his car running thirty to thirty-five miles an hour, he saw, his testimony is, two hundred feet ahead, the truck on-coming at a rate of speed comparable to, perhaps faster than, that of his own machine. Plaintiff testified: "It" (the pronoun referring to the truck for antecedent) "seemed to be rolling a lot. The body was rolling around and the truck coming fast, and I didn't think when I saw it coming, he had very good control of it, the way it was coming, so therefore I pulled to the extreme right of the highway to clear it." Again, "When I got on the extreme right-hand side of the road, I thought I was safe."

These excerpts are far from completing the picture of the case.

There was legally admissible evidence, and other evidence received without the interposition of objection (which became what the decisions call consent evidence, *Moore* v. *Protection Insurance*

Co., 29 Me., 97, 102; *Brown* v. *Moran*, 42 Me., 44), not essential to quote literally, to justify factual findings that, when plaintiff first saw the truck, it was beyond the easterly end of the long fence, and on its own side of the highway. Plaintiff drove on the approach to the bridge, and continued onto the bridge itself. His roadster, five feet and five inches in width over-all, to use a witness' words, he brought to within five or six inches of the fence on his right, but he did not bring it to a stop. There was, evidence shows, between the caps on his left wheels and the fence on that side of the bridge, clearance of eleven feet.

The truck, speaking of an evidentially warranted inference, because the evidence does not describe the particular truck, but a duplicate or similar one, had a body seven feet eleven and one-half inches wide, hung high enough to clear the tops of the mudguards on the roadster.

For anything that appears, the truck could reasonably have been kept in course to the right of the center of the roadway on the bridge until it and the roadster had passed without interference, but it was not. Plaintiff had driven almost the length of the bridge, when the truck, having crossed to its left of the center of the roadway, collided with his car.

The shock did not immediately disturb any of the occupants of the roadster. Plaintiff and his companions heard a click, and a scraping sound as though against the mudguard, and, thinking such the extent of probable injury or damage, kept on until at a distance of about one hundred feet, plaintiff "noticed a numbness," and stopped his car. Where the truck was stopped is not shown.

Plaintiff had been driving, to recur to his testimony, with both hands on the steering wheel, his left elbow resting on the frame of the opening in the door, and protruding not more than two inches. When his car was at rest, plaintiff discovered that the instantaneous impact of the rapidly passing truck had severed his arm near the shoulder, no sensation registering.

The arm lay in the street, almost back to the bridge. The left door handle of the roadster was broken off, along that side of the body of the car was a single scratch, and the bow of the top frame was bent.

The bill of exceptions might well be overruled without an opinion,

on the simple statement that there was evidence to sustain the facts, did it not seem necessary to discuss contributory negligence.

Contributory negligence, it is true, would defeat the action, and plaintiff had the burden of proof.

The exercise of ordinary prudence requires the driver of a motor vehicle, suddenly and unexpectedly confronted with peril, although it arises from the fault of another, to seek to avoid a collision, if it is reasonably practicable to do so. *Skene* v. *Graham*, 114 Me., 229; *Ritchie* v. *Perry*, 129 Me., 440. Not fury for speed, nor indifference to danger, nor undue insistence upon the technical right of way, but forbearance, becomes every operator of a motor vehicle on the public ways. *Marquis* v. *Fitts*, 127 Me., 75. The mere fact that one person has violated a road regulation does not justify another in taking the law into his own hands and punishing him. Whether, in the presence of danger, the driver of an automobile has taken the proper course, depends upon all the circumstances of the individual case, having reference not to the highest degree of care, nor even the degree of care which a highly prudent person would use, but upon the average of reasonable care.

Defendant did not attempt to show that the accident happened in any other manner than as proven by plaintiff. Where there is no dispute on the evidence as to the facts, the general rule is that it is for the court to apply a conclusion of law, or, more properly, a canon of responsibility. This rule, however, is more pertinent to questions of contract than to those of tort. In negligence cases, where, notwithstanding the evidence may not be conflicting, exigences are to be weighed, or matters of expediency considered, except the case is so palpably right or wrong that men of fair mind and ordinary intelligence could not reasonably disagree in their opinion about it, the question is for the jury and not for the court. *Lasky* v. *Canadian Pacific Railway Company*, 83 Me., 461.

Extraordinary instances may turn up now and then, but ordinarily contributory negligence is for the jury. A verdict should not be directed for a defendant if, in any reasonable view of the testimony, under the law, the plaintiff can recover. *Nugent* v. *Boston C. & M. R.*, 80 Me., 62. If a verdict would be clearly against the evidence, the question is one of law. *Brown* v. *European & North American Railway Company*, 58 Me., 384.

The rights and duties of the plaintiff operating his roadster, and the driver of the motor truck, were reciprocal. Unless there were that which otherwise informed him, or ought to have informed him, each could rely to some extent on the exercise of due care by the other. In other words, it was for them to approach and pass, each in qualified expectation that the other would use consistent caution, and both exercising commensurate watchfulness. To recover for injury and damage negligently done by the owner of the truck, it was incumbent on the plaintiff to establish that he himself, at the time of the infliction thereof, was free from fault directly and proximately contributory thereto.

When plaintiff drove on the bridge approach, he had an undoubted right to do so, as the truck was a sufficient distance away. The truck, as has before been mentioned, was on-coming rapidly, and rolling. The evidence offers rational explanation for the rolling. This is it. A heavy truck, such as the jury could find that of the defendant to have been, with pneumatic tires on the front wheels, and solid tires on the rear wheels, is likely to deviate from course when driven "light."

But, though the truck, when first seen, was traveling rapidly and rolling, there is no evidence, direct or inferential, that the truck was to its left of the median line of the road. And, though plaintiff bears witness that he thought the driver did not have very good control of the truck, he does not say the truck was out of control, or that its driver was not observing the law of the road.

The situation of danger arose when the truck was close to the roadster, then nearly across the bridge. This created an emergency. Did plaintiff, in the jaws of danger, where instant action by him was requisite, act as an ordinarily careful and prudent man would reasonably act? This question was one to be decided, not by a careful calculation afterwards, nor by the conduct of a man under no excitement, with time to deliberate, but by what a man of average circumspection would have done under like surroundings and in the like situation.

It was not at the distance of two hundred feet, but when plaintiff was not far from the east end of the bridge, that the truck was moving uncertainly forward, at unretarded speed. It was on plaintiff's side of the road; his own car was already within six inches of

the fence. The fence precluded steering farther to the right; swerving to the left would have placed the car in front of the truck. Had plaintiff stopped his car, would it have availed anything? Was plaintiff rash and imprudent in driving from the bridge? Was he negligent in a plight likely to produce fright or terror? He was not bound to use infallible judgment. The standard of care depends upon the nature of each act.

Being rightly upon the bridge, plaintiff could not be charged with contributory negligence as a matter of law, if, in an emergency, he erred in judgment. It is easy, in retrospect, to be wise. For ordinary care, the common law, in respect to travelers upon highways, adopts as its standard such care as persons of common prudence generally exercise. *Farrar* v. *Inh. of Greene*, 32 Me., 574.

But, contend counsel for defendant, there was indubitable evidence of contributory negligence on the part of the plaintiff, in voluntarily and unnecessarily resting his arm on the door of the car, his elbow projecting, and in keeping the arm and elbow in that position after he knew, or ought to have known, danger in time to avert it.

Even so, the declaration contained allegations of property damage, under which evidence was introduced. Had plaintiff's arm not been where it was, the collision would have occurred, with damage to property only. The question of responsibility for such damage was for the jury.

It is easy to contemplate a person riding in a vehicle, his arm projecting in such a way as to be causal to injury, as a matter of law.

In the instant case, with its attendant circumstances, the question of whether plaintiff was negligent in extending his elbow, in fair inference not beyond the handle on the roadster door, and whether this coöperated with negligence on the part of the defendant to bring personal injury on the plaintiff, rested for determination upon experience and judgment.

Where, from the facts, reasonable men may reasonably make different deductions, or come to different conclusions, the case is for the jury. *Lasky* v. *Canadian Pacific Railway Company*, supra.

It was for the jury to settle whether and how far, driving as plaintiff drove, or any other act of plaintiff, as the jury should

find the fact from the evidence and all legitimate inferences, viewed most favorably for him, was indicative, if at all, of such want of care as ought to bar his recovery.

Motion overruled.
Exception overruled.

GORDON L. HESSELTINE PRO AMI

vs.

MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion April 17, 1931.

RAILROADS. NEGLIGENCE. MOTOR VEHICLES.

A traveler upon the highway in approaching a railroad crossing at grade must be on the alert to ascertain by the use of sight and hearing and by any other appropriate means, the approach of trains so as to seasonably avoid collision with them.

The train having the right of way, a collision at a railroad crossing is prima facie *evidence of negligence on the part of the traveller. A traveller approaching the railroad crossing should never assume that the track or crossing is clear. He should apprehend the danger, and use every reasonable precaution to ascertain surely whether a train or locomotive is near.*

When the traveller's view of the track is obstructed, greater care is required in looking and listening.

In the case at bar no satisfactory excuse was presented by the plaintiff for his failure to exercise the degree of care ordinarily required of a traveller in like situation. While the fact that the gates were open was a circumstance which he might properly take into consideration, this did not relieve him of all care. An examination of the testimony discloses clearly that the plaintiff's negligence and want of care contributed to the occurrence of the collision.

On general motion for new trial by defendant. An action to recover damages for injuries sustained by plaintiff while riding in a motor truck which came in collision at the grade crossing on the

main highway at Pittsfield, Maine, with freight train of the defendant. Trial was had at the November Term, 1930, of the Superior Court for the County of Penobscot. The jury rendered a verdict for the plaintiff in the sum of $10,309.10. A general motion for new trial was thereupon filed by the defendant. Motion granted. The case fully appears in the opinion.

Fellows & Fellows,

Percy E. Higgins, for plaintiff.

Perkins & Weeks, for defendant.

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

BARNES, J. Plaintiff sues to recover damages for injuries received on the grade crossing in Pittsfield village, where at 4.52 in the morning of April 22, 1930, a Dodge truck driven southerly by his father collided with the head engine of defendant's freight train moving over the main highway, the main street of the village. Plaintiff sat at the right of the driver in the cab of the truck, and the evidence shows the truck hit the framework of the locomotive just back of the pilot or cow-catcher.

The father, a resident of Oldtown, Me., was driving the first of two trucks loaded with merchandise, from Oldtown toward Portland, the second truck following closely in his rear. Plaintiff was then sixteen years eleven months old, an intelligent lad, in his senior year in high school, and accompanying his father at the latter's request, so far as the evidence shows, an invited guest. Defendant's railway marks the southerly edge of the business section of the village, the highway below running through a residential section and thence into open country.

Plaintiff had never before ridden through the business section of the village and knew nothing of the crossing which he was approaching.

The crossing is double tracked, the southerly track used by eastbound trains. For 800 feet and more, northerly of the crossing, the business blocks of the village stand close upon either side of the highway, except that on the easterly side the buildings end in the Lancey House, a hotel, several rods north of the railroad track,

and the southeasterly corner of the most southerly building on the westerly side, the Connor block, is about 110 feet from the middle line of the east-bound crossing.

The mouth of a street and the entrance to the yard of defendant's passenger station occupy the space between the Connor block and the railroad tracks, and in the intersection of this side street and the main highway a traffic signal, so-called, a concrete structure about eight feet high, topped by a light flashing at short intervals, was standing, about fifty-three feet from the northerly rail of the east-bound track. The easterly end of the station building is probably more than 250 feet from the point of collision.

The crossing is equipped with gates, but at the time of the accident, in conformity with the ruling of the Public Utilities Commission, the gates were operated only between the hours of six o'clock in the morning and midnight. Pittsfield's streets were brightly lighted as the truck traversed them, and plaintiff testified that it's speed was about fifteen miles per hour, slowed down to four or five miles per hour as it passed the Connor block.

The street here, and over the crossing, is practically level and at right angles to the railroad tracks. Plaintiff testified that when about opposite the Connor block his father said that the crossing before them "was a darned bad crossing." Somewhere between the Connor block and the traffic signal the father shifted gears of his motor, and plaintiff testified that he himself looked to the right, the direction from which an east-bound train would come, and saw nothing that would indicate the approach of a train, and heard no sound. The window on his side of the truck cab was half opened, that on the driver's side completely opened. He testified that after passing the traffic signal both he and his father looked to the left as they continued rolling along, seeing or hearing nothing of a train; then as plaintiff turned to look straight ahead the collision occurred.

The father was killed and plaintiff lost his right hand and the lower part of his arm, and suffered other injuries.

The train with which he was in collision was a regular freight, running from plaintiff's right toward Bangor, on the east-bound track. It was hauled by two engines and consisted of seventy loaded and seven light cars.

Plaintiff recovered a verdict and defendant filed a motion for a new trial.

Plaintiff pleaded, and the evidence must satisfy this court, that during his passage from a point opposite the Connor block to the point of collision he was exercising due care, or a verdict in his favor can not be sustained.

That is to say, the evidence must satisfy the jury, dispassionate observers at the trial, that the plaintiff did what a boy of his age, exercising the degree of prudence and caution required of a boy of that age, would do under like conditions; that he did not fail to act as the reasonably prudent and cautious boy of his age would have acted in like situation, or their verdict will be against the law.

Certain principles that shall govern the conduct of a traveller on the highway as he approaches an area where a railroad crosses or is crossed by a highway are and have been for years settled in this state.

Some of them are as follows. It is the duty of the traveller to wait for the train. The train has the preference and the right of way. *Smith* v. *Maine Central Railroad Company*, 87 Me., 339, 347.

A collision at a railroad crossing is *prima facie* evidence of negligence on the part of the traveller. *Hooper* v. *B. & M. R. R.*, 81 Me., 260, 267.

"One in the full possession of his faculties who undertakes to cross a railroad track at the very moment a train of cars is passing, or when a train is so near that he is not only liable to be, but in fact is struck by it, is *prima facie* guilty of negligence, and in the absence of a satisfactory excuse, his negligence must be regarded as established." *State* v. *Maine Central Railroad*, 76 Me., 358.

The obvious peril of collision at grade crossings of railroads with common roads requires "that the traveller upon the common road, when approaching a railroad crossing, should exercise a degree of care commensurate with the peril. He should bear in mind that he is approaching a railroad crossing and that a train or locomotive may also at the same time be approaching the same crossing at great speed.

"He should never assume that the railroad track or crossing is clear. He should apprehend the danger, and use every reasonable precaution to ascertain surely whether a train or locomotive is

near. He should, when near or at the crossing, look and listen, not simply with physical eyes and ears but with alert and intent mind, that he may actually see or hear if a train or locomotive be approaching.

"He should not venture upon the track or crossing until it is made reasonably plain that he can go over without risk of collision." *Giberson* v. *B & A. R. Co.*, 89 Me., 337, 343.

"If the plaintiff did not listen with ear and mind both he was negligent." *McCarthy* v. *B. & A. R. Co.*, 112 Me., 1.

The traveller upon the highway, in approaching a railroad crossing at grade, must, "to comply with his duty to exercise ordinary care, be on the alert to ascertain by the use of his senses of sight and hearing, and by any other appropriate means, the approach of trains, and to seasonably avoid collision with them. . . . Care commensurate with the peril requires the traveller upon the highway to look and listen for trains at the very time he is approaching the crossing, and omission to take this ordinary precaution is, if unexplained, contributory negligence *per se*, as matter of law, and will bar an action for the collision even though the railroad was negligent in the premises." *Day* v. *B. & M. Railroad*, 96 Me., 207.

And ordinarily, when the traveller's view of the track is obstructed, "greater care is required in looking and listening, even to the extent, if driving, of alighting." *Blanchard* v. *Maine Central Railroad Co.*, 116 Me., 179.

Nothing in the history of the case at bar, or the conditions affecting plaintiff, presents "satisfactory excuse" for his failure to exercise the degree of care ordinarily required of a traveller in like situation. He was a guest of the driver of the truck in which he was riding. But it was his own body that was approaching a place of serious peril.

He was more than sixteen years old; if not more intelligent than the average boy of that age, he was at least of the intelligence commonly found in boys of his age, and we have held that the negligent conduct of a boy of twelve years approaching a railroad crossing, a gratuitous passenger, precluded recovery of damages. *Crosby* v. *Maine Central Railroad Co.*, 113 Me., 270.

The same defense prevailed in case of a boy fourteen years old. *McCarthy* v. *B. & A. R. Co.*, supra.

It is urged in argument that the station building of defendant obstructed plaintiff's vision, but testimony and exhibits convince us that at the distance of 110 feet from the east-bound track he had a line of vision in the direction whence the train was approaching for 260 feet, unobstructed save for a post some few inches thick, and this line continually lengthened as he approached the rails.

Plaintiff testified that at about 110 feet distance from the crossing his father had termed it a bad crossing; that he looked to his right then, but that while riding about the latter half of the distance he looked the other way.

That the gates were open is proffered as an excuse for lack of vigilance. But we have stated the rule to be "while the fact of open gates is a circumstance which a traveller may properly take into consideration, and upon which he may place some reliance, this does not relieve him of all care." *Blanchard* v. *Maine Central Railroad Co.*, supra.

As we study the record we conclude that plaintiff's negligence and want of care contributed to the occurrence of the collision; the verdict is against the law and the entry must be,

Motion granted.

DAVID LEMIEUX & CO. *vs.* GEORGE E. LETOURNEAU ET AL.

Androscoggin. Opinion April 21, 1931.

CONTRACTS. JURY FINDINGS.

The finding by a jury that a written contract has been abandoned and an oral agreement substituted must be supported by reasonably clear and convincing evidence.

The mere statement by the plaintiff that such was the case, met with square denial by defendant and not only uncorroborated but contradicted by every circumstance in the case and by irresistible inference drawn from documentary evidence, is not sufficient to sustain such a finding.

Written contracts may be rescinded or modified by the parties thereto, and new and different arrangements substituted for them; they may be abandoned

and oral contracts substituted for them; but they are not to be lightly set aside. The business of the world depends upon them.

In the case at bar, the force and effect of the evidence was apparently wholly misapprehended by the jury.

On general motion for new trial by defendants. An action in assumpsit upon an account annexed for work, labor, and materials furnished by the plaintiff in erecting a hotel for the defendants at Old Orchard, Maine. The issue involved the question of abandonment of a written contract made between the plaintiff and the defendants. The jury found for the plaintiff on this issue. A general motion for new trial was thereupon filed by the defendants. Motion sustained. Verdict set aside. New trial granted. The case fully appears in the opinion.

Benjamin L. Berman,
David V. Berman,
Jacob H. Berman,
Edward J. Berman, for plaintiff.
Waterhouse, Titcomb & Siddall, for defendants.

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

PATTANGALL, C. J. On motion. Action on account annexed for labor performed and material furnished in the erection of a hotel. Defendants plead the general issue and, as a matter of special defense, "That the several items in plaintiff's writ are embraced in the provisions of a written contract entered into by plaintiff and defendant."

Plaintiff admitted that such a contract was executed and that the building was partially constructed under it but claimed that, during the progress of the work, on account of certain controversies concerning changes in the plans, the written contract was abandoned and a new agreement made whereby it was to receive compensation on the basis of *per diem* charges for labor, actual cost of material and a reasonable charge for superintendence.

While specifically denying any abandonment of the contract, defendants admitted that in addition to the price stated therein,

plaintiff was entitled to some compensation on account of certain minor changes in the plans and specifications and, on the other hand, contended that they were entitled to credit because of having paid substantial bills for materials in order to relieve the property from lien claims.

It was apparent that however the principal contentions might be decided, the services of an auditor would be required in the final adjustment of the controversy, and the parties therefore agreed that the jury should be required to do no more than answer the question: "Was the written contract, dated October 19, 1928, between the plaintiff and defendants, abandoned?"; to which the jury answered, "Yes."

The conclusion thus reached is binding upon this court unless the evidence preponderates so strongly against it as to make it a moral certainty that the jury erred. *Inhabitants of Enfield* v. *Buswell et al*, 62 Me., 128; *Smith* v. *Brunswick*, 80 Me., 191.

There was no dispute as to certain facts. Defendants projected the building of a hotel. An architect was employed, plans were made and bids asked for. Plaintiff submitted a bid. The amount was very much larger than defendants desired to invest and the plans were materially changed with the idea of reducing the cost of the building. Plaintiff examined the new plans and specifications and reduced its bid to conform to the changed conditions. Its bid was accepted, a contract was executed, work was begun on the building in the latter part of October, 1928, and continued until December 15 following when it was suspended until February 4, 1929.

In February one man worked five days and one-half on the job. In March the labor bill amounted to $334.73. In April the work was resumed on a substantial scale and continued until June 6 when the building was completed.

Plaintiff's contract called for payment to it of $13,660.00. Including a payment of $500.00 on May 17, it received from defendants $10,632.75 and an order for $646.00 which it credited, making an admitted total credit of $11,278.75. In addition to these payments, defendants were liable for material bills amounting to four or five thousand dollars, so that unless plaintiff was entitled to a very substantial allowance for work and material not covered

by the contract, it had received all that was due it, assuming that the original contract remained in force.

It was plaintiff's contention that the contract was abandoned in April, 1929, by mutual agreement and the new arrangement heretofore referred to substituted.

Its account annexed totalled $18,026.02. In this was included contractor's profit, $1,493.18; bill of Pineland Lumber Company, $272.69; bill of A. N. Parent, $1,321.25; and bill of F. R. Conant Co., $3,048.74. There were also included per diem charges for superintendence at the rate of $15.00 per day, amounting to $670.00. These bills totalled $6,805.86. The Lumber Company bill, Parent's bill and Conant's bill had already been paid by defendants. There was then nothing due plaintiff on its own theory excepting its bill for superintendence and contractor's profit. On the other hand, on defendants' theory, plaintiff owed them between one and two thousand dollars.

It was obviously impossible to reach a final adjustment without the assistance of an auditor. All that could be determined in a trial before a jury was to fix a basis on which the accounting should be made. The plaintiff assumed the burden of proving the abandonment of the original contract and the substitution therefor of the agreement upon which it based its claim.

The record is voluminous. Including the exhibits, it fills three hundred and thirty-five pages, but the evidence directly bearing upon the question submitted to the jury is singularly brief.

Plaintiff's agent, Mr. Boucher, testified that defendant George E. Letourneau insisted on so many changes in the plans and interfered with the progress of the work to such an extent that he, Boucher, on behalf of the plaintiff, at some time in April informed Letourneau that plaintiff considered the contract breached by defendants and would go no farther on the job unless some satisfactory agreement was substituted for the original undertaking, which he says was done. Mr. Boucher was unable to fix the exact date when the new contract was made but from certain admitted facts, it must have been made on April 22, 1929, if made at all.

The changes in the plans were not extensive. They related principally to the work done in February and March, which, as has been indicated, was unimportant. Plaintiff could easily have kept

an account of them as extras and have been compensated for them under that head. They were not sufficient to create a situation which warranted it in rescinding the contract. Rescission could only be based on mutual agreement.

The case is bare of credible evidence that any such agreement was reached. Mr. Boucher's testimony on this point is not only squarely contradicted by Mr. Letourneau but stands without corroboration, and the record contains abundant evidence in support of defendants' position.

The building was erected under the supervision of an architect. Plaintiff drew money from time to time on architect's certificates.

On April 17, Certificate No. 6 was issued. It read as follows:

"$1000.00 CERTIFICATE No. 6 PLAN No. Apr. 17, 1929

To George E. Letourneau.

This is to Certify that under the terms of Contract dated ..... for work on Hotel at Old Orchard, Me. David Lemieux & Co., contractor for General Construction is entitled to the six payment amounting to .....

One thousand and 00/100 ..... Dollars.

Notice

Amount of Contract	$13660.00	
Additions to Contract		
Deductions from Cont.		Pulsifer & Eye, Inc.,
		Architects,
Total	$13660.00	163 Main St.,
		Lewiston, Me.
Am't this Cert.	$1000.00	
Previously paid	8132.75	GIBBS & PULSIFER, Architects
		Per A. G. Pulsifer.
Total paid to date	9132.75	
Balance	$4527.25"	

On April 22, the very date when Mr. Boucher says the contract was abandoned and the new contract made, he signed the following receipt on the back of this certificate:

"$1000.00 Lewiston, Me., 4/22, 1929.
RECEIVED FROM George E. Letourneau .....
One thousand and 00/100 ..... Dollars
as per enclosed Certificate. David Lemieux & Co.,
by J. C. Boucher."

On May 4 another certificate, exactly similar in form, was issued, authorizing the payment of $1,000 on the contract and receipted for, in like manner, by Boucher for plaintiff.

On May 17, a payment of $500 was made, certificate issued and receipt signed as before, the existence of the contract being again specifically recognized.

On May 10, the architect wrote plaintiff the following letter:

"David Lemieux & Co.,
110 Chestnut St.,
Lewiston, Me.
Gentlemen:

In your contract dated October 19, 1928 with Mr. George E. Letourneau you agreed to deliver the building substantially completed May 15th, 1929. We cannot see any material progress in your work since our last visit. Something will have to be done at once to speed up this work.

We refer you to article 21 and 22 of your contract. Your painter is one week late, also your outside stucco.

This letter is not intended to cause friction between the parties involved but to ask you to speed up the work and bring it to as early a closing as possible.

The concrete mix for the floor in the basement is too wet for a floor laid over sand as the extra water draws the cement to the bottom of the slab and will cause trouble. You will be held responsible for this floor curling or cracking. It is a deplorable fact that the entire plastering job is very unsatisfactory both as to materials and workmanship.

Very truly yours,

PULSIFER & EYE, INC."

On June 4, the architect wrote plaintiff the following letter:

"David Lemieux & Co.,
110 Chestnut St.,
Lewiston, Me.
Gentlemen:

In regard to the finishing of the building for Mr. George E. Letourneau at Old Orchard, Maine, there are a great many items that are being overlooked or being taken up at the wrong time, so that when they are done causes dirt and defaces the floors, etc., such as repairing the plastered walls and cleaning the plaster where it is dirty by your own workmen, also the fireplace. Washing the windows, your man started to clean the glass with an old pair of pants dry and scratched the glass badly. The doors that were hung wrong were patched badly and will have to be renewed. Some of the floors are wavy and imperfectly buffed.

The concrete floor in the basement was mentioned in our previous letter. It is still unsatisfactory.

The basement window openings are not straight and square. Mr. Boucher promised to correct this before the stucco was applied.

Very truly yours,
PULSIFER & EYE, INC.

Copy to: Mr. George E. Letourneau."

On June 21, the architect wrote plaintiff the following letter:

"David Lemieux & Co.,
110 Chestnut St.,
Lewiston, Me.
Gentlemen:

In regard to the final completion of the building for Mr. George E. Letourneau at Old Orchard, Maine.

Mr. Pulsifer visited the building Thursday, June 10th and there are many items that are not accepted. There are several broken lights of glass and many lights that are scratched badly.

The floors are rough and poorly buffed.

The concrete floor in the basement has been treated with a cement wash and dust, and tracks all over the house.

The painting is not acceptable and is hereby rejected.

There are several doors that are not accepted.

These items must be made good or an adjustment made before you can get the approval of the Architects.

Very truly yours,

PULSIFER & EYE, INC.

Copy to George E. Letourneau."

Not until after June 21 did plaintiff inform the architect of the claimed change in the contract. In fact, when, on May 17, it requested defendants to pay $500, it went to the bother and expense of taking the architect from Lewiston to Old Orchard to discuss the matter with Letourneau and order the payment.

Boucher's conduct in the light of the documentary evidence is so directly contradictory to his present claim that it is only possible to account for the verdict of the jury on the ground that it utterly failed to comprehend the force and bearing of the testimony.

Written contracts are not to be lightly set aside. The business of the world depends upon them. It is no exaggeration to say that if they had no binding force, orderly civilization, as we understand it, would end. True, such contracts may be rescinded or modified by agreement of parties and new and different arrangements substituted for them; but to assume such a proposition simply because one party to the contract asserts it, when every admitted fact contradicts the assertion and no single incident even tends to support it, would make such contracts of less value than the paper on which they are written.

Motion sustained.
Verdict set aside.
New trial ordered.

ADRIAN C. ROBINSON

vs.

CHARLES R. BUSWELL AND LESTER BUSWELL.

Penobscot. Opinion April 27, 1931.

SALES. WARRANTY. PLEADING & PRACTICE. R. S. 1930, CHAP. 96, SEC. 105.

To sustain a verdict against two defendants, evidence to support a verdict against one defendant only, with no inference from any proven fact tending to indicate liability on the part of both defendants, is not sufficient.

When no exceptions are taken to the charge of the presiding Justice, the Law Court may properly assume that the jury was fully instructed as to its right, under Chap. 87, Sec. 103, R. S. 1916 (Chap. 96, Sec. 105, R. S. 1930), to bring in a separate verdict in favor of one defendant.

In the case at bar, there was ample evidence justifying the jury in rendering a verdict against Charles R. Buswell, but a careful consideration of the record, reviewing it in the light most favorable to the plaintiff, discloses that a verdict against the other defendant, Lester Buswell, was not warranted.

On general motion for new trial by defendants. An action for breach of warranty as to the physical condition of cattle sold. Trial was had at the November Term, 1930, of the Superior Court for the County of Penobscot. The jury rendered a verdict for the plaintiff against both defendants in the sum of $891.66.

A general motion for new trial was thereupon filed by the defendants. Motion sustained. Verdict set aside. New trial granted. The case fully appears in the opinion.

P. A. Hasty,

B. W. Blanchard, for plaintiff.

P. A. Smith, for defendants.

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

FARRINGTON, J. Action for breach of a warranty that heifers sold by the defendants to the plaintiff were sound and free from communicable diseases. The case is before this court on general motion, after verdict for plaintiff against both defendants in the sum of $891.96.

It appears in evidence that the plaintiff owned eleven registered pure bred Jersey cows and heifers and seven grade Jerseys. In October, 1928, desiring to add to his herd, he purchased two two-year old grade Jersey heifers from Charles R. Buswell, one of the defendants, giving him a check for $50.00 and turning in a pure bred Jersey cow to complete payment.

On October 17, 1928, these two heifers were delivered to the plaintiff by Lester Buswell, the other defendant, who was the son of Charles R. Buswell, and were mingled with the rest of the herd in which the plaintiff testified that up to this time there had never been a case of contagious abortion. One of these heifers developed what was claimed to be contagious abortion, the plaintiff testifying that on December 8, 1928, that heifer dropped one dead calf "about half grown." He also testified that on February 14, 1929, the other heifer purchased of Charles R. Buswell dropped a seven months' calf which lived two hours. It also appears in the plaintiff's testimony that after having bred his pure bred Jerseys and his grade Jerseys "as near December 11th as I could," none of them "went the full term before they dropped their calves," and that since the purchase of the heifers of Charles R. Buswell he had lost twelve calves.

After a careful reading of the entire record, we are convinced that the jury was fully justified in rendering a verdict against Charles R. Buswell, one of the defendants, nor do we see any reason to disturb their conclusion as to the amount awarded as damages.

As to Lester Buswell, the other defendant, the record discloses a different situation.

In November following the purchase of the two heifers from Charles R. Buswell the plaintiff bought two more from Lester Buswell. These two were not mingled with the plaintiff's herd but were taken to his step-father's farm about a third of a mile away

and both were sold within a very few days from the time they were purchased.

In connection with the purchase of the first two heifers from Charles R. Buswell, the plaintiff testified in cross examination that he had "nothing to do with Lester Buswell" and that in the deal involving the purchase of the two from Lester he had "nothing to do" with the father. He also stated that the two purchased from Lester "did not damage my herd."

It is clear that whatever connection with the case the defendant, Lester Buswell, had, must have arisen from the sale of the first two heifers which the plaintiff had from Charles R. Buswell.

The record does not disclose that Lester Buswell himself at any time made any warranty with reference to these two heifers and the plaintiff testified positively that Lester was not present in the pasture when Charles R. Buswell made his statement of warranty, although both Buswells testified that he was present at that time. There is no direct evidence indicating that the father and son jointly owned these two heifers or any other heifers or cattle. One undisputed piece of evidence may fairly lead to the conclusion that Lester Buswell and his father were not conducting any joint operation in the cattle business, regardless of what their relations might have been in the meat business to which we will refer later. Charles R. Buswell testified that the plaintiff in October, when he selected for his herd the first two heifers from those in the pasture, was told that one of them belonged to Lester, the son, and that he, Charles R. Buswell, would sell her to him if he, the father, could buy her from the son, and that the son finally agreed to sell her to his father and did so sell her and that the father then closed the trade with the plaintiff for the two heifers, receiving as payment the $50.00 check hereinbefore mentioned, which the son testified was by his father endorsed to him in payment for the heifer sold by him to his father.

The father stated that a meat cart was driven by his son but that the son had nothing to do with the business. On cross examination he acknowledged that on the cart were the words "Charles R. Buswell & Son." The son, thirty-five years of age, testified that he was not in partnership with his father; that "I peddle meat for my father"; that he was "employed" by him; that he himself bought

and sold some cattle. In reply to a question, "What is that name 'C. R. Buswell & Son' on your cart for?", Lester replied, "I don't know. He (referring to his father) had it put there when I came home from the war," and stated that he had driven the cart for ten years.

The jury evidently, in reaching the verdict against the son, placed great weight on the words, "Charles R. Buswell & Son" on the cart. Outside of that evidence, which at best is entitled to little weight, save as to a possible joint ownership and interest in the meat business, there is in the record, in our opinion, not sufficient evidence of probative value upon which a verdict against Lester Buswell could be based. If joint interest and ownership in the meat business could be assumed as proved, that by no means signifies the same relationship in buying and selling cattle generally. After careful consideration of the record, we can not escape the conclusion that the evidence therein disclosed, reviewing it in the light most favorable to the plaintiff, does not justify this court in sustaining the verdict as to Lester Buswell.

We may well use the language of the court in *Day* v. *Scribner et al*, 127 Me., page 189: "While there may have been evidence, within the province of the jury to believe or disbelieve, which might have supported a verdict against one defendant alone, no fact in the evidence for the plaintiff, reading that evidence as a whole, nor inference from any proven fact, tended to indicate liability on the part of both defendants."

No exceptions were taken to the charge of the presiding Justice and this court may properly assume that the jury was fully instructed as to its right, under Chap. 87, Sec. 103, R. S. (1916) (Chap. 96, Sec. 105, R. S. 1930), to bring in a separate verdict in favor of this defendant, if it had so found. A verdict against both defendants having been rendered, the mandate will be,

Motion sustained.
Verdict set aside.
New trial granted.

P. M. ISRAELSON *vs.* CYRUS GALLANT.

Oxford. Opinion April 28, 1931.

WRITS. R. S. 1930, CHAP. 91, SEC. 19.

The statutory requirement, R. S. 1930, *Chap.* 91, *Sec.* 19, *that Superior Court writs shall be signed, means by an incumbent clerk. The absence of such a signature is a matter of substance which the power of amendment can not reach.*

On exceptions by defendant. An action of assumpsit on account annexed. The writ dated January 3, 1931, was signed by the Clerk of Courts whose office expired at midnight December 31, 1930. To the ruling of the presiding Justice permitting plaintiff to amend his writ and denying motion of defendant to dismiss the writ, defendant seasonably excepted.

Exceptions sustained. The case sufficiently appears in the opinion.

Albert Beliveau, for plaintiff.

Peter M. MacDonald,

Ralph T. Parker, for defendant.

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

DUNN, J. The writ in this case was made, with the intention of service, on January 3, 1931. The signature thereon was not that of the then clerk of the court (the Superior Court in Oxford County), but of him who had been clerk for the term which ended January 1, 1931.

The question is whether this rendered the writ void in the inception, or merely voidably defective, and amendable *nunc pro tunc*. On motion to dismiss, the trial Judge took the latter view. A motion to amend was allowed. Defendant excepted.

The statutory requirement, R. S., Chap. 91, Sec. 19, that Superior Court writs shall be signed, means by an incumbent clerk.

The absence of such a signature is a matter of substance which the power of amendment can not reach. *Pinkham* v. *Jennings*, 123 Me., 343.

Exception sustained.

GLADYS L. ANDERSON, ADM'X *vs.* CITY OF PORTLAND.

Cumberland. Opinion April 28, 1931.

PLEADING & PRACTICE. DEMURRER. MUNICIPAL CORPORATIONS.

A general demurrer will not lie to a declaration good in part, though bad as to a part divisible from the rest.

The liability of cities and towns for the negligence of their officers and agents depends upon which of their two classes of powers, that of sovereignty or merely corporate, is being exercised when the damage complained of is done.

A municipality maintaining a hospital for public welfare only, is not liable to a private action for neglect to perform, or the negligent performance of, duties legislatively imposed on it, unless right of action has been given by statute.

When, however, public use descends to private profit, even incidentally, liability attaches.

In the case at bar, the declaration sets out that in the particular instance the defendant city was not discharging duties partaking of a governmental power, but was conducting a business for a private profit. The declaration stated a cause of action and was good as against demurrer.

On exception by defendant. An action to recover damages for the alleged negligence of the defendant in transferring, while ill with a contagious disease, the plaintiff's intestate from defendant's isolation hospital to intestate's home. Defendant filed a demurrer to the declaration set forth in plaintiff's writ.

The demurrer was overruled by the presiding Justice and defendant thereupon seasonably excepted. Exception overruled. The case fully appears in the opinion.

Howard Davies, for plaintiff.
Harry C. Wilbur, for defendant.

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

DUNN, J. Defendant filed a general demurrer to the declaration in the writ, which had but a single count. The presiding Justice overruled the demurrer, and defendant saved the point. If, with reference to material allegations, the declaration be good in part, though bad as to a part divisible from the rest, the demurrer being to the whole declaration, and not to faulty part only, that part does not vitiate the pleading.

The action is on the case by the administratrix of the estate of an intestate decedent, in his lifetime a resident of the town of Cape Elizabeth, against the City of Portland, for damages claimed to have been sustained by the intestate, by reason of his injury through the negligence of the defendant, in wrongfully refusing to keep him any longer, as a private patient for remuneration, in the isolation hospital in that city, and in improperly removing him from the hospital to his home, when he was ill and enfeebled.

It is alleged, in substance, that on January 20, 1929, and before that day and afterward, the municipal corporation of Portland owned and maintained, chiefly as an activity for the public benefit, a hospital wherein it put and cared for persons afflicted with contagious diseases. Incidentally, is allegation, the defendant city there received and treated sick persons as private patients for reward or gain.

On the aforesaid twentieth day of January, the declaration continues, the now deceased intestate, who was then in another hospital in Portland, was found to be contagiously diseased, the diagnosis of his affliction being that of scarlet fever, upon which, by invitation of the defendant, intestate was taken to the isolation hospital. There, for remuneration, it is declared, defendant cared for him, as a private patient.

On January 22, 1929, in actionable negligence, is the essence of allegation, defendant refused longer to treat the intestate in the hospital, and sent him, in an ambulance, to his home. As a result,

the declaration reads, of the exposure and exertion proximately attributable to breach of duty on the part of the defendant, to which intestate was subjected, he suffered pain and incurred expense until he died. His death occurred February 5, 1929.

The case presents the perspective of the distinction between the governmental functions of a municipal corporation and its business or proprietary power. For torts in connection with the former, the municipality is not liable. In respect to the latter, being governed by the same rules as individuals or private corporations, there may be municipal liability.

The liability of cities and towns for the negligence of their officers and agents depends upon which of their two classes of powers, that of sovereignty or merely corporate, is being exercised when the damage complained of is done. The exact line of demarcation between the powers is oftentimes difficult to ascertain. *Lloyd* v. *New York*, 5 N. Y., 369, 55 Am. Dec., 347.

What, on trial of this case, the proof might show, or the recovery be, is not now of concern, sole inquiry being as to whether the declaration is good as against demurrer.

Scarlet fever is a disease dangerous to the public health. R. S., Chap. 22, Sec. 55. Municipalities may establish hospitals for the treatment of such diseases. R. S., Chap. 22, Sec. 102. The quarantined person, if of sufficient pecuniary ability, shall reimburse reasonable expenditures, not apportioned to the protection of the public health; otherwise, this shall be done by the town to which he belongs, but not as a pauper charge. R. S., Chap. 22, Sec. 78; *Ellsworth* v. *Bar Harbor*, 122 Me., 356.

Portland, it is averred, maintained, principally as an agency of government, an isolation hospital.

A municipality maintaining a hospital of that kind, only for the public welfare, is not liable to a private action for neglect to perform, or the negligent performance of, duties legislatively imposed on it, unless right of action has been given by statute. *Libby* v. *Portland*, 105 Me., 370.

But the declaration sets out, in effect, in the particular instance, the defendant city was not discharging duties partaking of the nature of a governmental power. On the other hand, assertion is, that realm was left, and one entered, albeit casually, in which the

rules which regulate the responsibility of business corporations are applicable.

Herein lies the test. *Libby* v. *Portland*, supra. When public use descends to private profit, even incidentally, liability attaches. *Larrabee* v. *Peabody*, 128 Mass., 561; *Libby* v. *Portland*, supra.

The declaration states a cause of action. The exception must be overruled.

Exception overruled.

GUILFORD & SANGERVILLE WATER DISTRICT

vs.

SANGERVILLE WATER SUPPLY CO. ET ALS.

GUILFORD & SANGERVILLE WATER DISTRICT

vs.

GUILFORD WATER COMPANY ET ALS.

Piscataquis. Opinion April 28, 1931.

EQUITY. SPECIFIC PERFORMANCE. PUBLIC UTILITIES. CORPORATIONS. ULTRA VIRES.

Corporations engaging in quasi *public occupations hold their franchises not only for their stockholders, but also in trust for the public. A* quasi *public corporation may not, without legislative consent, so deal with its property as to incapacitate itself from performing its public duties.*

A court of equity will not compel performance of an ultra vires *agreement.*

When a statute is revised, and a provision contained in it is omitted, the inference to be drawn from such a course of legislation is, that a change in the law was intended to be made. The omitted provision is not to be revived by construction.

In the case at bar, the Sangerville Water Company took over the contract of the original promoter, but the proposal to sell the water system went beyond the scope of its corporate power.

In the case of the Guilford Water Company, the authorization to convey its property was not such a vested right as was beyond the control of the legislature, and the legislation having been repealed, the bill to enforce conveyance was necessarily defeated.

On report. Bills in equity, brought by Guilford & Sangerville Water District against the Sangerville Water Supply Company et al, and Guilford Water Company et als, for specific performance of two contracts providing for the sale of the two water works to the plaintiff district. After evidence was taken out the cases were by agreement reported to the Law Court. Both bills dismissed. The cases fully appear in the opinion.

Laughlin & Gurney,
John S. Williams, for plaintiff.
W. B. & H. N. Skelton, for defendant.

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

DUNN, J. These two equity cases by the same plaintiff are here on report. In each instance, design is to enforce the conveyance of the plant of a public water service corporation to a water district. Theory and contention in such connection is that the district, having accepted the proposal, or offer, of the utility to sell its property (the proposal being contained in the contract with the town where the utility serves), is ready, able and willing to exercise the right of purchase. Although not a party to the contract, plaintiff district asserts that, at the making thereof, it was, prospectively, and since coming into existence in a subsequent year has actually been, a beneficiary thereunder. Besides the water company, the town, and the trustee of bonds of the company, are parties defendant.

Whether specific performance will lie is, on the report, the question material to issue. If not, the bill is to be dismissed; otherwise, the cause is to be remanded to determine the amount to be paid for the property which plaintiff seeks to acquire.

The cases are unlike on the facts.

The Sangerville Water Supply Company, its case being first in order, is successor to one Charles N. Taylor, a water-works promoter, who, on September 7, 1910, contracted in writing with the incorporated town of Sangerville to construct a sufficient system, and furnish water for fire and other public purposes, and to private users, through pipes and conduits, in that town. In the contract was a provision that the town, or a water district, in the event the Legislature should create such a district, might acquire the water works by purchase, at any time after their installation, at a price equivalent to construction cost, as the contract defined this term, plus fifteen per centum additional.

In relationship to instant inquiry, the Legislature may be said to have created plaintiff water district, by enlarging the area of an already existing district, in the year 1929. P. & S. L., 1929, Chap. 81.

Mr. Taylor, the promoter, never vended water in Sangerville. The defendant utility, although the contract does not appear to have been formally assigned to it, has furnished the water from the beginning. Claim is that such defendant assumed the contract, and that, as a consequence, it is bound to sell its property to the district. The situation is unaffected by legislation.

The bill is not sustainable.

Defendant corporation is engaging in a *quasi* public occupation. Such corporations hold their franchises not only for their stockholders, but also in trust for the public. *Stockton, Attorney General* v. *Central Railroad*, 50 N. J. E., 52; 24 Atl., 964. A public *quasi* corporation may not, without legislative consent, so deal with its property as to incapacitate itself from performing its public duties. Brice on Ultra Vires (2d Am. Ed.) 120; *Brunswick Gas Light Company* v. *United Gas, etc., Company*, 85 Me., 532. The evidence warrants finding that the water company took over the contract, but the proposal to sell the water system went beyond the scope of corporate power. A court of equity will not compel performance of an *ultra vires* agreement. *Phillips Village Corporation* v. *Phillips Water Company*, 104 Me., 103.

The bill must be dismissed.

In the case wherein the Guilford Water Company is a defendant, this, in brief, is what the record shows:

In 1909, P. & S. L., Chap. 226, the Legislature chartered the Guilford Water Company to establish and operate works, and distribute water for municipal and domestic purposes, in the town of Guilford. The charter authorized the water company, after ten years of operation, to convey its works to the town, or to a water district, at a price to be mutually agreed upon, or determined by arbitration.

The charter was accepted, organization effected, a contract entered into, under date of August 10, 1910, to install a water-works plant, and to furnish water for public purposes and private uses.

The contract provided, among other things, that on completion of the water works, or at any time thereafter, the town of Guilford, or a water district, in the event of its creation, should have the right to buy the original works, and all extensions and additions, for fifteen per centum more than cost. The charter of the water company, as before noted, authorized a sale only after ten years. 1909 P. & S. L., *supra.*

The Guilford Water District dates from 1911. It was created to supply water for public and other needs. 1911 P. & S. L., Chap. 201. The legislative act provided for the acquisition by the district of the Guilford Water Company's plant, in accordance with the proposal in the contract between the company and the town of Guilford, but was silent in respect to acquisition by the town.

On accepting the act, as it did in the same year, the district became a *quasi* municipal corporation. *Kennebunk, etc., District* v. *Wells*, 128 Me., 256.

Nothing further was done until 1929. The Legislature then amended the Act of 1911. 1929 P. & S. L., Chap. 81. The amendment changed the name of the district from Guilford Water District to Guilford & Sangerville Water District, extended the district boundaries to embrace a part of the territory of the town of Sangerville, repealed the provision respecting sale and purchase under the contract offer, and provided for the acquirement of the plant of the Guilford Water Company, and also that of the Sangerville Water Supply Company, by purchase (without reference to

either proposal or offer) or by exercise of the right of eminent domain. 1929 P. & S. L., *supra.*

On May 12, 1930, the Guilford & Sangerville Water District advised the Guilford Water Company of its desire to buy the property of the company on the terms of the contract offer. To this, the water company did not accede.

The contract offer, or proposal, of 1910, was *ultra vires.* On accepting its charter, the Guilford Water Company became bound to render to the public that service, the performance of which was the inducement of the grant. *New Orleans Gas Company* v. *Louisiana, etc., Company,* 115 U. S., 650, 29 Law ed., 516. The Guilford Company, like the Sangerville Company, could not, without legislative permission, leave itself without facilities to perform its public duties. *Phillips Village Corporation* v. *Phillips Water Company,* supra. Legislative consent, which the Guilford Company had, to sell after ten years, was not a consent to sell at once.

In establishing the Guilford Water District, in 1911, the Legislature, it is true, authorized that district, and it alone, to purchase in accordance with the contract of August 10, 1910. This, however, was nothing but an authorization which, all parties in interest assenting, the district might exercise before the expiration of the original ten-year period which the water company charter named, or might not exercise at all. *Denver Water Company Case,* 229 U. S., 123, 57 Law ed., 1101. The authorization was not such a vested right as was beyond the control of the Legislature. The State, having authorized the purchase, might revoke it.

The Legislature, in conferring that right in the first instance, used these words:

> "Section 2. Said water district is hereby authorized and empowered to acquire by purchase the entire plant, property and franchises, rights and privileges now held by the Guilford Water Company within said district, including all lands, rights of way, waters, water rights, dams, reservoirs, standpipes, pipes, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said Guilford Water Company and used or usable in supplying water in said district in accordance with the written contract entered into on the

tenth day of August, one thousand nine hundred and ten, by and between said Guilford Water Company and the inhabitants of the town of Guilford." 1911 P. & S. L., Chap. 201, *supra.*

The Section, as amended in 1929, reads:

"Sec. 2. Rights of Sangerville Water Company included. Said water district is hereby authorized and empowered to acquire by purchase the entire land, property and franchises, rights and privileges now held by the Guilford Water Company and the Sangerville Water Supply Company within said district, including all lands, rights of way, waters, water rights, dams, reservoirs, standpipes, pipes, machinery, fixtures, hydrants, tools and all apparatus and appliances owned by said Guilford Water Company and of said Sangerville Water Supply Company used or usable in supplying water in said district." 1929 P. & S. L., Chap. 81, *supra.*

When a statute is revised, and a provision contained in it is omitted, the inference to be drawn from such a course of legislation is that a change in the law was intended to be made. *Denver Water Company Case*, supra; *Buck* v. *Spofford*, 31 Me., 34, 36; *Knight* v. *Aroostook Railroad*, 67 Me., 291. The omitted provision is not to be revived by construction. *Pingree* v. *Snell*, 42 Me., 53.

The legislation on which the plaintiff relies having been repealed, the bill in the case of the Guilford Water Company is defeated.

Both bills dismissed.

MARION F. SKILLIN *vs.* HARLON L. SKILLIN.

York. Opinion May 4, 1931.

MOTOR VEHICLES. INVITED GUESTS. NEGLIGENCE. LIABILITY INSURANCE.

The failure of a passenger to warn the driver of an automobile of danger or lack of proper caution in his driving is not, in the absence of unusual circumstances, negligence as a matter of law.

The negligence of the driver is not imputable to the passenger.

Seeming modification arising out of the relation of principal and agent or by reason of joint control over operation of the car does not affect the principle of the above general rule.

The fact that a defendant carries liability insurance can neither enlarge nor restrict the right of a plaintiff to recover. The introduction of evidence of insurance for the purpose of influencing a decision on liability or damages is improper whether offered by a plaintiff or by a defendant.

In the case at bar, whether or not the plaintiff was barred from suing her parent because she was unemancipated was a question for the jury.

On exceptions by plaintiff. An action on the case to recover damages for injuries sustained by plaintiff who was a passenger in an automobile driven by her father and whose negligence she alleged occasioned the accident.

At the close of the plaintiff's testimony the defendant moved for a nonsuit on the ground of contributory negligence and the same was granted. The defendant then moved that the case be dismissed from the docket on the ground that it was against public policy and a fraud on the court which motion was granted. To these rulings plaintiff seasonably excepted.

Exceptions sustained. Case to be restored to the docket of the Superior Court. The case sufficiently appears in the opinion.

Hinckley, Hinckley & Shesong, for plaintiff.

Robinson & Richardson,

Willard & Willard, for defendant.

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

THAXTER, J. This is an action for personal injuries brought by a daughter against her father. At the conclusion of the plaintiff's evidence the defendant moved for a nonsuit. The motion was granted. The defendant then filed a motion that the case be dismissed from the docket because of fraud and collusion in bringing and in prosecuting the action. This was likewise granted. The case is before us on exceptions to these rulings.

The evidence shows that the plaintiff, who was more than twenty-one years old, was a passenger on the rear seat of an automobile driven by her father. On the front seat was a friend, Dr. Woodworth, and her mother sat on the rear seat with her. Just prior to the accident her father was driving on the left-hand side of the road, on which there was another automobile approaching. He delayed in turning to the right until close to the other car, and then turned so sharply that he lost control of his car, which went off of the road and overturned. For injuries received the plaintiff has brought suit. She admits that she gave her father no warning of the approaching automobile nor cautioned him that he was driving on the left side of the road.

The defendant contends that the nonsuit was properly ordered, because the plaintiff was guilty of contributory negligence in failing to warn her father, and because this was a joint enterprise and the negligence of the defendant is imputable to her. On neither ground can the nonsuit be sustained. We can not hold that the failure of a passenger to warn the driver of an automobile under such circumstances as this is negligence as a matter of law. In this jurisdiction the negligence of the driver of an automobile is not imputed to a passenger. It is unnecessary to discuss seeming modifications of this doctrine arising out of the relation of principal and agent, or by reason of a joint control by both occupants over the operation of the car. The facts of this case do not bring it within such variations of the ordinary rule. There is some suggestion by counsel for the defendant in their brief that the plaintiff could not maintain this action, because, though she was more than twenty-one years of age, she was in fact unemancipated. It is perhaps

sufficient to say that this is a question for the jury and not for the court.

The motion to dismiss the case from the docket was filed by counsel for the defendant as *amicus curiae*, and the basis of it is that the suit is fictitious, and in fact instigated by the father, he being insured, for the purpose of collecting money, which will eventually go into his own pocket.

The right of the plaintiff to recover depends on the ordinary rules governing liability for negligence, and on whether or not she was of age and emancipated. The fact of insurance can not enlarge or restrict such right. That she should not be prejudiced by reason of it seems such an obvious principle that we should not comment on it, were it not for the fact that counsel seem to argue strenuously to the contrary.

Evidence showing insurance was introduced, not by the plaintiff, but by counsel for the defendant. This court has repeatedly held that the offering of such testimony for the purpose of influencing a decision on liability or on damages is improper and reprehensible. The authorities may be found collected in the recent case of *Ritchie* v. *Perry*, 129 Me., 440. It is evidence entirely irrelevant to the issues in this case, and there is as much impropriety in its introduction by a defendant as by a plaintiff. The ruling of the trial court in dismissing the case from the docket can not be sustained.

Exceptions sustained.
Case to be restored to the docket of the Superior Court.

S. W. GOULD *vs.* SELDON S. HUFF.

Somerset. Opinion May 4, 1931.

CONDITIONAL SALES. EVIDENCE. R. S. 1930, CHAP. 123, SEC. 8.

The provisions of R. S. 1916, *Chap.* 114, *Sec.* 8 (*R. S.* 1930, *Chap.* 123, *Sec.* 8), *as to the form and execution of a conditional sales agreement are imperative. If unmet, no conditional sale is effected.*

As to third persons, a conditional sales agreement is a nullity unless duly recorded.

A conditional sales agreement is sufficiently definite and, when recorded, is constructive notice to third persons, if its description is such as will enable a third person, aided by inquiry which the instrument itself suggests to identify the property.

Persons with actual knowledge of the property covered by the mortgage stand in no better position than the mortgagor in respect to their right to object to an insufficient description.

Actual knowledge, which will cure insufficiency of description in a mortgage, is a question of fact for the jury, not for the court.

In the case at bar, the defendant would have been able upon reasonable investigation to have ascertained that the Holstein cow which he was about to purchase was included in the Holmes note given the plaintiff. That was all that was required to give the description *prima facie* validity and warrant the admission of the note in evidence.

The sufficiency of the description in the note made proof of the defendant's actual knowledge of its existence and the provision covered by it unnecessary.

On exceptions by plaintiff. An action of trover for the conversion of a Holstein cow. Trial was had at the January Term, 1931, of the Superior Court for the County of Somerset. To the ruling of the presiding Justice excluding a Holmes note in evidence for insufficiency of description and lack of preliminary proof of actual knowledge on the part of the defendant of its existence and the property covered by it, and to his direction of a verdict for the defendant, plaintiff seasonably excepted. Exceptions sustained.

The case fully appears in the opinion.

Gower & Eames, for plaintiff.

Merrill & Merrill, for defendant.

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

STURGIS, J. Trover for the conversion of a Holstein cow. The plaintiff claims title and right of possession under a conditional sales agreement given by one Millard Palmer, from whom the defendant bought the cow. The presiding Judge excluded the instrument for (1) insufficiency of description and (2) lack of preliminary proof of actual knowledge on the part of the defendant of the existence of the conditional sale and the property it included. To these rulings and the direction of a verdict for the defendant exceptions were reserved.

The Bill of Exceptions discloses that March 21, 1927, the plaintiff delivered four Holstein cows to Palmer upon receipt of his note and included agreement of the following tenor:

"$370 — Skowhegan Mar 21 1927
Four months after date I promise to pay to the order of S. W. Gould Three hundred and seventy dollars and interest
Value received The four Holstein cows for which the above note is given are to remain the property of said Gould until said note and interest is fully paid.
No. Due Millard Palmer"

After the instrument was duly and seasonably recorded, Frank T. Palmer, father of the conditional vendee, apparently with the latter's consent, sold one of the cows to the defendant. No part of the note has been paid. Demand was made before suit.

The instrument upon which the plaintiff relies is a conditional sales agreement and, as written, is usually termed in this state a Holmes note. To have validity as between the original parties, the agreement must be in writing and signed by the person to be bound thereby, and as to third persons, it must also be recorded. R. S. (1916), Chap. 114, Sec. 8.

The provisions of this statute as to the form and execution of a

conditional sales agreement are imperative. If unmet, no conditional sale is effected. *Pinkham* v. *Acceptance Corporation*, 128 Me., 139; *Holt* v. *Knowlton*, 86 Me., 456; *Boynton* v. *Libby*, 62 Me., 253. Context and reason demands the application of the same rule to the requirements of record. As to third persons, a conditional sales agreement is a nullity unless duly recorded. It seems to be generally accepted that the same rule of description which applies to a chattel mortgage determines the sufficiency of the description in a conditional sales agreement. *Furniture Co.* v. *Furniture Co.*, 120 Ga., 879, 48 S. E., 333; *Motor Co.* v. *Motor Co.*, 197 N. C., 371; *Cook* v. *Van Buskirk et ux*, 127 Ore., 206; *Stoll* v. *Schneider*, 158 Tenn., 341; *Rogers* v. *Whitney*, 91 Vt., 79.

A chattel mortgage is sufficiently definite and, when recorded, is constructive notice to third persons, if its description is such as will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property. Jones on Chattel Mortgages, Sec. 53 et seq; 5 R. C. L., 422; 11 C. J., 457; *Elder* v. *Miller*, 60 Me., 118; *Harding* v. *Coburn*, 12 Metc. (Mass.), 333; *Brooks* v. *Aldrich*, 17 N. H., 443; *Roundy Co.* v. *Kelley et al*, 99 Vt., 350.

Under this rule, a statement of the location of the goods enumerated in a mortgage is held to furnish a sufficient description, *Cayford* v. *Brickett*, 89 Me., 77; *Elder* v. *Miller*, supra; *Bank* v. *Farrar*, 46 Me., 293; *Burditt* v. *Hunt*, 25 Me., 419; so also a statement of the color and age of animals enumerated, *Connally* v. *Spragins*, 66 Ala., 258; *Bank* v. *Spicer*, 10 Ga. App., 503; *Rawlins* v. *Kennard & Son*, 26 Neb., 181; *Shum* v. *Claghorn*, 69 Vt., 45; or "a dark bay mare," *Burns* v. *Harris*, 66 Ind., 536; and "forty-one Berkshire hogs and sixty-five grain-sacks," *Knapp* v. *Deitz*, 64 Wis., 31; or the person owning or from whom the animals or goods were purchased, *Furniture Co.* v. *Furniture Co.* (Ga.), supra; *Nichols* v. *Hampton*, 46 Ga., 253; *Pettis* v. *Kellogg*, 7 Cush. (Mass.), 456; *Brooks* v. *Aldrich*, supra. And in *Simmons* v. *Carroll*, 232 Mass., 428, an enumeration of animals and articles mortgaged, with neither statement of location nor ownership, but with a provision that the mortgagor was not to remove the property from a given town without the consent of the mortgagee, was held sufficient.

The Holmes note here involved must be construed as an entirety, each part read in the light of the other so that, if reasonably possible, every part may be made effectual. 5 R. C. L., 422. The note part of the instrument states the date and the place of the transaction. The cows conditionally sold are those "for which the above note is given." "Holstein," in its adjective use, gives notice of breed and general color and markings. The sex of the animals is indicated. And with the attending presumption of title in the vendor and the inference of transfer of possession to the conditional vendee to be drawn from the instrument, the description can not be deemed insufficient as a matter of law. Aided by the inquiries which this recorded description suggests, the defendant would certainly have been able, upon reasonable investigation, to have ascertained that the Holstein cow in the possession of Millard Palmer, which he was about to purchase, was included in this Holmes note given the plaintiff. This is all that is required to give the description *prima facie* validity and warrant the admission of the note in evidence. The plaintiff should have been allowed to introduce his Holmes note and the question of fact as to the identity of the cow purchased by the defendant, as one of those included in the description of the note, submitted to the jury.

The defendant's second Exception needs brief consideration. Authorities support the view that a third person who has actual knowledge of the existence of a chattel mortgage and of the property affected thereby can not avail himself of any lack of sufficiency of description as could one to whom constructive notice alone was attributable. Persons with actual knowledge of the property covered by the mortgage stand in no better position than the mortgagor in respect to their right to object to an insufficient description. *Bank* v. *Freeman*, 171 U. S., 620; *Fenby* v. *Hunt*, 53 Wash., 127; 11 C. J., 460 and cases cited. This rule may well be applied to conditional sales agreements.

Actual knowledge, which will cure insufficiency of description in a mortgage is a question of fact for the jury, however, not for the court. It bears directly upon a vital issue between the parties. It is not a preliminary question upon which the admissibility of the mortgage instrument itself depends. The proper procedure in such a case, we think, is to admit both the mortgage and facts bearing

on the defendant's knowledge, leaving the question of the sufficiency of the proof for the jury under proper instructions. Noncompliance with this rule of evidence, in the trial of this cause, was error, but without prejudice to the plaintiff. The sufficiency of the description in the note made proof of the defendant's actual knowledge of its existence and the property covered by it unnecessary.

The Exception to a directed verdict requires no discussion. The exclusion of the Holmes note entitles the plaintiff to a new trial. The entry is

Exceptions sustained.

JAMES D. MAXWELL, TRUSTEE *vs.* DELBERT W. ADAMS.

Kennebec. Opinion May 5, 1931.

MONEY HAD & RECEIVED. PLEADING & PRACTICE. FRAUDULENT CONVEYANCES.

An action for money had and received is a comprehensive action founded on equitable principles, and lies when one person has in his possession money which in equity and good conscience belongs to another; or if, though not having the money, he has paid it out with knowledge of the plaintiff's right to it.

Fraud is not to be presumed and the proof of it should be full, clear, and convincing, but this does not mean that fraud can not be proved by circumstantial evidence.

A transfer of property from a husband to a wife without more carries with it no implication of fraud. When, however, such a transaction is made under unusual conditions, for no apparent reason or by a man in failing circumstances or on the eve of bankruptcy it will be carefully scrutinized and may require an explanation by the parties.

When a plaintiff, who is seeking to set aside a transfer as fraudulent, proves that it was made by a debtor on the eve of bankruptcy, that it involved a payment of money to a near relative, that it was made secretly or in an underhanded way, he has made out a prima facie *case. He does not have to go farther and prove that no consideration in fact passed. Under such circumstances the burden of establishing good faith, of overcoming the presumption of such evidence, is on a defendant who was a participant in the affair.*

On a general motion a jury's verdict will not be set aside unless manifestly wrong or the result of bias or prejudice.

In the case at bar, the circumstances of the transfer of the money to Mrs. Quirin unexplained make out a *prima facie* case of fraud. The payment was made secretly; it was made on the eve of bankruptcy; it was made to the wife of the owner of the business; and it was made entirely out of the usual course of business.

The defendant was chargeable with knowledge of the fraudulent character of the payment. No other possible conclusion could be drawn from such a strange proceeding as this on the part of Quirin than that he was endeavoring to conceal the ultimate destination of the money from someone entitled to know about it. Defendant's admission that he failed to use his faculties to discern that which should have been clear to the veriest novice in business affairs can not save him from liability.

On exceptions and general motion for new trial by plaintiff. An action for money had and received. To the admission and exclusion of certain testimony, plaintiff seasonably excepted, and after the jury had rendered a verdict for the defendant, filed a general motion for new trial. Motion alone considered. Motion sustained. New trial granted. The case fully appears in the opinion.

Maurice E. Rosen, for plaintiff.

Cook, Hutchinson, Pierce & Connell,

Perkins & Weeks, for defendant.

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

THAXTER, J. This case is before us on exceptions by the plaintiff to the admission and exclusion of certain evidence and on a general motion for a new trial. We shall consider only the motion. The declaration is the common omnibus count, but is restricted by the specification to an allegation for money had and received. The plaintiff is the trustee in bankruptcy of E. C. Nichols Dry Goods Co., and has brought this action to recover the sum of $13,438.41, which he claims was paid improperly and without authority by the bankrupt to the defendant just prior to bankruptcy. The case was submitted to the jury, and there was a verdict for the defendant.

The bankrupt was a corporation engaged in business in Bangor.

Its sole stockholder was a man by the name of William E. Quirin, who was its president and treasurer. He had been for many years a close personal friend of the defendant Adams, who ran a similar business in Augusta. Adams had at times loaned Quirin money, had bought goods from him, and sold to him. In October, 1928, Adams learned from Quirin that he was planning to close out his business, and bought some of the fixtures, which had been used by the Nichols Co. in carrying on its business. These, he states, he bought from Quirin, because Quirin told him that they belonged to him personally. Sometime in the latter part of November, 1928, Quirin called Adams on the telephone, and asked him if he would be willing to send to Quirin's wife checks for $13,000 if Quirin should send them to him. Without asking for or receiving any explanation for this unusual request Adams agreed, believing, as he says, that the transaction was an entirely proper one. On November 28 he received two certified checks of the E. C. Nichols Dry Goods Co., payable to his order, one for $426.40 and the other for $6,500. Accompanying these was a memorandum addressed to Adams, stating that they were in payment of $6,500 on principal and $426.40 for interest. Adams deposited these checks to his personal account, drew his own check to the order of Quirin's wife for $6,926.40, and forwarded it to her at Manchester, New Hampshire. On December 10 he received from Quirin another certified check of the Nichols Company for $6,511.91, which he likewise deposited to his own account and forwarded his check to Quirin's wife for a like amount. At the time of the receipt of these checks by Adams the Nichols Co. owed him nothing. In January, 1929, the Nichols Company went into bankruptcy, and the plaintiff was appointed trustee. He has brought this action to recover back the payments made to Adams, apparently on the ground that they were fraudulent as to creditors. There is no evidence in the record that Adams in any way profited by the transaction.

The plaintiff's action is one for money had and received. This is a comprehensive action founded on equitable principles, and ordinarily lies, when one person has in his possession money, which in equity and good conscience belongs to another. *Webb* v. *Brannen*, 128 Me., 287; *Eldridge* v. *May*, 129 Me., 112. The action can likewise be maintained, even though the defendant does not actually

have the money in his possession, if, having had it, he has paid it out with knowledge of the plaintiff's right to it. *Hindmarch* v. *Hoffman*, 127 Pa., 284.

If the plaintiff is to recover in this case, he has the burden of establishing two propositions, first that the payment made by the Nichols Company to Grace H. Quirin was a fraud on its creditors, which the trustee in bankruptcy would have a right to recover back from her, and secondly that the defendant Adams, who participated in the transfer of the money, had notice of the fraudulent nature of the transaction.

The principle involved in this case is quite different from that enunciated in *Gilman* v. *F. O. Bailey Carriage Co., Inc.*, 125 Me., 108; *Boyle* v. *Lewiston Trust Co.*, 126 Me., 74, and in *American Lumber Sales Co.* v. *Fidelity Trust Co.*, 127 Me., 65. These cases hold that one, receiving a corporation check or note from a corporate officer payable to his own order and appropriated by him to his own uses, is chargeable with notice of his want of authority to issue the check or note for such purpose. In the case at bar the authority to issue the check is not in issue. The question is whether the payment to Mrs. Quirin was made to hinder, to delay, or to defraud creditors, and whether the defendant had notice of that fact. The case is analogous to that of *Boyle* v. *Clukey*, 126 Me., 443, in which this court held that the mere fact that a deed of a corporation conveyed property to its treasurer, which he in turn conveyed to a bank as security for a loan, was not alone sufficient to give notice to the bank that the conveyance was fraudulent as to creditors. It was merely evidence which, coupled with other circumstances, might be sufficient.

This case is before us on a general motion for a new trial. The only question therefore which we have to consider is, has the plaintiff so clearly sustained the burden of proving that the payment to Mrs. Quirin was fraudulent and that the defendant had notice of its character, that a verdict for the defendant is manifestly wrong.

Fraud is not to be presumed, but must be proved; and it is usually said that such proof should be clear, full, and convincing. *Frost* v. *Walls*, 93 Me., 405; *Grant* v. *Ward*, 64 Me., 239. This maxim does not, however, mean that in an action based on fraud

we can not as in other instances draw inferences from known or admitted facts. *State* v. *Kimball*, 50 Me., 409, 420. If it were not so, it would seldom be possible to establish fraud at all, for the proof of it ordinarily lies in circumstantial evidence. The intent with which an act is done is ordinarily the material factor. That is not customarily evidenced, certainly where the purpose is fraudulent or unlawful, by an open avowal of it; but can only be deduced from acts and circumstances. When, not one but several of these, all point in one direction their force is often compelling. *Ingersoll* v. *Barker*, 21 Me., 474.

In the case which is now before us what circumstances are there which show us Quirin's purpose in making this payment of more than $13,000 from the treasury of his company? The payment was made secretly; it was made on the eve of bankruptcy; it was made to his wife; and it was made entirely out of the usual course of business. Each one of these evidentiary facts points the finger of suspicion at the transaction; all of them unexplained are conclusive evidence of fraud. Such has been the consistent holding of courts from earliest times.

In *Tuynes Case*, 3 Coke, 80 b, decided two hundred and fifty years ago, we find the following language: "And therefore Reader, when any gift shall be made to you in satisfaction of a debt by one who is indebted to others also; 1. Let it be made in publick manner, and before the neighbors, and not in private, for secrecy is a mark of fraud."

See to the same effect 27 Corpus Juris, 494.

Transactions, which are legitimate, are not ordinarily conducted out of the usual routine of business. When a circuitous course is followed to do that which customarily would be done openly as an ordinary business affair, we are justified in asking for an explanation. The Maine Insolvent Law was but declaring a common law doctrine, when it provided that a transfer made out of the usual course of business was *prima facie* fraudulent. *Mathews* v. *Riggs*, 80 Me., 107.

In the words of the United States Supreme Court such a transaction "is *prima facie* evidence of fraud, and throws the burden of proof on the purchaser to sustain the validity of his purchase." *Walbrun* v. *Babbitt*, 16 Wall., 577, 581.

See also *Nisbet* v. *Quinn*, 7 Fed., 760; 32 L. R. A., note page 58; 12 R. C. L., 542.

It is true that proper and legitimate business transactions take place between husbands and wives. With changes in social and economic conditions, we are perhaps more likely to see such today than in the past. A transfer of property from one to the other without more carries with it no implication of fraud. *Grant* v. *Ward*, 64 Me., 239. When, however, such a transaction is made under unusual conditions, for no apparent object, or by a man in failing circumstances or on the eve of bankruptcy, it will be carefully scrutinized and may require an explanation by the parties.

In *Robinson* v. *Clark*, 76 Me., 493, we find the following language at page 494 with reference to a conveyance by a husband to a wife: "Transactions of this kind between husband and wife are to be closely scanned. There are between them unusual facilities for fraud. The absorption by her of his property, against the right of existing creditors, is not allowed."

In *Woodbridge* v. *Tilton*, 84 Me., 92, the court said, page 95: "Conveyances from husband to wife are to be closely scanned when the rights of his creditors are concerned."

In *Phinney* v. *Holt*, 50 Me., 570, 575, Judge Walton uses the following language: "When it can be shown that a party has disposed of *all* his attachable property, some progress has been made in establishing such a fraud. If in addition to this it can be shown that it has been disposed of to a relative, the evidence is strengthened, for experience shows that such transfers are oftener made to relatives than strangers."

That the language in these cases from our own jurisdiction is but an expression of a doctrine universally adopted can be seen by a glance at the following authorities. *Bank of Colfax* v. *Richardson*, 34 Ore., 518; *Butler* v. *Thompson*, 45 W. Va., 660; *Burt* v. *Timmons*, 29 W. Va., 441; *Kansas Moline Plow Co.* v. *Sherman*, 3 Okla., 204; *Flint* v. *Chaloupka*, 78 Neb., 594; *Kaine* v. *Weigley*, 22 Pa., 179. See also the cases cited in the note, 90 Am. State Rep., 500.

When a plaintiff, who is seeking to set aside a transfer as fraudulent, proves that it was made by a debtor on the eve of bankruptcy, that it involved a payment of money to a near relative, that it was

made secretly or in an underhanded way, he has made out a *prima facie* case. He does not have to go farther and prove that no consideration in fact passed. Under such circumstances the burden of establishing good faith, of overcoming the presumption of such evidence, is on a defendant who was a participant in the affair.

In the case of *Page* v. *Smith*, 25 Me., 256, the defendant was charged as trustee under a provision of the statute which provided that "if any person, summoned as trustee, shall have in his possession any goods, effects or credits of the principal defendant, which he holds under a conveyance that is fraudulent and void, as to the creditors of the defendant, he may be adjudged a trustee on account of such goods, effects or credits." The evidence showed a conveyance by a man in embarrassed circumstances to his brother, the defendant, who claimed that the conveyance was for a valuable consideration. The court held that it was the defendant's duty to have put his brother on the stand to explain the transaction, and that having failed to do so, he did not overcome the *prima facie* case made out by the plaintiff. The court said, page 266: "These circumstances present a case so unlike any thing that would ordinarily occur in a *bona fide* transaction, that, to say the least of it, should excite strong suspicions of fraud. And when such is the case, if the party implicated be in fact innocent, and has the means of making his innocence appear quite within his power, and does not do it, it is but reasonable, that the conclusion should be against him."

Seavey v. *Seavey*, 114 Me., 14, is a case of an attempt to hold the defendant as trustee under a similar statute to that discussed in *Page* v. *Shaw*, supra. The court said, page 16: "But when one summoned as trustee attempts to account for money, admittedly received from the defendant, as a payment on account of indebtedness, we think he is bound, if inquired of on examination, to make a full, direct and explicit disclosure of the character and amount of the claimed indebtedness, in order that the court may be able to judge whether the relation of debtor and creditor actually existed, and, if so, the extent of the indebtedness. Doubtful, indefinite and sweeping statements do not satisfactorily supply the omission of details and particulars."

In *Rollins* v. *Mooers*, 25 Me., 192, the question was whether a

conveyance was fraudulent as to creditors. The court said, pages 199-200: "But it is insisted, on the part of the defendant, that the deed to Smith and Getchell was fraudulent and void as against those creditors. It appears that their debts accrued before that deed was made; that the plaintiff was then greatly embarrassed, and indeed insolvent; it was a conveyance of all his real estate, so far as appears, whereby his creditors might be defrauded; it was to two individuals, neither of whom, so far as appears, wanted the estate for his own occupation; and both were his sons-in-law; and he was permitted to continue his occupation afterwards as before. These circumstances are recognized as badges of fraud. Newland on Contracts, 372; *Jackson* v. *Mather*, 7 Cowen, 301; *Gunn* v. *Butler*, 18 Pick., 248. By the agreement of the parties we are authorized to draw such inferences from the facts proved and legally admissible as a jury might. From this evidence a jury, in the absence of any proof on the part of the plaintiff of the payment of the consideration expressed in the deed, would be legally authorized to infer that the conveyance, as against those creditors, was fraudulent."

Where there are facts such as are disclosed in the case at bar, indicating that a fraudulent transaction has taken place, there is no injustice in demanding that those who participated in it should establish that it was in fact *bona fide*. As was said by the court in *Kaine* v. *Weigley*, supra: "It is no hardship upon an honest man to require a reasonable explanation of every suspicious circumstance, and rogues are not entitled to a veto upon the means employed for their detection."

To the same effect as the above authorities illustrating the burden on the defendant are the following: *Bank of Colfax* v. *Richardson*, supra; *Butler* v. *Thompson*, supra; *Burt* v. *Timmons*, supra; *Flint* v. *Chaloupka*, supra; *Linn* v. *Brown*, 182 Ky., 166, 171; *Trice* v. *Rose*, 79 Ga., 75; *Riker* v. *Gwynne*, 113 N. Y. S., 404; *Winslow* v. *Staab*, 233 Fed., 305.

There is no dispute that the payment by Quirin to his wife through the medium of the defendant was made on the eve of bankruptcy. It seems clear that the method employed was for the purpose of concealment. In the absence of any evidence that the intent was to discharge an indebtedness from the corporation to her, it must be held to have been in fraud of creditors. Adams was an

active participant in transmitting the corporation's money to Mrs. Quirin. The question is did he have notice of the fraudulent nature of the transaction.

The defendant is a man of large experience in business affairs. When Quirin called him up and asked him to transmit the money, Adams never inquired of him the reason for this strange request. He received no explanation and asked for none. The same suspicions that come to the mind of an outsider must have been present to him. What other possible conclusion could be drawn from this strange proceeding than that Quirin was endeavoring to conceal the ultimate destination of these funds from someone entitled to know about them? A favor of this kind, which is nothing more nor less than a substitution of one person's check for that of another, might be asked by one friend of another, if he wished to conceal from the recipient the source from which the payment came. This obviously was not the situation here. Such an arrangement might be made because of a temporary shortage of funds to meet the first person's checks; but clearly Adams knew that such was not the fact, for the checks of the corporation payable to his order were certified. Furthermore, a memorandum came with the first remittance addressed to Adams indicating that it was in payment of a note. Adams held no note of the corporation. How does he explain this circumstance, which clearly indicates an attempt to deceive someone? He merely says that he didn't see it.

Adams admits that he was taken in, that he was a dupe of a personal and business friend. How does he account for his credulity? He says that it never occurred to him for an instant that the Nichols Company was not in a solvent and sound condition. Yet he knew that Quirin was the owner of it, to whom he had lent money but a short time before with which to make a settlement with his creditors. He knew that Quirin was closing out the business; and he had himself bought some of the fixtures. He had sent merchandise to Quirin's company not on a sale so that the relation of debtor and creditor arose between them, but on consignment to enable him to repossess the property in case of trouble. Beside the suspicion, which should have been aroused by the knowledge that Quirin by a circuitous route was sending corporate funds to his wife, the defendant had knowledge of facts, which caused him to

hesitate about extending credit to Quirin's company. Adams says that Miss Pomeroy, an honest employee of the Nichols Company, who issued the checks, suspected nothing wrong. The testimony indicates that this is true; but there is no evidence that Miss Pomeroy knew the important fact, which Adams knew, that this money was eventually to be paid to Mrs. Quirin. The circuitous method of payment may well have been adopted to conceal the true facts from her as well as from creditors.

Two other contentions of the defendant should be considered. He claims that there is evidence to show that Mrs. Quirin was a creditor of the corporation, and that this payment was to discharge that debt. The only testimony supporting such contention is from an accountant who testified that he believed that Mrs. Quirin held notes of the company for a considerable amount. We are left completely in the dark, if there were any indebtedness, as to the amount of it, and whether it was in fact outstanding at the time of the payments to her. Vague testimony of this kind does not meet the requirement laid down by Chief Justice Savage in *Seavey* v. *Seavey*, supra, that there should be "a full, direct and explicit disclosure of the character and amount of the claimed indebtedness." Furthermore there is no evidence in the case that Adams knew of any indebtedness owed by the bankrupt company to Mrs. Quirin. Counsel for the defendant further contend that the admitted facts — the insolvency of the company, and the method of payment to Mrs. Quirin — were consistent with an attempt merely to give Mrs. Quirin a preference. We construe such circumstances rather as evidence of a fraudulent payment than as indicating an attempt to prefer a *bona fide* creditor. Had it been a preference there was no need of concealment, for such a payment, under the provisions of the National Bankruptcy Act, could only be recovered back from the creditor if she had reasonable cause to believe that its effect was to give her a preference. Under such circumstances one obvious consequence of the attempt at concealment would have been to have charged her with notice of its preferential character and to have injured her chances of retaining it.

We can not ignore the fact that the defendant at the bankruptcy hearing at Bangor, when called on for an explanation of his receipt of the corporation checks and of his transmittal of the money

to Mrs. Quirin, refused to answer, because as he said his answer might have incriminated him. We feel that this is significant of a state of mind. Excuses are offered because of his inexperience in court procedure, because he acted on advice of counsel; but neither inexperience, confusion, nor counsel's advice can account for an innocent man's willingness to take refuge behind such a defense.

There is no rational explanation of the defendant's conduct. Counsel practically concede this when they say in their brief that "Adams very apparently was as innocent as a newborn babe and acted perhaps with as little wisdom as might a child of tender years." Such an admission hardly constitutes a defense. In the law of negligence we have a somewhat analogous situation. A person is required under certain circumstances to look and to listen or he will be held negligent. He must, however, look and listen not only with eyes and ears but with mind as well, and will be held accountable for a failure to see that which is perfectly obvious. So here the defendant's mere assertion of honest intent, his admission that he failed to use his faculties to discern that which was clear to the veriest novice in business affairs, can not save him from liability.

We reaffirm the doctrine, so often expressed by this court, that on a general motion a jury's verdict will not be set aside unless manifestly wrong or the result of bias or prejudice. *Hatch* v. *Dutch*, 113 Me., 405, 411. We feel here that it is manifestly wrong. Quite possibly the jury were influenced by the fact that the defendant admittedly received no profit from the transaction.

Motion sustained.
New trial granted.

WILLIAM RAFFERTY, PETITIONER FOR HABEAS CORPUS

vs.

JAMES E. HASSETT
KEEPER OF THE JAIL FOR CUMBERLAND COUNTY.

Cumberland. Opinion May 9, 1931.

HABEAS CORPUS. PLEADING & PRACTICE. R. S. 1930, CHAP. 144, SEC. 18.

Habeas corpus lies to release from imprisonment one who was committed as a result of a sentence from which he seasonably undertook to appeal, the magistrate denying him the right.

In the case at bar, the petitioner in accordance with the provisions of Sec. 18, Chap. 144, R. S. 1930, within twenty-four hours after the sentence was imposed upon him attempted to appeal to the Superior Court. This right of appeal was, without warrant of law, denied him. The commitment which followed such denial was illegal.

On exceptions by petitioner. A petition for a writ of habeas corpus. The petitioner who had been on probation and suspended sentence was committed to jail and his right of appeal from the decision of the Judge of the Municipal Court denied. At the hearing on the writ of habeas corpus the presiding Justice ruled that the imprisonment was lawful and dismissed the writ, to which ruling petitioner seasonably excepted. Exceptions sustained. Prisoner discharged. The case fully appears in the opinion.

Bernstein & Bernstein, for petitioner.

Walter M. Tapley, County Attorney.

Albert Knudsen, Assistant County Attorney, for the State.

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

PATTANGALL, C. J. On exceptions. Petitioner charged with a violation of the prohibitory law was arraigned before the Munici-

pal Court of Portland, plead not guilty, was tried and adjudged guilty. The case was continued for sentence indefinitely. The following additional entry appears on the docket, "Probation one year, on condition that he return to his home in Pittston, Pennsylvania."

Two months later, petitioner was surrendered into court by probation officer for alleged breach of probation. He was then sentenced to pay a fine of $200 and costs, also to serve two months in jail and in default of payment of fine six months additional imprisonment.

From this sentence, petitioner claimed the right to appeal, which was denied him. He was forthwith committed to the county jail, where he is now confined.

Immediately thereafter, he filed his petition for writ of habeas corpus on the following grounds:

"That the said restraint and imprisonment of your petitioner is illegal and that illegality thereof consists of the following, to wit:

(a) That the said Court lost jurisdiction of said cause and of your petitioner when on the aforesaid third day of January, 1931, it continued said cause for sentence indefinitely.

(b) That said Court lost jurisdiction of said cause and of your petitioner on said third day of January, 1931, when it placed your petitioner on probation on condition that he return to his home in Pennsylvania, thereby placing your petitioner beyond the jurisdiction of the probation officer.

(c) That the terms of said probation were void because they exceeded the powers of the said Court as granted to it under Section 5 of Chapter 346 of the Public Laws of Maine of 1905.

(d) That the aforesaid terms of probation being void, your petitioner was unlawfully arrested for breach of said probation.

(e) That the said Court, having lost jurisdiction of your petitioner in said cause, was without legal authority and power to impose the aforesaid sentence.

(f) That sentence having been imposed for the first time

on said ninth day of March, 1931, your petitioner was denied the right of appeal granted to him by Section 18 of Chapter 144 of the Revised Statutes of Maine.

That your petitioner was on the aforesaid date of March 9th, 1931, able to furnish good sureties with sufficient property in a reasonable amount, ready and willing to give bail, and that your petitioner is now ready and willing to furnish such sureties."

Hearing was had, petition denied, and writ dismissed. Exceptions were taken.

For the purpose of deciding this case, it is necessary to consider but one of the many novel and interesting points raised by the petition.

Sec. 18, Chap. 144, R. S. 1930, provides that "Any person aggrieved by the decision or sentence of a magistrate may within twenty-four hours after such sentence is imposed, Sunday not included, appeal therefrom to the next Superior Court in the same county."

This right was, without warrant of law, denied the petitioner who sought at the earliest opportunity to avail himself of it. The commitment which followed such denial was illegal.

Exceptions sustained.
Prisoner discharged.

MAUDE DEEHAN HILTZ, APPELLANT FROM DECREE OF PROBATE JUDGE IN RE JOHN E. DEEHAN'S WILL.

Kennebec. Opinion May 12, 1931.

WILLS. BURDEN OF PROOF. COSTS.

In the probate of a will the burden of proof in respect to the execution of the will and the sound and disposing mind and memory of the testator, is upon the proponent.

On the issue, however, of undue influence and fraud the burden of proof is upon the party alleging the same.

"Costs" as the statute uses the term, means taxable costs as ordinarily taxed, and does not include attorney's fees. The whole subject of costs in a probate appeal lies in judicial discretion.

In the case at bar, the proponent sustained the burden of proof resting upon him. On the issue of undue influence and fraud, the appellant failed to sustain the burden of proof resting upon her. Judicial discretion in the matter of costs was not abused.

On exceptions by appellant from the decree of the Supreme Court of Probate allowing the will of John E. Deehan late of Augusta, deceased testator. Exceptions overruled. The case fully appears in the opinion.

Joseph E. F. Connolly,

Ralph W. Farris, for proponents.

McLean, Fogg & Southard, for appellant.

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

DUNN, J. A signed and witnessed instrument, bearing date January 27, 1930, was approved and allowed by the Probate Court in Kennebec County, as and for the last will of John E. Deehan, late of Augusta, deceased.

A sister of the decedent, she being one of his heirs at law, appealed from the decree of the Probate Court to the Superior Court, as the Supreme Court of Probate. R. S., Chap. 75, Sec. 31. The questions of compliance with the statutory requirements in the execution of the will, of testamentary capacity, and of undue influence and fraud were those presented to the Appellate Court on trial of the contest.

The decree of the Probate Court was affirmed. Besides, in precaution, the Supreme Court of Probate itself took proof, and admitted the propounded document to probate. Costs were denied the appellant. The case was then remitted for further proceedings. Appellant took exceptions. The exceptions have been argued.

Allowance of the will depended on the sufficiency of the evidence. In respect to execution of the will, and sound and disposing mind

and memory, the proponent had the burden of proof. *Chandler Will Case*, 102 Me., 72. Appellant had the burden in the issue of undue influence and fraud. *Chandler Will Case*, supra. The evidence, the court found, sustained the burden resting on the proponent. The appellant, it was found, failed to sustain the burden resting upon her.

The findings are not disturbable. Proof supported the burden of the proponent. The evidence introduced by the appellant was so meager as to have been most negligible.

It remains to consider whether appellant was entitled to costs. The power to award costs in contested probate cases does not exist independently of the statutes. The relevant provision of the statute is that "in all contested cases in the original or appellate court of probate, costs may be allowed to either party, to be paid by the other, or to either or both parties, to be paid out of the estate in controversy, as justice requires." R. S., *supra*, Sec. 38.

"Costs," as the statute uses the term, means taxable costs as ordinarily taxed, and does not include attorney's fees. *Brown* v. *Corey*, 134 Mass., 249. The whole subject of costs in matters of this kind lies in judicial discretion. *Peabody* v. *Mattocks*, 88 Me., 164. In the present case, discretion was not abused.

Exceptions overruled.

NETTIE B. YORK *vs.* CLARA E. MCCAUSLAND ET ALS.

Cumberland. Opinion May 12, 1931.

EQUITY. TITLE TO REAL ESTATE.

A court of equity is not the proper tribunal in which to try out the question of title to real estate when the sole question involved is the location of lines on the face of the earth.

To allege and claim a cloud on title is not sufficient of itself to give a court of equity jurisdiction. The proper forum to try title to land is a court of law, and this jurisdiction can not be withdrawn at pleasure and transferred to a court of

equity under the pretense of removing clouds from title. It is not the business of equity to try titles and to put one party out and another in.

Equity will not take jurisdiction where the remedy at law is plain, adequate and complete. In all cases where the plaintiff holds or claims to have a purely legal estate in land, and simply seeks to have his title adjudicated upon, or to recover possession against an adverse claimant who also relies upon an alleged legal title, there being no equitable feature of fraud, mistake, or otherwise, calling for the application of equitable doctrines or the granting of peculiar equitable reliefs, the remedy at law is adequate, and the concurrent jurisdiction of equity does not exist. A suit in equity, under its concurrent jurisdiction, will not be maintained to take the place of the action of ejectment, and to try adverse claims and titles of land which are wholly legal, and to award the relief of a recovery of possession.

In the case at bar, the bill disclosed that there was nothing more than a line dispute between the plaintiff and the defendants. The plaintiff should seek her remedy in a court of law and the bill, for want of jurisdiction, be dismissed without prejudice.

On appeal. A bill in equity brought to remove a cloud on plaintiff's title and to establish the boundary line between the land of the plaintiff and land of defendants. The sole question at issue between the parties was the location of the boundary line between their respective properties. Hearing was had before a single Justice who dismissed the bill. Appeal was taken. Appeal dismissed. Decree in accordance with the opinion. The case fully appears in the opinion.

Laughlin & Gurney,
Gail Laughlin, for plaintiff.
Chapman & Chapman,
Sydney B. Larrabee, for defendants.

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

FARRINGTON, J. The case is before this court on appeal from the decree of a single Justice dismissing a bill in equity after due hearing at which it appeared that by deed dated September 19, 1894, recorded in Cumberland Registry, Book 618, Page 79, Arthur E. Marks conveyed to Herbert W. McCausland the following described real estate:

"A certain lot or parcel of land with all buildings thereon, situated on the Northerly side of Clifton Street in said Deering, more particularly bounded and described as follows, viz.: Beginning at a point in the Northerly side of Clifton Street, distant Easterly from the intersection of the Northerly side line of Clifton Street with the Easterly side line of Forest Avenue One Hundred and Five (105) feet; thence running Northerly parallel with said Avenue a distance of Ninety-Four and one half (94½) feet to land of Mary E. Whitney; thence running Easterly along the line of said Whitney's land to the South Easterly corner thereof; thence Northerly along the Easterly line of said Whitney's land a distance of six inches more or less, to the point where the extension of the Northerly line of land sold to Louise M. Lidback by Warren and Ann Sparrow by deed dated Oct. 23-A. D. 1880 and recorded in Cumberland Registry of Deeds in Book 475 Page 431, intersects said Easterly side line of Whitney's land; thence running Easterly in a straight course a distance of Fifty Two feet (52) more or less to the Northwest corner of said Lidback's land; thence running a little east of Southerly by the Westerly side line of said Lidback's land a distance of Ninety Five (95) feet more or less to Clifton Street; thence running Westerly by said Clifton Street Sixty (60) feet to the point of beginning, with the right of way along and over said Clifton Street, and the right to connect with and use the main drain running across Arlington Street and the lots adjoining the lot hereby conveyed on the Northerly side thereof, and of entering upon said lots and the lot adjoining on the East to repair and reconstruct such drain as occasion may require. Meaning hereby to convey a part of the property conveyed to me by Charles S. Foss by his deed dated April 3rd A.D. 1894 and recorded in Cumberland Registry of Deeds in Book 611, page 212."

It also appeared that Arthur E. Marks conveyed to Fannie E. Hopkinson by deed dated March 27, 1896, acknowledged March 28, 1896, and recorded April 4, 1896, real estate described as follows:

"A certain lot or parcel of land with the buildings thereon, situated in said Deering, and bounded and described as follows, to wit: Beginning at the South-Westerly corner of Clifton Street at the point of intersection of said Clifton Street with Forest Avenue; thence Northerly on the Westerly side line of said Clifton Street eighty-nine (89) feet to a stake; thence North Westerly at nearly right angles with said Clifton Street and along the Southerly side-line of land deeded to H. W. McCausland forty-seven (47) feet to an iron rod located in the South-Easterly side line of land of L. W. Whitney; thence Southerly on the South Easterly side-line of said Whitney's land eighty-nine (89) feet more or less to the Northerly side-line of Forest Avenue; thence South-Easterly on the Northerly side-line of said Forest Avenue forty-seven (47) feet to the point of beginning."

It further appeared that by deed dated March 26, 1896, acknowledged March 28, 1896, and recorded on June 27, 1927, more than thirty-one years after the date thereof, the said Arthur E. Marks conveyed to Herbert W. McCausland the following described real estate:

"A certain lot of land, situated in said Deering and bounded and described as follows, to wit: Beginning at a point on the South-Easterly corner of land of said McCausland on the North-Westerly side line of Clifton Street, thence southerly on the North Westerly Side line of said Clifton Street, sixteen (16) feet to a stake; thence North-Westerly at nearly right angles with said Clifton Street forty-seven (47) feet, more or less, to an iron rod in the ground, situate seven feet southerly from the Southerly side line of said McCausland's land; thence Northerly on the Easterly side-line of L. W. Whitney's land seven (7) feet to the land of said McCausland; thence Easterly on the Southerly side-line of said McCausland's land forty-seven (47) feet more or less to point of beginning."

In connection with the September 19, 1894, deed from Marks to McCausland, it was not in dispute between the parties that the Southwest corner of the Lidback land therein described, where it intersected the northerly side of Clifton Street, was a definite and well defined landmark or bound and that the lot as described in that deed had a frontage of sixty (60) feet on Clifton Street, extending westerly from the aforesaid Lidback corner.

It was stipulated and agreed by the parties to the case that Fannie E. Hopkinson died September 24, 1913, and that Elizabeth H. Marks, her sister, was her only heir at law.

On July 28, 1914, by deed recorded the following day, Elizabeth H. Marks conveyed to Nettie B. York, the plaintiff, as follows:

> "A certain lot or parcel of land with the buildings thereon, situated in said Portland, in that part known as the Deering District, and bounded and described as follows, to wit: Beginning at the Southwesterly corner of Clifton Street at the point of intersection of said Clifton Street with Forest Avenue; Thence Northerly on the westerly side line of said Clifton Street eighty-nine (89) feet to a stake; thence Northwesterly at nearly right angles with said Clifton Street and along the southerly side line of land deeded to H. W. McCausland forty-seven (47) feet to an iron rod located on the Southeasterly side line of land of L. W. Whitney; thence Southerly on the southeasterly side line of said Whitney's land eighty-nine (89) feet more or less to the northerly side line of Forest Avenue; thence southeasterly on the Northerly side line of said Forest Avenue forty-seven (47) feet to the point of beginning. Said property is deeded subject to taxes for 1914." This description was the same as that in the 1896 deed from Marks to Hopkinson.

It was further stipulated and agreed between parties that Herbert W. McCausland died on June 25, 1927, and that under his will, duly probated, the defendants succeeded to his title to all real estate owned by him at the time of his decease.

The plaintiff in her bill, after describing the land in the above conveyance to her from Elizabeth H. Marks, alleged that there-

upon she "entered into possession of said real estate and has ever since been and now is in possession of and occupying said real estate."

It was undisputed between parties that on September 19, 1894, Arthur E. Marks was the owner of all the real estate described in the deeds hereinbefore set forth. The plaintiff alleged in her bill that by reason of the recording of the "purported deed" from Marks to McCausland dated March 26, 1896, and recorded in Book 1269, Page 131, more than thirty-one years after its "purported execution" that "a cloud or suspicion is thrown upon the title of the plaintiff to the aforesaid real estate conveyed by said Elizabeth H. Marks to her, whereby the value of said real estate is greatly depreciated." In the prayer of the bill she asked the Court to decree "that the delivery of said deed from Elizabeth H. Marks to the plaintiff and the recording of the same prior to the recording of the deed from Arthur E. Marks to Herbert W. McCausland, recorded in Book 1269, Page 131, conveyed to the plaintiff all the land on the Northerly side of Clifton Street as described in said deed, extending Easterly from Forest Avenue to the Westerly line of the real estate described in the deed from Arthur E. Marks to Herbert W. McCausland, recorded in said Registry in Book 618, Page 79.", which was the September 19, 1894, deed. She also asked that it be decreed that the Easterly side of her land be bounded by the Westerly line of the land as conveyed to said Herbert W. McCausland by the deed of September 19, 1894, *supra*, and that decree be entered that the defendants had no right, title, interest, or claim in or to any portion of the real estate lying Westerly of said line, under or by virtue of the "purported deed" from said Marks to McCausland, as recorded in Book 1269, Page 131, *supra*, being the 1896 deed from Marks to McCausland as indicated above.

She also asked that a decree be entered perpetually restraining and enjoining the defendants from selling or attempting to sell and from exercising any acts of ownership over the lot of land embraced within the boundaries of the aforesaid March 26, 1896, deed from Marks to McCausland recorded as above, "or in any other manner casting a cloud upon the plaintiff's title to her said premises or setting up an adverse claim to the same or interfering with her possession thereof," concluding with a general prayer for relief.

The defendants in their reply alleged that Herbert W. McCausland entered into possession of the real estate described in the said deed of March 26, 1896, and was at all times in possession of the same until his death, and that upon his death Clara E. McCausland, life tenant under the will, entered into possession of said real estate and that she had ever since been and was at the time the action was brought in possession of the same.

The defendants further claimed that the line of Forest Avenue mentioned in the deed to Fannie E. Hopkinson, *supra*, from which the distance on Clifton Street was measured, was the old line of Forest Avenue as laid out and travelled prior to a widening thereof, the record of which was closed in 1897, and that measuring easterly from that Forest Avenue line to the undisputed Lidback corner, the total Clifton Street frontage of the three lots in question was the total frontage described in the three deeds involved.

The sitting Justice in his findings said, "The parties own adjoining lots and the line between those lots is in dispute. Upon the title of this disputed land rests the decision. Each of the parties rests claim upon their respective deeds.

"One Arthur E. Marks originally owned all of the land now owned by both parties. Conveyance was made by Marks to Herbert W. McCausland of the major portion of his lot, plaintiff's exhibit 4, and subsequently Marks delivered to McCausland a deed, plaintiff's exhibit 5, which deed remained unrecorded until delivery and recording of all other deeds which have any bearing upon the question at issue. Subsequent to the delivery of this deed Marks made a conveyance to Fannie E. Hopkinson, plaintiff's exhibit 6, and the land as conveyed came by mesne conveyances to the plaintiff." . . . The sitting Justice further stated, "I find that the plaintiff did not, at the time of the filing of her bill, have title to any of the land included in the deed from Marks to McCausland, plaintiff's exhibit 5, the recording of which deed the plaintiff claims is a cloud upon her title.

"I rule that the said deed from Marks to McCausland, plaintiff's exhibit 5, and the recording thereof and any other act complained of in plaintiff's bill is not a cloud upon the title of the plaintiff."

By final decree the plaintiff's bill was dismissed and an appeal taken, on which appeal the case has come to this court.

From a careful examination of all the allegations contained in the bill, in the light of the evidence disclosed in the record, we are compelled to the conclusion that the plaintiff had a complete and adequate remedy at law. A Court of Equity was not the proper tribunal in which to try out a question of title to real estate when clearly the sole question involved was location of lines on the face of the earth. No fraud was alleged or proved. Possibility of multiplicity of suits was not alleged, and the record indicated no such possibility. Nor did any other element appear requiring the power of a court in equity to prevent injustice.

Allegation was made that the second deed from Marks to McCausland, recorded thirty-one years after its date, constituted a cloud on the title. The plaintiff strenuously argued her contention that the March 27, 1896, deed from Marks to Fannie E. Hopkinson covered the same land conveyed by Marks to McCausland, March 26, 1896, and that because the Hopkinson deed was recorded long before the deed to McCausland and, because neither Fannie E. Hopkinson nor the plaintiff who received and recorded her deed in 1914 had constructive or actual notice of the second McCausland deed, she, the plaintiff, therefore acquired title to the land described in that deed and the presence of that deed on the records constituted a cloud on her title.

To allege and claim a cloud on title is not sufficient of itself to give a court of equity jurisdiction. The proper forum to try titles to land is a court of law, and this jurisdiction can not be withdrawn at pleasure, and transferred to a court of equity under the pretense of removing clouds from title. *Miles et al* v. *Strong et al*, 62 Ct., 95, 25 Atl., 459.

The bill discloses nothing more than a line dispute between the plaintiff and the defendants and the evidence in the case adds nothing which changes that situation.

"It is not the business of equity to try titles, and put one party out and another in." *Frost et als* v. *Walls et als*, 93 Me., 412; *Robinson* v. *Robinson et al*, 73 Me., 176.

In the case of *Watkins* v. *Childs*, 79 Vt., 234, a bill in equity was brought which showed that a controversy had arisen between the plaintiff and the defendant as to the true location of the line di-

viding their adjoining lots. The case came up on an appeal to a decree sustaining a demurrer. The decree was affirmed, the Court saying, "It is sufficient to say that the law court affords the oratrix a plain and adequate remedy. The existence of a dispute as to the boundary line between independent proprietors of adjoining lands does not afford sufficient ground for the interposition of a court of equity to ascertain and fix such boundary. . . . Nor will equity interfere to determine a question of title involved. 'It is not the business of equity to try titles, and put one party out and another in.' . . . Neither irreparable mischief, and multiplicity of suits, not oppressive litigation is threatened, for the dispute can be settled in a single action of trespass."

"The rule is, that when a cause of action cognizable at law is entertained at equity on the ground of some equitable relief sought by the bill, which it turns out can not, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice." *Gamage* v. *Harris et als*, 79 Me., 531, 536, cited with approval in *Snow* v. *Russell et al*, 93 Me., 362.

It is a well established principle that equity will not take jurisdiction where the remedy at law is plain, adequate and complete. "In all cases where the plaintiff holds or claims to have a purely legal estate in land, and simply seeks to have his title adjudicated upon, or to recover possession against an adverse claimant who also relies upon an alleged legal title, there being no equitable feature of fraud, mistake, or otherwise, calling for the application of equitable doctrines or the granting of peculiar equitable reliefs, the remedy at law is adequate, and the concurrent jurisdiction of equity does not exist. A suit in equity, under its concurrent jurisdiction, will not be maintained to take the place of the action of ejectment, and to try adverse claims and titles of land which are wholly legal, and to award the relief of a recovery of possession." 1 Pom. Eq. Jur., 4th Ed., Sec. 177. See also 5 R. C. L., Sec. 4, page 637.

We have referred to only a few of the many cases which might be cited covering the same general principle, which is so well established that citation of authority seems almost superfluous.

The fact that in the instant case no demurrer was filed to the bill does not confer jurisdiction, the absence of which is clearly shown. *Loggie* v. *Chandler*, 95 Me., page 220.

Without further review of the evidence, we hold that the plaintiff must seek her remedy in a court of law and that the bill, for want of jurisdiction, must be dismissed without prejudice.

Appeal dismissed.
Decree in accordance with this opinion.

ROGER NORTH *vs.* AUGUSTA REAL ESTATE ASSOCIATION.

Kennebec. Opinion May 27, 1931.

WILLS. TRUSTS. LESSOR & LESSEE.

Where no power to lease is expressly given in the will, but trustees are directed to hold, manage and care for the property given them by the testator, to collect the income therefrom, and to expend it for purposes enumerated, a power to make leases is necessarily implied.

A trustee may give a valid lease even though it runs beyond the period of the trust, provided it terminates within a reasonable time thereafter.

A lessee, who erects a building on the land of another with the landowner's permission under a lease which plainly negatives the idea of the building becoming the property of the owner of the land when the lease terminates, has a reasonable time after the termination of the lease in which to remove the building.

In the case at bar, the lease and rights of the defendant thereunder terminated on October 1, 1926. The occupation of the defendant from that time was with the tacit assent of the plaintiff, who at no time ordered the defendant to vacate the premises. The defendant must be held to have occupied the lot as a tenant in common, in exclusive possession, but charged with notice that its co-owner would claim rent for his undivided half of the lot. A reasonable figure for this rental the court finds to be $350.00 per annum. The court also finds the defendant to be the owner of the undivided half of the lot and of the entire building erected on the lot. A physical division of the property would be practically impossible the court likewise finds.

On appeal. A bill in equity seeking construction of certain portions of the will of James W. North of Augusta, deceased. The issue involved rights in a city lot and a brick business block erected thereon by a lessee of trustees under the North will. Plaintiff, a devisee, owned his testator's interest in the lot and claimed an undivided half of the building. From the decree of single Justice before whom the case was heard, finding for the defendant, plaintiff appealed. Appeal dismissed. Decree below affirmed. The case fully appears in the opinion.

Ernest L. Goodspeed, for plaintiff.

Walter M. Sanborn,

Perkins & Weeks, for defendant.

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

BARNES, J. This is a bill in equity praying the court to construe portions of a will and determine on the legality of certain proceedings; also to point out the pathway for further procedure.

Plaintiff's grandfather died in 1882, leaving by devise to trustees parcels of real estate, and his interest in a vacant lot, in the congested section of Water Street in Augusta.

The remaindermen were to be the testator's grandchildren, if any survived the widow and sons, with descendants of grandchildren, deceased, at the death of the surviving son, when the trust was to terminate.

It was plainly the intent of the testator, that none of the trust property was to be sold by the trustees, but, as parties agree, was to be managed and controlled by them.

Property in the vacant Water Street lot, at probate of the will, was an undivided half-interest; a like ownership being in a Davis family.

The trustees and the Davis parties were then tenants in common of the vacant lot; and plaintiff, since July 3, 1926, by purchase from the other remaindermen under the will, has his grandfather's interest in the lot, and owns only an undivided half-interest therein.

In the trustees' hands until October 1, 1891, the lot lay unproductive and a charge on the estate for taxes.

On that date, joining with the other owners, the trustees exe-

cuted a lease to L. K. Smith for a period of ten years, the rental for the whole lot to be two hundred dollars per year, and all taxes, "during the term aforesaid, and for such further time as the Lessee may hold the same," to be paid by the Lessee.

The lease further prescribed, "in consideration that said L. K. Smith shall hereafter erect a brick building on said premises it is further mutually agreed by and between said Lessors and Lessee, that upon the termination of this lease, such brick building so erected shall be the sole property of said Smith: . . . That if said Lessors and Lessee shall not at the expiration of this lease, mutually agree to extend said lease for a further term of years, that said Lessee shall then sell and convey to said Lessors, and said Lessors shall purchase said building which shall be erected by said Lessee, at a fair valuation and for a fair consideration therefor, to be mutually agreed upon, if practicable, . . . and if said Lessors and Lessee shall not thus mutually agree upon the valuation thereof, and consideration to be paid therefor, that said Lessors shall pay, and said Lessee shall receive such sum for said building as shall be fixed by three appraisers, one to be chosen by said Lessors, one by said Lessee: . . . and a third appraiser by the two thus chosen, if said Lessors and Lessee shall not mutually agree upon said third appraiser, and when said value shall be so determined, said Lessee hereby agrees to sell and convey for and said Lessors hereby agree to purchase and pay therefor such appraised value thereof."

Smith built of brick a business block, and the lease was several times renewed, last for a term of five years, to end on October 1, 1926, the rent by the last lease to be three hundred dollars a year; and all renewals of the lease containing the original clause relating to purchase of the building.

The building was more than once sold, with chattel bill of sale and assignment of lessee's rights, and on January 9, 1914, was so purchased and has been since held by the defendant.

The last of the trustees died April 1, 1926; and in the early part of July, 1926, the remaindermen divided the real estate inherited, plaintiff becoming sole owner of the undivided half-interest left by the testator.

It is not denied that plaintiff received his proportional part of

the benefit of rent of the lot during the running of the several leases; and from July 1, 1926, until October 1, 1926, he received the rent paid.

In compliance with the terms of the series of leases the lessee paid the taxes on the lot up to 1928, although plaintiff offered to pay the tax in 1927. Plaintiff paid these taxes in 1928 and 1929, although defendant offered to pay them.

By a letter dated September 30, 1926, plaintiff notified defendant he would not renew the lease and would expect rent at the rate of five hundred dollars a year for his part of the lot so long as defendant occupied the premises.

From that time until the filing of plaintiff's bill on July 8, 1930, defendant and plaintiff discussed from time to time two propositions; first, rental; second, sale of plaintiff's interest in the lot, but failed to agree as to amount of rental or value of the land.

Hence, although defendant has tendered payment of rent at the times and rate fixed in the lease, plaintiff has declined to accept the same since October 1, 1926.

Plaintiff never ordered or requested defendant to vacate the premises.

The only demand made was for the increase in rent, and such demand does not serve as a notice to quit, *Cogan* v. *Ryan*, 130 Me.

Correspondence between the parties, and in their behalf between their respective attorneys, continued up to June 5, 1928, but no agreement was arrived at.

Plaintiff asks whether or not the lease originally executed by the trustees was a valid lease; when it terminated, if valid; for partition of the lot; for relief from obligation to buy the building on the lot, if the lease was valid; for land rent at five hundred dollars a year since October 1, 1926, with interest; for a decree that an undivided half-interest in the building became, at its erection, a part of the real estate held by the trustees; decree that defendant shall render an accounting of all rents, profits and income received by the defendant from the building since the date on which defendant took possession of it, and for physical division of land and building, or if physical division is not practical, that building and land be sold by order of court and the proceeds divided between plaintiff and defendant in such proportion as the court shall determine.

Plaintiff's contention is that the trustees under the will had no right to execute the original lease to Smith, renewal leases and similar leases to lessees who followed Smith; and in particular no right to execute the lease of October, 1921, containing as it did a renewal clause and a clause binding the trustees to purchase the building on the lot if the lease were not renewed; and that even if they had that right, the lease terminated with the termination of the trust, in April, 1926.

It may not be necessary to determine whether the original agreement with Smith was binding on the estate.

What is the limit, not to be overstepped by a trustee in any line of action in connection with real estate given him to "manage and control," may be difficult to determine in a given case, but the language of *Robinson* v. *Robinson*, 105 Me., 68, is suggestive.

The Court say there, "While it is true that under the original theory of a trust the powers and duties of the trustee were confined substantially to holding and caring for the property, it is equally true that the purposes of the modern trust are of a much broader character requiring ordinarily much greater powers on the part of the trustee."

See also, *Bartlett* v. *Pickering*, 113 Me., 96, where power to transform real estate, growing timber, into personal property and sell the same is held implied.

Where no power to lease is expressly given in the will, but trustees are directed to hold, manage and care for the property given them by the testator, to collect the income therefrom, and to expend it for purposes enumerated, the Court say, "in view of the nature of the property and of these obligations, a power to make leases is necessarily implied." *Russell* v. *Russell*, Conn. (1929), 145 Atl., 648.

The Justice below found that the trustees in good faith made an arrangement which resulted in procuring an income from a half interest in a vacant lot which they were forbidden to sell, which was annually taxed, and upon which they, as owners of an undivided half would not have desired to erect a building. Their action was profitable to the estate and when the trust terminated, the *cestui qui trust*, who became the owner of the lot, accepted the situation as it was, recognized the lease and collected rent by virtue of

it to the end of its original term, thus acquiescing in the action of the trustees. That a trustee may give a valid lease even though it runs beyond the period of the trust, provided it terminates within a reasonable time thereafter, is settled law. *Re Caswell*, 197 Wis., 327, 222 N. W., 235; *Russell* v. *Russell*, supra; *Watland* v. *Good*, 189 Iowa, 1174, 179 N. W., 613; *Greason* v. *Keteltas*, 17 N. Y., 491; *Sweeney* v. *Hagerstown Trust Co.*, 144 Md., 612, 125 Atl., 522.

This lease terminated within six months after the termination of the trust. It is, of course, true that a trustee can not bind his *cestui* to renew a lease nor bind him to purchase buildings, in the absence of a special power to do so, and these trustees did not attempt so to do. Neither the agreement with Smith nor that with any of his successors, including this defendant, attempts to bind the assigns of the lessor.

The lease expired on October 1, 1926.

Had it been such as to have been terminated by the death of the surviving trustee on April first before, and had the plaintiff done nothing recognizing the lease in the interim, it would have been void only as to the excess. *Hubbell* v. *Hubbell*, 135 Iowa, 637, 113 N. W., 512.

But plaintiff assumed the rights of a lessor under it when he acquired the property in July, and can not be heard to deny its validity up to that time. In September he notified defendant that he would not renew the lease, that he denied the right of the trustees to bind him by the agreement to purchase the building, and that he should charge a rent at the rate of five hundred dollars a year for his interest in the land.

At the termination of the lease, provided nothing further occurred, the defendant became tenant at sufferance; but plaintiff, by his own suggestion that defendant should continue the tenancy, paying rent at the rate indicated, accepted it as a tenant at will, and that remains the status of the parties, modified only by the purchase by defendant of the original Davis share.

True, defendant has paid no rent since October 1, 1926, and no agreement as to rent was reached, but after notice from plaintiff that the rent would be five hundred dollars a year, defendant must be held to have acquiesced in the payment either of that sum or of

a reasonable rental because of the fact that it remained on the property. Its rights were limited to paying reasonable rent or removing the building.

Plaintiff insists that because it did neither, the building is forfeited to the owners of the land and that he now owns a half-interest in common and undivided in the building, but every demand that plaintiff made on defendant would have been satisfied by the payment of rent at the rate of five hundred dollars a year, with plaintiff paying the tax.

A lessee, who erects a building on the land of another with the landowner's permission under a lease which plainly negatives the idea of the building becoming the property of the owner of the land when the lease terminates, has a reasonable time after the termination of the lease in which to remove the building. Plaintiff agrees to this but argues that four years is an unreasonable length of time to continue such occupancy. Ordinarily this would be so, but not in this case. Plaintiff at no time ordered or even requested defendant to vacate the premises. He employed various attorneys. Correspondence ensued between them and attorneys for defendant. Conferences were had and others proposed. Settlement was discussed. Attempts were made to agree on a price for rent. Negotiations as to purchasing plaintiff's interest in the land were entered into and failed. This situation continued down to the filing of this bill. Under these circumstances, it was not unreasonable that the defendant refrained from destroying a valuable property, a three story brick block worth eight thousand dollars, by moving it.

Plaintiff now asks for partition of the property. The lot is twenty-three feet and six inches wide on Water Street and runs back toward Commercial Street about thirty-five feet but not through to Commercial Street, so that there is no rear entrance, and the erection of another building between it and Commercial Street forbids the extension of a building on the lot to occupy its entire depth, an open space for light and air being necessary. To physically divide the lot would leave each owner holding a plot of ground of comparatively little value.

The lot as it is is valuable. A division as plaintiff requests would reduce that value very materially. The only practical and reason-

able division is by means of a sale of the whole lot and a division of the proceeds.

The lease and rights of defendant thereunder terminated on October 1, 1926. Since that date defendant has occupied the lot as a tenant in common, in exclusive possession, but charged with notice that its co-owner would claim rent for his undivided half of the lot.

Defendant should, therefore, be held to pay a reasonable rate from October 1, 1926, until different terms are agreed upon with plaintiff, or the matter is finally disposed of by judgment of the court.

From the record it seems that a reasonable annual charge for rent of plaintiff's half-interest in common and undivided in the lot should be three hundred fifty dollars.

Against this amount the tax paid by defendant in 1927 should be credited. The rent has been demanded each year, beginning October 1, 1927, and is still unpaid.

To the amount of rent accrued as above, less credit for the 1927 tax, should be added interest computed on each annual rent charge at the rate of six per cent per annum from time of demand. The plaintiff is the owner in fee simple of an undivided half of the lot. Defendant is the owner of an undivided half of the lot, and is also owner of the entire building erected on the lot.

Appeal dismissed.
Decree below affirmed.

STATE OF MAINE *vs.* CHESTER A. PLANT AND ARTHUR L. PLANT.

Sagadahoc. Opinion June 3, 1931.

CRIMINAL LAW. FISH AND GAME. P. L. 1929, SEC. 19. RIVERS. HIGHWAYS.

For the propagation of fish and for the protection of migratory birds the State may exercise certain control of its waters, but it is beyond the power of the legislature to suspend the general use of a navigable river as a highway.

In the case at bar, the use of a boat for the purposes of transportation more than one and one-half hours before sunrise on the restricted portion of the

waters of the Kennebec River was not an allowance of the boat in such location for hunting purposes within the meaning of the statute.

On report on an agreed statement of facts. The issue involved the construction of Sec. 19, P. L. 1929, with reference to the transportation by boat, during the closed game season, over the waters of the Kennebec River at a point one mile above Swans Island at a time earlier than one and one-half hours before sunrise. In accordance with stipulation of the report, cases remanded to the lower court for entry of *nolle prosequi*. The cases sufficiently appear in the opinion.

Ralph O. Dale, County Attorney, for State.

Edward W. Bridgham, for appellants.

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

BARNES, J. On agreed statement of facts. The case alleges breach of a law for the protection of game.

Respondents, jointly managing a small boat earlier in the morning than one and one-half hours before sunrise, on September 16, 1930, were arrested on warrant issued out of the Bath Municipal Court.

The statute prohibiting their activity and defining the crime with which they are charged in Sec. 19 of the P. L., 1929.

Application of this section is in terms restricted to the waters of the Kennebec River below a point one mile above Swans Island, and reads, "No boat shall be allowed in said waters for hunting purposes earlier than one and one-half hours before sunrise."

The facts are that the respondents set out during the night time from Brunswick, for the purpose of running into and down the Kennebec River, to the southerly shore of Perkins Island to hunt ducks on that shore. It was their purpose to reach the island before sunrise.

They were on the waters where boats are not allowed for hunting purposes, a few minutes earlier than one and one-half hours before sunrise, then and there, "without any intention of hunting for ducks in Merrymeeting Bay and its tributaries," or elsewhere on the Kennebec River.

It is their defense that they were, at the time charged, using a public highway to reach their destination, far down the river, and hence that their boat was not by them "allowed in said waters," within the meaning of the prohibitory statute.

We think their defense complete. The Kennebec River below the northerly limit of the area described in the statute is a public highway, in time of peace open at all hours to passage in any direction by any person for purposes of lawful business or pleasure. It is the tidal portion of a navigable stream.

For the propagation of fish and for the protection of migratory birds the State may exercise certain control of its waters, but it is beyond the power of the legislature to suspend the general use of a navigable river as a highway.

Using a boat then, for purposes of transportation, in the location where it is alleged respondents were at the time when its use is complained of, is not allowing the boat there for hunting purposes.

In accordance with the stipulation of the Report, the cases must be remanded to the lower Court for entry of nolle prosequi.
So ordered.

PHILIP BLUMENTHAL *vs.* LOUIS SEROTA.

Cumberland. Opinion June 3, 1931.

MORTGAGES. PLEADING AND PRACTICE.

If a mortgagee, with knowledge of the conveyance of the equity of redemption of a parcel of real estate by the mortgagor and the 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 as a discharge of the original mortgagor, unless it is known and assented to by him or his liabilities are preserved by express reservation.

In the case at bar, the defendant further argued that the assumption of the mortgage debt by the last grantees was assented to by the plaintiff, who accepted them as his debtors in the place of the original mortgagor. No proof to sustain this defense was presented. Instructions given by the presiding Justice on this phase of the issue, though correct as abstract principles of law, were inapplicable to this case for want of testimony upon which they could rest. The plaintiff's exceptions to the instructions were well taken and as the record did not indicate upon which of the two defenses submitted the verdict rested, the jury may have been misled and the plaintiff thereby aggrieved by the instructions given.

On exceptions and general motion for new trial by plaintiff. An action of assumpsit on a promissory note secured by a second mortgage on real estate, in Portland. The equity of redemption having passed through successive grantees and the time of payment having been extended by the mortgagee to the last grantee, the question at issue involved whether or not such extension operated as a discharge of the original mortgagor. To certain instructions given by the presiding Justice, plaintiff seasonably excepted and after the jury had rendered a verdict for the defendant filed a general motion for new trial. Exceptions sustained. The case fully appears in the opinion.

Abraham Breitbard,
Frank H. Haskell, for plaintiff.
Israel Bernstein, for defendant.

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

STURGIS, J. Action of assumpsit against the maker of a promissory note secured by a mortgage of real estate. Upon plea of general issue with brief statement, the defendant has a verdict. The plaintiff brings the case here upon general motion and exceptions.

The Bill of Exceptions shows that on April 3, 1926, the defendant gave the plaintiff his promissory note for three thousand dollars, payable in two years after date with interest at seven per cent, secured by a second mortgage on a parcel of real estate in Portland. Later, the equity of redemption passed through successive grantees to Thomas H. Fahey and Daniel C. Cavanaugh, each successively assuming and agreeing to pay the mortgage debt.

There is evidence tending to show that on or about February 21, 1929, more than six months after the maturity of the note, the plaintiff, having knowledge of the assumption of the mortgage debt by Fahey and Cavanaugh, in consideration of their payment of ten per cent interest for the preceding six months period and their promise to pay a like increased rate for the next half year and an indefinite period thereafter, agreed with them to extend the time for payment of the note for six months. This was without the knowledge or consent of the defendant.

Upon this evidence, a verdict for the defendant would not have been clearly wrong under the rule recently stated in our review of a previous trial of this case. *Blumenthal* v. *Serota*, 129 Me., 188. If a mortgagee, with knowledge of the conveyance of the equity of redemption of a parcel of real estate by the mortgagor and the 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 as a discharge of the original mortgagor, unless it is known and assented to by him or his liabilities are preserved by express reservation. The plaintiff can not prevail upon his general motion or his exceptions to the denial of his motion for a directed verdict.

It appears, however, from the charge of the presiding Justice that, at the trial, the defendant presented the further claim that the plaintiff not only assented to the assumpion of the mortgage debt by Fahey and Cavanaugh, but accepted them as his debtors in place of the mortgagor, releasing him from his original liability. If sustained by the proof, this claim also would be a complete defense to this action. Jones on Mortgages (Third Ed.), Sec. 983; 41 C. J., 733; *Webster* v. *Fleming*, 178 Ill., 140; *Bank* v. *Ashton*, 200 N. Y. S., 245; *Urquhart* v. *Brayton*, 12 R. I., 169. Not supported by evidence of probative value, it served, however, only to invite instructions which, though correct as abstract principles of law, were inapplicable to the case for want of testimony upon which they can rest and must be held erroneous. *Witzler* v. *Collins*, 70 Me., 290, 299; *Hopkins* v. *Fowler*, 39 Me., 568.

The plaintiff's exception to the instructions given the jury reaches this error. Read in the light of the language of the charge, the ground of exceptions, stated at the trial and brought forward

in the Bill, are that, there being no evidence that the plaintiff "assented" to the assumption of the mortgage debt by Fahey and Cavanaugh, in the sense of accepting them as his debtors in place of the original mortgagor, that issue was not properly before the jury. The presiding Justice had so used and defined "assent" in his charge, submitting the question of its existence as an independent defense, additional to that which would result from a finding that the mortgagee extended the time for payment of the mortgage debt without the knowledge or consent of the mortgagor. The exception was directed to this instruction only and was noted in sufficiently clear and appropriate language, we think, to leave no reasonable doubt of its intended application. There is no breach of the rule that the excepting party is confined to grounds expressly stated at the trial or contained in his exceptions.

Unfortunately, there is nothing in the record before us to indicate upon which of the two defenses submitted the verdict rests. The jury may have been misled, rendering their verdict under a rule of law here inapplicable. It not appearing as a matter of law that, upon proper instructions, a contrary verdict could not have been properly found, the plaintiff is aggrieved and his second Exception must be sustained. *Colbath* v. *Lumber Co.*, 127 Me., 406; *Starkey* v. *Lewin*, 118 Me., 87; *Coombs* v. *Fessenden*, 114 Me., 347, 354.

Exceptions sustained.

MABELLE R. LANG

vs.

LURA A. CHASE, ESTELLE C. CHASE AND MINNIE R. BRYER; AND ELIAS SMITH AND HENRY CLEAVES SULLIVAN, ADMINISTRATORS OF THE ESTATE OF JOHN H. CHASE, LATE OF WATERBORO, DECEASED.

York. Opinion June 11, 1931.

CONTRACTS. WILLS. EQUITY.

Contracts to dispose of property by will in return for services rendered will not be sustained unless they are proved by full, clear, and convincing evidence. Such contracts may divert from natural channels large portions of estates and should always be regarded as containing elements of danger and to be subjected to the very closest scrutiny.

As determined in Brickley *v.* Leonard, 129 *Me.*, 94, *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 facts clearly bring it within the principles laid down in *Brickley* v. *Leonard.* The contract was satisfactorily established by the required degree of evidence. It was satisfactorily shown that the plaintiff had fully and completely performed her part under the agreement so as to take it from the Statute of Frauds and that she could not be adequately compensated in law and that there were no circumstances or conditions rendering her claim inequitable. She was therefore entitled to one-half of the net property of the deceased.

On report. A bill in equity to enforce specific performance of an oral agreement to dispose of property by will in consideration of services to be rendered, which services were subsequent to the agreement rendered in accordance with its terms. Bill sustained. Decree in accordance with the opinion. The case fully appears in the opinion.

Willard & Willard, for plaintiff.

Elias Smith,

Henry Cleaves Sullivan,

E. P. Spinney, for defendants.

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

FARRINGTON, J. On report. Bill in equity in which the plaintiff alleges in substance, that the said John H. Chase on or about September 1, 1926, entered into an oral agreement with her by which he promised and agreed that, if she would remain with him as long as he needed her, and assist him about his housework, and in his home in nursing and caring for him, and in and about his business and store, he would give her one-half of all the property he had, real and personal; and that she, the said plaintiff, acting in reliance on said promise and agreement, left her home in Michigan and took up her residence with said Chase and remained with him from the said first day of September, 1926, until the date of Chase's death, and that during all that time she fully carried out and performed all the duties and obligations on her part to be performed and without payment to her of wage or compensation.

The bill asks (1) for a decree that Lura A. Chase, Estelle C. Chase and Minnie R. Bryer, defendants, be declared "trustees for the plaintiff of one half of the said hereinbefore described real estate, and as holding one half of said real property in trust for said plaintiff;" and (2) that they be ordered to convey one half of the said real estate to the plaintiff "without any other or further payment by the plaintiff;" (3) that the said Elias Smith and Henry Cleaves Sullivan be adjudged trustees for the plaintiff "of one half of all of the hereinbefore described goods and chattels, rights and credits, and other personal property, and as holding said one half

of the said personal property in trust for the plaintiff;" and (4) that the said Smith and Sullivan, as administrators, be ordered to give to the plaintiff a "good and sufficient" bill of sale, "conveying full title, free from all incumbrances," of the said one half of all said personal property; (5) that "the plaintiff may have such other and further relief as the nature of the case may require;" (6) that the plaintiff may have reasonable costs.

John H. Chase died intestate at Waterboro, Maine, August 11, 1929, leaving as his only heirs at law and next of kin three nieces, Lura A. Chase, Estelle C. Chase and Minnie R. Bryer, defendants in this case. On petition of the three nieces Elias Smith of Limerick, Maine, and Henry Cleaves Sullivan of Portland, Maine, both of whom are also named as defendants, were appointed and qualified as administrators of the estate. The inventory which was filed discloses real estate, $34,500.00, goods and chattels, $1,041.34, and rights and credits, $8,086.05, a total appraised valuation of $43,632.40.

The plaintiff, Mabelle R. Lang, was a daughter, by a former marriage, of Josephine Chase, deceased wife of John H. Chase. The record definitely discloses neither her age at the time of her mother's marriage to Chase nor the date of the marriage but it does disclose the fact that she was a member of Chase's family at least until she went away to school in Limerick and Portland. Later plaintiff married and came back at times to Chase's and her mother's home and still later, after her own marriage, with her own daughter, Josephine, about ten years of age, she came to the Chase home and cared for her mother during her last illness in 1912. It is clear that with her daughter, Josephine, the plaintiff remained with Chase some time after her mother's death, and it is also clear from letters and other evidence in the case that even after this time the plaintiff came to the Chase home more or less during the summer vacations. In letters to the plaintiff and her daughter Chase addressed them as "Dear children" and signed as "Grandpa," and letters to the plaintiff he signed "Dad," and in letters written to him by the plaintiff she addressed him as "My dear daddy" or "Dear daddy." It is also clear, giving due weight to all evidence in the case introduced by the defendants for the purpose of casting doubt on the situation, that Chase had always been interested in the plaintiff's

welfare and that of her daughter, Josephine, who graduated at Ann Arbor, Michigan, in which state the plaintiff was living with her daughter at the time she came on to see Chase in the summer of 1926, when the agreement, which is the basis of plaintiff's claim, is alleged to have been made.

At this time Chase was living in rooms over a store owned and operated by him, together with the local Post Office, and here the plaintiff came and made her home with him and remained until his death on August 11, 1929. The testimony of Chase's family physician for a period of twenty-five years shows Chase's physical condition was not good; that he had Bright's disease in a mild form; that he was troubled with hemorrhoids, constipation and indigestion, and that he had difficulty about walking, his death following a fall as he was coming downstairs.

Mabelle E. Chase, whose father was a cousin of John H. Chase, testified that she came to Maine from Florida in 1926, stating, "I think it was about the first of April." She said that she saw Chase a short time before the plaintiff came to his home later in 1926; that before plaintiff came Chase told her that he had sent for the plaintiff, and that after this, in August, 1926, she found him and plaintiff there together; that in May, 1929, in the store, he said to her, "Well, Mabelle will never be sorry if she stays and sees me through. I have talked with her and have agreed to give her half of everything I have." She testified that Chase said, "Mabelle is awfully good. She does the best she can. I couldn't get along without her." She also stated that a Mrs. Woodward and Ernest W. Stowers, who worked for Chase, were in the store when Chase made this statement and that the plaintiff was at the time attending to the mail at the Post Office.

Mrs. Woodward, who took Mabelle E. Chase to see Chase on the above occasion, testified she had never before seen the plaintiff nor Chase and that she was sitting within four feet of him and heard him say, "Mabelle has been awfully good to me and if she sees me through I am going to leave her half of what I have."

Ernest W. Stowers, who worked for Chase from August 17, 1928, until his death, August 11, 1929, testified that he heard him say to plaintiff, "When you came here to take care of me I agreed to give you half of everything I had and I will go 50-50 with you,"

and the plaintiff said, "If you are going to do that, I think you ought to attend to it."; that Chase said, "I will. I am going to have Elias down and make out the papers." Mr. Stowers testified that he was in the store the day Mrs. Woodward was there and that he could hear part of the conversation. The plaintiff's attorney asked him if he heard the statement made by Chase with reference to his giving Mabelle half of his property and the opposing attorney interrupted to make objection and Stowers did not answer. Plaintiff's attorney, instead of repeating the question, then asked him if he had heard Chase make similar statements to any other person and Stowers then said that he had heard him say to one Frank A. Chadbourne, "I am going to give half to Mabelle when I get through.", and that a good many times he had heard him say that he would provide for her and see that she was well taken care of.

John E. Lewis, who had charge of Chase's cottages at Camp Ellis, testified that in the first part of the summer of 1926 Chase said to him, "I have sent for Mabelle to come and take care of me. I am not going to stay alone.", and that shortly after that Chase brought the plaintiff to Camp Ellis.

Mrs. Annie B. Johnson stated that she heard Chase say he was going to "look after Mabelle, and that he didn't know what he would do without her."; that he "couldn't get along without her."

The deposition of Mildred B. Johnston, taken pursuant to order of the Supreme Judicial Court, is properly before us and admissible as newly discovered evidence which the plaintiff could not with due diligence have previously discovered. In that deposition Mildred B. Johnston stated that she was and had been since 1919 cashier in the Bank at Limerick, Maine, and that the last of October or first of November, 1926, plaintiff came to the bank with Chase and that witness talked with both of them; that she took to Chase in the Directors' room some securities for which he had asked; that later she went back and she testified that at that time "Mr. Chase was talking about his health and better condition, and I asked him if Mabelle was going to stay with him, and he says, 'Yes, I have persuaded her to stay; she wanted to go back to Michigan, but I have persuaded her to stay; I told her I would give her half I have got if she would stay with me,' and he said 'That ought to be enough hadn't it?', and you know how he would chuckle over things, and I

told him I thought it would." She testified that the plaintiff was not there and that the time "was after the 27th of October, and prior to the third of November — or the fifth of November, I should say."; that Chase said, "I am much better, but I can't think of staying alone."

By this competent and clearly admissible evidence disclosed by the record, evidence which we regard as full and clear, we are satisfied and convinced that at some time around August 1, 1926, an oral agreement was entered into between John H. Chase and the plaintiff, the substance of which was that the plaintiff was to remain with and care for Chase as long as he lived and that, if she performed her part of the agreement, Chase was to give her one-half of all the property which he had.

The defendants present little or no evidence of real probative value to dispute the plaintiff's contention that such a contract was made. One of the defendants' witnesses on being asked if Mrs. Bryer, herself a defendant, had not told witness that Chase had talked with her about plaintiff staying there and taking care of him and had said plaintiff was to have half of the property, answered, "I don't recall, but I wouldn't say it wasn't said." Another witness for defendants, in reply to the question, "John appeared to think a good deal of Mabelle, didn't he?", said "He did. Yes, a good deal of her. He told me with his own mouth that he should see that Mabelle was taken care of."

Several of the defendants' witnesses testify that after Chase's death the plaintiff made statements to the effect that there was nothing there for her, "nothing for her to stay for," and that she wanted to go back to her daughter in Michigan. There was also evidence from two or more witnesses for the defendants that the plaintiff made conversation about the possible value of her services during the time she had been with Chase. All this was clearly designed to cast doubt upon the existence of any contract and also upon the plaintiff's recognition of one. We are not impressed by it, as such remarks by the plaintiff might equally well be attributed to her ignorance of her legal rights under all the circumstances of the case. Mr. Chase had died without making a will to carry out the provisions of the contract and that fact was uppermost in her mind. There is nothing to indicate that she had consulted any attorney

in her own behalf and she may well have felt, in her ignorance of law, that the failure to make a new will, and the fact that an old will under which it is in evidence that she was to receive $2,000.00 could not be found, was the end of it all. The plaintiff, under the rule of exclusion, did not testify as to anything occurring prior to Chase's death. Just why she did not take the stand to give her own testimony as to events occurring after the death of Chase does not appear of record, but we regard the making of the contract as established by evidence too clear, full and convincing to be seriously affected by such statements, assuming that she did in fact make them.

After giving due consideration to all the admissible direct evidence presented by the plaintiff and by the defendants, and to all inferences which may be properly drawn therefrom, we are fully satisfied that the plaintiff fully, faithfully and completely performed her part of the agreement, thereby removing it from the operation of the Statute of Frauds. The relationship between the plaintiff and Chase was closer than that of a friend; it was virtually that of a father and daughter, and what the plaintiff did in that relationship and what she did for him in the store and the Post Office altogether constituted services which were in our opinion beyond those of a mere employee or housekeeper, services which could not ordinarily be expected of any servant and for which adequate compensation could not be provided by wages as such. It seems clear from the record that no compensation was paid to the plaintiff, although it is in evidence that Chase conveyed to her a half interest in the Welch place, so called, which was owned jointly by him and his wife during her lifetime, reserving a life interest therein. It also appears that he purchased for her an automobile which was used for his comfort and enjoyment as well as for hers. There is nothing in the case to indicate that either of these transactions was in the nature of payment for services or that either was anything but a gift to the plaintiff.

Contracts like the one involved in the instant case should not be sustained unless they are proved by full, clear and convincing evidence. *Brickley* v. *Leonard*, infra. Such contracts may divert from natural channels large portions of estates. We recognize the tendency of those who have rendered services for one since deceased to

magnify their value and if contracts of this character are accorded too much favor it may open the door for unscrupulous claimants to prosecute claims based on unsatisfactory, or even perjured, testimony, to the great prejudice of and danger to the rights of heirs and legatees. Such contracts should always be regarded as containing the elements of danger and should be subjected to the very closest scrutiny.

In this case we are, however, convinced that the contract has been satisfactorily established by the degree of evidence laid down above, and we are further satisfied that the plaintiff has fully and completely performed her part under the agreement so as to take it from the Statute of Frauds, and that she could not be adequately compensated in law, and that there are no circumstances or conditions rendering the claim inequitable.

"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*, 129 Me., 94, 98, and cases cited.

The facts in the instant case clearly bring it within the principles laid down in *Brickley* v. *Leonard*, supra, and the plaintiff's bill should be sustained, but without costs.

We hold that one-half of the several lots or parcels of land, with the buildings thereon, situated in the County of York and State of Maine, as bounded and described in paragraph 1 of plaintiff's bill, all formerly the property of John H. Chase, late of Waterboro in said county, deceased, and in addition thereto one-half of all goods

and chattels, rights and credits, and one-half of all personal property, as described in paragraph 3 of plaintiff's bill, all formerly the property of the said John H. Chase, the legal title to which said real estate is now in the defendants, Lura A. Chase, Estelle C. Chase and Minnie R. Bryer, and the legal title to said goods and chattels, rights and credits and personal property being in the defendants, Elias Smith and Henry Cleaves Sullivan, Administrators of the Estate of John H. Chase, deceased, in equity belong to, and the same hereby are charged with a trust as and from the date of the death of the said John H. Chase, to wit, August 11, 1929, in favor of and for the sole use and benefit of the plaintiff, the said Mabelle R. Lang, but all, by reason of the terms of the contract made and the existing equities, subject to a deduction of the amount necessary to pay one-half the costs and expenses of administration and all lawful claims and demands against said estate.

Inasmuch as the evidence in the case discloses no likelihood that resort to the real estate will be necessary for the payment of any part of the said costs and expenses, claims and demands, we hold that the defendants, the said Lura A. Chase, Estelle C. Chase and Minnie R. Byer, as trustees now holding in trust for the plaintiff for her sole use and benefit one-half of said hereinbefore described certain lots or parcels of land, with the buildings thereon, be ordered, within thirty days of the date of the decree to be rendered in this cause, to convey to the said plaintiff one-half in common and undivided of the said hereinbefore described lots or parcels of land by a good and sufficient quitclaim deed with covenants against the lawful claims and demands of all persons claiming by, through or under them, to be by them made, executed and acknowledged in due form and to be delivered to the said plaintiff.

From the record in the case, there would seem to be no question but that there is more than sufficient personal property to cover all claims and charges against the estate, and possibly one-half of the total amount of all classes of personal property disclosed by the inventory would be sufficient for that purpose, but, in our opinion, the agreement between the plaintiff and the deceased did not contemplate that she should have her half free from the payment of costs and expenses of administration and from the payment of claims and demands against the estate, but that she should have it

reduced by such payments. In any event, it can not be held that the plaintiff should have any greater rights than she would have had, had a will been made carrying out the provisions of the contract with the deceased. If there had been a will, the personal property in the first instance would have been liable for the payment of all said costs and expenses, claims and demands, and, if there had not been sufficient personal property for that purpose, resort to the real estate would have been necessary. This court, acting in equity, must do equity to the rights of others and we accordingly hold that the said defendants, Elias Smith and Henry Cleaves Sullivan, Administrators and defendants in this cause, as trustees now holding in trust for the plaintiff for her sole use and benefit one-half of the goods and chattels, rights and credits and personal property as described in paragraph 3 of plaintiff's bill, be ordered as said administrators and trustees to transfer and pay over to the said plaintiff for her sole use and benefit an amount of money equivalent to one-half of the net proceeds of all said goods and chattels, rights and credits and other personal property aforesaid, as soon as possible after final account shall have been rendered and allowed in said estate and costs and expenses of administration and all claims and demands against said estate shall have been paid.

The case being before us for complete disposition on report, for the purpose of carrying out the above holding we further hold that it is for the advantage of the estate itself, as well as in the interest of the plaintiff, that the said administrators as such trustees and in their capacity as administrators should convert said goods and chattels, rights and credits and other personal property into cash and pay over to the plaintiff the net one-half belonging to her as above.

Bill sustained.
Decree in accordance with this opinion.

MABEL ARVILLA TUCK, APPELLANT

FROM

DECREE OF JUDGE OF PROBATE

vs.

ELLERY A. BEAN.

Androscoggin. Opinion June 15, 1931.

PROBATE COURTS. CLAIMS. EXECUTORS & ADMINISTRATORS. EVIDENCE.
R. S., CHAP. 96, SEC. 114.

A decree of a Justice of the Supreme Court of Probate, under the statutes of this state, can not be reviewed by the Law Court on a general motion for a new trial; nor can it be considered on appeal. It must be brought forward on exceptions.

An executor or administrator in prosecuting his private claim against the estate which he represents, can not testify in his own behalf as against his estate which he nominally represents, but which in such an instance, is the real defendant against which he is proceeding as plaintiff. He is barred from refuting statements attributed to him as made before the death of his intestate. His wife's testimony as to both these matters is equally incompetent.

In the case at bar, neither the defendant nor his wife were competent witnesses under R. S., Chap. 96, Sec. 114. By the common law, they were disqualified by reason of interest and neither could testify for the other.

On exceptions and general motion for new trial and an appeal by defendant. The issue involved the validity of a private claim by the administrator against his decedent's estate. To the exclusion of certain testimony offered by the defendant, defendant excepted and after verdict against him filed a general motion for new trial and an appeal. Exceptions overruled. Motion for a new trial overruled. Appeal dismissed. The case fully appears in the opinion.

E. R. Parent,

F. H. Lancaster, for plaintiff.

Frank A. Morey, for defendant.

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

STURGIS, J. In the Probate Court of original jurisdiction, the defendant's private claim against the estate of Jennie M. Knowlton, late of Lewiston, deceased, of which he was administrator, was allowed as a credit in his final account. On appeal to the Supreme Court of Probate, the claim was disallowed. The case is here on exceptions, accompanied by a general motion for a new trial and an appeal.

The exceptions only can be considered. A decree of a Justice of the Supreme Court of Probate, under the statutes of this state, can not be reviewed by this court on a general motion for a new trial. *Look, Appellant*, 129 Me., 359. Nor can it be considered on appeal. It must be brought forward on exceptions. *Cotting* v. *Tilton*, 118 Me., 91.

The defendant's first and second exceptions show no prejudice. They were reserved to the exclusion of questions asked the attending physician concerning the value or the usual price paid for the care given the defendant's intestate in her last illness. If the exclusion of these questions was error, it was cured by the physician's subsequent testimony, in which this value was fully stated.

Neither the defendant nor his wife were allowed to testify in support of his private claim against the estate nor to refute statements alleged to have been made by them in the intestate's lifetime. This was not error. The statute, allowing parties to be witnesses, in express terms is made not to apply to cases where one of the parties is an administrator or executor, except in certain cases there specified and not here involved. R. S., Chap. 96, Secs. 114, 119. The competency of witnesses not bringing themselves within these exceptions is governed by the rule of the common law. *Insurance Co.* v. *Foss*, 124 Me., 399; *Weed* v. *Clark*, 118 Me., 466; *Sherman* v. *Hall*, 89 Me., 411. They are disqualified by reason of interest and neither husband nor wife can testify for the other.

This common law rule applies to cases where an executor or administrator is prosecuting his private claim against the estate which he represents. He can not testify in his own behalf in support of his private claim against the estate which he nominally repre-

sents but which, in such an instance, is the real defendant against which he is proceeding as plaintiff. *Preble* v. *Preble*, 73 Me., 362; *Ela* v. *Edwards*, 97 Mass., 318. By parity of reasoning, he is barred from refuting statements attributed to him as made before the death of his intestate, as in the analogous cases of *Weed* v. *Clark* and *Sherman* v. *Hall*, supra. His wife's testimony as to both these matters must be held equally incompetent.

The remaining exceptions, directed only to the competency of the defendant and his wife as witnesses, must be overruled, and the entry is,

Exceptions overruled.
Motion for a new trial overruled.
Appeal dismissed.

EDWARD E. TRUMPFELLER *vs.* ERVIN W. CRANDALL.

Aroostook. Opinion June 15, 1931.

MOTOR VEHICLES. INVITED GUESTS. LIABILITY INSURANCE. IMPUTED NEGLIGENCE.

One riding as a passenger or guest may not place his safety entirely in the keeping of the driver of an automobile, but must exercise due and reasonable care for his own protection in a position of danger.

As held in Ritchie *v.* Perry, 129 *Me.*, 440, *when it develops in the course of trial that the defendant carries liability insurance, "the only safe course to be followed is to order a mistrial when requested to do so by the 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 conduct of counsel merits rebuke, and in the other, possibility of a prejudiced verdict is imminent."*

The negligence of the driver of an automobile will not be imputed to an invited guest unless they are engaged in a joint enterprise. In order to have a joint enterprise there must be a community of interest in the object and purposes of the undertaking, and an equal right to direct and govern the movements and

conduct of each other in respect thereto. Each must have some voice and right to be heard in the control or management.

In the case at bar, the evidence clearly discloses that there was no contributory negligence on the part of the plaintiff, but that he was justified in believing, on the assurance given by the defendant, that he would properly drive the car. The record of the case disclosed no community of interest sufficient to occasion the court to pass upon the question of imputed negligence.

On exceptions and general motion for new trial by defendant. An action to recover damages for personal injuries sustained through the alleged negligent operation by the defendant of his automobile in which the plaintiff was riding as an invited guest. To the refusal of the presiding Justice to give certain instructions, and to instructions given, defendant seasonably excepted, and after the jury had rendered a verdict for the plaintiff in the sum of $10,000.00, filed a general motion for new trial. Motion overruled. Exceptions overruled. The case fully appears in the opinion.

George B. Barnes, for plaintiff.

Bernard Archibald, for defendant.

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

FARRINGTON, J. On general motion and exceptions. An action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant in the operation of his automobile in which the plaintiff was riding as an invited guest. The jury returned a verdict for ten thousand dollars ($10,000.00).

The plaintiff and the defendant were both in the employ of the American Telephone and Telegraph Company at its radio station at Houlton, Maine.

On the evening of June 22, 1929, defendant invited the plaintiff to ride with him in his car. For a time they rode about town and then went to the house of one Phil Clark, who joined them, the three at first riding on the front seat together. After driving around town for a short time, plaintiff took his place on the rumble seat. After going to the plaintiff's room and to one other place, defendant drove his car to the home of one Miss Flemming and there was some talk about going over to Woodstock, New Brunswick, to

see if they could find a friend of Clark's. Miss Flemming got into the car on the rumble seat by the side of the plaintiff and the defendant started for Woodstock somewhere around eleven o'clock in the evening. Evidence shows that at a sharp turn on Broadway in Woodstock Clark asked the defendant in effect to be more careful about taking corners. At Woodstock they did not succeed in finding the person whom they were seeking and after remaining a short time they started to drive back to Houlton.

There was evidence that on the return trip from Woodstock, at a point which is not clearly established as to miles, but at something more than half the distance to Houlton, the defendant began to drive in such a manner and at such a speed that Clark told him to stop the car. The defendant did stop it on the top of Parks Hill, which was practically level for a little distance. There is evidence that while the car was stopped Clark and the defendant had some conversation about the defendant's manner of driving and that Clark told him if he did not drive properly he would rather get out and walk and that the defendant gave assurances, which were heard by the plaintiff, that he would drive properly and that he and Clark then got into the car and they went on their way to Houlton. Defendant denies that he said anything about driving more carefully, claiming that he was driving all right.

Plaintiff stated that he did not think it was necessary to say more to defendant because Clark had had his argument with him and he had promised to drive in a proper manner. Clark stated that after they got back into the car and came to the top of Parks Hill the defendant, instead of driving his car more slowly, "seemed to increase his speed" and that he thought when he started down over the hill he was going fifty miles an hour. The plaintiff also estimated the speed at the same rate but the defendant said he was not going over forty miles an hour and thinks it was between thirty-five and forty, but when questioned closely insisted that he could not say how fast he was going. The plaintiff testified that at that time he tried to "holler" to the defendant to slow down but that he did not believe the defendant could hear him.

When the car was about two-thirds down the hill it left the road, jumped a ditch and was overturned and the plaintiff was seriously injured.

The defendant and his wife, in an effort to explain the overturning of the car, testified that the plaintiff told them that Clark pulled the emergency brake and the defendant said that Clark admitted to him that he did so. Clark, who is plaintiff in a separate personal action of his own against the defendant, denied this, and the plaintiff denied saying that Clark pulled the brake. Thus was presented to the jury an issue of fact as to whether or not Clark had, by such an act, caused the accident. The jury, however, after seeing the witnesses on the stand and after listening to their testimony and after considering all the evidence as it was presented to it, returned its verdict for the plaintiff.

Without further recital of the evidence, after a careful reading and weighing of all contained in the record before us, we find ourselves unable to reach any conclusion other than that the jury was fully justified, under all the circumstances of the case, in finding negligence on the part of the defendant and that such negligence was the proximate cause of the accident which resulted in the plaintiff's injury. The overturning of the defendant's car, unexplained by any other satisfactory evidence, could be attributed to nothing else than the defendant's negligence.

The case before us involves the rights of an invited guest. The question is whether the defendant exercised toward the invited guest that degree of care and diligence which would seem reasonable and proper from the character of the thing undertaken, which was the transportation of the guest in the defendant's automobile, a machine of even more "tremendous power, high speed and quick action" than at the time the opinion was written in the case of *Avery* v. *Thompson*, 117 Me., 120 (1918), which was a case "of novel impression in this state." In that case the Court said, "In a sense she may be said to have assumed the risks ordinarily arising from these elements, provided the machine is controlled and managed by a reasonably prudent man who will not by his own want of due care increase their danger or subject the guest to a newly created danger. In other words we conceive the true rule to be that the gratuitous undertaker shall be mindful of the life and limb of his guest and shall not unreasonably expose her to additional peril. This would seem to be a sane, sound and workable rule, one consistent with established legal principles and just to both parties. It

leaves the determination of the issue to the jury as a question of fact."

We may well apply to the instant case the language of the Court in the case of *Avery* v. *Thompson*, supra: "Tried by this test we are constrained to say that the verdict of the jury fastening liability upon the defendant in the case at bar is not so manifestly wrong that it should be set aside. His conduct bordered upon if it did not actually reach recklessness. It did not evince that regard for the safety of its passengers which is required."

We think we can go further in the instant case and say that the jury could not reasonably, under all the circumstances disclosed by the record, have come to any other conclusion but that the defendant was guilty of negligence.

With full recognition of the principle in *Humphrey* v. *Hoppe*, 128 Me., 92-95, and many other similar cases which might be cited, that one riding as a passenger or guest may not place his safety entirely in the keeping of the driver of an automobile but that he must exercise due and reasonable care for his own protection if he finds himself in a position of danger, we can not say that the jury was so clearly wrong in its conclusion that there was no contributory negligence on the part of the plaintiff that for that reason the verdict should be set aside. Whether there was or was not due care on the part of either the defendant or the plaintiff was a question of fact to be decided by the jury upon all the circumstances of the case and to the jury the presiding Justice had given full instructions. We feel that the jury was justified in taking the view that, at the time the car stopped, assurance was given by the defendant that he would drive properly and that the plaintiff had the right to rely upon that assurance, and that he was not contributorily negligent in remaining in the car as it was started again for Houlton.

The defendant in argument before this court has expressly stated that he made no claim that the damages were excessive. As far, therefore, as the general motion is concerned, it must be overruled on all points.

The case is also before us on four exceptions which will be considered in order.

1. During the direct examination of the plaintiff he was asked if, during the time he was in the hospital and while he was lying in

bed at home, his knowledge that his wife was "carrying a baby" worried him, and he answered, "It did." This evidence was offered for the purpose of proving mental suffering. Exceptions were duly reserved to the refusal of the presiding Justice to have the testimony struck from the record.

Assuming that this testimony was improperly admitted as constituting an element of damages, in no other way could it have prejudiced or affected the defendant's case. As counsel for defendant has expressly stated that the damages were not regarded as excessive, the exception is, as far as this case is concerned, without merit and must be overruled.

2. During the cross examination of the plaintiff, in an apparent attempt to show that Clark may have had something to do with the accident, counsel for defendant, while interrogating as to whether plaintiff saw Clark pull the emergency brake, received an answer to one of his questions in which the plaintiff, referring to the defendant, said, "He said he wasn't responsible for the accident; the insurance company was."

Defendant's attorney then moved for a withdrawal of the case from the jury and the motion was denied. Exceptions were duly taken and allowed. The plaintiff's attorney having expressed his willingness to have the answer struck out, the defendant's attorney said, "No. I want the record to stand as it is."

The fact that the defendant carried liability insurance having been brought to the attention of the jury might have influenced it in its decision on two points, on the question of the liability of the defendant, and on the amount of damages.

By his express statement to this court that the amount found by the jury was not excessive, the defendant disposed of any contention that he was prejudiced as to that phase of the case.

And we can not say that the defendant was prejudiced on the question of liability.

After a careful study of the record, it is our conclusion that, regardless of the presence of the element of insurance, the evidence in the case fully warranted the jury in finding that the defendant was negligent, and we are unable to see that he was prejudiced by the fact that the jury knew he was insured or by the refusal of the presiding Justice to order a mistrial. The verdict found full justifi-

cation in the admissible evidence and for that reason we can not say that the jury was influenced in its judgment because of the fact of insurance which was in the case.

"The ordering of a mistrial is discretionary with the presiding Justice and no exceptions lie to his refusal unless that discretion is abused." *Ritchie* v. *Perry*, 129 Me., 440; *Gregory* v. *Perry*, 126 Me., 99.

We find no abuse of discretion in the record before us, but we take this opportunity to emphatically reaffirm what was said by this Court in *Ritchie* v. *Perry*, supra, "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 conduct of counsel merits rebuke, and in the other, possibility of a prejudiced verdict is imminent."

In the instant case, however, for the reasons hereinbefore given, the second exception must be overruled.

3. The defendant, at the close of the charge to the jury, requested the presiding Justice to give the following instruction:

"If the jury find that the plaintiff knew the danger of riding with the defendant by reason of the defendant's negligent operation of the car from Woodstock to the point where the car stopped just prior to the accident, and that he failed to remove himself from that danger when the car was stopped, the plaintiff cannot recover."

The Court declined to give the requested instruction, saying, "I refuse to give you that instruction, and will say to you that it involves a question of fact whether or not the plaintiff was negligent under those circumstances, if those circumstances existed." Exceptions were again reserved as to the refusal to instruct and to the instruction as given.

We find no error either in the instruction given or in the refusal to give the instruction requested. It was a question of fact for the jury under all the circumstances of the case whether the conduct of the plaintiff in continuing on to Houlton was such as to constitute contributory negligence on his part which, as the presiding Justice had properly instructed the jury, would bar him from recovery.

The instruction requested would have taken from the jury the right to consider and weigh events and the conduct of any of the parties subsequent to and concurrent with the stopping of the car and was properly refused. If further instructions on any points, which, in the opinion of counsel, were not clearly covered, had been desired, requests to cover those points could have been made. None were made.

4. The following instruction was also requested: "If the jury find that the plaintiff failed to protest to the defendant as to the manner of the defendant's operation of the car, and that the plaintiff recognized the danger due to the defendant's manner of driving, he cannot recover."

The Court said, "I will refuse to give you that instruction, stating to you that the elements involved there are questions of fact, which you are to determine and the elements of facts, if they exist, are for your determination as to whether or not the plaintiff exercised due care or whether or not he did anything or failed to do anything which a reasonably prudent man would do — should do or should not do under like or similar circumstances."

Here also exceptions were duly noted and allowed, both as to the refusal to instruct and to the instructions as given.

It is not clear to the court whether this request was intended to relate to the situation existing as the automobile began the descent of Parks Hill, or to conditions on the entire trip, or to the situation just before the car was stopped, but in any case it was a request for the Court to instruct the jury that it must make its finding on that point as a matter of law instead of being free to base its decision on facts as it found them to exist under all the circumstances of the case. This instruction also was properly refused, and here also we see no merit in the exception to the instruction as given which properly left with the jury for determination questions of fact bearing on the plaintiff's due care. Exceptions (3) and (4) must accordingly be overruled.

There is no force or merit in the instant case in the defendant's contention that the defendant's negligence must be imputed to the plaintiff on the ground that they were engaged in a joint enterprise and that therefore the plaintiff can not recover.

We have found no case in this state in which the Court has at-

tempted to give any definition of what constitutes a joint enterprise, but decisions from other states, a few of which are cited below, hold that in order to have a joint enterprise there must be a community of interest in the object and purposes of the undertaking and an equal right to direct and govern the movements and conduct of each other in respect thereto. Each must have some voice and right to be heard in its control or management. *Barry* v. *Harding*, 244 Mass., 588; *Landry* v. *Hubert*, 100 Vt., 268, 274, 137 Atl., 97; *Crescent Motor Company et al* v. *Stone* (Ala.), 101 So., 49; *St. Louis & S. F. R. Co.* v. *Bell* (Okl.), 159 Pac., 336; *Myers* v. *Southern Pac. Company et als* (Cal.), 218 Pac., 284; *Schwartz* v. *Johnson* (Tenn.), 280 S. W., 32; *Northern Texas Traction Co.* v. *Woodall et al* (Tex. Civ. App.), 294 S. W., 873; *Cunningham* v. *City of Thief River Falls et al*, 84 Minn., 21, 86 N. W., 763; 20 R. C. L., Sec. 122, page 149.

Or, as stated in *Hines et al* v. *Welch* (Tex.), 229 S. W., 681, 683, "a joint enterprise, within the meaning of the law of imputed negligence, is, as given in 20 R. C. L., p. 149, s. 122, 'the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the control of the means or agencies employed to execute such common purpose.'"

The record in the case before us discloses no community of interest between the defendant and the plaintiff in relation to the automobile, and fails to show the essential element of right of control or management. For this reason, therefore, there is no occasion for this court to pass upon the question of imputed negligence. The entries in this case must be,

Motion overruled.
Exceptions overruled.

EDWARD L. CHENEY *vs.* HORACE G. RICHARDS.

Aroostook. Opinion June 16, 1931.

LAW COURT-JURISDICTION. EQUITY. DEEDS. R. S. 1930, CHAP. 91, SECS. 9 & 56.

By authority of Sec. 9, Chap. 91, R. S. 1930 and Sec. 56, Chap. 91, R. S. 1930, the Law Court has jurisdiction to hear and decide, on report, cases involving civil contempt.

A decree ordering a conveyance of real estate "by good and sufficient quitclaim deed with covenant against the lawful claims and demands of all persons claiming by, through or under the grantor" speaks from its date and does not include an after-acquired interest in the property. It is immaterial whether such an interest is acquired by purchase, descent or attachment.

A deed in the form required by the decree excepting such an interest fully complies with the decree.

Whether or not, under the circumstances of this case at bar, defendant acquired any interest in the real estate in question, by a general attachment of plaintiff's real estate, after the date of the decree was not before the Law Court in this cause. That issue, if raised, may be settled in later appropriate proceedings, unprejudiced either by the somewhat inexact wording of the exception in the deed or by the decision here recorded.

On report. Proceedings to determine whether or not the defendant should be adjudged in contempt for failure to comply with a decree in equity. Petition dismissed. The case fully appears in the opinion.

A. S. Crawford, Jr., for complainant.

Cook, Hutchinson, Pierce & Connell, for respondent.

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

PATTANGALL, C. J. On report. The sole issue presented by the record and which this court is required to decide is whether or not defendant failed to comply with the terms of a decree in equity ordering him to make a conveyance of certain real estate to plaintiff and because of such non-compliance is guilty of contempt.

The controversy arose from the following state of facts. Plaintiff brought a bill in equity to compel specific performance of an oral contract to convey certain real estate of which defendant held legal title and plaintiff was in possession. The parties disagreed as to the conditions of the contract. After full hearing, the court below sustained the bill and decreed that conveyance be made as prayed for, provided that the plaintiff within a definite time deposited in court for the benefit of the defendant a stated sum of money.

One question involved in the proceedings was whether or not certain notes held by defendant, of which plaintiff was maker, should be included in the accounting. The presiding Justice found that these notes were in no way related to the contract in question and did not consider them in computing the amount due.

The decree was filed April 15, 1930, and the paragraph ordering the conveyance read as follows:

> "The said Horace G. Richards be and hereby is ordered to convey to the plaintiff, Edward L. Cheney, the Cheney farm, so-called, situated in Mars Hill, in this county, as fully described in Paragraph 1 of the bill herein, with the buildings thereon, by a good and sufficient quit-claim deed, with covenant against the lawful claims and demands of all persons claiming by, through, or under the defendant, within sixty days from the date of this decree: provided that before said deed is delivered and conveyance made, and within said period, said Edward L. Cheney shall have deposited in this court, to be paid to said Horace G. Richards, the sum of fifteen hundred and six dollars and seventy-nine cents, together with interest at six per cent on said sum from April 13th, 1930 to date of such delivery of said deed, less the said plaintiff's taxable costs; as by said decree may more fully appear."

Plaintiff deposited the amount fixed by the decree. Defendant deposited his deed; but before doing so, he had brought suit against plaintiff on the notes referred to and had made a general attachment of plaintiff's real estate. Because of this, he inserted in his deed the following paragraph:

"Excepting and reserving however from this conveyance all that interest in said premises, acquired by said grantor under and by virtue of an attachment of the real estate of said grantee made by said grantor on the third day of May A.D. 1930 upon a writ returnable before the Superior Court at the term thereof to be held at Caribou in said County of Aroostook on the 2nd Tuesday of September A. D. 1930."

Plaintiff refused to accept the deed, claiming that it was not in accordance with the decree, and, defendant refusing to modify it, a petition was filed requesting the court to issue an order for defendant to appear and show cause why he should not be adjudged in contempt. Order issued and the matter was proceeding to hearing when it was agreed that the case should be reported to this court.

Under the provisions of Sec. 9, Chap. 91, R. S. 1930, the Supreme Judicial Court, sitting as a Law Court, has jurisdiction of cases involving "questions of law arising on reports of cases."

Sec. 56, Chap. 91, R. S. 1930, provides that, "Upon a hearing on any cause in equity, the Justice hearing the same may report the cause to the next term of the Law Court if he is of the opinion that any question of law is involved of sufficient importance or doubt to justify the same and the parties agree thereto. The cause shall be heard and decided by the said Law Court in like manner and with like result as herein provided in case of appeals."

The first question confronting us is one of jurisdiction. The authority of this court, sitting as a Law Court, is limited by the statutes and it is by virtue of the above quoted enactments that the questions involved in the matter now before us may be considered, if at all.

Discussing these provisions, our court in *Mather* v. *Cunningham*, 107 Me., 242, regarded the word "case" or "cause" as used in its unrestricted sense and says that the term "when applied to legal proceedings imports a state of facts which furnish an occasion for the exercise of the jurisdiction of a court of justice," adding that "the phrase, 'reports of cases,' was employed by the legislature as a method of submitting questions involving both law and facts in the most comprehensive manner to the decision of the court.

It consequently becomes immaterial whether the case was a probate appeal, an equity appeal, an agreed statement of facts, or a civil or criminal case presenting a question of law, if reported without any restrictions as to the questions to be decided."

A slight verbal correction in the above statement might be made in the interest of exact accuracy. "Causes in equity," not "equity appeals," come before us on report. Such causes may come before us on appeal or on report. One method of bringing them forward should not be confused with the other.

"Case" and "cause" are synonymous terms. Unless the problem here presented may properly be designated a "case" or "cause," it lies without the jurisdiction of this court.

"These words when used as legal terms are generally understood as meaning a judicial proceeding for the determination of a controversy between parties wherein rights are enforced or protected or wrongs are prevented or redressed." Ex parte Chesser (Fla.), 112 So., 87.

"Any question, civil or criminal, contested before a court of justice, is a cause or case." *Blyew* v. *U. S.*, 80 U. S. (13 Wall.), 581.

Case is synonymous with cause and means any question, civil or criminal, contested before a court of justice. In proceedings for contempts or failure to obey orders or writs of the court, the parties have a right to be heard and to clear themselves of the charge of contempt if they can. Such a proceeding is commenced by a regular process of the court and there is a question to be contested and decided. *Erwin* v. *U. S.*, 37 Fed., 470; *Baldwin* v. *Miles*, 58 Conn., 496.

Assuming that a case is here presented, one more requisite is necessary to bring it within jurisdictional limits. Cases should not be sent to the Law Court, even upon report at the request of the parties, except at such stage of the proceedings that a decision of the question may dispose of the case itself, unless the report contains a stipulation which provides that the decision may, in at least one alternative, supersede further proceedings. "Reports are intended to take up the whole case for the Court to make final decision. It should not come up by installments. It should have proceeded to a decree upon the merits before the sitting justice and

then come here by appeal, or the whole case, both law and fact, should have been reported." *LaForest* v. *Blake Co.*, 100 Me., 220; *Casualty Co.* v. *Granite Co.*, 102 Me., 148.

The issue presented here was not involved in the decision of the cause in equity. It related only to the enforcement of the decree therein. The time has passed for an appeal from that decree and this court has no power to disturb it nor is it requested to do so.

Proceedings for contempt, based upon disobedience to a decree, are independent and separate from the original suit. *Hayes* v. *Fischer*, 102 U. S., 122. To the same effect is the reasoning in *State ex rel Edwards* v. *Davis* (N. D.), 51 N. W., 942; and *Gale* v. *Water Co.* (Cal), 145 Pac., 532, states that "A contempt proceeding, though arising in a case in equity based on the violation of an injunction, is an independent proceeding."

Generally speaking, "the sole adjudication of contempt belongs exclusively and without interference to each respective court." Ex parte Kearney, 7 Wheat, 38. Every court is the exclusive judge of a contempt committed in its presence or against its process and the exercise of such power by a court of competent jurisdiction can not be reviewed. *Ex parte Hardy*, 68 Ala., 308; *First Congregational Church* v. *Muscatine*, 2 Iowa, 69; *Ex parte Holman*, 5 Am. Rep., 159.

Contempts of court are of two kinds. Those committed in the presence of the court by insulting language or acts interrupting the proceedings may be summarily punished by the presiding Judge after such hearing as he may deem just and necessary. Such are known as criminal contempts.

There is another class of contempts known as civil contempts which are in a sense constructive and arise from matters not transpiring in court but in reference to failures to comply with the orders and decrees issued by the court and to be performed elsewhere. Such refusals or failures are undoubtedly contempts as actual as those committed in open court and liable to be punished under the same law; but the process to bring parties into court and the time given for a hearing by our rules are different from the summary process in case of criminal contempt. *Androscoggin & Kennebec R. R. Co.* v. *Androscoggin R. R. Co. et als*, 49 Me., 392; *in re Nevitt*, 117 Fed., 448; *Wasserman* v. *U. S.*, 161 Fed., 722.

"A civil contempt is one in which the conduct constituting the contempt is directed against some civil right of the opposing party, as where an injunction is disregarded or some act required by the court for the benefit of the other party should be neglected. In cases of contempts of this sort, the proceeding for its punishment is at the instance of the party interested and is civil in character." *Welch* v. *Barber*, 52 Conn., 156. In many jurisdictions, the judgment of a lower court in cases involving civil contempt is by statute made subject to appeal, but under the laws of this state, such a judgment by a court of competent jurisdiction is final on the parties.

Sec. 67, Chap. 91, R. S. 1930, provides that whenever a decree or order of the court which is not for the payment of money only has been disregarded or disobeyed by any person, summary process shall issue, requiring such person to appear and show cause why he should not be adjudged guilty of contempt, and if found guilty may be punished by fine or imprisonment.

"No appeal lies from any order or decree for such punishment, nor shall exceptions thereto be allowed save upon questions of jurisdiction."

In the instant case, the appellate court is not requested to review the finding of a single Justice at the instance of a litigant. The court below made no finding in this case. Had that been done, it could not be disturbed. The matter is not before us on exceptions, appeal or writ of error. It was not brought here by a party aggrieved by the decision of the tribunal before which hearing had been had. It is here by the act of the presiding Justice himself, the parties having acquiesced.

A complete and independent case is presented and one which has reached a stage where final decision is possible. The statute which specifically denies the right of a party to question the findings below on appeal or exceptions does not deny the right of the judge, with the consent of the parties, to report the case.

On the contrary, the broad construction of the statute in *Mather* v. *Cunningham*, supra, gives the right to report any case, civil or criminal, arising in law or equity or in the probate courts. In view of these various considerations, it would appear that this court has jurisdictional right to act in the premises. We come,

therefore, to a consideration of the issue submitted for our decision, namely the question of whether or not defendant, by the deed tendered, complied with the decree in the equity case.

We hold that he has so complied. The exception in the deed related to an alleged interest in the property which defendant claimed to have acquired subsequent to the date of the decree. Obviously the decree did not, and was not intended to, embrace after acquired property. The fact that the interest so claimed was based on an attachment does not affect the situation. It stands on the same basis as though it had resulted from purchase or inheritance. Nor is it affected by the further fact that the debt sought to be secured by the attachment was evidenced by notes which defendant claimed should have been considered in the equity case. The court below ruled that these notes could not be so considered, but this in no way affected defendant's right to recover on them in an independent action, provided plaintiff was legally liable thereon; and in a suit brought to collect them, defendant had an undoubted right to attach any property interest of plaintiff which might be attached by any creditor.

Plaintiff argues that he had no attachable interest in the real estate at the time defendant undertook to attach the same and that the acceptance by him of a deed containing the exception noted might affect his right to raise that issue in possible future proceedings.

We can not here decide whether or not defendant by his attachment acquired an interest in the property. That question is not properly before us. But plaintiff's right to contest the point at the proper time will not be prejudiced by his acceptance of the deed. While the wording of the exception is somewhat inexact, its intent and meaning is sufficiently clear so that it can only be construed to include the interest, if any, which defendant acquired by his attachment and if no interest was so acquired, nothing is excepted.

Decree in equity may be fully satisfied by defendant's accepting the money deposited by plaintiff and plaintiff's accepting the deed tendered by defendant.

Petition dismissed.

JOHN W. MAHONEY *vs.* CITY OF BIDDEFORD.

York. Opinion June 16, 1931.

R. S. 1930, CHAP. 22, SEC. 8. HEALTH OFFICERS.

Under the provisions of Sec. 8, Chap. 22, R. S. 1930, local health officers are appointed by municipal officers subject to the approval of the State Commissioner of Health and are not qualified to perform the duties of the office until their appointment is so approved.

By authority of an ordinance of the defendant city such an officer holds until his successor is elected and qualified, unless sooner removed by the city council.

A duly elected and qualified local health officer, not having been legally removed from the position and no successor having qualified to succeed him has a legal right to the office and is legally entitled to the salary.

On report. An action of assumpsit to recover two months salary alleged to be due to plaintiff as health officer of defendant city. Hearing was had at the January Term, 1931, of the Superior Court for the County of York. After the testimony had been taken out the case was by the agreement of the parties reported to the Law Court for its determination on so much of the evidence as was legally admissible. Judgment for the plaintiff for $166.67 with interest from date of writ. The case sufficiently appears in the opinion.

Leroy Haley, for plaintiff.

Thomas F. Locke, for defendant.

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

PATTANGALL, C. J. On report. Assumpsit to recover $166.67 alleged to be due as salary of health officer for the months of June and July, 1930. The facts are not in dispute.

Plaintiff was duly elected and qualified as health officer of the defendant city for a term of three years beginning January 1, 1926,

at an annual salary of $1,000.00. The statute governing the selection of such officers provides that "Every town, city and organized plantation shall employ an official who shall be known as the local health officer and who shall be appointed by the officers of the municipality, subject to the approval of the State Commissioner of Health." The requirements of the statute were complied with and no question is raised as to plaintiff's legal right to the office and its emoluments for the term which he was chosen to fill. In fact, no question is raised in this case concerning his right to continue to act as health officer after the expiration of that term and receive pay therefor until a successor had been elected and qualified or unless he was removed by the city council because of a provision in defendant's charter which reads: "All of the subordinate officers and agents shall hold the offices during the ensuing year and until others are elected and qualified in their stead unless sooner removed by the city council." It is agreed that the health officer is a subordinate officer within the meaning of this provision, and the phrase "ensuing year" may properly be construed to mean the term for which the officer is elected.

Plaintiff has never been removed by the city council. In 1927, during the term for which plaintiff was originally elected, the city government passed a resolution notifying him that his services were no longer required and elected one Nadeau to fill out the unexpired term. Apparently this was no more than an attempt to procure plaintiff's resignation and failing that, no further attention was given the matter.

After the expiration of his regular term, two attempts were made to choose his successor. On January 7, 1929, the city council elected Leniere Doyon health officer for the ensuing three years. Mr. Doyon did not qualify and never undertook to perform the duties of the office. Plaintiff therefore continued to act and was paid the regular salary during the next five months, and since that time has been at all times ready, willing and able to act as health officer but has been prevented by the defendant from so doing. On June 2, 1930, the city council elected Frederick Sullivan health officer for one year. On the following day, he took the oath of office, but the selection was not approved by the State Commissioner of Health. Lacking that approval, Mr. Sullivan has not qualified.

Until and unless such approval is secured, he has no authority to act.

In view of the provisions of the statute and city ordinance already quoted, plaintiff was, at the date of the writ, health officer of defendant city and, holding the legal title to that office, was entitled to the salary.

"The person who holds the legal title to an office is entitled to the legal right to the salary." *Andrews* v. *Portland*, 79 Me., 484.

Judgment for plaintiff for $166.67 *with interest from date of writ.*

G. KENNETH ESPONETTE *vs.* GEORGE A. WISEMAN.

Kennebec. Opinion June 26, 1931.

MOTOR VEHICLES. NEGLIGENCE. JURY FINDINGS. VERDICTS.

The driver of a motor vehicle making a left hand turn and crossing the street in front of another vehicle should so watch and time the movements of the other as to reasonably insure himself a safe passage either in front of or behind it, even to the extent of stopping and waiting if necessary.

Negligence in this respect, however, does not excuse lack of due care on the part of the driver of the vehicle in front of which he attempts to pass.

It is the duty of the driver of a motor vehicle to keep it at all times under reasonable control.

It is negligence to drive a motor cycle at a speed so excessive that it is impossible to stop it within a reasonable distance or to guide it so as to avoid contact with an obstruction in plain view and so situated as to permit passage on either side.

One may not operate a motor vehicle at excessive speed so as to prevent its reasonable control in an emergency and be permitted to say, after an emergency arose, that he did all he reasonably could with the means at hand to avoid the injury.

The fact that the driver may have done all that could have been done in attempting to stop and to avoid a collision after discovering a vehicle in front of him by no means relieves him from the charge of negligence. If he, at the time of the discovery of the defendant's position, was travelling at an excessive rate of speed under the conditions presented, the fact that he did all he could to stop, when the manner in which he had been driving had rendered it impossible for him to do so, instead of relieving the plaintiff subjects him to the charge of negligence.

Contributory negligence is usually a jury question but when, in the face of admitted facts positively proving such negligence, the finding of the jury is wholly inconsistent with those facts and the verdict depends upon that finding, it is the duty of the Law Court to set the verdict aside.

In the case at bar, the evidence clearly disclosed that the plaintiff, at the time defendant's car attempted to cross the highway, was proceeding at a rate of speed absolutely inconsistent with due care.

The occurring emergency was not created entirely by the negligence of defendant. In spite of that, had plaintiff been travelling at a speed consistent with reasonable safety and with his machine under control, no emergency would have arisen.

The natural sympathy for the plaintiff, aroused in the minds of the members of the Jury, evidently overcame their ability to analyze the situation correctly and their finding should be set aside.

On general motion for new trial by defendant. An action on the case to recover damages for personal injuries sustained by plaintiff in a collision between a motor cycle operated by him and a truck driven by the agent of the defendant. Trial was had at the February Term, 1931, of the Superior Court for the County of Kennebec. The jury rendered a verdict for the plaintiff in the sum of $7,267.50. A general motion for new trial was thereupon filed by defendant. Motion sustained. The case fully appears in the opinion.

George W. Heselton, for plaintiff.

Locke, Perkins & Williamson, for defendant.

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

PATTANGALL, C. J. On motion. Action to recover damages for injuries resulting from a collision between a motor cycle operated by plaintiff and a small Ford truck driven by an agent of defend-

ant, admittedly engaged in defendant's business at the time. Verdict for plaintiff. Damages assessed at $7,267.50. No complaint is made as to the amount of the verdict. The sole issue before us is whether or not there is evidence in the case upon which a jury was authorized to predicate liability.

The collision took place on a state highway, the hard surfaced portion of which was twenty-one feet in width. It occurred in the early afternoon of an August day at a point where, ordinarily, there is very considerable traffic. The highway was straight and practically level for a distance of at least four hundred feet south of the point of collision and seventeen hundred feet north thereof. At various points it was crossed by intersecting roads, and there was a filling station and wayside store on its eastern side, in front of which the grounds had been graded to the street level and a gravel driveway built connecting the premises with the highway. It was at the junction of the main road and this driveway that the trouble occurred.

Plaintiff was proceeding northerly toward his home. Defendant's car was proceeding southerly, its destination being the filling station and store above mentioned. Both drivers were familiar with the locus and each was driving on his extreme right until defendant's car came to a point opposite the filling station, when the driver turned to the left and started to cross the highway nearly at a right angle and in the path of the on-coming motor cycle. His car had entered the driveway and proceeded to a point where its rear wheels projected three or four feet beyond the eastern side line of the hard surface portion of the highway when the motor cycle crashed into it with sufficient force to push its rear end northerly a distance of three feet and to severely damage it. The blow was glancing and the speed of the motor cycle such that it proceeded twenty feet beyond the point of contact, where plaintiff was thrown off and fell in the highway twenty feet still farther on. He sustained so severe an injury to his right leg that amputation was later found necessary.

The only eye witnesses to the collision were plaintiff and defendant's agent. Their testimony is sharply conflicting.

Plaintiff testified that he was riding at a reasonable rate of speed, not exceeding thirty miles an hour, on the right-hand side of a level

road with nothing to obstruct his view for more than a third of a mile; that, looking ahead, he saw approaching him, on the opposite side of the way, an automobile and following it, not very closely, the small truck with which he later collided; that the automobile passed him but when he was approximately sixty feet from the truck, it turned sharply to its left and crossed the road directly in front of him, proceeding at an ordinary rate of speed; that, fearing a collision, he immediately applied his brakes, locking his rear wheel; and that, although he did all that could be done to stop the progress of his machine, his efforts in that respect were ineffectual and the collision followed.

The driver of the truck gave a different version. He said that, proceeding along the highway on his right as he approached the filling station, he came to a stop to permit one car going south and another going north to pass him; that the road was then clear excepting that he could see the motor cycle approaching some four hundred feet away; that he then proceeded to cross the highway at a rate of speed which he estimated at three or four miles an hour and did not observe the motor cycle again until its noise attracted him, after he had entered the driveway and when it was too late to avoid contact with it.

Two witnesses observed plaintiff riding by them a few seconds before the collision. One testified that the motor cycle did not appear to be moving unusually fast, the other estimated its speed at thirty-five miles per hour. Whether this was before or after the application of the brakes is not entirely clear and we do not regard this evidence as especially important.

The remainder of the oral testimony, in so far as it bears on the question of liability, relates to certain matters apparently not finally in dispute and to expert evidence concerning operation of motor cycles.

The jury saw and heard the witnesses and were the judges of their credibility. They had a right to accept plaintiff's story of the event as correct in so far as it was not modified or contradicted by admitted facts. To that extent we are bound by its findings but only to that extent. It therefore becomes of vital importance to analyze the undisputed evidence.

It is agreed that marks on the highway plainly show that at a

point sixty-one or two feet distant from the point of contact between the two machines, plaintiff applied the rear brake of the motor cycle and that for at least fifty feet of that distance the wheel was locked, so that it is not disputed that for that distance plaintiff used his utmost endeavor to stop the machine in so far as it was possible to do so by braking it.

One important fact in issue is the distance between the vehicles when defendant's car started to cross the road. If it was four hundred feet, as the driver of the truck testified, he had nothing to fear. Doubtless the jury regarded this distance as grossly, even though unintentionally, exaggerated. The roadway was but twenty-one feet in width. If the rear of defendant's car was within two feet of the edge of the highway when it started to cross and if it had arrived within four feet of the opposite side line when it was struck, it traversed so short a distance that even if it was moving as slowly as the driver states, at the rate of four miles an hour, it would have occupied but three or four seconds in the crossing.

However fast the motor cycle may have been travelling before the application of the brake, its speed must have been materially reduced during the last sixty feet of its journey and no reasonable estimate of that speed, even if this important factor were not taken into account, could place plaintiff at the point indicated by defendant's agent when the truck started to cross the road.

On the other hand, regardless of the rate at which he had been travelling up to the time he applied his brake, it is not unreasonable to suppose that plaintiff's speed would have been so reduced during the time occupied in traversing the sixty feet immediately prior to his coming in contact with the truck that three or four seconds would necessarily have elapsed between the application of the brake and the collision.

The jury may have concluded that defendant's car started to cross the highway when plaintiff was approximately sixty feet distant; that it proceeded as slowly as the driver stated, and therefore predicated a finding of negligence on the part of defendant on these facts. We can not say that such a finding was unjustified.

"It should be declared as a rule of law governing the movements of motor vehicles 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 itself a safe passage either in front or rear of such car, even to the extent of stopping and waiting if necessary." *Fernald* v. *French*, 121 Me., 4.

"An automobile driver making a left-hand turn and crossing the highway at a point other than a roadway intersection is required to use extraordinary care and caution for the preservation of his own safety and to avoid injury to others." *Onkels* v. *Stogsdill* (Wash), 275 Pac., 692.

But it is not sufficient that plaintiff sustain the burden of proving defendant's negligence. He must also negative lack of due care on his part. It is upon this feature of the case that defendant relies.

The case shows that the motor cycle was being driven at a rate of speed so that the application of the brakes in such a manner as to lock the rear wheel failed to stop it in a distance of eighty feet.

Estimates of speed and distances by the most conscientious witnesses is necessarily inexact, but certain physical facts present evidence which can not be gainsaid. It is admitted that marks on the highway proved beyond any possible doubt that at a point at least sixty feet from the place of collision plaintiff utilized to its full extent the mechanical appliance designed to stop the progress of his machine; that he not only did not succeed in accomplishing that purpose but that at the end of the sixty feet was under such headway that the motor cycle pushed the Ford out of position, crushed one of its wheels, broke one of its springs and the housing of its rear axle, and ran twenty feet farther before it stopped; also that when it did stop, its momentum was such that the driver, a man weighing two hundred pounds, was thrown forward an additional twenty feet.

With these facts in mind, the conclusion is irresistible that plaintiff, at the time defendant's car attempted to cross the highway, was proceeding at a rate of speed absolutely inconsistent with due care.

"The speed of an automobile is excessive whenever it places the car beyond the control of the driver. To drive a car so fast as not to be able to avoid a visible obstruction is negligence." *Knox* v. *Cimmerman* (Pa.), 151 Atl., 678.

Considering the location, the amount of traffic incident to the time and season, the intersecting roads, the filling station with cars

entering and leaving its premises frequently, the duty of having his machine under reasonable control, a duty which always devolves upon the driver of a motor vehicle, should have been impressed upon plaintiff's mind.

"The duty to keep an automobile under control involves the ability to stop within a reasonable distance." *Boumaster* v. *DePree Co. et al* (Mich.), 233 N. W., 395.

"The phrase 'having his car under control' does not necessarily mean ability to stop instantly under any and all circumstances. A car is under control within the meaning of the law if it is moving at such a rate and the driver has the mechanism and power under such control that it can be brought to a stop with a reasonable degree of celerity." *Caruthers* v. *Campbell* (Ia.), 192 N. W., 138.

There was evidence tending to show that the course pursued by plaintiff in his attempt to avoid the collision was not such as, under any circumstances, would command itself to the judgment of a reasonably prudent man. An expert called by plaintiff, in direct examination, stated that if the brake was applied with sufficient force to lock the rear wheel, it would be impossible to steer the machine. This was advanced as an answer to the suggestion that plaintiff might have, by a very slight change of direction, passed safely to the rear of the truck.

This witness added that with the rear wheel locked the driver "would have no control"; that the proper way to stop the machine would be to shut off the power and that "if you locked your hind wheel it would be dangerous."

Plaintiff answers this proposition by saying that one faced by an emergency is not held to the exercise of the same degree of judgment as when one is permitted to view a situation calmly and with opportunity to select the best course of conduct to be pursued. But the emergency was not created entirely by the negligence of defendant. In spite of that, had plaintiff been travelling at a speed consistent with reasonable safety and with his machine under control, no emergency would have arisen.

"The rule that the law does not require one acting in an emergency to do the thing which afterwards appears to have been the safest only applies where the emergency is created or caused by the negligence of the other party and not where it is brought about in

whole or in part by the negligence of the injured party himself." *Zellmer* v. *Hines* (Ia.), 192 N. W., 281.

"One may not operate a car at excessive speed so as to prevent its reasonable control in an emergency and be permitted to say, after an emergency arose, that he did all he reasonably could with the means at hand to avoid the injury." *Knapp* v. *Gibbs* (Ky.), 277 S. W., 259.

"The fact that the driver of the car may have done all that could have been done in attempting to stop his car and to avoid a collision after discovering the car in front of him by no means relieves him from the charge of negligence. If his car, at the time of the discovery of the plaintiff car, was travelling at an excessive rate of speed under the conditions presented, the fact that he did all he could to stop, when the manner in which he had been driving had rendered it impossible for him to do so, instead of relieving the defendant subjects him to the charge of negligence." *Davis* v. *Brown* (Cal.), 267 Pac., 754.

We can not but be convinced that the jury entirely overlooked these various propositions, although they were clearly set out in the charge of the presiding Justice. The natural sympathy aroused in the minds of its members by the presence of a young man, who apparently but for this unfortunate misadventure would have enjoyed more than the usual measure of health and vigor, now crippled for life, overcame their ability to analyze the situation correctly.

We reach the conclusion regretfully but unavoidably that plaintiff's own negligence contributed to the happening of the event which caused his injury.

Motion sustained

GERTRUDE B. PIPER *vs.* GARDNER T. VOORHEES.

Cumberland. Opinion June 29, 1931.

EVIDENCE. EASEMENTS. PRESCRIPTION.

Traditionary evidence is admissible when the fact or tradition under investigation is of public or general interest.

It is a prerequisite, however, to its admissibility that the declarant must be dead, or supposed to be dead; otherwise transmission would not pass from prior generations beyond the reach of observation, to a living generation.

Town histories and maps from the files of recognized Historical Societies are admissible without extrinsic evidence of their authenticity, to prove remote facts of general history.

A road, like any other easement, may be extinguished by a nonuser. A cesser for twenty years, unexplained, to use a way acquired by use, is regarded as a presumption, either that the former presumptive right has been extinguished in favor of some adverse right, or, where no such adverse right appears, that the former has been surrendered, or, that it never existed.

While the nonuser of a prescriptive easement, for a period sufficient to create an easement by prescription, is evidence of an intention to abandon the easement, it is open to explanation, and may be controlled by proof that such intention did not exist. A voluntary and intentional desertion of a highway, the acquirement of a new road in its place, its travel and recognition by the public, may operate as an abandonment of the former.

When a highway is abandoned from the strip of land over which the public has a right of way, the land is discharged of the burden, and the private right revived.

In the case at bar, the evidence clearly disclosed that the ancient trail or bridle path, if it ever had been a public thoroughfare, was abandoned, so as to defeat the right of the public to use and enjoy it. The usage shown in no way established a claim of right. Judgment should properly be awarded the plaintiff.

On report. An action of trespass *quare clausum fregit*, for breaking and entering the close of the plaintiff, in the town of Scarborough. After the evidence had been taken out at the No-

vember, 1930, Term, of the Superior Court for the County of Cumberland, the cause was, by agreement of the parties, and with a stipulation for liquidated damages in the event plaintiff prevailed, reported to the Law Court for its determination. Judgment for plaintiff with damages assessed at $21.00 with costs. The case fully appears in the opinion.

Verrill, Hale, Booth & Ives, for plaintiff.

Skillin, Dyer & Payson, for defendant.

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

DUNN, J. This is an action of trespass *quare clausum fregit*, for breaking and entering the close of the plaintiff, in the town of Scarborough, on September 28, 1927, and then, and in a succession of like or repeated trespasses, trampling and spoiling grass and herbage. The case comes up, on a report of the legally admissible evidence, from the Superior Court sitting in Cumberland County, for final determination. In the event plaintiff prevails, stipulation liquidates damages.

The action, it is conceded, is maintainable, unless defendant proves as a defense that, where the acts were done, the land is burdened (1) by a right of way in the public; (2) or in classes of the public of which he is one, namely, persons dwelling or sojourning in Scarborough, or in a particular village in that town; (3) or in himself individually. Some of the defenses claim an easement by prescription; some by custom.

The important facts in the case are undisputed.

The close, the approximate area of which is seventy acres, lies near Higgins Beach, where persons summer. Use apparently was for pasturage until, in 1921, plaintiff erected her dwelling house thereon. In the main, the land is still uncultivated; it is "wild land," to use the descriptive words of a witness, in the sense that it is waste land.

On the southwest, a bluff rises from the sea. On the brow of this bluff, a pathway is discernible, on thinner or thicker coatings of earth, over outcropping ledge, and through bushes, across the premises of the plaintiff. In continuation from, and by projection

on adjoining lands, the path is from Higgins Beach to Scarborough Beach. At Higgins Beach, defendant has a summer cottage.

Fifty years or so ago, steps led over permanent fences, on either side of the locus, at the pathway. The steps were succeeded by turnstiles. The turnstiles have been gone for more than twenty years. From the time of their disappearance to 1926, the path appears to have been openly accessible. Plaintiff then built a wire fence across the path on the side towards Higgins Beach. Somebody cut the fence. In this situation, defendant entered and walked along the pathway and back again. He testified he had thus walked, from boyhood, in the summer seasons, for fifty years, more than a thousand times.

Testimony was admitted to show that, in colonial times, there was a common trail, or bridle path, along the shore above high-water mark, from Portland to Portsmouth and Boston, known as the King's Highway.

Augustus F. Moulton, Esquire, of the Cumberland Bar, who had been taken by his parents, in 1853, when but four years old, to Scarborough to live, testified in reference to the trail. His testimony was "from knowledge since 1878; prior thereto by report." In 1928, he traced the old path, on the locus and on the laterally adjoining lands, from beach to beach, the distance, as indicated on a chart or sketch, being about one mile.

Traditionary evidence is permissible, in exception to the rule excluding extrajudicial statements or declarations of third persons as hearsay, when the fact or tradition under investigation is of public or general interest. I Greenleaf on Evidence, Sec. 128; Wigmore on Evidence, Secs. 1582, 1583; 1 Phillips' Evidence, 189; *Reg.* v. *Bedfordshire*, 4 El. & Bl., 535; *Morewood* v. *Wood*, 14 East, 329, n., Lord Kenyon; *Wooster* v. *Butler*, 13 Conn., 309; *South-West School District* v. *Williams*, 48 Conn., 504; *Brown* v. *Jefferson County*, 16 Iowa, 339, 343; *Lawrence* v. *Tennant*, 64 N. H., 532, 543; *McKinnon* v. *Bliss*, 21 N. Y., 206, 218; *Drury* v. *Midland R. Co.*, 127 Mass., 571, 581; *Ellicott* v. *Pearl*, 10 Pet., 412, 9 Law ed., 475; *Morris* v. *Lessee of Harmer*, 7 Pet., 554, 558, 8 Law ed., 781, 783.

The admissibility of the declaration, it has been said, is sanctioned because the rights and liabilities are generally of ancient and

obscure origin, and may be acted upon only at distant intervals of time, and therefore direct proof of their existence ought not to be required; because, in local matters in which the community are interested, all persons living in the neighborhood are likely to be conversant; because, common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true; because conflicting interest would lead to contradiction from others if the statements were false; and thus a trustworthy reputation may arise from the concurrence of many parties, unconnected with each other, who are all interested in investigating the same subject. *Reg.* v. *Bedfordshire*, supra.

It is a prerequisite to the operation of the rule that the declarant must be dead, or supposed to be dead; otherwise transmission would not pass from prior generations beyond the reach of observation, to a living generation. *Davis* v. *Fuller*, 12 Vt., 178, 36 Am. Dec., 334; *South-West School District* v. *Williams*, supra; *Drury* v. *Midland R. Co.*, supra; *Ellicott* v. *Pearl*, supra. "The witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way . . . ." Mansfield, C. J., in the *Berkeley Peerage Case*, 4 Campb., 415.

There is room in the evidence for inference that they who declared to Mr. Moulton were old people, since dead. It is deducible, too, that the witness meant that those persons spoke to him of a trail or bridle path which, even at that time, had long ceased to be used.

The History of Scarborough, and the accompanying map, produced from the Maine Historical Society (Col. Maine His. Soc., Vol. 3), were admissible without extrinsic evidence of their authenticity, to prove remote facts of general history. *Bow* v. *Allenstown*, 34 N. H., 351, 368, 69 Am. Dec., 489, 498; 1 Enc. of Evidence, 880; *Almy* v. *Church*, 18 R. I., 182; *Drury* v. *Midland R. Co.*, supra; *Weld* v. *Brooks*, 152 Mass., 297, 305; *Whitman* v. *Shaw*, 166 Mass., 451; *State* v. *Wagner*, 61 Me., 178, 188; *Goodwin* v. Jack, 62 Me., 414; *Morris* v. *Lessee of Harmer*, supra. The map delineates, among other things, the route of a ferry road near the shore, in the now incorporated town of Scarborough.

"The highway in common use at that time," reads the history,

"was the seashore, which appears to have subjected travelers to some inconvenience besides that of the irregularities of the ferries; for in 1672 the court took measures to open a new way between the settlements."

In that year, Scarborough and other towns were ordered to mark the most convenient way for the passage of strangers and others from Wells to Falmouth (Portland). Col. Maine His. Soc., *supra.* Eventually an inland highway, "in general course of the present post-road between Wells and Portland," was opened. Col. Maine His. Soc., *supra.*

Like any other easement, a road may be extinguished. Elliott, Roads & Streets, 3rd ed., Sec. 1172; *Holt* v. *Sargent*, 15 Gray, 97, 101. A cesser for twenty years, unexplained, to use a way originally acquired by use, is regarded as a presumption, either that the former presumptive right has been extinguished in favor of some adverse right, or, where no such adverse right appears, that the former has been surrendered, or that it never existed. *Wooster* v. *Fiske*, 115 Me., 161.

In *Beardslee* v. *French*, 7 Conn., 125, Hosmer, C. J., speaking for the court, said: "Evidence to prove a highway often consists in showing that the public have used and enjoyed the road; and the uninterrupted use of it, for a considerable space of time, affords a strong presumption of a grant. On the other hand, the nonuser of an easement of this kind, for many years, is *prima facie* evidence of a release of the right to the person over whose land the highway once ran; and although the precise limit of time in respect to the public, in such cases, has not been established, there can be no doubt that the desertion of a public road for nearly a century, is strong presumptive evidence that the right of way has been extinguished."

While the nonuser of a prescriptive easement, for a period sufficient to create an easement by prescription, is evidence of an intention to abandon the easement, it is open to explanation, and may be controlled by proof that such intention did not exist. *Pratt* v. *Sweetser*, 68 Me., 344. Again, the laying out of a new road near an old road does not necessarily operate a discontinuance of the latter. *Chadwick* v. *McCausland*, 47 Me., 342. Still, voluntary and intentional desertion of a highway, the acquirement of a new road in its place, its travel and recognition by the public, may operate as

an abandonment of the former. Elliott, Roads & Street, Sec. 1174; *Peoria* v. *Johnston*, 56 Ill., 45; *Hartford* v. *New York & N. E. R. Co.*, 59 Conn., 250; *Galbraith* v. *Littiech*, 73 Ill., 209. Acquiesence for even a few years, in the discontinuance of an old road, and the adoption of another, has been held sufficient to show the abandonment of the old road in the absence of evidence of a contrary intention. *Warner* v. *Holyoke*, 112 Mass., 362; *Pope* v. *Devereux*, 5 Gray, 409; *Hobart* v. *County of Plymouth*, 100 Mass., 159.

From 1672, when the towns were ordered to mark the new road, to 1927, in which year plaintiff commenced this action, was two and a half centuries. There was delay, the historian states, in constructing the new road, but there is no pretense that it was not constructed, opened, traveled by the public, and recognized by the public authorities in the time of the Colonial Government. Furthermore, there seems to have been, on the part of successive owners of the land which the ancient trail had occupied, continual, inclusive, and adverse possession of the easement, reaching further back than living memory can go.

In the light of all the facts, it is clear that the ancient trail or bridle path, if it ever had been a public thoroughfare, was abandoned, so as to defeat the right of the public to use and enjoy it.

Whenever the public interest is relinquished, the owner of the soil is restored to his original dominion over the same. The land, it is sometimes said, reverts to the owner, disencumbered of the public use, but the expression is not altogether accurate. The land does not revert, because there has been no alienation. The public has only been entitled to a certain specific right, the enjoyment of which is incompatible with the exercise of certain private rights, which are, therefore, necessarily suspended. When, however, the highway is abandoned from the strip of land over which the public has a right of way, the land is discharged of the burden, and the private rights revive. Angell on Highways, Sec. 326; *Fairfield* v. *Williams*, 4 Mass., 427; *Perley* v. *Chandler*, 6 Mass., 454; *Alden* v. *Murdock*, 13 Mass., 256; *Barclay* v. *Howell's Lessee*, 6 Pet., 498, 513, 8 Law ed., 477, 483.

This, however, is not the end of the case. As was pointed out at the beginning, there are the defensive contentions of entry on the location where the trail or path had been, in the exercise of a right

of way resting in certain classes of the public, or personally in the defendant.

The public, as well as an individual, may acquire an affirmative easement, as a right of way, by use of the privilege, under a claim of right, adverse to and acquiesced in by him against whom it is claimed, for at least twenty years. *Rowell* v. *Montville*, 4 Me., 270; *Estes* v. *Troy*, 5 Me., 368. Prescription presupposes and is evidence of a previous grant. But a prescriptive right of way, either in the public or the defendant, is not established in this case. Of this, more will be said, following consideration of the defense of custom.

Under the common law of England, a local right, analogous to that of a strict easement, could be proved by immemorial usage in favor of the inhabitants, for the time being, of a particular territory or district. Such a right, unlike a prescriptive right, never was assumed to arise from a grant by the land owner of an easement in it, but to have come, if at all, from some governmental act of a public nature, the best evidence of which had perished, or of which there never had been, as in the case of a charter from some feudal lord or ecclesiastical corporation, a public record. "Custom" was an invention to surmount the incapacity of a fluctuating body, as the inhabitants of a manor or barony, to take by grant.

The defense of a personal right of way by custom was interposed in the cases, cited by counsel for defendant, of *Bethum* v. *Turner*, 1 Me., 111, *Littlefield* v. *Maxwell*, 31 Me., 134, and *Hill* v. *Lord*, 48 Me., 83. The discussions, while interesting, were not made necessary by the controversies. None of the cases, as counsel themselves observe, is abstract authority.

In Maine, there never has been affirmation of the recognition of a right of way by custom. Connecticut, in an informing opinion, to which this opinion acknowledges indebtment, holds that there, no such thing as a customary easement exists. *Graham* v. *Walker*, 78 Conn., 130. See, too, the Massachusetts cases of *Codman* v. *Evans*, 5 Allen, 308, and *Attorney General* v. *Tarr*, 148 Mass., 309. It is unnecessary, on the evidence in the instant case, to dwell upon whether the doctrine of custom obtains in our jurisdiction.

The evidence for the defense, respecting both prescription and custom, falls short of showing other than a permissive use of what, in the words of defendant's sister, is "a place of wild beauty where

people enjoy the scenery," and defendant himself says is "the most attractive thing on the beach."

The owner, fifty years ago, of the locus and adjoining land, began selling lots for cottages. The cottagers (of whom the father of the defendant was among the first) were permitted, without objection, to go generally over all the land. Defendant gave testimony that, from boyhood on, he went on the pathway, not to pass to and from another place or settlement, but for pleasure or recreation. He had frequently seen other persons strolling there. When plaintiff built the wire fence, defendant asked her for a card that he might use the path.

Other witnesses testified to walking the pathway at different times over periods varying from twenty-five to fifty years, before interrupted by the wire fence. "Anybody," said one witness, "walked over it (the path) who wanted to."

In the testimony is no claim of right, *Blanchard* v. *Moulton*, 63 Me., 434, except what might arise from long-continued usage of the path. The usage shown does not establish a claim of right. The character of the land, the manner in which, with regard to steps and turnstiles, it was fenced, the use to which they who went upon it put it, which may have induced the sale of cottage lots, and certainly did no injury, show but permissive use. *Bethum* v. *Turner*, supra; *Mayberry* v. *Standish*, 56 Me., 342; *Littlefield* v. *Hubbard*, 124 Me., 299. The application by defendant, after the building of the wire fence, for leave to go upon the close, is evidence that his previous use was not under a claim of right. *Tracy* v. *Atherton*, 36 Vt., 503.

Judgment is awarded the plaintiff. Agreeably to stipulation in the report, damages are hereby assessed at twenty-one dollars. Costs follow.

Judgment accordingly.

ANNA LOUISE POST *vs.* FIRST AUBURN TRUST COMPANY.

Androscoggin. Opinion June 29, 1931.

GUARDIAN AND WARD.

The power of a guardian over the personal estate of his ward is coextensive with that of an executor of a will. In the management of the ward's estate it is for the guardian to apply the income and profits for the maintenance of the ward; if these be insufficient, principal may be used. The use of principal may involve selling property; borrowing money is an alternative mode of raising funds.

The statute providing that the Probate Court may license a guardian to sell or mortgage the estate of his ward is, in relation to personal estate, permissive and not restrictive. A guardian may protect the interests of himself and sureties by procuring a license, and thus establish in advance that a sale or mortgage is for the interest of the ward, instead of leaving that fact open to dispute at a future day; but he is not obliged to do so.

If one loans to a guardian on collateral of the ward, with knowledge or reason to know, that the guardian intends to misapply the money, or that he is in fact applying it to his own private use, the pledge is not good. When, however, one loans in good faith it is of no moment what becomes of the borrowed money. The lender is not bound to see to its application.

In the case at bar, the agreed facts show good faith on the part of the defendant. It had a right to rely on the affirmation of the guardian that the money was for his ward, and it was not wanting in diligence in the discovery of any contemplated breach of trust.

On report on an agreed statement. An action in trover to recover the value of twenty shares of the capital stock of The Mountain States Telegraph and Telephone Company, which had been bequeathed to the plaintiff in her minority, and had been pledged by her guardian to defendant as collateral security for a loan. Judgment for defendant. The case fully appears in the opinion.

Frank A. Morey, for plaintiff.

George C. Webber, for defendant.

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

DUNN, J. This case is here, on report from an Androscoggin County sitting of the Superior Court, on an agreed statement of facts. The action was trover for the conversion of twenty shares of the capital stock of The Mountain States Telegraph and Telephone Company. The stock was bequeathed the plaintiff in her minority. A certificate, in the name of David A. Post, Guardian of Anna Louise Post, minor, was issued.

The guardianship was by judicial appointment. The guardian, as such, and without a license from the Probate Court, assigned the certificate in blank, and delivered it to the defendant bank as collateral security for the payment of a promissory note signed by him, individually only. The consideration for the note was a loan of fifty dollars. The money was being borrowed, the guardian told the treasurer of the bank, for the benefit of his ward. Later, the guardian borrowed one hundred dollars; still later, fifty dollars more. In each of these transactions, as in the first, he gave his own note, used the same security, and stated the borrowing to be for his ward.

Ultimately, a single note, for which the stock was made collateral, evidenced the total amount of the loans. Of this note there were frequent renewals. The last, which matured June 8, 1926, was, too, signed but personally. It specifically describes the stock as in pledge.

Upon coming of age, and after the death of her guardian, the ward demanded that the bank surrender the stock to her. The demand was refused. Suit followed.

There is but one question in this case, though stipulation accompanying the report would propound others, which will bear a present argument. That question is, whether the guardian validly pledged the stock. The answer must be "Yes."

The power of a guardian over the personal estate of his ward is coextensive with that of an executor of a will. *Echols* v. *Speake* (Ala.), 64 So., 306, Ann. Cas., 1916C, 332. An executor, his title being fiduciary and not beneficial, may pledge the personal property of his testator, for the general purposes of the will. *Carter* v. *National Bank*, 71 Me., 448.

In the management of the ward's estate, it is for a guardian to apply the income and profits for the maintenance of the ward; if these be insufficient, principal may be used. R. S., Chap. 80, Sec. 15.

The use of principal may involve selling property; borrowing money is an alternative mode of raising funds.

The statutes provide, it is true, that the Probate Court may license a guardian to sell or mortgage the estate of his ward. R. S., *supra*. Certainly, in relation to personal estate, the statutes would seem to be permissive, and not restrictive. A guardian may protect the interests of himself and his sureties by procuring a license, and thus establish in advance that a sale or mortgage is for the interest of the ward, instead of leaving that fact open to dispute at a future day; but he is not obliged to do so. *Gardner* v. *Beacon Trust Company*, 190 Mass., 27, 31; *Maclay* v. *Equitable Life Assurance Society*, 152 U. S., 499, 504, 38 Law ed., 528, 531.

If the collateral had been accepted from the guardian, with knowledge, or reason to know, that he intended to misapply the money, or was, in fact, at the time applying it to his own private use, the pledge would not have been good. *Field* v. *Schieffelin*, 7 *Johns*, Chap. 150, 11 Am. Dec., 441; *Carter* v. *Bank*, supra.

But the agreed facts do not exhibit such a case. On the contrary, they show good faith.

What became of the borrowed money is not of moment. The lender was not bound to see to its application. *Field* v. *Schieffelin*, supra; *Bank* v. *United States Fidelity, etc., Co.* (Ala.), 75 So., 168. What is of consequence, was the affirmation of the guardian that the money was for his ward, and the absence by the bank of knowledge, or notice, of any contemplated breach of trust, if such there were, on the part of the now dead guardian. *Carter* v. *Bank*, supra.

The fact that, in executing the note, the maker omitted to designate his action as that of guardian eo nominee, does not affect the issue. The debt contracted by the guardian was in law personal. *Davis* v. *French*, 20 Me., 21; *Carter v. Bank*, supra; *Call* v. *Garland*, 124 Me., 27. It would have been just as much personal whether the guardian added to his signature his tutelar description or not. *Farmers', etc., Bank* v. *Sanford* (Ala.), 43 So., 226 That he did not add the descriptive word, "guardian," to his signature, was not, of itself, sufficient to inform the defendant that the money was not for the benefit of the ward.

In form, the money was advanced to the guardian personally, but actually upon security which revealed upon its face, as the bank was bound to notice, that it belonged to the estate of the ward.

The bank was not wanting in diligence.

Judgment for defendant.

STATE OF MAINE *vs.* RICE & MILLER COMPANY

AND

STATE OF MAINE *vs.* RICE & MILLER COMPANY.

Penobscot. Opinion July 13, 1931.

PLEADING & PRACTICE. EXCEPTIONS. R. S. 1930, CHAP. 38, SEC. 63.

In a bill of exceptions where the evidence is made a part of the bill and the statements of fact in the bill are contradicted by the evidence, the latter controls.

To expose or offer for sale, sell or purchase a light fitted for use in hunting in the night time, is in this state forbidden by statute.

In the first case at bar, the complaint did not properly charge an offense under the statute, and the motion in arrest of judgment should have been sustained and the complaint dismissed.

In the second case, the complaint properly charged an offense and the evidence which was made a part of the bill of exceptions disclosed that the defendant sold a light which the court found was admirably "fitted for use in hunting in the night time." The finding of guilty was proper.

On exceptions. Two complaints, one for exposing and offering for sale flash lights; the other for selling a light fitted for use for hunting in the night time. Respondent found guilty in each, upon trial in the lower court, filed motions for arrest of judgment. To the overruling of these motions it seasonably excepted. In the

former, exceptions sustained; in the latter, exceptions overruled. The opinion fully states the two cases.

James D. Maxwell, County Attorney, for the State.

Fellows & Fellows, for respondent.

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

BARNES, J. On exceptions from Bangor Municipal Court. Respondent was tried before the lower court on two complaints for alleged violations of the provisions of Sec. 63, Chap. 38, R. S. 1930, and was adjudged guilty on each. Motion in arrest of judgment was filed in each case, and overruled.

Exceptions were taken to these and other rulings.

The statute, Chap. 38, Sec. 63, R. S., reads as follows: "No person shall expose or offer for sale, sell or purchase in this state any jack-light or light fitted for use in hunting in the night time. No person shall have in possession at any time when he is upon the wild lands, water or highways, or in the woods or fields of the state, or in any camp, lodge or place of resort for hunters or fishermen, or in its immediate vicinity, any jack-light, or light fitted for use in hunting in the night time, or any swivel, pivot or set gun; nor shall any person have in possession at any time any spear, trawl or net, except such as are authorized for the taking of suckers, eels, horn pouts and yellow perch, as provided in section twenty-eight of this chapter, in any camp, lodge or place of resort for hunters or fishermen or in its immediate vicinity, or on any of the lakes, rivers or streams of the state, or in their immediate vicinity, in the inland territory of the state. Nothing in this section shall be construed as affecting or restricting the legitimate possession and sale of flash-lights."

In one of the complaints, numbered 3893, on docket of the court below, the offense charged was that respondent, "did expose and offer for sale flash lights, to wit: jack-lights, the same being fitted for use in hunting in the night time."

These words do not charge an offense under the statute, and as to this complaint the motion in arrest of judgment should have been sustained and the complaint dismissed.

In the other case, numbered 3892 on the docket of the same court, the charge was that respondent "did sell to one . . . a light fitted for use in hunting in the night time."

These words import an offense. They are quoted directly from the statute. The motion in arrest of judgment was properly overruled.

The bill of exceptions recites as a fact that "all of the evidence in this case shows a legitimate possession and sale of flash lights." If this statement is taken as true, the state has obviously no case.

The exceptions were allowed by the Judge and agreed to by the attorney for the State. But where the evidence is made a part of the bill and the statements of fact in the bill are contradicted by the evidence, the latter controls.

This question has been repeatedly passed upon by our court where statements in the bill of exceptions as to what a witness said upon examination have been found to be incorrect when compared with the report of the testimony as written by the court stenographer, sent up as a part of the record.

"The first requested instruction was properly refused because the evidence did not warrant it, as appears by a report of the evidence which is made a part of the bill of exceptions, and must control its allegations as to matters of fact." *Harmon* v. *Harmon*, 63 Me., 437.

"While generally this court can act on a bill of exceptions only in the form as made up and allowed at *nisi prius*, still when the stenographer's report of the evidence is made a part of the bill of exceptions, it must control the allegations in the bill as to matters of fact, if there be a conflict between them." *Tower* v. *Haslam*, 84 Me., 86; *State* v. *Sandford*, 99 Me., 441, 447; *Charles* v. *Harriman*, 121 Me., 484.

A light in all respects similar to that sold as charged in the complaint and taken from respondent's stock, was introduced in evidence as an exhibit on the part of the State, and made a part of the bill of exceptions. The light, with its attached equipment was submitted to this court. If the court can decide such a matter, it is admirably "fitted for use in hunting in the night time."

Its attached equipment is adapted to such use, and adjusted and made a part of the article.

So fitted it was sold by the respondent.

Whether it was sold for use in hunting we need not inquire.

That such a light, so fitted, is suitable for many other uses is immaterial. To expose or offer for sale, sell or purchase a light fitted for use in hunting in the night time is forbidden by the statute.

Exceptions were taken to certain rulings of the Judge below.

The first ruling was that "the burden was on the respondent to show that this flash light, capable of being used for hunting in the night time, was sold to be used for a lawful purpose."

Respondent was not aggrieved by this ruling. If the State had admitted that the light "was sold to be used for a lawful purpose," and had proved at the same time that it was "a light fitted for use in hunting in the night time," the result must have been the same.

The second ruling was, "that it is not necessary for the state to prove an unlawful possession or an unlawful sale. The state need only show that the light sold or exposed for sale was capable of use for hunting in the night time."

If the State proved its case, respondent is not aggrieved by the fact that the trial Judge regarded it unnecessary for it to do so; and it is not important that the Judge conceived "fitted for use in hunting" and "capable of use for hunting" to be synonymous.

The third ruling was that although "these lights were sold and exposed for sale to be used for lawful purposes, because (they are) fitted for use in hunting in the night time the respondent is found guilty," and is correct as applied to the case numbered 3892 on the docket of the lower court.

Exceptions sustained in case numbered 3893.
Exceptions overruled, and judgment for the State to be entered in case numbered 3892 *on docket of the Bangor Municipal Court.*

OLIN B. BUZZELL *vs.* JASPER B. COUSENS.

Cumberland. Opinion July 15, 1931.

FRAUD. PLEADING & PRACTICE. DAMAGES.

In an action based on fraud actual damage is a necessary element, which the plaintiff must prove to sustain his suit. If it is fairly deducible from the evidence that the plaintiff has suffered some pecuniary loss, even though the extent of it is difficult to measure, the action may be sustained.

Mere difficulty in determining values, and in assessing damages is not a sufficient reason for the withdrawal of the case from the jury.

In the case at bar, evidence was submitted of the price paid by the plaintiff for the shares of stock and of representations made by the defendant. If defendant actually made statements that the stock represented ownership in a hotel building, when in fact it did not, and that there was insurance against vacancies when there was no insurance, the stock had less value than plaintiff had reason to suppose.

The fact that the stock passed its dividend shortly after the sale is evidence bearing on its value at the time of the purchase.

There was sufficient evidence of the plaintiff's having suffered pecuniary loss to justify the submission of the case to the jury.

On exceptions by plaintiff. An action of deceit based on alleged misrepresentations by the defendant in the sale of shares of stock. To the exclusion of certain evidence offered by plaintiff and to the granting of a nonsuit, plaintiff seasonably excepted. Exceptions sustained. The case fully appears in the opinion.

Hinckley, Hinckley & Shesong, for plaintiff.

Benjamin B. Sanderson,

Frederick R. Dyer, for defendant.

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

THAXTER, J. This is an action of deceit based on alleged misrepresentations by the defendant in the sale of shares of stock to the plaintiff. The stock represented an ownership in certain real estate enterprises in Boston and Washington. The fraud, as alleged by the plaintiff in his declaration and as testified to by him, was in substance that the defendant told him that there was a steady income from the buildings because there was insurance in reliable companies against vacancies, and also that the defendant informed him that the stock in the Ritz-Carlton Hotel covered the hotel building, when in fact there was no such rent insurance assuring the income from the buildings, and the stock in the Ritz-Carlton Hotel did not represent an ownership in the building itself. Within a year or two after the sale of the stock the dividends on all of it were passed.

The plaintiff was asked by his counsel to give his opinion of the value of the stock at the time he purchased it. On objection this evidence was excluded and an exception was taken. At the close of the plaintiff's case on defendant's motion a nonsuit was granted. The case is before this court on exceptions to the rulings excluding the evidence and to the granting of the nonsuit. No other evidence was offered of the value of the stock at the time of the purchase, and defendant's counsel in oral argument conceded that the ruling of the court could be justified only on the ground that there was no evidence from which a jury could determine that the plaintiff had suffered damage.

It is true that in an action based on fraud actual damage is a necessary element, which the plaintiff must prove to sustain his suit. As was said in the leading case of *Pasley* v. *Freeman*, 3 T. R., 51, "Fraud without damage, or damage without fraud, gives no cause of action: but where these two concur, an action lies." If it is fairly deducible from the evidence that the plaintiff has suffered some pecuniary loss, even though the extent of it is difficult to measure, the action may be sustained. Pomeroy: Equity Jurisprudence, 3 ed., Sec. 898; 26 C. J., 1171-1172; *Stuart* v. *Lester*, 1 N. Y. S., 699, 702; *Dubovy* v. *Woolf*, 127 Me., 269, 277.

In the case at bar we have evidence of the price paid by the plaintiff for the shares of stock. If there had been, as he claims was represented to him, insurance against vacancies in the different build-

ings, it is obvious that the stock was worth more than without such insurance. Likewise the stock of the Ritz-Carlton Hotel was worth more, if it represented an ownership in the hotel building than if it did not. Without such elements of value the plaintiff's stock was worth less than he had reason to suppose it was worth. Just how much less it is difficult to determine, and it must be admitted that the evidence which would help a jury to a decision is far from satisfactory. It is a fact that within a comparatively short time after the sale to the plaintiff dividends on the stock were passed. This circumstance is not in and of itself conclusive that the stock was of less value than represented; and yet it is evidence with the other testimony which a jury would have a right to take into account. Subsequent events in the history of a company, if not too remote in point of time, may be considered in determining what was its previous condition. *Davis* v. *Coshnear*, 129 Me., 334.

We feel that there was sufficient evidence of the plaintiff's having suffered a pecuniary loss to justify the submission of the case to the jury. The mere difficulty in assessing damages is not a reason for the granting of a nonsuit or for the direction of a verdict. *Peterson Co.* v. *Parrott*, 129 Me., 381.

The view which we have here taken renders it unnecessary that we consider the exception to the exclusion of the plaintiff's testimony as to value.

Exception sustained.

FRANK GOODWIN *vs.* GEORGE H. BOUTIN.

York. Opinion July 15, 1931.

REAL ACTIONS. PLEADING & PRACTICE. ESTOPPEL. PROBATE COURTS.

In a real action equitable estoppel is open to the defendant.

The law will not permit a man to say that what he is proven, clearly and certainly to have said or done, as a solemn act, by which others have acquired rights, was not according to the truth.

Decrees of Probate Courts touching matters within their authority, can not be collaterally impeached.

In the case at bar, the decree by the Supreme Judicial Court in equity, abridging or shortening the trust period, when, by express provision in the will, the trust was yet an active one, divested the trustee of the legal title to the real estate. Thereupon, the existing remainder vested in possession. But, in the absence of registry record, or actual notice, the decree was without force as against third persons having no actual knowledge.

The succeeding trustee, appointed by the Probate Court, conveyed the real estate to the defendant, who was not shown to have had actual notice of the decree terminating the trust, but who, in purchasing the property, relied upon the probate and registry records.

Under this state of facts in proof, plaintiff was estopped from setting up a title to the demanded premises, to the injury of the defendant.

The verdict was properly directed for the defendant.

On exception by plaintiff. A real action brought for the recovery of certain land and buildings in Biddeford. Defendant pleaded the general issue with a brief statement setting up equitable estoppel. To the direction of a verdict for the defendant, plaintiff seasonably excepted. Exception overruled. The case fully appears in the opinion.

Leroy Haley, for plaintiff.

Joseph R. Paquin,

Robert B. Seidel, for defendant.

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

DUNN, J. This is a real action. Defendant pleaded *nul disseisin*; he also, by brief statement, set up equitable estoppel. At the close of the evidence, the judge in the trial court ordered a verdict for the defendant. Plaintiff excepted.

The controlling question is, whether the plaintiff, upon whom the burden of proof was imposed, introduced evidence of such a character, assuming it true and giving it full probative value, as would have warranted the jury in finding the issue in his favor. *Heath* v. *Jaquith*, 68 Me., 433; *Jewell* v. *Gagne*, 82 Me., 430; *Royal, Admrx.* v. *Bar Harbor, etc., Co.*, 114 Me., 220.

The demanded premises, a lot of land and a house thereon, in Biddeford, in York County, were owned by Mehitable W. Goodwin of that city, when she died.

Her will, duly proved and allowed, created a trust, the real estate in question comprising the corpus. The testatrix nominated a trustee to manage and control the property, and pay the net income, annually, to her son, Frank Goodwin, during his natural life. The trust attached and the trustee entered upon the discharge of his duties.

A power to convey the property, in whole or in part, if an amount of money greater than the income was necessary for the comfort and support of the son, was conferred on the trustee.

The will did not provide a remainder, but only disposed of one, should it exist, to another son, Octavius B. Goodwin. He died soon after the death of the testatrix.

Two sons of Octavius, reciting themselves his only two heirs at law, quitclaimed by recorded deed, to Frank Goodwin, the life beneficiary, the vested but defeasible interest which the will passed to their father, and which had descended to them. A quitclaim deed conveys the estate which the grantor has, and can convey by a deed of any other form. R. S., Chap. 87, Sec. 20. Such a deed will convey an equitable interest defeasible by a contingency. *Whipple* v. *Fairchild*, 139 Mass., 262.

After the conveyance, the Supreme Judicial Court, at an equity sitting in York County, on a bill filed against the trustee by the beneficiary, decreed the testamentary trust terminated and determined. On the trial of the case at bar, plaintiff introduced the decree into the evidence. For what reason, notwithstanding the trust was to continue during the life of the still living son of the testatrix, the court acting under its equitable jurisdiction relieved against the provisions of the will, is not apparent. The bill and answer in that cause, if they were in evidence, are not in the printed record; nor is the testimony; nor any finding of material facts by the judge.

What emergency of sufficient gravity had arisen to justify relief, the decree does not state. The bill of exceptions, however, recites that the decree, which was never recorded in the registry of deeds, was entered "upon proper proceedings."

Besides modifying the terms of the trust, the decree ordered that the trustee settle his final account in the Probate Court, which he did. The real estate not having been sold, the account dealt only with income.

The decree, by abridging or shortening the trust period, when, by express provision in the will, the trust was yet an active one, divested the trustee of the legal title to the real estate. Thereupon the existing remainder vested in possession. But, in the absence of registry record, or actual notice, the decree, in consequence of the entry of which such remainder then vested in possession, was without force as against third persons. R. S., Chap. 91, Sec. 61.

On the termination of the trust, plaintiff appointed an agent to collect the rentals from the property.

Fourteen years afterwards, in a petition to the Probate Court of original jurisdiction, plaintiff averred existence of the trust, his interest as beneficiary thereunder, and the decease of the trustee. He prayed the appointment of a trustee in succession. After notice and hearing, an appointment was made.

A succeeding trustee, the statutes provide, has the same powers as if he had been originally appointed. R. S., Chap. 82, Sec. 18; *Chase* v. *Davis*, 65 Me., 102, 106; *Hichborn* v. *Bradbury*, 111 Me., 519, 523.

The trustee appointed by the Probate Court conveyed the real estate to the defendant, who was not shown to have had actual notice of the decree terminating the trust, but who, in purchasing the property, as evidence tended to establish, relied upon the probate and registry records.

Plaintiff testified, over objection, that, in signing the petition to the Probate Court, he had supposed himself making an application to a bank for a loan of money. The testimony was inadmissible. Decrees of probate courts, touching matters within their authority, can not be collaterally impeached. *Taber* v. *Douglass*, 101 Me., 363, 367.

Although the action was at law, for land, equitable estoppel was open to the defendant. *Copeland* v. *Copeland*, 28 Me., 525; *Bigelow* v. *Foss*, 59 Me., 162. The law, abhorring fraud and falsehood, will not permit a man to say that what he is proven, clearly and certainly, to have said or done, as a solemn act, by which others have

acquired rights, was not according to the truth. *Ham* v. *Ham*, 14 Me., 351; *Copeland* v. *Copeland*, supra; *Dickerson* v. *Colgrove*, 100 U. S., 578, 25 Law ed., 618.

Under the state of facts in proof, plaintiff was estopped from setting up a title to the demanded premises, to the injury of the defendant. *Titus* v. *Morse*, 40 Me., 348, 352, 353; *Martin* v. *Maine Central, etc., Company*, 83 Me., 100, 104; *Rogers* v. *Portland & Brunswick St. Ry.*, 100 Me., 86; *Stubbs* v. *Franklin & Megantic Ry. Co.*, 101 Me., 355; *Holt* v. *New England Tel. & Tel. Co.*, 110 Me., 10, 12; *Davis* v. *Briggs*, 117 Me., 536, 539; *Smith* v. *Heine Safety Boiler Company*, 119 Me., 552, 564.

The verdict was properly directed for the defendant.

Exception overruled.

BERTHA L. MCINTIRE *vs.* GEORGE E. MCINTIRE.

Penobscot. Opinion July 16, 1931.

DIVORCE. CONSTRUCTION OF STATUTES.

The statement of the residence of the libellee in the writ of attachment to which the libel for divorce is affixed constitutes a full compliance with the statutory requirement that the residence of the libellee "shall be named in the libel," even though the said residence is not stated in the body of the libel.

It is a generally recognized rule that the enactment of the revision of statutes manifestly designed to embrace an entire subject of legislation operates to repeal former acts dealing with the same subject, even though there is no repealing clause to that effect. The application of the rule is not dependent on the inconsistency or repugnancy of the new legislation and the old, for the old legislation is impliedly repealed by the new even where there is no repugnancy between them.

Where a statute is revised, or a series of acts on the same subject is revised and consolidated into one, all parts and provisions of the former act or acts, that are omitted from the revised act, are repealed, even though the omission

may have been the result of inadvertence, and unless the earlier provision is continued in force by a saving clause.

Jurisdiction over divorce is purely statutory, and every power exercised by the court with reference to it must be found in the statutes or it does not exist.

In the case at bar, the statute authorizing the Court to grant a divorce to one party, even though the other party had obtained a decree, had long since been repealed, and their being no statutory power under which the divorce in the case before the Law Court could have been decreed, the 1922 divorce granted to the libellee in the present case is a bar to any divorce proceedings on the part of the present libellant against him. The married status is as completely destroyed as if it had never existed and there is no more or better reason to take jurisdiction in such case than in cases where there has never been a marriage or where proof of marriage is insufficient.

On exceptions by libellee. A libel for divorce brought by Bertha L. McIntire against George E. McIntire and inserted in a writ of attachment of the Superior Court for Penobscot County, returnable on the first Tuesday of September, 1930. Trial was had at the November Term, 1930, of the Superior Court for the County of Penobscot. To the refusal of the presiding Justice to dismiss the libel on the grounds that the residence of the libellee was not named in the libel, and that the court lacked jurisdiction, the libellee seasonably excepted. Second exception sustained. The case fully appears in the opinion.

Crosby & Crosby, for libellee.

L. B. Waldron, for libellant.

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

FARRINGTON, J. The case is before this court on exceptions (1) to the refusal of the presiding Justice to dismiss the libel and (2) on exceptions to the decree granting the divorce.

We will first consider the exception to the refusal to dismiss. It is claimed by the libellee that the court lacked jurisdiction by reason of the fact that his residence was not stated in the libel as provided in Sec. 4, Chap. 65, R. S. (1916), Sec. 4, Chap. 73, R. S. (1930).

The divorce libel dated July 17, 1930, in the usual form and signed by the libellant was inserted in a writ of attachment, re-

turnable to Penobscot County Superior Court on the first Tuesday of September, 1930. The officer's return shows due personal service on George E. McIntire. The writ, upon which a real estate attachment was actually made, contained the usual command "to attach the goods or estate of George E. McIntire of Dexter, in our County of Penobscot," but in the body of the libel or petition the residence of the libellee was not named, nor was the residence stated in any place other than as above indicated.

The docket entries show that the libellee, through counsel, entered a general appearance.

The contention of the libellee is, in effect, that a libel for divorce is a complete petition in itself and that it should set out all matters which are required by statute, and that the residence of the libellee not being named in the libel or petition, such omission or failure can not be cured by the fact that such residence is named or stated in the writ in which the libel was inserted. The evident contention is that the writ is no part of the libel and that a statement in the writ as to residence is not a compliance with the statute which provides that the residence, when it can be ascertained, "shall be named in the libel."

The first appearance in our statutes of any provision for the insertion of a libel for divorce in a writ of attachment was in 1862 when the Legislature by Chapter 122, Section 1, of the Public Laws of that year provided that "In addition to the mode of service already provided, the libel for divorce may be inserted in a writ of attachment, and served as other writs, by attachment, summons and copy; which attachment shall be a lien on any real or personal property attached for the execution of any decrees of the Court in such proceeding; and the Court shall have power to render any judgment necessary to carry such attachment into effect."

Up to this time the only method was by filing the libel, signed by the party complaining, with the Clerk of the Courts with such service as was required by the statutes.

Down to and including the Revision of 1871, no statutory requirement is found relating to the naming of the residence of the libellee in the libel, if it can be ascertained, and none relating to obtaining actual notice. This provision was first enacted by the Legislature of 1874, Chapter 184 of the Public Laws of that year,

Section 1, which was as follows: "Upon all libels for divorce when the residence of the libellee can be ascertained, it shall be named in the libel and actual notice shall be obtained, if the libellee is out of the state, in such manner and by such means as may be ordered by the court. When it is not known to the libellant and can not be ascertained by reasonable diligence, the libellant shall allege and make oath to the same in the libel."

The 1874 provision became Section 4 of the 1883 Revision and the 1862 provision became Section 3 of that Revision.

From 1883 down to and including the date of the exceptions the provisions of the 1874 Act and those of the earlier 1862 Act have been in all the revisions of our statutes, as Sections 4 and 3, with some slight and unimportant difference in language and punctuation, but, in effect, unchanged.

The purpose of the 1874 Act is apparent on a reading of its provisions. Under its requirements a greater measure of certainty as to actual notice to the party libellee was sought and made possible.

It might be said that the Legislature by the 1862 provision above referred to intended that the libel and the writ should be merged into a single legal instrument to be known as the libel and that such a construction of that statute is the natural and obvious one, because at that time there was no statutory provision relating to the naming of the residence of the libellee which was not required until the 1874 Act above quoted. But whatever the 1862 Legislature intended and whatever construction it may have placed upon its own Act, the Supreme and Superior Courts of this State since the enactment of the 1874 Law have granted many divorces on libels inserted in writs of attachment where the only naming of the residence was in the writ itself, and by their decrees they have placed a judicial construction upon the meaning of the phrase "it shall be named in the libel."

While the decrees of presiding Justices in the granting of divorces can not *per se* be regarded as judicial decisions directly involving the construction of a statute, yet, a construction uniformly followed and acquiesced in, over a period of more than fifty-six years, can not be regarded as entirely without weight. But, apart from that, and bearing always in mind the clearly fundamental in-

tent of the 1874 Act to insist upon knowledge of the residence of the libellee and actual notice upon him or her, which is fully assured and accomplished by having the residence stated in the writ, we hold in this case that the residence was "named in the libel" and that such naming of the residence constitutes full compliance with the statutory requirements relating thereto. To place any other construction on the statute would be subversive of its real purpose and might well result in infinite difficulty and evil.

We quote with approval the language of the court in the case of *Bridgeman* v. *The City of Derby*, 104 Conn., 1, 8, 132 Atl., 25, 27; "It will be well to keep before us some of the fundamental principles of statutory construction. The intent of the law-makers is the soul of the statute, and the search for this intent we have held to be the guiding star of the court. It must prevail over the literal sense and the precise letter of the language of the statute." After citing other cases, the Court further says: "When one construction leads to public mischief which another construction will avoid, the latter is to be favored unless the terms of the Statute absolutely forbid."

The point covered by this exception was involved in the case of *Brennan* v. *Brennan*, 129 Me., 498. Although a majority of the Court failed to agree in that case, so that no decision resulted, we are in full accord in this opinion, and this exception is accordingly overruled.

Before considering the other exception, the following facts will be noted.

The libellant was married to the libellee in Dexter, Maine, November 29, 1900. From the libellee's answer to the libel in the instant case and from the libellant's reply thereto, both of which form a part of the record in the case, it appears that she brought divorce proceedings against him by libel entered at the March, 1922, Term of the Superior Court for Penobscot County, at which time it was continued to the May Term and was thereafter continued until, at the November Term, 1922, it was dismissed from the docket. It further appears that on October 7, 1922, he obtained a decree of divorce from the present libellant issuing from the Supreme Judicial Court for Somerset County. The docket entries in the original libels are not in evidence, due, doubtless, to the fact

that when, in objecting to the admission of evidence of cruel and abusive treatment by reason of a judgment in the former case, the libellee's attorney said, "I will offer in evidence — ," the Justice presiding remarked, "I do not think at this point it will be necessary for you to offer evidence. I think the Court would have the right to take Judicial notice of records."

The case before us, however, was clearly tried on the basis of undisputed facts that George E. McIntire was granted an absolute divorce from Bertha L. McIntire on October 7, 1922, and that at the November Term, 1922, her libel was dismissed from the docket of the Penobscot County Superior Court. It is also undisputed that the libellee in this case remarried in 1924, and on the basis of these facts we come to the consideration of the second exception.

After hearing in the instant case the Justice presiding granted a divorce and awarded the libellant the sum of one thousand dollars ($1000.00) in lieu of alimony.

The only question raised by this exception is as to the power of the Court to make the decree.

The libellee's contention is that, inasmuch as an absolute divorce was decreed to him in 1922, the Justice presiding had no power to decree a divorce to his former wife on her present libel brought some eight years after his divorce was granted.

In granting the divorce the Justice presiding clearly relied on the case of *Stilphen* v. *Stilphen*, 58 Me., 508, which was followed by *Stratton* v. *Stratton, Admr.*, 77 Me., 373.

In the Stilphen case, the wife petitioned for a divorce and while her libel was pending her husband brought a cross libel, both libels pending in the same court at the same time. In the absence of her counsel, who was acting for her in respect to both libels and in her absence and at a time when, as she claimed, she did not expect the actions to be called for trial, her husband had her called and defaulted on his libel. Following that, at an ex parte hearing he obtained a decree in his favor. The wife at once petitioned for a review which the court had no power to grant because of the remarriage of the husband. Failing to secure the review, the wife was given the right to go on with her libel which was first filed. The only objection on the part of the libellee was that the fact that he had already obtained a divorce was a bar to her libel. The question be-

fore the court was as to whether the fact that a husband had already obtained a divorce deprived the Court of the power to grant a "like divorce" to the wife. The Court in the Stilphen case decided that it did have the power to grant such divorce on her libel, which was dated September 22, 1864, and accordingly made a decree in favor of the wife.

Using the language of the opinion, "The Court is thus called upon to decide whether the fact that the husband has already obtained a divorce, deprives the Court of the power to grant a like divorce to the wife, and thus lay the foundation for an ancillary decree, securing to her such portions of the common property as justice and humanity may dictate."

The reason for the conclusion of the Court in this case, that "a like divorce" could be granted, is clearly indicated by the language in the opinion following immediately after the above quoted portion, "We cannot doubt that this Court is vested with such power. It was at one time conferred in express terms. The Revised Statutes of 1841, c. 89, s. 2, contained an enumeration of eight clauses for which a divorce might be granted. The seventh was, that when one party had been divorced, the Court might grant a like divorce to the other upon such terms and conditions as in the exercise of a sound discretion should be judged reasonable. This entire section was afterwards repealed, — not, however, for the purpose of depriving the Court of the power to grant a divorce in any of the cases therein named, but because a new statute had in the meantime been enacted, conferring upon the Court such enlarged powers, in matters of divorce, that the former enumeration of causes was not only useless, but imperfect and deceptive. The very act which repealed the former enumeration, reaffirmed the power of the Court to grant a divorce in any case and for any cause (except where both parties had been guilty of adultery, or were guilty of collusion), if the same should be deemed reasonable and proper, etc. Act of 1850, c. 171."

Chap. 89, Sec. 2, R. S. 1841, to which the opinion referred, provided that, "a divorce may be decreed from the bonds of matrimony, in the following cases, and for the following reasons:" . . . "Seventh. In all cases, where one party has been, or shall be, divorced from the bonds of matrimony, the Court granting the same,

may, on application of the other party, grant a like divorce, on such terms and conditions as such Court, in the exercise of a sound discretion, may judge reasonable;"

P. L. 1847, Chap. 13, made certain changes but those provisions were repealed by P. L. 1849, Chap. 116, additional to Chap. 89, R. S. 1841, which were as follows: "A divorce from the bonds of matrimony may be decreed by any Justice of the Supreme Judicial Court at any term thereof held in the county in which either of the parties reside, when such Justice, in the exercise of a sound discretion, may deem the same reasonable and proper, conducive to domestic harmony and consistent with the peace and morality of society; and the same orders and decrees may be made, and the same proceedings had as are prescribed in the chapter to which this is additional."

"Act of 1850, c. 171," referred to in the opinion in the Stilphen case provided that in the trial of all libels, "the libellant shall not be restricted to the proof of causes happening within the State, or where either of the parties are residing within the State, or since the passage of the acts to which this is additional, but may allege and prove any facts tending to show that the divorce would be reasonable and proper, conducive to domestic harmony, for the good of the parties, and consistent with the peace and morality of society."

There were no further changes or amendments before the 1857 Revision of the Statutes which provided in Chap. 60, Sec. 2, as follows: "A divorce from the bonds of matrimony may be decreed by any Justice of the Supreme Judicial Court, at any term thereof in the county where either party resides at the time of filing the libel, when in the exercise of a sound discretion, he deems it reasonable and proper, conducive to domestic harmony, and consistent with the peace and morality of society, if the parties were married in this State, or cohabited here after marriage."

This is the history of the divorce laws, as far as they could possibly relate to the point involved, from 1841 to 1864, the date of the wife's libel in the Stilphen case. From and including the Revision of 1857 down to and including even the Revision of 1930, there has been no provision for granting a "like divorce" to the other party where one party "has been, or shall be, divorced

from the bonds of matrimony," nor has there been any other law which could by any stretch of the imagination be regarded as so providing.

It is the generally recognized rule that the enactment of Revisions of Statutes manifestly designed to embrace an entire subject of legislation operates to repeal former acts dealing with the same subject, even though there is no repealing clause to that effect. The application of the rule is not dependent on the inconsistency or repugnancy of the new legislation and the old, for the old legislation is impliedly repealed by the new even where there is no repugnancy between them. It is well phrased in 25 R. C. L., Sec. 175, page 925, where it says, "Where a statute is revised, or a series of acts on the same subject is revised and consolidated into one, all parts and provisions of the former act or acts, that are omitted from the revised act, are repealed, even though the omission may have been the result of inadvertence, and unless the earlier provision is continued in force by a saving clause."

Bartlett et als v. *King, Exr.*, 12 Mass., 537, 545, expresses it in this way: "A subsequent statute, revising the whole subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law as well as in reason and common sense, operate to repeal the former."

We cite a few of the many cases recognizing the principle stated in 25 R. C. L., *supra*, and in *Bartlett et als* v. *King, Exr.*, supra; *Morris et al* v. *City of Indianapolis et al*, 177 Ind., 369, 94 N. E., 705; *Murdock* v. *City of Memphis*, 20 Wall., 590; *Sibley et al* v. *Continental Supply Co.* (Tex.), 290 S. W., 769; *Mayor et als of Frederick* v. *Groshon*, 30 Md., 436, 96 Am. Dec., 591; *State ex rel. City of Milwaukee* v. *Milwaukee Electric Ry. & Light Co.*, 144 Wis., 386, 129 N. W., 623; *C. N. Ray Corporation* v. *Secretary of State*, 241 Mich., 457, 217 N. W., 334; *State* v. *Michaels* (W. Va.), 138 S. E., 199; *Bay Bridge Ferry Corporation* v. *County Commrs.* (Md.), 153 Atl., 441; *People* v. *Borgeson*, 335 Ill., 136, 166 N. E., 451; *Nash* v. *State* (Ind.), 166 N. E., 252; *State* v. *Wilson*, 43 N. H., 415, 82 Am. Dec., 163; Appeal of Snyder (Pa., 1931), 153 Atl., 436, 437; the principle appears to have been recognized in the early Maine case, *Towle* v. *Marrett*, 3 Me., 22, and

also in *Knight et als* v. *Aroostook River R. R. Co.*, 67 Me., 291.

If the legislatures which passed the several revisions from 1857 to date had intended to grant to the courts the right to decree divorces to one already divorced or who might be divorced, where the marriage relation no longer existed, such provision could have been made, but none was made. It must be constantly borne in mind that matters of divorce are purely statutory. In spite of the fact that many divorces are being granted, the tendency of the law has been in the direction of restriction. In 1841 causes were defined, and then prior to and including the 1857 Revision it was practically left to the discretion of the Judge as far as causes were concerned, and this was also true as to the 1871 Revision. The Revision of 1883, however, swung back and restricted divorce to specified causes. In view of the entire situation as thus revealed, we find there was no statutory authority or power by virtue of which a decree of divorce could have been granted in the instant case.

We do not regard the Stilphen case as an authority in the present case. To say that the 1841 provision in relation to granting divorces to both parties was in force when the present libel was brought would be equivalent to saying that any former provision of a statute would still be alive and form a part of our statute law, in spite of the fact that six Revisions have been enacted none of which have referred to it in any way.

"It may be conceded to be settled in this State that the jurisdiction and authority of the Court, in matters pertaining to divorce, are derived from the provisions of the Statute," *Stratton* v. *Stratton*, 77 Me., 373, 377, citing *Henderson* v. *Henderson*, 64 Me., 419; *Stewart* v. *Stewart*, 78 Me., 549, 551.

Jurisdiction over divorce is purely statutory and every power exercised by the court with reference to it must be found in the statutes or it does not exist. 2 Schouler on Divorce, Marriage and Domestic Relations, 6th ed., Vol. 2, Sec. 1468, p. 1724; *Rumping* v. *Rumping* (Mont.), 91 Pac., 1057, 1058; *Baugh* v. *Baugh*, 37 Mich., 59, 26 Am. Rep., 496; 14 Cyc., 581, cases cited; *Cotter* v. *Cotter*, 225 Fed., 471; *Martin* v. *Martin* (Wis.), 167 N. W., 304; *Cizek* v. *Cizek*, 76 Neb., 797, 107 N. W., 1012; *Chapman* v. *Chapman et al*, 269 Mo., 663, 192 S. W., 448; *Gilbert* v. *Hayward et al*, 37 R. I., 303, 92 Atl., 625.

There being no statutory power under which the divorce in the case before us could have been granted, we are forced by that conclusion to hold that the 1922 divorce granted to the libellee was and is a bar to any divorce proceedings, on the part of the present libellant, against him.

Where parties have never been married, or the evidence is not sufficient to prove marriage, the court will not assume jurisdiction to decree a divorce. Where a previous divorce, as in this case, has been decreed to one party, the marriage status as such is as completely destroyed as if it had never existed and there is no more or better reason, apart from statute, to take jurisdiction in that case than in cases where there has never been a marriage or where proof of marriage is sufficient.

An examination of the court decisions of other states reveals some as holding that where one of the married parties goes into another state and procures a divorce, such a divorce, if found valid, is a bar to a divorce in favor of the other party. *Dunham* v. *Dunham* (Ill.), 44 N. E., 841; *Jones* v. *Jones*, 108 N. Y., 415, 15 N. E., 707; *Flaxell* v. *Flaxell* (Neb.), 165 N. W., 159; *Malcolm* v. *Malcolm* (Ky.), 38 S. W., 141.

We have found no cases, apart from statutes, which assumed jurisdiction on facts similar to those in the instant case. The Stilphen case, as we have noted, rests upon the opinion of the court that it did have such statutory authority.

In *Drake* v. *Drake*, 76 N. H., 32, divorce proceedings were brought in New Hampshire against a libellee living in Massachusetts to whom there had been granted a decree *nisi* in the latter state. That decree not being absolute, the court said, "There was, therefore, no binding judgment of divorce in favor of the libellee, *which would deprive this court of jurisdiction or constitute a bar to the maintenance of the libellant's suit.* The libellee's action had not gone to judgment when this suit was begun, or at the time of the hearing. It was merely pending. *The marriage between the parties still subsisted.* Its dissolution was contingent and might never take place. Under such circumstances, it was held in the recent case of *Sworoski* v. *Sworoski*, 75 N. H., 1, that the *pendency* of divorce proceedings in another State by the husband is no bar to a similar action in this State by the wife whose domicile is here."

The principle that, after the dissolution of the marriage relation is brought about by divorce granted to one, the other can not subsequently maintain an action for divorce, is recognized in *Downey* v. *Downey* (Ala.), 13 So., 412, 414, and also in the case of *Feickert* v. *Feickert*, 98 N. J. Eq., 444, 131 Atl., 576, in which the court says, "Of course New Jersey can grant a divorce only to parties who are married, and can not divorce parties who are already validly divorced. To divorce parties who are not married would be a nullity; and the Court will not do a vain thing." Citing *Zudiak* v. *Szuryk*, 93 N. J. Eq., 559, 561, 118 Atl., 331.

All these cases recognize the general principle that, once lawfully granted, a divorce ends the marital relation and that there is nothing on which the party against whom a divorce has been decreed can base a jurisdictional right to another decree in his favor.

In Nelson on Divorce and Separation, Vol. 2, Sec. 1033, page 1003, referring to valid decrees of divorce obtained in another state and recognizing the principle that the marriage relation is dissolved when one party is lawfully divorced, it is stated, "The only avenue of escape is to provide by *appropriate legislation* that such decree shall not be a bar to the wife's suit for dower, or by permitting a subsequent suit for divorce after a decree has been obtained in another State."

Apart from statutory authority, a husband or wife divorced on the libel of the one has no standing in court for the purpose of obtaining a decree in his or her favor against the other. In this case there was no such authority, and the entry as to the second exception must be,

Exception sustained.

SEWARD L. HUME, APPELLANT
FROM DECREE OF JUDGE OF PROBATE.

Washington. Opinion July 16, 1931.

EXECUTORS AND ADMINISTRATORS. SURVIVING PARTNERS. PROBATE COURTS.

Until he shall have performed his full duty, or have been regularly superseded, the administrator of a partner, deceased, is the only party who has access to the court of probate to require of the survivor of the administrators of the partnership estate any accounting.

Ordinarily the widow and legatees of a deceased partner can not act directly against the surviving partners but must compel the executor or administrator to act for them.

The remedy of such is to compel the representative of decedent to account or have him removed.

In the case at bar, plaintiff had a direct and enforceable interest in the estate of his ancestor, and defendant as survivor of the administrators of the partnership estate was charged, with the duty of rendering a true account of his receipts and disbursements as administrator, and of distributing the surplus of the estate in his hands, if any, according to law.

The administrator of the decedent had, however, until his service was ended, the only direct interest that authorized appeal, and the plaintiff, though directly interested, was not the proper moving party.

On exceptions. An appeal from the decision of the Supreme Court of Probate for the County of Washington, dismissing the petition of appellant, an heir of a deceased copartner asking annulment of an account, allowed by the Probate Court, filed by the survivor of the administrators of the copartnership estate. To the dismissal of his petition, appellant seasonably excepted. Exceptions overruled. Decree below affirmed. The case fully appears in the opinion.

L. D. Lamond,
R. J. McGarrigle, for plaintiff.
J. C. McCart,
O. H. Dunbar, for defendant.

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

BARNES, J. This case comes from the Supreme Court of Probate, upon exceptions to a decree dismissing appellant's petition for annulment of allowance of a probate account.

In 1924, upon the death of William S. Hume, the partnership of S. B. Hume & Son was dissolved, and Charles W. Hume was duly authorized to administer and close its affairs as surviving partner.

In the following year, and before administration was complete, Charles W. Hume died, and Edwin B. Jonah, defendant here, and one George S. Hume were appointed administrators of the partnership estate. In 1929 George S. Hume died and administration was taken out in his estate; Mr. Jonah proceeding with the administration of the partnership.

Among the heirs at law of the deceased Charles W. Hume is Seward L. Hume, the present plaintiff. July 8, 1930, the first and final account of Mr. Jonah, the survivor of the administrators of the estate of the partnership, was allowed; and on November 10 of that year, plaintiff, as an heir at law and next of kin of said Charles W. Hume, filed a petition in the Probate Court, praying for an annulment and reversal of the decree allowing the account of the partnership estate, alleging as reasons for the desired action that there were certain errors and mistakes in such account, and that he has a pecuniary interest in the account which is diminished to his detriment because of the errors therein, so that he is aggrieved by the allowance thereof.

This petition was dismissed at the Probate Court held in December, 1930, and subsequently plaintiff's appeal from the decree of dismissal was likewise dismissed in the Superior Court. From the latter the case comes up to this court, upon exceptions to the decree dismissing the petition.

Plaintiff argues that the dismissal was an error in law, because he says that he is a person aggrieved, to whom right of appeal is given by Sec. 31, Chap. 75, R. S., from denial of his petition, and, secondly that he is an heir, and hence may require the administrator to render an account.

Plaintiff has a direct and enforceable interest in the estate of Charles W. Hume, a former member of the partnership.

Defendant, as survivor of the administrators of the partnership estate is charged with the duty of rendering a true account of his receipts and disbursements as administrator and of distributing the surplus of the estate in his hand, if any, according to law.

But, until he shall have performed his full duty, or have been regularly superseded, the administrator of the estate of the late Charles W. Hume is the only party who has access to the court of probate to require of the survivor of the administrators of the partnership estate any accounting.

"Ordinarily the widow and legatees of a deceased partner cannot act directly against the surviving partners but must compel the executor or administrator to act for them." 20 R. C. L., 1004, par. 242; *Valentine* v. *Wysor*, 123 Ind., 47, 23 N. E., 1076, 7 L. R. A., 788.

The remedy of such is to compel the representative of decedent to account or have him removed. *Harrison* v. *Righter*, 11 N. J. Eq., 389; *Walling* v. *Burgess* (Ind.), 7 L. R. A., 481, and note.

Exceptional cases arise, and relief is provided where fraud is proved, or collusion between the representatives. Such conditions are not alleged here.

It is not to be assumed that the administrator, upon whom is the immediate liability of accounting, is so neglectful of his own interest as to fail to appeal in proper cases. *Woodbury* v. *Hammond*, 54 Me., 332.

The administrator of the decedent has, until his service is ended, the only direct interest that authorizes appeal. *Tuxbury's Appeal*, 67 Me., 267.

Exceptions overruled.
Decree below affirmed.

MARY ELLEN CHAISSON *vs.* HOWARD S. WILLIAMS.

Kennebec. Opinion September 2, 1931.

MOTOR VEHICLES. NEGLIGENCE. INVITED GUESTS. RES IPSA LOQUITUR. "ORDINARY CARE" DEFINED.

An individual owning or operating an automobile must, for the safety of his guest in the vehicle, exercise in his conduct ordinary care, which is that degree of care that a person of ordinary intelligence, and reasonable prudence and judgment, ordinarily exercises under like or similar circumstances.

For the failure on the part of the owner or operator to exercise ordinary care for the protection of his guest, the guest not having assumed other than the risks and dangers usually or naturally incident to such transportation and not having been guilty of contributory negligence, such owner or operator will be held negligent, and liable for the damages between which and such failure, causal connection existed.

The driver of an automobile owes to his guest the duty of exercising ordinary care, not unreasonably to expose the latter to an additional peril, or subject him to a newly created danger.

Where an automobile, and the operation thereof, are exclusively within the control of the defendant, whose guest is injured, and it is not reasonably in the power of such guest to prove the cause of the accident, which is one not commonly incident, according to everyday experience, to the operation of an automobile, the occurrence itself, although unexplained, is prima facie *evidence of negligence on the part of the defendant.* Res ipsa loquitur — *the thing speaks for itself. The question of the defendant's negligence arises as a matter of law.*

Res ipsa loquitur, *in whatever latitude taken, is a rule of evidence which warrants, but does not compel, the inference of negligence from circumstantial facts.*

The doctrine of res ipsa loquitur *does not dispense with the rule that the person alleging negligence must prove it, but is simply a mode of proving the negligence of the defendant, inferentially, without changing the burden of proof. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff. The doctrine is not to be invoked when all the facts attending the injury are disclosed by the evidence, and nothing is left to inference.*

The maxim of res ipsa loquitur *has been held as applicable to automobile carriers without reward, as to carriers for hire.*

The character of the accident, rather than the fact of accident, decides, as a legal proposition, whether the doctrine applies.

In the case at bar the doctrine of *res ipsa loquitur* clearly applied.

The award of fifty-five hundred dollars damages, however, the Court found excessive in the amount of fifteen hundred dollars. Four thousand dollars seemed a reasonable award.

On exceptions and general motion for new trial. An action on the case to recover damages for injuries sustained by plaintiff through the overturning of defendant's automobile in which she was riding as an invited guest. Trial was had at the April Term, 1931, of the Superior Court for the County of Kennebec. To the refusal of the presiding justice to direct a verdict for the defendant, and to certain portions of his charge, defendant seasonably excepted, and after the jury had rendered a verdict for the plaintiff in the sum of $5,500.00, filed a general motion for new trial. Exception overruled. Motion overruled, excepting as to damages. Touching damages, if remittitur of $1,500.00 is filed within fifteen days from the filing of rescript, motion will be overruled; otherwise sustained. The case fully appears in the opinion.

Locke, Perkins & Williamson, for plaintiff.

Robinson & Richardson,

Burleigh Martin, for defendant.

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

DUNN, J. The plaintiff, while riding by invitation of the defendant, as a guest in an automobile owned and operated by him, sustained personal injuries.

An exception to the refusal of a directed verdict for the defendant, made at the close of the evidence, and a general motion by defendant for a new trial, seasonably filed after verdict for the plaintiff, raise the same questions. The motion raises, in addition, that the damages assessed by the jury are excessive. Defendant also pursues an exception to an instruction.

The declaration is in two counts.

The gist of the first count is that defendant, notwithstanding he knew that the steering gear of his automobile was not working properly, and that the air pressure in a front tire had become low, yet, unmindful of legally imposed duty to exercise care and prudence for the protection of his invitee, attempted to drive his auto-

mobile rapidly around a highway curve; the automobile, however, being out of control, continued on, and left the road and ran into the woods, and struck a stump, the actionable injury of plaintiff proximately resulting.

The second count alleges that while plaintiff was so riding gratis, and she herself was in the exercise of due care, defendant carelessly, recklessly, and negligently drove his automobile off the road into and among bushes and trees, and against a stump, to the immediate hurt of the plaintiff.

The plea was the general issue.

Only the plaintiff introduced evidence; the defense put in none whatsoever. A general verdict was returned, the assessment of damages being $5,500.00.

The element of contributory negligence, counsel for defendant concede in their brief, is out of the case, because not relied on in the specifications of defense, filed under Superior Court Rule IX.

The accepted invitation was to ride, for pleasure, in the afternoon of November 1, 1930, from Augusta to Jackman, and return. In Augusta, before the start, a garage man installed a new valve in the left front tire of the automobile, a Studebaker of the sedan type. This done, defendant drove, plaintiff sitting beside him, in the direction of Jackman, for approximately three hours, without trouble or mishap.

Plaintiff witnessed that, ten or fifteen minutes before the occurrence of the accident (when, so far as the printed record shows, no one was meeting them on the smooth, tarred-surfaced, but hilly and crooked road, and nothing out of the usual was being done to the automobile), she "thought there was something wrong." "The car," to use her own words, "seemed to be on the left side of the road. I looked at him (defendant) and he seemed to be at ease, and by the time I looked again the car was on the right side, and I didn't think any more about it."

Defendant, so plaintiff's testimony continues, "turned his wheel as he went into the particular curve; we didn't make the curve, but went across the road," and out of the road, and the car hit the stump.

The testimony of two other witnesses, who, traveling in the same direction, in another automobile, arrived shortly at the scene of

the accident, agrees in proving that the automobile of the defendant left the road. On the subject of the cause of the accident, one of the witnesses testified: "Instead of taking the S curve to the right, at the foot of a pitch, the car went straight ahead, and landed in the woods, the bigness of it, against a stump."

The condition of the automobile after the accident is not shown. If the steering mechanism was defective, or the tire partially deflated, or wholly blown out, there is no evidence of the fact.

Plaintiff testified that after the accident, and before she and defendant had been helped from his car, defendant, in answer to her question, "What in the world do you suppose happened?" replied, "It must have been that front tire; it had been bothering a little while." Another witness attested that the injured defendant, on his way to the office of a physician, "said something as to the tire; that he had to fix it, or something," but what the defendant said, the witness said he himself could not recollect.

The defense argues that, recalling the incident of the installation of the new valve, defendant but surmised that the tire in which the valve had been put, went flat, and that his statement had no other basis than conjecture.

It might well be argued that the weight to be given to the testimony was slight, but it is not to be said, as a matter of law, that the testimony was without any probative force.

The defendant spoke about "that tire." This, however, is not all there is in the transcript on the point. Defendant had driven the automobile to the moment of the impact. He told the plaintiff, on the authority of her testimony, that the tire "had been bothering." Inference that, at the crucial curve, a defective tire had counteracted effort to steer the machine, would not have been unreasonable. It was for the jury, aided by the arguments of counsel, and guided by the instructions of the judge, to determine what defendant said, what he meant by what he said, to deduce legitimate inferences, and resolve to what extent, from the standpoint of the likelihood of truthfulness and accuracy, to apply the testimony.

The great question in this case arises, not so much under the first count as under the second count in the declaration, basing right to recover on the general allegation of the negligent, careless, and reckless operation of the automobile.

In most cases of that variety founded upon the averred violation of a legal duty, voluntarily assumed without consideration, the testimony is conflicting; some facts indicating liability, and some pointing to the exercise of proper care. Not so here.

In the instant case, entirely apart from the testimony, under the first count in the declaration, that directly tended to assign default to the defendant for driving the automobile off the road, when he knew, or ought to have known, in time to have prevented catastrophe, that the steering mechanism and tire were not functioning suitably, there was, under the second count, legally sufficient evidence that the defendant failed in the performance of the duty which arose when the plaintiff entered the automobile. *McDonough* v. *Boston El. Ry. Co.*, 208 Mass., 436.

An individual owning or operating an automobile must, for the safety of his guest in the vehicle, exercise in his own conduct, "ordinary care," which is that degree of care that the great majority of legally responsible persons, owing a legal duty to use care, or the type of that majority — that is to say, a person of ordinary intelligence and reasonable prudence and judgment — ordinarily exercises under like or similar circumstances.

No definition of "negligence" can, in itself, be complete without regard to special circumstances, nor be fully understood without the addition of some essential set of facts.

However, for a failure on the part of the owner or operator to exercise ordinary care for the protection of his guest, the guest not having assumed other than the risks and dangers usually or naturally incident to such a mode of transportation, nor having been guilty of contributory negligence, such owner or operator will be held negligent, and liable for the damages between which and such failure, causal connection exists. *Avery* v. *Thompson*, 117 Me., 120; *Peasley* v. *White*, 129 Me., 450.

Holding the owner or operator to the standard of ordinary care may tend to prevent inviting guests, but the gratuitous passenger should be entitled, from the owner or operator, to the exercise of some degree of care, for safety in the driving of the car, and that of ordinary care seems fair and just.

The rule adopted in *Avery* v. *Thompson*, supra, was characterized by the Michigan Supreme Court (prior to the enactment in

the state of a different statutory standard, Act No. 19, Public Acts 1929, amending Act No. 302, Public Acts 1915), as reasonable and sane. *Roy* v. *Kirn* (Mich., 1919), 175 N. W., 475. The same rule found application in Kentucky (Ky., 1914), *Beard* v. *Klusmeier*, 164 S. W., 319, 50 L. R. A. (N. S.), 1,000, Ann. Cas., 1915D, 342; in Maryland (Md., 1914), *Fitzjarrel* v. *Boyd*, 91 Atl., 547; and in Connecticut, *Dickerson* v. *Connecticut Company*, 98 Conn., 87.

The law imposes on the plaintiff, in an action of this kind, the general burden of proving the material averments of the declaration in his writ, by a preponderance of all the evidence, else his case fail. In a strict sense, this burden never changes, though it may be inferentially aided and sustained; circumstantial evidence may justify the inference that the defendant was wanting in respect to the exercise of commensurate care.

Such an inference helps this plaintiff.

An automobile host, as has been seen, owes to his guest the duty of exercising ordinary care, not unreasonably to expose the latter to an additional peril, or subject him to a newly created danger. *Avery* v. *Thompson*, supra.

Automobiles, when operated by prudent persons, with reasonable care, do not usually leave the highway, and run headlong into the woods, until stopped by the stump of a tree. When they do, it is the extraordinary, and not the ordinary, course of things.

Where an automobile, and the operation thereof, are exclusively within the control of the defendant, whose guest is injured, and it is not reasonably in the power of such guest to prove the cause of the accident, which is one not commonly incident, according to everyday experience, to the operation of an automobile, the occurrence itself, although unexplained, is *prima facie* evidence of negligence on the part of the defendant. *Res ipsa loquitur*, the thing speaks for itself. The question of the defendant's negligence arises as a matter of law.

It matters little whether it be said, in reference to the situation on such a stage of the evidence, that the thing speaks for itself, or there is some evidence of negligence, or sufficient to shift to defendant the burden of going forward with the evidence, or that the facts are adequate to carry the case to the jury, or that explana-

tion is requisite, because the different expressions mean much the same thing.

Res ipsa loquitur, in whatever latitude taken, is a rule of evidence which warrants, but does not compel, the inference of negligence from circumstantial facts. *Edwards* v. *Cumberland County, etc., Co.*, 128 Me., 207. The basic rule that facts in issue are to be submitted to the jury, includes cases where the question is as to the inference to be drawn from such facts.

The doctrine of *res ipsa loquitur* does not dispense with the rule that the person alleging negligence must prove it, but is simply a mode of proving the negligence of the defendant, inferentially, without changing the burden of proof. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff. *Sweeney* v. *Erving*, 228 U. S., 233, 57 Law ed., 815. The doctrine is not to be invoked, it is to be borne in mind, when all the facts attending the injury are disclosed by the evidence, and nothing is left to inference. 20 R. C. L., 188.

The maxim of *res ipsa loquitur* has been applied in cases of injury to invited guests, caused by the operation of automobiles. Huddy on Automobiles, 7th ed., Sec. 512. It has been held as applicable to automobile carriers without reward, as to carriers for hire. *Crooks* v. *White* (Cal., 1930), 290 Pac., 497.

The character of the accident, rather than the fact of accident, decides, as a legal proposition, whether the doctrine applies. *Brync* v. *Great Atlantic & Pacific Tea Co.* (Mass., 1929), 168 N. E., 540. It is universal knowledge that motor vehicles may skid on slippery roads without fault on account of the manner of their handling, or on account of being there. *Linden* v. *Miller* (Wis., 1920), 177 N. W., 909. Therefore, that injury results from the skidding of an automobile, is not, of itself, evidence of negligence. *King* v. *Wolf Grocery Co.*, 126 Me., 202. But though mere accident is not proof of negligence, some accompanying elemental facts may, under ruling by the court, afford room for the jury to infer that the negligence of the defendant caused the injury.

The doctrine of *res ipsa loquitur* was applied when plaintiff, a guest in defendant's automobile, was thrown therefrom and injured, by reason of the car leaving the road and running into a tree. *Masten* v. *Cousins*, 216 Ill. App., 268. It was applied in

Rindge v. *Holbrook* (Conn., 1930), 149 Atl., 231, where the guest was injured in consequence of the automobile running off the road and striking a fence. In that case, exculpatory explanation was that the presence of a bee on the wrist of the defendant temporarily distracted her attention.

The fact, unexplained, that a truck went off the road, and ran against a tree, to the injury of an invitee riding gratuitously, did not, under the rule which obtains in Massachusetts, and a few other jurisdictions, show gross negligence on the part of the defendant. It would, however, says Mr. Justice Field, delivering the opinion of the court, have warranted a finding of ordinary negligence. *Cook* v. *Cole* (Mass., 1931), 174 N. E., 271.

The doctrine was put to use where injury to occupant resulted from driver's loss of control, and consequent collision with poles. *Zwick* v. *Zwick* (Ohio, 1928), 163 N. E., 917. (Petition in error dismissed by Supreme Court, 166 N. E., 202.)

There is support by parity of reasoning in *Iannuzzi* v. *Bishop* (N. J., 1930), 151 Atl., 477, where defendant's truck was found on plaintiff's porch, and in *Sheridan* v. *Arrow, etc., Company* (N. J., 1929), 146 Atl., 191, where a runaway truck, without driver or occupant, moved along the highway to the far side thereof, mounted the curb, and did injury to a person lawfully there. And in *Gates* v. *Crane Co.* (Conn., 1928), 139 Atl., 782, where the wheel of a truck became detached, and struck and injured plaintiff walking on sidewalk.

The overturning of an automobile on a curve warranted inference, in the absence of defects in road or car or other cause, of negligent operation. *Baker* v. *Baker* (Ala., 1929), 124 So., 740. Where parked automobile, with engine stopped, started and rolled down street into a store, the doctrine was pertinent. *Glaser* v. *Schroeder* (Mass., 1929), 168 N. E., 809. The mere fact that an auto truck swerved from the street to the sidewalk, to the injury of a pedestrian, was some evidence of the negligence of the operator. *Rogles* v. *United Rys. Co.* (Mo., 1921), 232 S. W., 93. The rule was held to establish *prima facie* evidence of negligence, where it appeared that defendant's truck was suddenly diverted without warning, from the street onto the sidewalk, and struck one standing thereon. *Brown* v. *Des Moines Bottling Works* (Iowa, 1916), 156 N. W., 829, 1 A. L. R.,

835. Negligence was inferred, in New York, where defendant ran his automobile into a pedestrian on the sidewalk. *Green* v. *Baltuch*, 191 N. Y. S., 70. The fact that an automobile rolled down an embankment afforded instance to apply the doctrine. *Hamburger* v. *Katz* (La., 1928), 120 So., 391.

Where a truck, which was being operated by the owner along a street, left such street, and collided with and damaged an adjoining building, and no other testimony was adduced to prove negligent operation of the truck, the *res ipsa loquitur* doctrine applied, and, in the absence of an explanation on the part of the defendant, showing due care in the operation of the truck, it was not error for the trial court, hearing the cause without a jury, to render judgment against the defendant. *Scovanner* v. *Toelke* (Ohio, 1928), 163 N. E., 493, 64 A. L. R., 258n.

It was held, in California, that in the absence of testimony to show the cause of, or reason for, a truck running upon the sidewalk, there was no other inference for the jury to draw except that the defendant's negligence caused the plaintiff's injuries. *Goss* v. *Pacific Motor Co.* (Cal., 1927), 259 Pac., 455.

The case at bar is distinguishable from that of *Waters* v. *Markham* (Wis., 1931), 235 N. W., 797, relied on by defendant. There, one of the tires evidently blew out when the automobile was traveling in the center of the road. Judgment for plaintiff, a gratuitous passenger, was reversed because the issues were not properly tendered to the jury. "If it were not for the blow-out," reads the opinion, "the physical evidence of the course and antics of the car might furnish an inference of excessive speed." The effect of the whole evidence, was the view of the Court, might have been very different than bare proof of the happening of the accident.

In *Klein* v. *Beeten* (Wis., 1919), 172 N. W., 736, another case relied on by defendant, the evidence leaving it open to conjecture whether the accident was caused by negligent driving, or by the blowing out of the tire, judgment adverse to plaintiff was affirmed.

In the present case, where the allegation of the second count is not so specific as to preclude reliance on *res ipsa loquitur*, the question of the negligence of the defendant was a proper one for the jury, and the finding of liability in such connection is not disturbable.

The judge in the trial court instructed the jury, in substance, if it found that, at the time of the accident, defendant was experiencing trouble in the operation of his car, and knew, or as a reasonable man, should have known, that the cause was a gradual leaking of air from the tire, and did not stop his automobile and ascertain the trouble, and remedy it if possible, the jury "would have a right to infer that that was the cause of the accident."

If, as defendant maintains, the instruction was erroneous, it was but partly erroneous, and other instructions, constituting the rules of law and duty for the government of the jury, appear to have been so full and clear as to exclude conclusion that the jury may have been led into error.

Furthermore, the instruction did not go to the unexplained running of the automobile off the road, and to the inference which the application of the doctrine of *res ipsa loquitur* might warrant.

The error, if any, was nonprejudicial.

The remaining question for consideration is that of damages. The jury awarded the plaintiff $5,500.00. She was thirty-nine years old, husbandless, had an earning power as clerk and stenographer, of twenty dollars a week, and besides, kept one boarder.

She incurred serious injury (fracture and other) to the bones of her left arm, involving mobility of the wrist joint, and suffered much pain for six weeks immediately following the accident. A remedial operation, performed at that time, partially restored function and reduced pain; but there is testimony that rotation is impaired, permanently, to the extent of forty per cent, and that movement of the wrist is painful.

At the trial, plaintiff testified she could not turn a doorknob or a faucet, carry anything in her hand, put her hand flat, use her hand in wringing clothes in washing, and that her efficiency as a typist had been lessened.

On the upper aspect of her wrist is a scar, occasioned by necessary surgery, two and one-half inches in length, and, at one place, a half-inch wide. A healed but still disfiguring cut, sensitive in cold weather, extends from her lip towards the corner of her chin, "quarter way down." Three upper teeth, starting from the median line, were crushed and are gone. The teeth, according to the testimony, were sound, regular in shape, and of good color. Her back,

and left shoulder and knee, were bruised and lamed. Nervous shock, that intangible yet nevertheless oftentimes very real thing, is apparently an affliction of the plaintiff.

Actual loss of time was but five weeks, plaintiff's position having been held for her.

Expenditures, concededly reasonable in amount, for dental and medical care, and for nursing, were $914.50. Plaintiff may require, though not immediately, further dental treatment. It is possible, a surgeon gave evidence, that an operation, at some future time, might improve the condition of the wrist.

The award of damages, all the members of the court agree, is large.

The majority of the Justices, while realizing it is difficult to say in such a case what amount of compensation is just, and that if an error is made, it perhaps should be made in favor of the plaintiff, are none the less of the opinion that the verdict is higher than is justified by precedents.

These Justices feel that a verdict of four thousand dollars, or fifteen hundred dollars less than awarded by the jury, would be reasonable.

Excessiveness of damages, not attributable to appeals to passion and prejudice, is not regarded as an unconditional ground for setting aside the verdict, because it may be cured by remittitur. If the plaintiff will, within fifteen days from the filing of rescript, enter her written consent to the reduction of the verdict to four thousand dollars, the motion for a new trial will be overruled. If the said reduction is not consented to within said period, the motion for a new trial will be sustained, but on no other ground than that the damages are excessive. On the new trial, if there is one, the issue is to be limited to the extent of the wrong inflicted upon the plaintiff.

Exception overruled.
Motion overruled, excepting as to damages. Touching damages, if remittitur of $1,500.00 *is filed within* 15 *days from the filing of rescript, motion will be overruled; otherwise sustained.*

BATES STREET SHIRT COMPANY

vs.

PARKER R. WAITE AND MAUDE R. WAITE.

Androscoggin. Opinion September 15, 1931.

EQUITY. CORPORATIONS. LIMITATION OF ACTIONS.

Equity takes jurisdiction when directors of a corporation are called to account for losses sustained by their mismanagement even though an action at law for money had and received might lie.

The statute of limitations does not begin to run where the defendant directors are in control of the corporation and charged with the duty of bringing an action against themselves in the name of the corporation until they cease to be directors and have given up control of the corporation or until a further reasonable time has elapsed to enable their successors to familiarize themselves with the facts.

The general rule that directors can not vote salaries to themselves nor vote a salary to one of them as president, secretary or treasurer at a meeting where his vote is necessary to make a quorum and that such votes are voidable by the corporation, does not apply when the directors are the sole owners of all of the stock entitled to vote and when their action works no fraud on creditors or non-voting security holders.

It is not illegal for a corporation to distribute its profits in salaries, provided that all of the stockholders who are entitled to share in the profits assent to such action.

The relation of trust clearly appears between the common stockholders having entire control of the corporation and preferred stockholders with an interest but no voice in the corporate management. Any action of the common stockholders in violation of the duty imposed on them by the trust relation would be a fraud upon preferred stockholders.

A court in equity has power to review the action of a board of directors in fixing the salaries of officers, even when such action has been ratified or acquiesced in by the common stockholders, and to inquire into the reasonableness of the amounts thereof considering all of the factors involved. If the salaries are found to be excessive, adequate relief may be furnished, but it is not the province of the Court to act as general manager of a private corporation or to assume the regulation of its internal affairs.

A corporation has the right to purchase its own stock and to retire or reissue the same.

Proof of the violation of a contractual obligation by joint action of a board of five directors acting in good faith does not satisfy a charge of individual fraud on the part of two of them.

In the case at bar, charges of fraud, neglect, and mismanagement against defendants were not sustained. They had no foundation in evidence. On the contrary, there was much to prove that defendants conducted the business of the corporation with fidelity and integrity.

On report. A bill in equity brought against the defendants as executive officers and directors of the Bates Street Shirt Company, alleging certain *ultra vires* acts and acts in violation of their fiduciary relation, and particularly to recover money alleged to have been converted to their own use and illegally expended by them. Bill dismissed with costs. The case fully appears in the opinion.

George C. Webber,
Bradley, Linnell & Jones, for plaintiff.
W. B. & H. N. Skelton, for defendant.

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

PATTANGALL, C. J. On report. Bill in equity brought to recover from former directors money alleged to have been fraudulently converted to their use or illegally expended by them.

The corporation was organized in 1907. The history of its first decade is not involved in these proceedings. In 1917, defendants became owners of all of its issued common stock with the exception of qualifying shares held by employees of plaintiff who with defendants made up the board of directors, but who had no financial interest in the business.

This condition continued during the entire period covered by the bill, excepting that in 1918 Herman A. Fosdick purchased of the corporation, through Parker R. Waite, four hundred shares of the common stock, paying therefor $40,000, which Mr. Fosdick held until his death in 1922 and which was held by his estate from that time until the stock was repurchased from his executrix by the corporation in 1924.

The corporation was capitalized at $500,000 with an author-

ized issue of two thousand shares of common stock of a par value of $100, and three thousand shares of six per cent cumulative preferred stock of the same par value, non-voting except as hereinafter stated.

The preferred stock was not only preferred as to earnings and assets but was issued subject to an agreement referred to in the record as the "preferred stock covenant," which read as follows:

> "The holders of the preferred stock shall have no voting power except in the event of the failure of the corporation to pay the preferred dividend for six months after its regular date of payment in which case the entire voting power of the common stock holders of the corporation shall pass to the holders of the preferred stock as provided in these By-laws, and shall remain in such preferred stock until its net earnings are sufficient to pay up arrears in its dividends. As long as any of the preferred stock is outstanding, the corporation's quick assets shall always exceed its entire indebtedness, both funded and floating, together with the amount of its preferred stock outstanding, and no mortgage or encumbrance of any nature shall be placed upon the assets of the company unless by the expressed agreement of the holders of at least 75% of such outstanding preferred stock properly given at a meeting of the preferred stock holders called for the purpose."

The business was profitable during the years 1917, 1918, 1919 and 1920, the net annual profits during that period averaging $50,000. During the next two years, following the general trend of business in the country, a substantial loss was occasioned by the writing down of inventory values and a re-adjustment from wartime prices to a lower level. This loss amounted to $147,000. In 1923, the profits were $50,000. In 1924, a loss of $46,000 was sustained; in 1925, the profits were negligible; and in 1926, there appears a loss of $19,000. Combining these figures, the total net profit for the ten years was, in round numbers, $40,000.

No dividends were paid on the common stock after 1912. In lieu of dividends, the directors distributed so much of the surplus earnings among themselves in the form of salaries and allowances as seemed to them consistent with the services rendered and their obli-

gations to the creditors of the corporation and its preferred stockholders.

Dividends on the preferred stock were paid in full down to and including the semi-annual dividend of July, 1927.

The relation between quick assets and the combined amount of corporate debts and preferred stock issued was maintained in accordance with the terms of the covenant until September 24, 1924.

On February 24, 1927, Maude R. Waite resigned as a director, as also did two of the employees of the company who were then acting in that capacity, and three of the preferred stockholders, each having been given a qualifying share of common stock, were elected to the board and constituted a majority thereof. Under the new management, 1927 showed a profit of $80.00 and 1928 a loss of nearly $60,000. There was a loss in 1929, not definitely stated in the record but somewhat less than in 1928.

No dividend was paid on the preferred stock in January, 1928, and on July 6, 1928, by authority of the provisions of the preferred stock covenant, the preferred stockholders took over the entire control of the corporation which they have since retained.

The corporation has always been solvent. In considering the various issues raised by the pleadings, the rights of creditors need not be regarded. In October, 1930, the liabilities of the company, exclusive of stock issues, amounted to but $65,000 while its assets were $475,000. The preferred stock amounted at par to $290,000. The remainder was represented by the common stock, of which at that time 773 shares were outstanding and which therefore had a book value of $155 per share. This situation obtained in spite of the fact that no profits were made after 1923, but on the contrary during the six subsequent years losses of approximately $175,000 were sustained. The creditors and preferred stockholders have always been amply protected.

The specific complaints in the bill may be summarized as follows: (1) payment of salaries and other allowances without lawful authority and in excess of the value of services rendered; (2) payment of expense accounts alleged to have been excessive; (3) substituting Maude R. Waite in place of the corporation as beneficiary under policies of insurance on the life of Parker R. Waite; (4) payment of corporate funds in the purchase and retirement of

common stock from the estate of Herman A. Fosdick; (5) payment of dividends on preferred stock of the corporation when the quick assets were less than the combined amount of the liabilities and the outstanding preferred stock.

A general charge of fraudulent conduct on the part of the defendants accompanies the allegations of these specific acts.

A fair analysis of plaintiff's claims is made difficult by reason of their exaggeration. If all of its contentions were sustained, it would be entitled to judgment for approximately $400,000, a sum sufficient to pay all of the debts of the corporation and retire the entire issue of preferred stock, after paying the accumulated dividends thereon. The allowance of these claims would also involve defendants receiving no compensation whatever for ten years' services and no return on their investment. Such a result could hardly be seriously urged. Nevertheless it represents a summary of plaintiff's demands.

The bill is dated August 29, 1929. Many of the matters which are the subject of complaint occurred prior to August 29, 1923, and as to these defendants invoke the Statute of Limitations. On this point, plaintiff in its replication says that "defendants fraudulently concealed causes of action set forth in said bill in equity from said plaintiff and plaintiff further says fraud has been committed by the said Parker R. Waite and Maude R. Waite as set out in its said bill in equity which entitles said plaintiff to bring its said bill and said action was commenced within six years after plaintiff discovered that it had a just cause of action."

As a general rule, the Statute of Limitations begins to run against an action against directors of corporations for their malfeasance or nonfeasance from the time of the perpetration of the wrongs complained of. *Williams* v. *Halliard*, 38 N. J. Eq., 373; *Spering's Appeal*, 71 Penn. St. 11. This does not apply in cases of fraudulent concealment, when the statute does not commence to run until discovery or until the time prior thereto when the exercise of reasonable vigilance would have disclosed the facts; and there is another exception to the rule — the statute does not commence to run where the defendant directors are in control of the corporation and charged with the duty of instituting an action against themselves in the name of the corporation, until they cease to be

directors and have given up control of the corporation to their successors or even until a further reasonable time has been permitted for such successors to familiarize themselves with the situation. *National Bank* v. *Wade*, 84 Fed., 10; *Ventress* v. *Wallace* (Miss.), 71 So., 636; Notes, 1917A L. R. A., 980.

These defendants, having been in control of the corporation from 1917 until 1927, find no defense in the Statute of Limitations. The entire record of their administration is properly before us.

While the purpose of the bill is purely and simply the recovery of money from defendants and an action for money had and received would have been appropriate, the situation is one that permits concurrent remedy in equity.

"The jurisdiction of courts of equity to compel unfaithful directors of corporations to account to the corporation for losses sustained by it through their breaches of trust has been settled since the time of Lord Hardwick." 3 Thompson's Commentaries on the Law of Corporations (1894 Edition), Sec. 4120; *Ellsworth Woolen Mfg. Co.* v. *Faunce*, 79 Me., 440.

Taking up the claims of plaintiff in the order stated, the salaries paid these defendants and to Mr. Fosdick may be first considered. It is alleged that salaries were illegally voted and that they were excessive in amount.

This issue may be more intelligently approached by dividing the time covered by the complaint into three periods and omitting, in the first instance, any discussion as to the amount of the salaries.

In the years prior to 1923, salaries were fixed by vote or by agreement of boards of directors consisting in whole or in majority part of the officers to whom the salaries were to be paid, all participating in fixing each individual salary, in violation of the general rule which is well settled.

"Directors cannot vote salaries to themselves. Nor can they vote a salary to one of their number as president, secretary or treasurer at a meeting where his presence is necessary to a quorum. Such votes if passed are voidable by the corporation and if money has been paid, it may be recovered back." *Camden Land Co.* v. *Lewis*, 101 Me., 78; *Pride* v. *Pride Lumber Co.*, 109 Me., 452.

The reason and justice of the rule is apparent. Directors have no authority to act for the corporation in matters in which they

are personally interested. They owe their whole duty to the corporation and they are not to be permitted to act when duty conflicts with interest. They can not serve themselves and the corporation at the same time. *European & N. A. Ry. Co.* v. *Poor*, 59 Me., 277.

But the peculiar circumstances of this case take it out of the general rule. Here the directors were the only bona fide common stockholders. It is not illegal for a corporation to distribute its profits in salaries provided that all of the stockholders assent. 2 Cook on Corporations, 6th Ed., Sec. 657.

It is settled law that "a corporation may ratify the unauthorized acts of its officers and directors, if they were within the powers of the corporation. This may be done by vote of the stockholders or may be inferred from long acquiescence. Such a ratification might validate an unauthorized or irregular issue of stock to a president in payment of salary which had been voted him at a board meeting at which his presence was necessary to make a quorum." *Camden Land Co.* v. *Lewis*, supra.

When all of the stock which is entitled to vote is owned by directors and directors act unanimously, formal ratification by the stockholders is unnecessary. Acquiescence with full knowledge of the facts is equivalent to ratification and in such a case acquiescence may be assumed.

The year 1923 stands by itself. Mr. Fosdick died in 1922. The stock which he had owned was held by his estate until it was purchased by the corporation in September, 1924. Salaries for 1923 were voted at a directors' meeting in which defendants appear to have participated in fixing the amounts which they were to receive. Their action in this respect was not ratified by the stockholders nor was it acquiesced in by the executrix of the Fosdick estate. On the contrary, she vigorously protested against it. In so doing, she was quite within her rights as a representative of minority stockholders. No dividends were being paid on the stock. Prior to Mr. Fosdick's death, it was immaterial whether the profits of the business were distributed in salaries or in dividends, but when his salary ceased, a different situation obtained. The objections of his executrix were finally silenced by the sale of the stock, but until that

was arranged she was entitled to register pertinent protest against the action of the directors.

The Fosdick estate was in a different position than that of this plaintiff. The complaint that money which should have been paid out in dividends was in fact distributed in the form of salaries was of importance to common stockholders not participating in the salaries and who might share in the dividends, but of no importance to preferred stockholders who received the dividends to which they were entitled, nor was the corporation damaged so long as the salaries paid were not excessive.

Whatever may have been the situation in 1923, equity does not call, at the present time, for the repayment to the corporation of salaries paid to these defendants, for services rendered during that year, solely on the ground that the method of fixing the salaries was irregular.

Subsequent to 1923, salaries were voted in accordance with technical requirements.

Summarizing the foregoing, we conclude that unless the salaries were excessive in amount, no damage is shown.

A court in equity has power to review the action of a board of directors, fixing the salaries of its officers, to inquire into the reasonableness of the amounts thereof, considering all of the factors involved, and if the salaries are found to be excessive to furnish adequate relief, but it is not the province of the Court to act as general manager of a private corporation or to assume the regulation of its internal affairs, and the power will only be exercised in extreme cases.

The action of directors in fixing the salaries of officers must amount to fraud upon the corporation or its stockholders before the court will interfere. *Poutch* v. *National F. & M. Co.*, 147 Ky., 242, 143 S. W., 1003. The salaries voted must be clearly excessive. *Matthews* v. *Chocolate Co.*, 130 Md., 523, 53 N. W., 218. Directors, especially when they own a majority of the stock of a corporation, are invested with large discretionary powers in the matter of fixing salaries, with which the court will rarely interfere. *Beha* v. *Martin*, 161 Ky., 838, 171 S. W., 393. If the directors act in good faith in fixing salaries, their judgment will not ordinarily be reviewed by the court however unwise or mistaken it may seem

to be. *Wight* v. *Hueblin*, 151 C. C. A., 337. The burden of proving that the salaries voted are excessive is on the complainant. *Presidio Mining Co.* v. *Overton*, 261 Fed., 1023. And if fraud is alleged, the proof must be clear and convincing, *Strout* v. *Lewis*, 104 Me., 65; *Getchell* v. *Kirkby*, 113 Me., 95.

If the salaries paid were so unreasonable in amount as to work injury to the corporation, this court has power, within the limitations stated, to correct the wrong, and if the preferred stockholders were damaged by reason of the acts of defendants, the corporation may recover for such damage in this action, although the preferred stockholders are not named as plaintiffs, for they may not, in their own behalf, seek redress for such wrongs until the corporation is shown to be unwilling or incapable of seeking the remedy for itself and for them. *Hersey* v. *Veazie*, 24 Me., 9.

"Aggrieved stockholders must seek their remedy through corporate channels. They must exhaust all remedies within their reach in the corporation itself. They must apply to the officers in charge. Failing with the officers, they must apply to the corporation itself or they must show why application would be ineffectual in either case. If they fail with both, then the courts are open for redress." *Ulmer* v. *Real Estate Co.*, 93 Me., 326.

Directors and voting stockholders alike owe a duty to non-voting stockholders.

"The common stockholders having entire control of the corporation involving their own interests and those of the preferred stockholders, the relation of trust between them and the latter with an interest, but no voice in the corporate management, more clearly appears, than in the relation of the majority to the minority stockholders who have the right to take part in the meetings of the corporation. The relation between the two classes of stockholders is plainly one of trust. Any action of the common stockholders in violation of the duty imposed on them by the trust relation would be a fraud upon the preferred stockholders." *Kidd* v. *Traction Co.*, 74 N. H., 178.

In the light of attendant circumstances, we do not find that these defendants violated their obligations either to the corporation or the preferred stockholders in the matter of salaries. The evidence, fairly analyzed, does not sustain plaintiff's claim that they were

excessive. There are many factors to be considered in determining that question. No dividends were paid on the common stock. Whatever return defendants and Mr. Fosdick secured on their investment was included in the salary account, and the investment was substantial. Defendants paid $75,000 for their stock, on which they have never received any direct return. Mr. Fosdick paid $40,000 for his stock and received nothing for the use of the money during the six years that it remained in plaintiff's treasury, unless some fair return thereon was included in his salary. They were not only directors but they filled the offices of president, vice-president, treasurer, assistant treasurer and clerk of the corporation. They also constituted the active working executive force of the company. Parker R. Waite was in general charge of manufacturing and supervised the work of the purchasing and sales departments. Mr. Fosdick gave especial attention to the financial side of the business. Mrs. Waite had charge of the accounting and credit departments and, excepting during the years from 1918 to 1922, Mr. and Mrs. Waite attended to the financing. The business was substantial, the net sales during the years 1917 to 1926 inclusive averaging nearly three-quarters of a million dollars per year. During that period, the average annual profits exceeded $29,000. The average annual amount distributed by the common stockholders among themselves was $25,000. During 1919, 1920 and 1921, the salaries were very much higher than during the remaining years. These were the years when excess profits, taxes were at their maximum and defendants pursued the course generally followed at that time, increasing salaries for the purpose of reducing taxes. Such action may have been detrimental to the government but was not injurious to plaintiff. Omitting these three extraordinary years from the calculation, the average annual salary account only amounted to $17,500 per year.

Plaintiff predicates the assumption that defendants' services were of little value on the fact that during a portion of their administration the business was unprofitable. We do not regard this argument as sound.

Defendants had charge of the business for ten years. In only four of these years is a loss recorded, and in two of them, 1921 and 1922, plaintiff suffered no larger loss proportionately than

did practically every manufacturer in America during that period of serious business depression which is still so vivid in the minds of all well-informed men of mature age that it needs but slight evidence to recall it to the memory of this court. Omitting those two years, the corporation under defendants' management made a net profit of more than $187,000 after deducting payment of preferred stock dividends and every disbursement of which plaintiff complains. The net profit for the entire ten years was slightly in excess of $40,000.

In 1927, the management passed into the hands of those now in control. The losses occurring under the new management have already been noted. It would be manifestly unjust to conclude that these losses are due to incompetent management and it is just as unreasonable to charge the losses of 1921, 1922, 1924 and 1926 to the incompetence of the former board.

At the time the salaries were paid, they were not regarded as excessive. That question was brought sharply to the attention of all of the parties interested in 1923 and 1924 by the Fosdick litigation. Auditors of high standing and expert in corporation finance, employed at the suggestion of preferred stockholders, examined that phase of the business with care and gave an opinion that the salary charges were reasonable. No common stockholder complained of them with the exception of the executrix of the Fosdick estate, and her complaints were withdrawn when the corporation purchased the stock. Indeed, as a practical matter, no one else had ground for complaint. Defendants had an undoubted right to distribute in dividends the profits of the business in excess of the requirements of the preferred stock covenant. Whether they so distributed them or divided them as salaries worked injury neither to the corporation, its creditors, nor to its preferred stockholders. If no just complaint could have been made of their acts in this respect at the time they were committed, it would seem that none can properly be entertained now, merely because during recent years, first under the old management, then under the new, the business has become unprofitable.

There is no justification for any charge of fraud or bad faith in connection with the salaries paid to defendants or authorized by them to be paid to Mr. Fosdick. Even in 1919 and 1920, the years

when the salaries reached their highest point, the condition of the business warranted them, aside entirely from the matter of taxes already referred to. In 1919, the net sales amounted to $1,230,435, the highest point reached in the history of the company. The profits were $117,000. After deducting salaries, $56,000 was added to the earned surplus account. In 1920, the sales amounted to $1,129,674, the profits were $73,000, and a further addition was made to the earned surplus account so that at the close of the year it showed a balance of $193,379, an increase of $67,000 over the figures of January 1, 1918, and on January 1, 1921, the quick assets of the company exceeded the sum of its debts and the preferred stock issue by $168,412.

As the sales fell off and profits decreased, salaries were steadily reduced until in 1926 they reached a minimum of $14,000. There was no concealment in regard to the amounts paid. They were regularly and properly entered upon the books, appeared annually in the auditor's reports, and were known, or upon even casual examination of the company's affairs might have been known, to any and all of the preferred stockholders.

In the absence of fraud or bad faith on the part of the directors, and we find none, we can not, on the facts presented here, revise their judgment as to the salaries paid during the period when they administered the affairs of the corporation.

The second subject of complaint concerns payments to Parker R. Waite on account of travelling expenses and certain other disbursements not supported by vouchers.

Under the latter head it is claimed that plaintiff is entitled to receive $5,595. The items making up this amount all refer to the year 1919. There is included therein $2,400 which appears to have been paid to Maude R. Waite as a bonus covering the years 1918 and 1919. These payments have already been considered in the discussion of salaries, in which all bonuses and allowances are included.

At the hearing on the bill in 1930, defendants were unable to find supporting vouchers for the items making up the remainder of this account. Maude R. Waite, testifying from memory, believed that it consisted in part of bonuses to various employees, considerable money having been paid out in that way during that

year. The charges were entered on plaintiff's books and must have been called to the attention of the auditors whose certification indicates that, at the time, proper vouchers were produced. It is not remarkable that defendants were unable to furnish them twelve years afterward. Mr. Fosdick was entitled to a bonus of $2,000 in 1919 and undoubtedly received it, yet, unless that amount is included in these unvouched items, there is no record of its payment. Plaintiff concedes the reasonableness of this explanation.

So far as the personal travelling expenses of Parker R. Waite are concerned, there seems to be no serious complaint, excepting that on the occasion of his marriage in 1920, he combined a business trip and a wedding journey, charging his wife's car fares and hotel bills in his expense account and that on two other occasions when she accompanied him the same thing occurred. The fact that Mr. Waite's bills when travelling for plaintiff, were, as a rule, larger than those of its regular travelling men and that vouchers had not been preserved covering all of the expenditures is also criticized. We do not deem it necessary to discuss these items in detail or at length. The facts were known at the time. The stockholders acquiesced in the expenditures. Auditors certified the accounts as properly vouched.

If the corporation was willing in 1920 that its president should at its expense enjoy the companionship of his wife while travelling on its business, it is too late now to charge the bill to him. Argument concerning this particular item may well be answered by quoting the maxim approved by our court in *Woodbury* v. *Marine Society*, 90 Me., 23, "Equity does not stoop to pick up pins."

The claims based on the substitution of Maude R. Waite for the corporation as beneficiary under two policies of insurance on the life of Parker R. Waite may be next considered.

At the time Mr. Fosdick became connected with the business, the corporation was named beneficiary in two policies for $25,000 each on the life of Parker R. Waite and was paying the premiums thereon. It was decided that a policy for $25,000 should be taken out on the life of Mr. Fosdick for the benefit of the company and at its expense, and that the amount of Mr. Waite's insurance, so far as the company was concerned should be reduced to $25,000. Instead of cancelling the policy which the company did not care

to longer carry, Maude R. Waite was made beneficiary and the policy continued in force.

Plaintiff urges that defendants should either pay back to the company the premiums which it had paid on this policy or at least pay to it the cash surrender value of the policy. There is no good reason for doing either. The premiums paid by the company secured it the protection which it desired during the time it was beneficiary. Unless it had the proprietary interest in the policy, it had no right to the cash surrender value; otherwise that belonged to Parker R. Waite.

The record does not clearly show that plaintiff's interest was other than that of a mere beneficiary. If it had further rights on which a claim for damages might properly be based, it was incumbent on it to prove the fact. While Mrs. Waite was benefited by the change of beneficiary, the evidence does not show that plaintiff was damaged thereby.

Later another policy for $75,000 was issued on Mr. Waite's life and the company named as beneficiary. In 1924 a change was made and Mrs. Waite made beneficiary. In 1926 another change was made and the company not only became again the beneficiary, but the proprietary interest in the policy was transferred to it. The company lost nothing by the transaction and should not recover anything because of it.

It is true that while Mrs. Waite was beneficiary, plaintiff paid the premiums on the policy. If Mr. Waite had died during that time, plaintiff could have recovered from Mrs. Waite the amount so paid. As the matter stands, however, Mrs. Waite was not benefited, nor was plaintiff injured by reason of the temporary change. Plaintiff now having the proprietary interest finds reimbursement for the premiums paid by it in the increased cash surrender value of the policy.

Plaintiff claims that the action of the directors in September, 1924, in purchasing the Fosdick stock was unwarranted because it resulted in reducing the quick assets below the limit fixed by the preferred stock covenant, and that these defendants are liable for the amount expended for that purpose, together with interest thereon from the date of payment.

The consideration of this claim necessitates a brief review of the

history of Mr. Fosdick's connection with plaintiff and the circumstances which led up to the purchase of this stock from his executrix. In June, 1918, Mr. Fosdick arranged to purchase four hundred shares of the common stock of the plaintiff corporation at par. Part of the stock was issued immediately and the balance during the following six months, the company receiving $40,000 as a result of the sale. Mr. Fosdick was elected a director, vice-president and assistant treasurer on July 1, 1918, and a by-law was passed defining his duties.

An agreement previously made between him and Mr. Waite was ratified, in so far as it concerned the corporation. Under this agreement, Mr. Fosdick was to receive the same remuneration as that paid Mr. Waite. There was also to be transferred to him by Mr. Waite, without payment of any money consideration, one hundred shares of common stock which was to be re-assigned if at any time Mr. Fosdick ceased to maintain his official connection with the company.

Mr. Fosdick gave his entire time to the service of the company until his health began to fail in 1921. After that he continued to act in an advisory capacity until he died in June, 1922. During this time he drew as compensation for his services $46,702.91. No dividends were paid on the common stock during his ownership. It may be noted that in 1918 a policy of insurance for $25,000 was issued to him in which plaintiff was named as beneficiary and that plaintiff received in December, 1922, the sum of $25,115.23, the proceeds of this policy, on which it had paid premiums for four years.

After Mr. Fosdick's death, the corporation continued its policy of paying no dividends on the common stock and the investment became unprofitable to his heirs. In 1923, his executrix brought a bill in equity, the purpose of which was to force a sale of the stock or compel a division of profits on a basis which would make it income producing. This bill was dismissed on technical grounds and in 1924 a second bill was brought with the same objects in view.

While the ultimate purpose of both bills was as stated, each contained charges of fraud and mismanagement against the Waites. Although the first bill was dismissed and the second never came to a hearing, the allegation contained in both were widely published

as a result of which both these defendants and the corporation were subjected to unpleasant criticism, applications for loans were more closely scrutinized than had been ordinarily the case; and those connected with the company believed with good reason that the pendency of the litigation was injurious to its business.

After the bringing of the second bill, Parker R. Waite brought an action against the Fosdick estate to compel the return to him of the one hundred shares which he had transferred to Mr. Fosdick and the corporation sued to recover $5,300 which it claimed was due it from Mr. Fosdick. Mr. Waite's claim was unquestionably sound. The claim of the corporation was somewhat doubtful.

A suggestion was finally made that the purchase of the Fosdick stock by the corporation might lead to an abandonment of all of the controversies and negotiations looking toward that end were begun. Aside entirely from the pending litigation, there were reasons for buying the stock which appealed to those familiar with the affairs of the company. It had benefited for six years by the use of $40,000 of Mr. Fosdick's money without paying interest thereon; it had received from his life insurance approximately $24,000 in excess of the premiums paid on the policy. He had rendered it faithful and valuable service for more than three years and when everything was taken into account, the net cost of that service to the company amounted to less than a reasonable salary for a single year. His family was left with an investment which was necessarily unproductive unless the method of distributing profits which the corporation had followed for many years was abandoned and even then, it was not such an investment as would recommend itself to any but an active business man valuing it as a means of securing profitable employment.

These considerations did not affect the situation from a legal standpoint; they did affect it from the standpoint of fair dealing. And while they would not, standing alone, have justified the purchase of the stock in the then financial condition of the company, there was added to them the factor of making peace with a stockholder who apparently intended to continue to harass the corporation with litigation so long as any excuse could be found upon which to base a suit. In this situation, the wisdom of purchasing the stock seemed apparent and was finally consummated on the fol-

lowing terms: The Fosdick estate was to be paid $35,000, the claim of the corporation against Mr. Fosdick was to be cancelled, the stock belonging to Mr. Waite returned to him, and the four hundred shares for which Mr. Fosdick paid the corporation $40,000 assigned to the plaintiff. This arrangement was immediately carried out.

The right of a corporation to purchase its own stock and to retire or reissue the same is not questioned. The amount paid can not be criticised. The book value of the stock at the time of purchase was in excess of $150 per share. If the directors acted in good faith, exercising their best judgment and honestly believing that what they did was for the benefit of the corporation, this Court has no authority to review their act, unless some peculiar feature takes the case out of the general rule applicable to such a situation.

At this time, the directors of the corporation were Parker R. Waite, Maude R. Waite, Harry Manser, A. M. Richardson and E. O. Garns. Miss Richardson was a sister of Mrs. Waite, employed by the company as a bookkeeper. Mr. Garns was and is now an employee of plaintiff. Mr. Manser was counsel for the company.

Plaintiff makes no claim that the directors, other than the defendants, were guilty of bad faith in this transaction. It alleges that only the defendants knew of the financial situation of the company in September, 1924, and "fraudulently and wilfully withheld the information from the directors and from others with whom they consulted"; that they "fraudulently and wilfully brought about the vote" to purchase the stock and "used their peculiar position of trust and responsibility for personal benefit"; that they "fraudulently and wilfully withheld information as to the financial condition of the company in a letter sent to preferred stockholders"; and that the letter contained at least one statement that "was false and known to them to be false."

It is upon these grounds that plaintiff predicates liability on the part of defendants to the exclusion of the remaining directors. It relies upon the proposition that Mr. Manser, Mr. Garns and Miss Richardson were pliant tools in the hands of defendants who, by fraudulent concealment and misrepresentation, induced the board

of directors to adopt a course of conduct which resulted in defrauding the company and caused it to sustain a large monetary loss for which defendants are liable. On any other theory, it must have joined the remaining directors as defendants.

The evidence does not support these allegations. Whatever may have been the situation with regard to Mr. Garns and Miss Richardson, there is no question but that Mr. Manser was fully informed as to the financial condition of the company at the time the Fosdick stock was purchased. He had been elected director in 1922 to fill the vacancy caused by the death of Mr. Fosdick. He was also counsel for the corporation, and although a nominal stockholder was active in its affairs and conversant with them.

There is no evidence whatever that the Waites or either of them exercised any influence to procure his assent to the vote authorizing the purchase of the Fosdick stock. On the contrary, he was the director who made the motion that such action be taken. And there is no evidence that defendants even suggested to Mr. Garns or Miss Richardson how they should vote on the motion. As a matter of fact, Mr. Manser initiated the negotiations which led to the purchase of the stock and strongly advised it. Not willing to take entire responsibility in the matter, he called into consultation a second attorney of recognized ability and integrity and, realizing that the situation presented a business as well as a legal problem, he conferred at length and in detail with the head of the firm of brokers which had marketed an issue of $118,000 of the preferred stock, who was himself a holder of preferred stock, who had sold a substantial amount of the stock to his wife as well as to personal friends and business associates, and who with full knowledge of the facts from every angle of approach advised the purchase.

Defendants acted in accordance with the advice which they received. There is no claim but that Mr. Manser acted in good faith and for what he believed to be the best interests of the company. We can not find defendants guilty of fraud in accepting his view as to the proper course to pursue.

Nor can we hold them liable because they received some personal benefit from the arrangement. They were relieved from the burden of defending the action then pending and their position as stock-

holders was somewhat improved by the cancellation of the Fosdick stock, but the right of the corporation to purchase the stock was not affected by the fact that the common stockholders were incidentally benefited by its so doing.

The purchase of the stock and the consequent reduction of the quick assets of the corporation was the act of the board of directors, not of the defendants, nor was it induced by fraud of the defendants as alleged by plaintiff. We are satisfied that the directors, including the defendants, acted in good faith, believing that the best interests of the corporation demanded the elimination of the Fosdick estate as a stockholder.

While a corporation may, in an action brought in its name, redress an injury done to its stockholders by its officials, proof of the violation of a contractual obligation, by joint action of a board of five directors acting in good faith, does not satisfy a charge of individual fraud on the part of two of them.

Four semi-annual dividends on the preferred stock were paid by order of the directors in 1925 and 1926 after the quick assets had been reduced below the point required by the by-laws, and plaintiff claims that defendants should restore to the treasury of the corporation the money so paid, together with interest thereon, the total amount being $45,484, alleging that the defendants committed a breach of trust in paying these dividends.

Adequate answer to this claim is that during this period there was at all times, after proper adjustments were made, a balance of earned surplus sufficient to warrant the payments. The propriety of paying them was recognized by the new management and by the preferred stockholders themselves who, by formal vote, continued to pay them through the following year.

The general charges of fraud, neglect and mismanagement may be disposed of without extended discussion. Of similar charges contained in the first bill in equity filed by the executrix of the Fosdick estate, Mr. Justice Morrill said, "These charges are not sustained. They have no foundation." The statement applies as well to the instant case. Plaintiff has not sustained the burden of proving these charges. On the contrary, there is much to prove that defendants conducted the business of the corporation with fidelity and integrity.

Bill dismissed with costs.

STATE OF MAINE *vs.* THOMAS PARADY.

York. Opinion October 9, 1931.

CRIMINAL LAW. INTOXICATING LIQUORS. PRINCIPAL AND AGENT. CHAP. 137, SEC. 6, R. S. 1930.

One who acts merely as the agent or messenger of another in purchasing liquor is not guilty of a sale where he has no personal interest in the transaction, and the fact that the agent advances his own money to make the purchase, being reimbursed by the principal on delivery, does not affect the relation of principal and agent so as to make the latter punishable unless the purchasing of liquor is made an offense by statute.

Whether or not the respondent was a bona fide agent of the buyer or was making a sale of the liquor on his own account or as agent for another, was a question for the jury and should have been submitted to them.

On exceptions by respondent. Respondent was tried at the May Term, 1931, of the Superior Court for the County of York on a warrant charging him with the sale of intoxicating liquor, and found guilty. Evidence was introduced that he acted merely as a bona fide agent of a bona fide purchaser. To the instruction of the presiding Justice that even if respondent did act as a bona fide agent of the purchaser, such fact would not absolve him from liability, respondent seasonably excepted. Exceptions sustained. The case sufficiently appears in the opinion.

Ralph W. Hawkes, County Attorney, for State.

Waterhouse, Titcomb & Siddall, for respondent.

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

PATTANGALL, C. J. Exceptions. Sale of intoxicating liquor. A prohibition agent visited respondent's office in company with an acquaintance of the latter and claimed to have purchased from respondent a quart of intoxicating liquor.

Respondent, recalling the incident, denied a sale to the officer but claimed that he delivered the liquor on the day in question to his acquaintance, receiving pay therefor, in pursuance of an arrangement previously made that he, respondent, would procure

the liquor for his friend and that in purchasing the same, making delivery thereof and being reimbursed for his expenditure, he had acted solely as agent for the real purchaser.

The presiding Justice declined to submit that question to the jury, in substance ruling that it did not constitute a defense. In this he erred.

The statute alleged to have been violated, Chap. 137, Sec. 6, R. S. 1930, reads: "No person shall at any time by himself, his clerk, servant or agent, directly or indirectly, sell any intoxicating liquor."

Statutes have been enacted in many states, including Alabama, Kentucky, Mississippi and North Carolina, making it an offense against the prohibitory law to purchase liquor for another or to procure it and deliver it to another, but there is no such law in this state.

The prosecuting attorney cites in his brief, Chap. 206, P. L. 1923, as containing the clause, "Any person who aids in the sale of intoxicating liquor by acting as agent or otherwise, either for the seller or buyer, or in any manner assists in violating the provisions of law relating to the sale of intoxicating liquor is equally guilty."

The quotation is incorrect. The words "either for the seller or buyer" do not appear in the final enactment. Whether they were omitted by accident or design, we can not say. In any event, we can not supply them. It is not a criminal offense, in this state, to purchase liquor either for the use of the purchaser or as an agent or messenger of another. *State* v. *Ennis*, 121 Me., 596.

The general question involved has been the subject of judicial enquiry and decision in many jurisdictions, and the authorities are reasonably uniform to the effect that one who acts merely as the agent or messenger of another in purchasing liquor is not guilty of making a sale where he has no personal interest in the transaction; and the fact that the agent advances his own money to make the purchase, being reimbursed by the principal on delivery, does not affect the relation of principal and agent so as to make the latter punishable unless the purchasing of liquor is made an offense by statute.

The defense raised a question of fact which should have been passed upon by the jury.

Exceptions sustained.

COMER'S CASE.

Penobscot. Opinion October 10, 1931.

WORKMEN'S COMPENSATION ACT. PLEADING AND PRACTICE.

Sudden heart dilatation caused by a strain, held to be accidental.

If a disorder existing before the accident has been so aggravated or accelerated by an industrial accident as to produce incapacity, the employee is entitled to compensation.

If, but for an injury arising out of and in the course of his employment, an employee would not have become incapacitated at the time and in the manner in which he did, then within the meaning of the Act, the unfortunate occurrence, though it merely accelerated a deep-seated disorder, must be held to have resulted in a compensatory injury.

Whether or not an accident, within the meaning of the Workmen's Compensation Act, caused petitioner's incapacity is a question of fact for the consideration of the Commission and their decision in the affirmative, finding support in evidence, leaves this Court without authority to do otherwise than to dismiss an appeal from their findings and affirm their decree.

Failure to file a petition seasonably must be noted in respondent's answer or is considered waived. The statute of limitations must be specially pleaded.

A Workmen's Compensation Case. Appeal from a decree of a single Justice affirming the decree of the Industrial Accident Commission, awarding compensation to petitioner. Prior to his receiving the injuries complained of, petitioner had been suffering from a condition of enlargement of the heart. The main question at issue was whether aggravation of this condition because of sudden strain, which resulted in dilatation of the heart, constituted an accident within the meaning of the Workmen's Compensation Act. Issue was likewise raised that the petition was not filed within one year after date of the accident.

Appeal dismissed. Decree below affirmed. Court below to fix employee's expenses on appeal. The case fully appears in the opinion.

Arthur L. Thayer, for plaintiff.

Robinson & Richardson,

Nathan W. Thompson, for defendant.

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

PATTANGALL, C. J. Workmen's Compensation Act. On appeal from decree by a Justice of the Superior Court in conformity with the findings of the Industrial Accident Commission, awarding compensation to the petitioner.

Two issues are raised: first, that in view of the evidence submitted, the finding that the injury which petitioner suffered was caused by accident was unwarranted; second, that the petition was not filed within one year after the date of the accident.

The decree of the Commission states the following facts. Petitioner, who had been employed by respondent for several years, was on November 14, 1929, engaged with other employees of respondent in unloading oil from a truck and transferring it to a warehouse. Petitioner's particular work consisted in lifting five-gallon cans filled with oil from a truck about four feet in height and carrying them, one in each hand, to a point where he delivered them to a fellow servant. While lifting the cans, or just after having done so, he became suddenly incapacitated, the collapse resulting from dilatation of the heart.

He had submitted to an examination by respondent's physician during the previous winter and it had then been discovered that he was suffering from enlargement of the heart.

From these facts, the Commission reached the following conclusions: that there was nothing out of the ordinary about petitioner's work on the day in question; that he had been, prior thereto, suffering from a progressive disease of the heart; that it was reasonable to expect that he would eventually suffer considerable incapacity therefrom, regardless of whether or not he should have an accident; that the preëxisting heart condition would be aggravated by exercise; that his collapse from dilatation of the heart, at the time it occurred, was "unusual, unexpected and sudden"; that "the exertions of petitioner, in the ordinary course of his work, materially contributed toward the weakening of an already diseased heart"; and "that his exertions on November 14, 1929, caused his collapse on that date."

On these facts and having reached these conclusions, the Commission awarded compensation. We can not say that the findings

of fact are without support in evidence or that the conclusions deduced therefrom are not based on reason. Under these circumstances, the Commission had ample precedent for its award.

In *Patrick* v. *Ham*, 119 Me., 519, this Court said, "That Patrick was suffering from diseased arteries pre-disposing him to cerebral hemorrhage is of no consequence in the case. That he might have died, or would have died in his bed, of cerebral hemorrhage, in a year or a week is immaterial.

"The question before the Commission was whether the work that he was doing on the afternoon of October 13th, 1919 caused the cerebral hemorrhage to then occur. If so, we think it was an accident arising out of and in the course of his employment.

"This was a question of fact. The Industrial Accident Commission through its chairman has decided this question of fact in favor of the claimant. The finding is, we believe, supported by rational and natural inferences from proved facts."

"If, but for an injury arising out of and in the course of his employment, an employee would not have died at the time at which and in the way in which he did die, then within the meaning of the Act, the unfortunate occurrence, though it merely hastened a deep-seated disorder to destiny, must be held to have resulted in an injury causing death." *LaChance's Case*, 121 Me., 506.

"If a disorder existing before the accident had been so aggravated or accelerated by an industrial accident as to produce incapacity, the employee is entitled to compensation." *Orff's Case*, 122 Me., 114.

"Sudden heart dilatation caused by a strain would, we think, in ordinary parlance be called accidental." *Brown's Case*, 123 Me., 424.

"The theory of the defense is that the hemorrhage was the natural result of a diseased condition of the circulatory system and that it occurred independently of the employment of the deceased. The existence of hardening of the arteries and high blood pressure is immaterial even though it would have finally produced cerebral hemorrhage. Acceleration or aggravation of pre-existing disease is an injury caused by accident." *Hull's Case*, 125 Me., 137.

The second objection is not open to appellant. It was not included in its answer. "If the opponents of the petition wish to in-

terpose the bar of a statute limitation, they should do so by answer before hearing that the issue may be apparent, or lose the benefit of such defense, as in procedure in actions at law requiring that the statute of limitations shall be specially pleaded." *Morin's Case*, 122 Me., 342.

Appeal dismissed.
Decree below affirmed.
Court below to fix employee's expenses on appeal.

GEORGE BOURISK *vs.* DERRY LUMBER COMPANY.

Androscoggin. Opinion October 13, 1931.

PLEADING AND PRACTICE. ABUSE OF PROCESS. SHERIFFS AND DEPUTIES. PUNITIVE DAMAGES.

In order to maintain an action for abuse of process, it is necessary to prove (a) the existence of an ulterior motive, and (b) an act in the use of process other than such as would be proper in the regular prosecution of the charge. The first may be inferred from the second.

An officer, authorized to attach a stock of goods in a store, is not warranted in placing a padlock on the entrance, assuming possession thereof, and excluding the owner from the premises.

In the case at bar, by his unlawful act, the officer became a trespasser. Acting as he did under express direction of defendant's attorney, defendant was liable for actual damage proved to have been caused by him.

The jury were justified in adding punitive damages, since acts wilfully and designedly done which are unlawful are malicious in respect to those to whom they are injurious.

General motion for new trial by defendant. An action on the case to recover damages for malicious abuse of process. Trial was had at the March Term, 1931, of the Superior Court for the

County of Androscoggin. The jury rendered a verdict for the plaintiff in the sum of $929.00. A general motion for new trial was thereupon filed by defendant. Motion overruled. The case fully appears in the opinion.

Harris M. Isaacson, for plaintiff.

Albert Beliveau, for defendant.

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

PATTANGALL, C. J. On Motion. Action on the case for abuse of process. Verdict for plaintiff. Damages assessed at nine hundred twenty-nine dollars ($929). Defense raises two issues — verdict against evidence, and damages excessive.

Plaintiff conducted a combined confectionary store and restaurant on leased premises, owning stock and fixtures subject to two mortgages aggregating approximately four thousand dollars. His equity in the property was estimated by him to be worth thirty-five hundred dollars.

He was indebted to defendant in the sum of three hundred four dollars and twenty-four cents ($304.24), and defendant brought suit against him for that amount. In pursuance of defendant's instructions and against plaintiff's protest, the officer charged with the duty of attaching sufficient property to satisfy the demand placed a lock on the outer door of the store, excluding plaintiff therefrom for four days, during which time the officer exercised complete control over the premises.

There were perishable goods in stock and plaintiff claims to have suffered a loss of $262.15 by their deterioration during the period that he was prevented from entering the store. Apparently the jury added punitive damages to the amount of actual damage found by them.

In order to maintain an action for abuse of process, it is necessary to prove (1) the existence of an ulterior motive, and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge. The first may be inferred from the second. *Lambert* v. *Breton*, 127 Me., 510.

The definite act which is the subject of complaint is the locking up of plaintiff's place of business, assuming control thereof and

excluding plaintiff therefrom. This action on the part of the officer was unwarranted. *Lambert* v. *Breton*, supra; *Williams* v. *Powell*, 101 Mass., 467; *Walsh* v. *Brown*, 194 Mass., 317; *Morrin* v. *Manning*, 205 Mass., 205; *Chetteville* v. *Grant*, 212 Mass., 17.

By his unlawful act, he became a trespasser. *Davis* v. *Stone*, 120 Mass., 228; *Cutter* v. *Howe*, 122 Mass., 541. Acting as he did under express direction of defendant's attorney, defendant is liable for damages caused by him, and actual damage having been proved, the jury were justified in adding punitive damages. "Acts wilfully and designedly done which are unlawful are malicious in respect to those to whom they are injurious." *Page* v. *Cushing*, 38 Me., 526.

We can not say that the amount awarded is manifestly excessive.

Motion overruled.

STEPHANIE GERULIS *vs.* NAPOLEON VIENS.

MARGARET LYONS *vs.* NAPOLEON VIENS.

ARTHUR J. O'BRIEN *vs.* NAPOLEON VIENS.

HELEN LYONS *vs.* NAPOLEON VIENS.

CATHERINE G. LYONS, ADMX. *vs.* NAPOLEON VIENS.

York. Opinion October 14, 1931.

EVIDENCE. ADMISSIONS.

A statement made in the hearing of a party to a cause in regard to facts affecting his rights, to which he makes a reply, wholly or partially admitting its truth, is admissible in evidence, and the reply likewise.

Silence as to such a declaration may, under certain conditions, be held a tacit admission of the facts. This is dependent upon whether the party hears and understands the statement and comprehends its bearing; whether the truth of the facts embraced in the statement is within his own knowledge or not; and

whether he is in such a situation that he is at liberty to make any reply and the statement is made under such circumstances, as naturally to call for a reply if he did not intend to admit the facts.

An admission by a party of the truth of statements made in his presence, by his silence, can not be implied or inferred, unless they were made under such circumstances as to call for a reply from him.

In the case at bar, under the circumstances having regard to the physical and mental conditions of the plaintiffs at the time of the alleged statement, evidence of that statement should not have been admitted. The evidence was clearly prejudicial and may have furnished the additional weight causing the jury to find in favor of the defendant. Exception as to the admission of the evidence was properly taken.

On exceptions and general motion for new trial by plaintiffs. These five cases were action in tort to recover damages for injuries sustained by the plaintiffs as a result of a collision between motor vehicles on the state highway leading from Kennebunk to Biddeford. The actions were tried together by agreement of the parties at the January Term, 1931, of the Superior Court for the County of York. The jury found for the defendant in each case. To the admission of certain evidence plaintiffs seasonably excepted, and after the jury verdict, filed a general motion for new trial in each case. Exceptions sustained. The case fully appears in the opinion.

Waterhouse, Titcomb & Siddall,
Kleber Campbell, for plaintiffs.
Hiram Willard,
William B. Mahoney, for defendant.

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

FARRINGTON, J. The five cases come before this court on general motion and on two exceptions.

The several actions arose out of the results of a collision occurring on July 20, 1930, in the town of North Kennebunkport, Maine, at a point between the City of Biddeford and Kennebunk. By agreement, the five actions were tried together at the January Term, 1931, of the York County Superior Court, and in each case a verdict was returned for the defendant.

All the plaintiffs were returning from Old Orchard Beach, Maine, to Worcester, Massachusetts, in a Ford sedan owned and operated by Arthur J. O'Brien, himself a plaintiff. While they were proceeding in a westerly direction, admittedly on their own side of the road, on what is known as State Highway No. 1, a three strip cement road, the O'Brien car was struck by an automobile operated by one Thomas Robida which was proceeding in an easterly direction on the same highway. Both cars were damaged, the O'Brien car being practically demolished. Phillip Lyons, one of the occupants of the O'Brien car, the administratrix of whose estate is one of the plaintiffs, was rendered unconscious and died later without regaining consciousness. All the other plaintiffs suffered painful injuries.

Without going into detail as to the evidence, it may briefly be stated that the plaintiffs' cases were based on the contention that the automobile driven by Thomas Robida, the car which struck the one in which the plaintiffs were riding, was hit by the defendant's automobile, negligently driven by him, in such a way as to force the car driven by Robida, and without negligence on his part, diagonally across the road and into the O'Brien car, thereby causing the damages recovery for which is sought in these several suits.

The contention of the defendant was briefly that he did not "cut in" and that he did not hit the Robida car, and that the first knowledge that he had of the accident was about a week after its occurrence.

In presenting his defense, the defendant offered as a witness one Conrad Schiller, who was proceeding in a Hudson car just behind the O'Brien car and in the same direction. Schiller testified that he "got a horn" and "saw a car going to pass me"; that he then saw a car, clearly the Robida car, moving in a direction opposite to his, "cut out of the opposite line and come directly across and hit the Ford in front of me," "hit the Ford head-on"; witness said he saw no car pass the Robida car; that he saw the Robida car come into contact with no car but the Ford.

Before Mr. Schiller was called to the stand as defendant's witness, one Linwood Carroll, a member of the State Highway Police, was called as a witness for the plaintiffs. On cross examination by the defendant's attorney, Mr. Carroll stated that he had talked

with Mr. Schiller. The evidence shows it was at the scene of the accident and shortly after it. He was permitted by the Court, against objection by plaintiffs' attorney, to answer the question, "Will you state what Mr. Schiller said there with reference to the Robida car cutting out of line and going across the road?" and the reply was, "Mr. Schiller said that the Robida car cut out of line and met a car on the middle lane and came over on the left hand lane to avoid hitting the car in the center *line*." To the admission of this evidence exceptions were seasonably reserved.

The court permitted the introduction of the evidence on the ground that, the plaintiffs being physically present, their silence or failure to deny the statement as to the manner or cause of the accident as made by Mr. Schiller to Mr. Carroll was an admission of its truth. This is clearly shown by the statement of the Court at the time that "as the case stands now, the plaintiffs were all present when the conversation was made against their interest." Immediately before this statement by the Court, the attorney for plaintiffs had said, "I don't know but it might be entirely out of order, but perhaps when the Court heard further testimony as to the condition of these several plaintiffs, with reference to their being present and bound by any conversation between this officer and outside parties, I think the Court will be in a better position to rule. I simply state that these three young ladies were seriously injured."

Mr. O'Brien had already testified. Later the other plaintiffs gave their testimony. Mr. Carroll had previously stated, in reply to a question on cross examination as to whether Mr. O'Brien was present at the time of the conversation with Mr. Schiller, that "He was around there, but I don't think he was present; no, Sir." And it is undisputed that Phillip Lyons was unconscious at the time.

In *Commonwealth* v. *Kenney*, 12 Met., 235, the Court said: "If a statement is made in the hearing of another, in regard to facts affecting his rights, and he makes a reply, wholly or partially admitting their truth, then the declaration and the reply are both admissible; the reply, because it is the act of the party, who will not be presumed to admit anything affecting his own interest, or his own rights, unless compelled to it by the force of truth; and the declaration, because it may give meaning and effect to the reply.

In some cases, where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts; first, whether he hears and understands the statement, and comprehends its bearing; and secondly, whether the truth of the facts embraced in the statement is within his own knowledge, or not; and whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it."

This language was approved in the case of *Thayer* v. *Usher*, 98 Me., 468, 471. Also in the case of *Pierce* v. *Goldsberry*, 35 Ind., 317, at page 321. To the same effect is *Schilling* v. *Union Road*, 77 App. Div., 74 (N. Y.), 78 N. Y. S., 1015; *Tinker* v. *N. Y., Ontario & Western Ry. Co.*, 92 Hun., 269, 36 N. Y. S., 672; *Parulo* v. *Philadelphia & R. Ry. Co.*, 145 Fed., 664; *McCord et ux* v. *Seattle Electric Co.*, 46 Wash., 145, 89 Pac., 491, 493; and *Whitney* v. *Houghton*, 127 Mass., 527, where the Court said, "Such evidence is always to be received and applied with great caution, especially when the statements are made, not by a party to the controversy, but by a stranger. An admission by a party of the truth of statements made in his presence, by his silence, could not be implied or inferred, unless they were made under such circumstances as to call for a reply from him." To the same effect see *Moore* v. *Smith*, 14 Serg. & R. (Pa.), 388.

In the cases at bar, the statement made by Schiller, a stranger, to Carroll was not made under circumstances which reasonably called upon plaintiffs for any reply, even if they had heard it. It is not claimed or in evidence that the statement was directed to any of the plaintiffs. There is not only no direct evidence in the case to show that any one of the plaintiffs heard any conversation between Carroll and Schiller or that they even saw them engaged in conversation, but the evidence goes far to negative such a conclusion. Mr. Schiller himself did not testify as to any such conversation. Mr. Carroll said, "They were all standing around there. I couldn't say whether any heard the conversation or not." It was "right side of the cars." At this point, the Court said, "You have now laid the foundation if you want to ask the question," refer-

ring to the question and answer covered by the exception under consideration.

The situation existing at the time of the conversation, as disclosed by the record, was one of confusion and traffic congestion at the place of accident. The evidence as to the condition of the several plaintiffs shows that Mr. O'Brien had two fractured ribs, a deep cut below his knee and bruises about his face and body, injuries sufficiently serious to keep him from his work thirteen weeks. Helen Lyons, herself painfully injured, had been holding her unconscious and bleeding brother in her arms until he was laid on the shoulder of the road, where he remained until all were taken to the hospital. Margaret Lyons suffered a sprained ankle, a badly strained back, bone bruises on both legs and on her hip and two cuts on her elbow. Immediately after the accident she was sick and vomiting, and spitting blood. Stephanie Gerulis, fiancee of Phillip Lyons, was suffering from an injury to her left leg which required two stitches. She had fainted from the shock of the accident but recovered consciousness shortly. During all the time and clearly while the alleged conversation between Carroll and Schiller was taking place, Phillip Lyons was lying unconscious by the roadside.

Under such circumstances as these, we are not ready to say that a person is bound to give his attention to statements made by a person in his presence relating to how an accident happened. Indeed it can not fairly be said that he is in a mental condition to have comprehended the bearing of such statements if he heard them.

"We know of no case, and can find none, which holds that, under such circumstances, a party seriously injured and suffering from shock is bound at his peril to give heed to every remark that is made by a person in his presence relating to the occurrence which produced those results." *Schilling* v. *Union Ry.*, supra.

We are of the opinion that, under the circumstances and conditions existing in the cases before us at the time the alleged statement was made by Schiller to Carroll, evidence of that statement should not have been admitted. It was clearly prejudicial and may have furnished the additional weight in the scales which caused them to tip, it may have been ever so slightly, in favor of the defendant when the jury weighed the evidence.

The admission, before Schiller was called to the stand by the defense, of the statement made by Schiller to Carroll could not have failed to strengthen his testimony in the minds of the jury on the basis that his story on the witness stand was the same that he told to Carroll at the time of the accident.

The exception must be sustained.

The other exception covering a somewhat similar situation, and the general motion, need not be considered.

Exception sustained.

WARREN S. MORRILL *vs.* EDWIN T. FARR.

Cumberland. Opinion October 14, 1931.

REAL ESTATE AGENTS. CONTRACTS.

A real estate broker's right to compensation is wholly dependent on a contract of employment. Such contract may be express or implied.

To demonstrate the existence of an implied contract facts and circumstances must be presented from which a hiring can be implied: it must appear that the broker rendered services in behalf of the seller, with the knowledge and consent of the latter.

In the case at bar, there was evidence of employment. A question of fact was raised whether there was a contract by which plaintiff became defendant's broker to sell the property. The question should have been left to the jury. Nonsuit was improper.

On exception by plaintiff. An action on the case to recover commissions as a real estate broker alleged to be due plaintiff as a result of a sale of property of the defendant in Brunswick, Maine. To the direction of a nonsuit, plaintiff seasonably excepted. Exception sustained. The case fully appears in the opinion.

Ellis L. Aldrich, for plaintiff.

Bermans,

Joseph H. Rousseau, for defendant.

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

BARNES, J. Plaintiff sued for services alleged to have been performed in securing a purchaser of defendant's village lot and building, declaring on a parol contract, on account annexed for a definite percentage of the price paid defendant, and in *quantum meruit*. There is no claim of a formal contract in stated terms.

It is admitted that the property was bought by the party to whom plaintiff suggested purchase.

Defendant denied having employed plaintiff.

Trial was had before judge and jury; and when plaintiff rested, defendant's motion for a nonsuit was granted.

The case comes up on exception to grant of nonsuit and a further exception to a ruling on the admission of evidence, which we do not consider, because, as the matter has proceeded, the plaintiff was not injured by the exclusion of evidence to which he excepted.

A broker's right to compensation is wholly dependent on a contract of employment. Such contract may be express or implied. *Saunders* v. *Saunders*, 90 Me., 284.

To demonstrate the existence of an implied contract facts and circumstances must be presented from which a hiring can be implied: it must appear that the plaintiff rendered services in behalf of the defendant, with the knowledge and consent of the latter.

In case there were no evidence of the setting up of a contract; no ratification of a suggested contract, nor evidence sufficient to justify reasonable men in concluding that plaintiff performed services beneficial to defendant in effecting a sale, under an implied contract, the order of nonsuit was proper.

But there was evidence of employment. The testimony is that while the defendant, for eight years prior to the sale of his store, had been a retail merchant in Brunswick, plaintiff had for more than twenty years been a real estate broker in that village, had known defendant and had traded with him more or less for eight years. He maintained an office in furtherance of his real estate business and for years had advertised such business in the local newspaper.

He testified that, knowing that one Senter was ready to buy real estate on Main Street, he approached defendant to ascertain whether the latter would sell his property there situate. The record reads: "I went to Mr. Farr and asked him if he wanted to sell this property. He said he did. I asked him for how much. He said, 'Fifteen thousand dollars.' I said, 'That is rather high, Mr. Farr, but I will see what I can do.' He said, 'All right.' "

After an interview with the prospective buyer, plaintiff had a second conference with defendant. It is reported as follows:

"Q. And will you tell us what conversation you had with Mr. Farr at that time?

"A. Yes, sir. I said, 'Mr. Farr, I cannot get $15,000. Can't you make me a better price? He thought a moment and then said $13,000.'

"Q. What did you say?

"A. I said, 'All right, I will see what I can do.'

"Q. And did he say anything?

"A. 'All right.' "

It appears that defendant sold in October, the consideration being $12,500 and the right on the part of the defendant to remain upon the premises and occupy certain rooms in the building until the succeeding April, or later.

Plaintiff further testified that upon learning defendant had sold the property to his prospective buyer, he went to defendant and the following conversation was had, "Mr. Farr, I see you have sold your place to Mr. Senter. He said, 'Yes.' I said, 'There is a commission due me.' He says, 'I guess not; I didn't get $13,000 for it.' "

Such testimony as that quoted above, especially because it is corroborated or strengthened by other testimony and by circumstances of probative value, definitely raised the question of fact, was there a contract by which plaintiff became defendant's broker to sell the property?

It follows that an answer should have been sought from the jury.

Exception to nonsuit sustained.

STATE OF MAINE *vs.* ONESIME VERMETTE, TONY LUMBARTI.

Oxford. Opinion October 16, 1931.

CONSPIRACY. INTOXICATING LIQUORS. PLEADING AND PRACTICE. R. S., CHAP. 137, SEC. 1. R. S., CHAP. 138, SECS. 26 AND 27.

The combination of two or more persons by concerted action to commit a crime, whether of the grade of a felony or a misdemeanor, and whether an offense at common law or by statute, is a conspiracy at common law.

Common law conspiracy is an indictable offense recognized and made punishable by R. S., Chap. 138, *Sec.* 26.

The manufacture of intoxicating liquor, other than cider, to wit, alcohol, is a misdeameanor under R. S., Chap. 137, *Sec.* 1.

The inclusion of a defective second count in an indictment does not vitiate the indictment.

A motion in arrest of judgment will not be sustained on an indictment containing several counts some of which are bad but some valid, if a general verdict of guilty is rendered upon the whole.

In the case at bar, the first count was fatally defective as an indictment for statutory conspiracy, inasmuch as it left out allegation of facts necessary to bring the defendants' acts within the scope, R. S., Chap. 138, Secs. 26 or 27.

The first count, however, did fully inform the respondents of the charges laid against them. The superfluous and meaningless expressions in the count might properly be rejected as surplusage. Omitting the unnecessary averments the first count charged a conspiracy at common law.

On exceptions. Defendants indicted for conspiracy were tried at the May Term, 1931, of the Superior Court for the County of Oxford, and found guilty. After the verdict defendants presented a motion in arrest of judgment setting forth that neither count in the indictment alleged or specified the commission of an offense which constituted a conspiracy. To the denial of this motion, defendants seasonably excepted. Exceptions overruled. Judgment for the State on the first count of the indictment. The case fully appears in the opinion.

E. Walker Abbott, County Attorney, for the State.
Albert Beliveau, for defendants.

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

STURGIS, J. The respondents in this case were found guilty in the court below of conspiracy and exceptions to the overruling of their motions in arrest of judgment bring the case to this court.

In the first count of the indictment, it is alleged that respondents did "feloniously conspire and agree together with the fraudulent and wicked intent for one or more of them to manufacture intoxicating liquor, other than cider, to wit, alcohol, in the State of Maine, in violation of law to one or more of the others and to other persons, against the peace of said state and contrary to the form of the statute in such case made and provided." This is not statutory conspiracy within the purview of Sections 26 and 27 of Chapter 138 of the Revised Statutes. As an indictment under the statute, the count is fatally defective. *State* v. *Clary*, 64 Me., 369.

It is elementary law, however, that the combination of two or more persons by concerted action to commit a crime, whether it be of the grade of a felony or only of a misdemeanor, and whether the crime be an offense at common law or by statute, is a conspiracy at common law, which is an indictable offense in this state, recognized and made punishable by the conspiracy statute. The State contends that conspiracy at common law is well pleaded in the first count.

The manufacture of intoxicating liquor, other than cider, to wit, alcohol, is a crime of the grade of a misdemeanor under R. S., Chap. 137, Sec. 1. The first count of the indictment sets out a conspiracy to commit this offense with sufficient certainty to fully inform the respondents of the charge laid against them. The inclusion of the superfluous and meaningless expression, "in violation of law to one or more of the others and to other persons," does not contradict any necessary averment, nor is it descriptive of the identity of the charge or anything essential to it. It may be rejected under the general rule that, whenever an allegation may be struck out of the indictment without injury to the charge, it may

be treated as surplusage. *State* v. *Mayberry*, 48 Me., 218; *State* v. *Whitten*, 90 Me., 53; *State* v. *Whitehouse*, 95 Me., 179; *Com.* v. *Randall*, 4 Gray (Mass.), 36; *Com.* v. *Wright*, 166 Mass., 174; 1 Bish. Crim. Proc., Sec. 478 et seq. The conclusion, "contrary to the form of the statute in such case made and provided," is also surplusage. 1 Bish. New Crim. Proc., Sec. 601; *State* v. *Dorr*, 82 Me., 341; *Com.* v. *Hoxey*, 16 Mass., 385; *Com.* v. *Reynolds*, 14 Gray (Mass.), 87; *State* v. *Gove*, 34 N. H., 510. Stripped of its unnecessary averments, the first count charges a conspiracy at common law.

In the second count, the prosecuting attorney attempts to charge the respondents with a conspiracy to keep a place to be used for the illegal manufacture of alcohol. He admits, however, and counsel for the respondents agrees, that the count is fatally defective and will not sustain a judgment. Assuming, without determining, the insufficiency of this pleading, its inclusion in the indictment works no prejudice to the parties. A motion in arrest of judgment will not be sustained on an indictment containing several counts, some of which are bad but some valid, if a general verdict of guilty is rendered upon the whole. In such a case, judgment and sentence will be considered as given in accordance with the offense laid and proved in the valid counts. *State* v. *Burke*, 38 Me., 574; *State* v. *Hadlock*, 43 Me., 282; *State* v. *Chartrand*, 86 Me., 547.

The respondents stand convicted of a conspiracy at common law properly pleaded in the first count of the indictment, and judgment for the State must be entered.

Exceptions overruled.
Judgment for the State on the first count of the indictment.

LENA MORRISON *vs.* UNION PARK ASSOCIATION.

York. Opinion October 17, 1931.

PLEADING AND PRACTICE. COURTS.

On the retrial of a cause returned by the Law Court to the Superior Court, the ruling of the Law Court as to the legal import of the facts disclosed by the evidence is binding on the Trial Court to be observed by it as law thereto applying.

In the case at bar, the presiding Justice should have instructed the jury that the question whether it was negligence in itself on the part of the defendant not to have withdrawn the horse from the race, had already been determined by the Law Court in the negative.

On exceptions and general motion for new trial by the defendant. An action on the case to recover damages for personal injuries received by plaintiff, who was struck by a race horse racing on the track of the defendant at its annual fair held at Acton, Maine, on October 5, 1927. The case was before the Law Court a second time, a motion for new trial having been previously sustained. To certain instructions given by the presiding Justice on the retrial of the cause at the January Term, 1931, of the Superior Court for the County of York, defendant seasonably excepted. Exception sustained. New trial granted. The case sufficiently appears in the opinion.

Demond, Woodworth, Sulloway & Rogers,
Waterhouse, Titcomb & Siddall, for plaintiff.
Willard and Willard, for defendant.

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

THAXTER, J. The defendant in this case was operating a fair at which a horse race was being run. The plaintiff was a patron watching the race and was injured, when one of the horses left the track, jumped the gate near which she was standing, and knocked

her down. The negligence of the defendant is set forth in two counts. In the first, it is declared to be in a failure to provide a suitable place for the plaintiff to view the race, and in an omission to properly maintain, construct, guard and protect the gate. The second alleges that the defendant was negligent in permitting the particular horse to run, when the defendant knew or should have known that he was vicious and ugly. The case has been tried once before on the second count, and after a verdict for the plaintiff, a motion for a new trial was sustained. *Morrison* v. *Union Park Association*, 129 Me., 88. This court there held that permitting the horse to run was not in itself negligence; but in sending the case back for a new trial, it left open the issue raised by the first count of whether the defendant failed to exercise due care in not providing suitable barriers at the gate or in not warning the plaintiff of the danger of standing there. By agreement the case was retried on this count and after a verdict for the plaintiff is again before this court on a motion for a new trial and on exceptions. We shall not consider the motion as one of the exceptions must be sustained.

The presiding Justice carefully and accurately instructed the jury on the principles of law which should govern them in deciding the issue of fact under the first count, and made it clear that the allegations of the second were not to be considered by them. After they had retired, however, they returned and asked the following question:

> "Assuming the association knew the horse was dangerous, was it necessary to withdraw the horse to safeguard the public?"

To this inquiry the Court made the following reply:

> "The only instruction I can give you on that is this, gentlemen. Bearing in mind that the defendant association owed a duty to use due care and diligence in safeguarding patrons of the society by not doing anything negligent, under the definition I have given you, the question you ask me involves a question of fact upon which I can give no opinion; but you may consider on that point, pro and con, whether the acts of the defendant were negligent or otherwise."

The defendant's exception to this instruction must be sustained. The previous decision of this court, which held that it was not necessary for the defendant to bar the horse from the track and that permitting him to run was not in itself negligence, was binding as law on the trial court. *Taylor* v. *Pierce Brothers, Ltd.*, 220 Mass., 254; 4 C. J., 1093. The main charge of the presiding Justice indicates plainly that he so understood it, and he explained to the jury the issue before them. The question asked by the jury, however, shows that they were confused on this point, and the reply of the Court in not giving a direct answer to their inquiry may well have added to their difficulties. We regret to order a new trial in a case which was handled by the presiding Justice with painstaking care, but the jury appear to have mistaken the real issue, and may have rendered a decision on a question not before them.

Exception sustained.
New trial granted.

MELLEN HOLMES, COLLECTOR

vs.

LEROY M. HILLIARD, AND TRUSTEE.

Androscoggin. Opinion October 28, 1931.

TRUSTEE PROCESS. PLEADING AND PRACTICE. EXCEPTIONS. R. S. 1930, CHAP. 100, SEC. 55, CLAUSE IV.

The validity of trustee process depends upon the state of facts existing at the time of the service of the writ on the alleged trustee.

Trustee process is not designed to attach that to the possession and enjoyment of which the principal defendant may never succeed.

Upon exceptions in a trustee process, as in review on an appeal in equity, the Law Court can not only overrule or sustain the exceptions, but also reëxamine and determine the whole case, or make such final disposition of it as justice requires.

In the case at bar, the absolute liability of the trustee to the defendant, required by statute, accrued only upon full delivery by the latter of all approved corn. Trustee process left in service in advance of that time was unavailing. The trustee should be discharged.

On exceptions by trustee. An action of debt for taxes due the town of Turner. No appearance was entered by the defendant and default was entered against him. The trustee appeared and filed disclosure denying its liability. To the decree of the sitting Justice charging the trustee in the sum of $296.33, exception was seasonably taken. Exception sustained. Trustee discharged from the action. The case fully appears in the opinion.

Tascus Atwood, for plaintiff.

Oakes & Farnum, for trustee.

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

DUNN, J. The single question which exception raises is whether, on default of the principal defendant, in this action of debt for taxes, the alleged trustee was legally holden.

The defendant entered into a written contract that, in the year 1930, he would raise a crop of sweet corn, and sell and deliver to the trustee, so much thereof as should have the approval of the latter as to quality. The trustee agreed to pay the defendant a stipulated price "for all his corn so received . . . within sixty days from the close of the canning season."

One day, when a field man employed by the trustee was at defendant's farm inspecting corn, and indicating that which could be delivered, defendant said to him: "Fernald, I've got to have some money before it is due from the company. Can you let me have it if I will give you an order?" The man answered that he would.

Defendant drew his order on the trustee, saying: "Please pay to James Fernald the sum of six hundred dollars ($600) and charge the same to my account."

The order was presented to the drawee corporation, after service of the trustee writ, but not accepted in writing. R. S., Chap. 123, Sec. 4.

At the time of such service, the worth of the corn which had been

delivered, in partial performance of the contract, was $296.53. For that amount, less costs, the alleged trustee was charged.

The validity of trustee process depends upon the state of facts existing at the time of the service of the writ on the alleged trustee. *Williams* v. *Androscoggin, etc., R. Co.*, 36 Me., 201.

Whether the written order indicates that the parties intended thereby to transfer the right to a particular fund, so that, equitable considerations prevailing, the writing should, to effectuate purpose, be treated as an assignment of the fund, operative as against the later attachment, it is quite unnecessary to decide.

"No person shall be adjudged trustee:

"IV. By reason of any money or other thing due from him to the principal defendant, unless . . . it is due absolutely and not on any contingency." So read the statutes. R. S., Chap. 100, Sec. 55, Cl. IV.

Trustee process is not designed to attach that to the possession and enjoyment of which the principal defendant may never succeed. *Dwinel* v. *Stone*, 30 Me., 384; *Cutter* v. *Perkins*, 47 Me., 557; *Jordan* v. *Jordan*, 75 Me., 100; *Hussey* v. *Titcomb*, 127 Me., 423.

Where money was to be paid on the contingency that work be well performed, trustee process was premature until the work had been duly performed. *Williams* v. *Androscoggin, etc., R. Co.*, supra. Likewise, in the instance of the wages of a school teacher employed for a definite term, until the expiration of which he was not entitled to receive any part of his pay. *Norton* v. *Soule*, 75 Me., 385. Nor did it affect the case that the teacher subsequently kept the term out. *Norton* v. *Soule*, supra. "The price," it is said in *Otis* v. *Ford*, 54 Me., 104, where the job was that of repairing the sills of a store, "was payable upon completion of the work. There was, therefore, nothing due from the trustee to the principal defendant, when service of the trustee process was made upon him; *non constat* that there ever would be."

Upon exceptions in a trustee process, in similarity to review on an appeal in equity, this court can not only overrule or sustain the exceptions, but also reëxamine and determine the whole case, or make such final disposition of it as justice requires. R. S., Chap. 100, Sec. 79; *Walcott* v. *Richman*, 94 Me., 364.

Conclusion is, that absolute liability of the trustee to the defendant accrued only upon full delivery by the latter of all approved corn. The trustee process having been left in service in advance of this, that process was unavailing. This conclusion requires the sustaining of the exception and the discharging of the trustee.

A witness, it has not been overlooked, testified that, when the attachment was made, the sum for which the trustee was charged was due, but not yet payable to the principal defendant. The witness, it is only too plain, misinterpreted the contract.

Entry will be,

Exception sustained.
Trustee discharged from the action.

ANNIE M. HOADLEY *vs.* ANNIE M. WHEELWRIGHT ET AL.

Oxford. Opinion October 28, 1931.

EQUITY. PLEADING AND PRACTICE. JURISDICTION. R. S., CHAP. 118, SEC. 48.

A decretal order not within the jurisdiction of the tribunal entering it is null and void.

The statutory provision (R. S., Chap. 118, Sec. 48, et seq.) authorizing the quieting of actual exclusive retention of realty by mandatory provision that another claimant to the same land bring his action to try his title thereto, creates a remedy not in equity, nor superseding the jurisdiction of courts of equity to remove clouds from titles, but at law.

Jurisdiction of the court cannot be established by considerations arising from the conduct of the parties.

In the case at bar the remedy was never enforceable by bill in equity in the Supreme Judicial Court, the procedure adopted in the original suit of the now defendants. The petition for partition was not a compliance with the decree of the equity court; that decree was unauthorized. The report should be discharged.

On report on an agreed statement of facts. An action for partition, heard at the May Term, 1931, of the Superior Court for

the County of Oxford, and reported to the Law Court for its determination. The question at issue was whether a petition for partition is a proper action to try the title to real estate, and a compliance with a decree of a single Justice on the equity side that plaintiff bring a proper action to enforce her claim to any interest in the property.

Report discharged. The case fully appears in the opinion.

Frank A. Morey, for petitioner.

Cyrus N. Blanchard,

Frank W. Butler, for defendants.

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

DUNN, J. This case was reported, the parties assenting, by the Justice presiding at a session of the Superior Court in Franklin County, for determination by the Law Court on an agreed statement of facts.

The only question which the report states is whether a petition for the physical division of certain real estate by writ of partition at common law (R. S., Chap. 102) complies with a decree of a single Justice of the Supreme Judicial Court, on the equity side, that the plaintiff bring a proper action to enforce her claim to any interest in the property.

What is inescapable, however, is that the decretal order, not being within the jurisdiction of the tribunal entering it, is null and void, and of no effect whatever. *Lovejoy* v. *Albee*, 33 Me., 414.

The statutory provision (R. S., Chap. 118, Sec. 48, et seq.), and the conditions precedent to its exercise, authorizing the quieting of the actual exclusive retention of realty by an imperative rule that another claimant to the same land bring his action to try his title thereto, creates a remedy, not in equity, nor superseding the jurisdiction of courts of equity to remove clouds from titles, but at law.

This remedy was never enforceable by bill in equity in the Supreme Judicial Court, the procedure adopted in the original suit of the now defendants.

True, want of jurisdiction is not interposed, but jurisdiction of the court cannot be established by considerations arising from the conduct of the parties. *Charles Dorman's Case*, 236 Mass., 583.

The petition for partition, it is plain, is not a compliance with the decree of the equity court; adversitively, that decree, as has been noticed before, was unauthorized.

Dismissal of the petition for want of compliance with the decree, although it would be in literal accordance with a stipulation embodied in the report of the case, might prevent the ultimate working out of justice.

It seems consistent to discharge the report.

The mandate will be,

Report discharged.

MARJORIE KELLER *vs.* JOHN B. BANKS.

EARL KELLER *vs.* JOHN B. BANKS.

BESSIE KELLER *vs.* JOHN B. BANKS.

ELWOOD KELLER *vs.* JOHN B. BANKS.

MURIEL KELLER *vs.* JOHN B. BANKS.

EARL KELLER *vs.* JOHN B. BANKS.

Kennebec. Opinion October 28, 1931.

MOTOR VEHICLES. NEGLIGENCE. INVITED GUESTS. PLEADING AND PRACTICE.

The fact that a driver of an automobile has the technical right of way does not relieve him from liability or responsibility to the driver of another automobile. Such right of way is not absolute. The supreme rule of the road is the rule of mutual forbearance.

Passengers are not expected to assume control over the operation of automobiles. The responsibility for operation rests on the driver, and constant suggestion as to the details of management of the car often does more harm than good. There is, however, a duty to warn of known and apparent dangers.

The failure by a passenger to warn the driver of an automobile, or to protest at his management of the car, can not be held to be negligence as a matter of law. It is a question of fact in each case for the jury to determine.

The driver of an automobile approaching a dangerous curve or intersection properly so marked by signs, has the right to assume until the contrary appears, that other automobiles approaching that spot will be operated in accordance with the laws of the state.

The provisions of Chap. 172, *Public Laws of* 1929, *providing for the designation of through ways, do not modify the requirements of the law in this state in regard to speed. They merely relate to the right of way at intersections of a designated through way.*

In the case at bar what constituted due care as to the passengers was a question of fact for the jury. The testimony of the plaintiff, Bessie Keller, herself however clearly discloses that she was not in the exercise of due care. Her rights of recovery and that of her husband for her medical expenses and loss of consortium were barred by her contributory negligence. It was not apparent that the jury erred in its finding for the other plaintiffs.

On exceptions and general motion for new trial by defendant. Six actions for recovery of damages for personal injuries and for property loss sustained by the several plaintiffs and occasioned by collision of auto of the plaintiff, Elwood Keller, driven by his wife, Bessie Keller, with auto of the defendant. The cases were tried together at the February Term of the Superior Court for the County of Kennebec, resulting in verdicts for the plaintiff in each case. To certain instructions given, and others refused by the presiding Justice, defendant seasonably excepted, and after the jury had rendered its verdict for the plaintiffs, filed a general motion for new trial in each case.

Exceptions overruled in each case.

Motions sustained in the cases of Bessie Keller and Elwood Keller.

Motions overruled in all other cases.

The cases fully appear in the opinion.

Ralph W. Ferris,

Francis H. Bate, for plaintiffs.

McLean, Fogg and Southard, for the defendant.

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

THAXTER, J. Elwood Keller, the plaintiff in one of the above actions, was the owner of a Model T Ford Sedan, which on the twenty-seventh day of August, 1930, was being driven by his wife, Bessie Keller, on the state highway between Augusta and Manchester in the direction of Manchester. At the intersection of the so-called Pelton Hill Road with the main highway, while the driver of the Ford was attempting to cross to enter the Pelton Hill Road, a collision took place with a car owned and driven by the defendant. Six actions have been brought as a result of such accident which have been tried together, and after a verdict for the plaintiff in each case are before this court on general motions for new trials and on exceptions. One action is brought by Bessie Keller to recover for personal injuries, another by Elwood Keller, her husband, to recover for damages to his car and for medical expenses incurred in the treatment of his wife's injuries and for loss of her services, another is brought by Muriel Keller, a passenger, to recover for personal injuries, another by her four year old daughter, Marjorie, and the remaining two by Earl Keller to recover for expenses of medical treatment and loss of services of his wife Muriel and for the expense of treatment of his daughter.

At the scene of the accident the main highway from Augusta made a sharp turn to the right. On the right-hand side there were bushes and trees which obscured the view of the highway in both directions. The Pelton Hill Road intersected the main road at the curve and continued from it in practically a straight line. A traveler proceeding from Augusta in going over the Pelton Hill Road would, therefore, continue on practically a straight course, whereas, if he continued on the main road, he would turn sharply to the right. The driver of the Ford was coming from Augusta on the main highway with the intention of entering the Pelton Hill Road. As she approached the intersection she slowed her car till it almost stopped, at which point, according to her own testimony, she had a clear view around the turn in the direction of Manchester of but thirty-five feet. She then started ahead in low gear and her front wheels had crossed the hard surface of the main road and were on

the gravel part of the other way, when the Ford was struck just in front of the rear wheels by the defendant's car coming from Manchester on the main road and pushed for some twenty feet into the ditch on the further side of the Pelton Hill Road. In his argument on the motions the defendant's counsel contends that there was no negligence on the part of the defendant, and that there was a failure to exercise due care by the driver and by the occupants of the Ford. We shall consider first the motions and these contentions in their order.

The defendant was driving a Studebaker car equipped with four wheel brakes, but these brakes had been disconnected from the front wheels thereby lengthening to some extent the distance within which he could stop. He was approaching a turn which he concedes was dangerous, and he knew that cars from the opposite direction on the main highway intending to enter the Pelton Hill Road would have to cross in front of him to accomplish their purpose. The degree of care which he owed was measured by the dangers which faced him. According to his own testimony as he approached the curve he was traveling between forty and forty-five miles an hour; he then slowed down, until as he claims he could see down the road beyond the turn toward Augusta, when he increased his speed to twenty or twenty-five miles an hour. The Ford, he says, suddenly appeared on his left and attempted to cross the main highway in his path. If at this time he had the view which he claims to have had down the road, there is no good reason why he could not have seen the other car. The testimony by the occupants of the plaintiff's car as to the defendant's speed is vague and unsatisfactory. There is evidence, however, that for a distance of thirty-six feet before the impact the wheels of the defendant's car were locked and dragged over the highway the surface of which was clean and dry, and that then the defendant's car was moving sufficiently fast to push the plaintiff's car more than twenty feet into the ditch. On such evidence the jury were warranted in finding that the defendant did not approach this particularly dangerous spot in a prudent manner and that he was negligent. The mere fact that the Ford car was on his left and that he had the technical right of way does not relieve him from liability. It has been well said by this

court that a "right of way is not absolute" and that "the supreme rule of the road is the rule of mutual forbearance." *Fitts* v. *Marquis*, 127 Me., 75, 77.

The plaintiffs have the burden of establishing their own due care. The testimony of Bessie Keller herself indicates that she was not in the exercise of due care. The place of the collision was a blind turn over which there was a heavy traffic. She states that she slowed her car, and made her observation for cars approaching from the opposite direction at a point where she could see around the turn but thirty-five feet. According to the testimony of Mr. Hovey and of Mr. Hunt and of highway officers, Marks and Fowler, it was practical for Mrs. Keller, before turning across the path of approaching traffic, to have continued on till a reasonable view of the highway toward Manchester could have been obtained. Her testimony that this could not have been done is refuted by the photographs and by the plans, as well as by the evidence of these impartial witnesses. She admits that she had traveled over this intersection many, many times and was thoroughly acquainted with it, and there is no reasonable excuse for her not having followed that course which was apparent and obviously the only prudent one to have taken. Instead of so doing, she started diagonally across the road at a point where her view was obscured. Had she used reasonable care she could have seen for a considerable distance the defendant's oncoming car. We can reach no other conclusion than that her negligence was a contributing cause of the accident. In her case the motion for a new trial must be sustained. Her husband sues for medical expenses, loss of consortium, and damages to his car. The verdict in his favor in so far as it covers damages to his car can perhaps be justified. We are unable to determine, however, what part of the gross amount awarded him represents this item and the motion for a new trial in his case must be sustained.

In the remaining four cases recovery is sought for injuries to passengers. Counsel for the defendant contends that they likewise failed to exercise due care. The negligence which bars the recovery of the driver of the automobile was a negligent operation of the car. It was not so much the failure to look for approaching vehicles, as it was crossing the highway at a point where she could not

see. Passengers are not expected to assume control over the operation of automobiles. *Danski* v. *Kotimaki*, 125 Me., 72. The responsibility for operation rests on the driver, and constant suggestion as to the details of management of the car often does more harm than good. There is a duty to warn of known and apparent dangers, but the evidence indicates that the passengers in the Ford car could not have done anything to have avoided this accident. The motions for new trials in the cases involving their injuries must be denied. We come now to a consideration of the defendant's exceptions.

First Exception

The Court, in accordance with the provisions of Sec. 16, Chap. 327, P. L. 1929, instructed the jury in effect that within fifty feet of the approach of intersecting ways where the view is obstructed a speed in excess of fifteen miles an hour is *prima facie* unlawful. The statutory definition of what constitutes an obstructed view was properly given. The presiding Justice further explained to the jury that an unlawful speed was *prima facie* evidence of negligence. The defendant's counsel than requested the Court to instruct the jury that the defendant's view of the Pelton Hill Road had no bearing on this case. The Ford car was not on the Pelton Hill Road; and the defendant, therefore, claims that the only obstruction which was material was that on his left, which would have hidden the plaintiff's car from him as it approached the intersection. The Court refused to so instruct but in effect told the jury that if the way was obstructed as defined by the statute, the defendant should have driven at not exceeding the statutory rate or the burden of explanation would be on him. The defendant excepted to the refusal to give the requested instruction, to the modification of it as given, and to the instruction as given with reference to the rate of speed at intersecting ways. The requested instruction was properly refused. The plaintiffs had the right to assume until the contrary appeared that automobiles approaching that spot would be operated in accordance with the laws of the state. *Sturtevant* v. *Ouellette*, 126 Me., 558; *Day* v. *Cunningham*, 125 Me., 328; *Marden* v. *Portsmouth, Kittery & York Street Railway*, 100 Me., 41.

It is of course true that what might have been actionable negligence with respect to cars approaching from one side of the intersection might not have been with respect to cars approaching from the other. The instruction as given can not be construed as a denial of such doctrine, particularly when the presiding Justice took pains to inform the jury that not only must the plaintiff prove the defendant's negligence, but also that such negligence was the proximate cause of the accident.

The defendant claims that the charge as given with respect to the rate of speed at this intersection was erroneous for two reasons. He contends that the highway at the point of the accident had been designated as a through way, and that the provisions of Chap. 172, P. L. 1929 providing for the designation of through ways modify the provisions of Sec. 16, Chap. 327 relating to speed. Secondly, he claims that the charge ignores the fact that Mrs. Bessie Keller knew that cars traversed the intersection at a rate of speed in excess of fifteen miles an hour. The provisions of Chap. 172 do not modify the requirements in regard to speed. They merely relate to the right of way at intersections of a designated through way. In answer to the second contention it is perhaps sufficient to say that the knowledge of the occupants of the Ford car that other cars approaching the intersection exceeded the statutory speed can have no relevance in determining whether or not the drivers of such other cars were negligent. Its only effect, if material at all, would be to indicate the degree of care required of the plaintiffs.

Second, Third and Fifth Exceptions

These exceptions are to portions of the judge's charge wherein he sets forth the duty owed by Mrs. Keller, the driver of the Ford. They relate to her contributory negligence. As the motion for a new trial in her case is sustained on the ground of her contributory negligence, it is unnecessary to consider these exceptions.

Fourth Exception

The defendant requested the following instruction:

> "After Mr. Banks passed that point in the curve of the road where the curve no longer obscured his vision he had a right

to operate his car at any rate of speed reasonable and proper on an open through way and was not bound to anticipate that one approaching from the opposite direction would cut across the white traffic line in front of him without suitable and sufficient warning."

The Court, in refusing to give the instruction, told the jury in effect that the obligation of the defendant was to use due care. To the refusal to instruct and to the instruction as given the defendant excepted. The refusal was proper and the instruction as given entirely correct. What constituted due care under the particular circumstances was a question of fact for the jury.

Sixth Exception

The defendant requested an instruction the purport of which was that in determining what was a reasonable and safe rate of speed at the intersection the jury might take into consideration the fact that this was a through way permitting an accelerated speed beyond the fifteen miles an hour prescribed by the statute, and that the white traffic line gave assurance that no one would be on the defendant's right-hand side of the line without taking reasonable precaution against oncoming traffic. The instruction was refused and properly so. It is unnecessary to repeat the discussion on this point which was given in considering the first exception. The language of the presiding Justice in commenting on the requested instruction is a correct statement of the law.

Seventh Exception

The defendant excepted to the refusal of the Court to give the following instruction:

"The fact that the curve where the accident happened was known to Mrs. Muriel Keller to be a dangerous curve, and the fact that she without warning or protest permitted herself to be driven to the left of the white line marking the center of the highway at a time when she admits she could not see around the turn, renders her guilty of such contributing negligence as will bar her recovery, if the crossing of the white line at that point in any way contributed to the accident."

The Court told the jury that the fact assumed in the requested charge was for them to determine, and repeated the correct rule given in the main charge defining the obligations of a passenger. The remarks of the Court and the refusal to give the instruction as asked for were correct. The failure to warn the driver or to protest at her management of the car can not be held to be negligence as a matter of law.

Eighth Exception

With reference to the duty of the passenger the presiding Justice charged the jury that she must use the ordinary care that a passenger or guest would use, and said in effect that such duty was fulfilled, if she gave warning of such dangers as were apparent to her and which might not be known or apprehended by the driver of the car. Counsel excepted to this portion of the charge, because as he says the meaning of it is that, if the driver knew the danger, the guest is relieved from all responsibility. We do not place such a construction on it. The court quite evidently by the use of the word "warning" meant the pointing out of a danger rather than a protest against the manner of driving. So construed the charge is a correct statement of law. A passenger is not required to warn the driver of every apparent danger. He has the right to assume that the person in control of the automobile is himself observing the ordinary dangers in his path. The purpose of a warning is to apprise the driver of that which he does not know. The case of *Peasley* v. *White*, 129 Me., 450, cited by counsel for the defense is entirely consistent with this principal. The apparent danger there referred to is a danger apparent to the guest. A warning broadly speaking may mean not only a pointing out of danger but a protest against incurring it. So defined the important consideration is whether it would have influenced the action of the driver. *Minnich* v. *Easton Transit Co.*, 267 Pa., 200; *Peasley* v. *White*, supra.

Ninth Exception

The defendant excepted to the admission of certain testimony relating to the disconnecting of the brakes from the front wheels of the car. We can see no valid ground for the objection. The con-

dition of the brakes may not have indicated negligence, but it may well have been a material factor in determining the distance within which the car could have been stopped, and the degree of care which the defendant under such circumstances should have exercised.

Exceptions overruled in each case.
Motions sustained in the cases of
Bessie Keller and Elwood Keller.
Motions overruled in all other cases.

JOSEPH B. DRUMMOND *vs.* RALPH PILLSBURY.

STATE STREET HOSPITAL *vs.* RALPH PILLSBURY.

Cumberland. Opinion October 30, 1931.

PLEADING AND PRACTICE. VERDICTS. STATUTE OF FRAUDS.

A motion for a directed verdict must be denied when the evidence considered most favorably for the adverse party warrants a verdict in his favor.

The promise by a father to pay his married daughter's hospital expenses and doctor's bills made before the services were rendered or the debt created, credit being extended solely to him, is not within the Statute of Frauds.

In the case at bar, the uncorroborated testimony of the defendant did not so clearly outweigh the evidence introduced by the plaintiff that only a finding for the defendant on the issue of his authority and promise could be sustained. The jury was justified in its finding that defendant's promise was made before any hospital or surgical services were rendered to his daughter, and that credit was extended solely to him.

On exceptions by defendant. Two actions in assumpsit to recover for medical services and hospital bills of defendant's daughter which plaintiffs allege were authorized by the defendant. The defendant in addition to his general denial raised the bar of the Statute of Frauds. The cases were tried together in the April Term

of the Superior Court for the County of Cumberland. To the denial of defendant's motion for directed verdicts, defendant seasonably excepted.

Exceptions overruled. The case fully appears in the opinion.

Frank B. Pretti, for plaintiffs.

Edward J. Berman, for defendant.

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

STURGIS, J. The plaintiffs in these actions declare in assumpsit on account annexed and the defendant pleads the general issue with a brief statement setting up the bar of the Statute of Frauds. The cases were tried together in the Superior Court and are brought here upon exceptions to the denial of the defendant's motions for directed verdicts.

The testimony of the plaintiffs' witnesses tends to prove that the defendant's married daughter, Mrs. Beulah Wescott, became critically ill and her attending physician, Dr. L. S. Lombard, after consultation with the plaintiff, Joseph B. Drummond, a physician and surgeon of Portland, advised her immediate removal to the State Street Hospital for an emergency operation. Learning that Mrs. Wescott was separated from her husband and without means, Dr. Lombard told the defendant that somebody would have to be responsible before Mrs. Wescott could be sent to the hospital. The defendant said he would pay the "bills incurred at the hospital" or the "bills at the hospital" for his daughter and directed the physician to call an ambulance.

On Dr. Lombard's statement that the defendant said he would pay his daughter's bills at the hospital, she was received there as a patient, cared for and operated on. The bills of the hospital and the surgeon were charged to the defendant, rendered to him in due course and remain unpaid. The items thereof make up the accounts annexed.

The defendant denies that he authorized Dr. Lombard to send his daughter to the hospital or agreed to pay her bills incurred there. His uncorroborated testimony, however, does not so clearly

outweigh the evidence introduced by the plaintiffs that only a finding for the defendant can be sustained. This issue was properly submitted to the jury.

Nor do we think the plaintiffs' actions are necessarily barred by the Statute of Frauds, R. S., Chap. 123, Sec. 1, Par. 2. Viewing the evidence most favorably for the plaintiff, the defendant's promise was made before any hospital or surgical services were rendered or any debt therefor created, and credit was extended solely to him. Upon a finding of these facts, the defendant's promise was original and not within the Statute. *Hines & Smith Co.* v. *Green*, 121 Me., 478; *Starkey* v. *Lewin*, 118 Me., 87; *Fairbanks* v. *Barker*, 115 Me., 11.

No more, as a matter of law, can it be said that the professional services of the plaintiff, Dr. Drummond, were not included in the defendant's promise. The necessity of a surgical operation appears to have been known by the defendant, and it was to submit to it that his daughter was to be sent to the hospital. The expression "bills incurred at the hospital" and "bills at the hospital," in the light of facts and circumstances attending its utterance, may well have been intended by the defendant and understood by the plaintiffs to include the expenses of the operation. A finding to that effect is not clearly outside the evidence.

A motion for a directed verdict must be denied when the evidence considered most favorably for the adverse party warrants a verdict in his favor. The refusal of the presiding Justice to direct verdicts for the defendant was not error.

Exceptions overruled.

RALPH W. BURNHAM

vs.

SAMUEL W. BURNHAM AND LESTER G. BURNHAM.

Lincoln. Opinion November 5, 1931.

PRESCRIPTION. EASEMENTS. LICENSES. EVIDENCE. PRESUMPTIONS.

To create an easement by prescription it is necessary to prove that the use has been adverse.

Where there has been an unmolested, open and continuous use of a way for twenty years or more with the knowledge and acquiescence of the owner of the servient estate, the use will be presumed to have been adverse and under a claim of right and sufficient to create a title by prescription, unless contradicted or explained.

The relationship of the parties is evidence, which the jury has a right to consider in determining the character of the use, but it is not conclusive.

Failure to protest the use or to make it clear that the use was with consent, is evidence which the jury has a right to consider, as showing that the owner of the servient tenement acquiesced in an adverse use.

Evidence of the inaccessibility of the defendant's land to the highway is admissible on the issue of whether the use may have been continuous.

There is no presumption that a permission to use the way given to predecessors in title of one claiming a right of way continues to a subsequent grantee so as to prevent his use from being adverse.

A license is a personal privilege. It creates no interest in land and can neither be assigned nor transferred. It does not pass with a conveyance of land. There would be no presumption that it continued to a subsequent grantee.

On exceptions and general motion for new trial by plaintiff. An action of trespass brought by the plaintiff for alleged illegal use of a certain way leading from the highway across land of the plaintiff to a certain wood lot owned by one Mary L. Burnham, the wife of one defendant and the mother of another. The defendants in

answer set up a right of way by prescription acquired by them. Trial was had at the May Term, 1931, of the Superior Court for the County of Lincoln. To the admission of certain testimony and to instructions given and refused by the presiding Justice, plaintiff seasonably excepted, and after the jury had rendered a verdict for the defendant, filed a general motion for new trial.

Motion overruled.

Exceptions overruled.

The case fully appears in the opinion.

Asa D. Tupper,

George A. Cowan, for plaintiff.

Weston M. Hilton, for defendants.

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

THAXTER, J. This is an action of trespass *quare clausum*. The defendants justify their entry on the plaintiff's land as agents of Mary L. Burnham, who, owning property adjoining that of the plaintiff, claims a right of way by prescription across his premises. The jury found for the defendants and the case is before us on a general motion and on exceptions.

Mary L. Burnham, the wife of one defendant and the mother of the other, owned a lot of land adjoining that of the plaintiff, who was her husband's brother. The plaintiff's father had at one time many years before owned both parcels, and had conveyed in 1888 that now owned by Mary to Elizabeth S. Lord, who in 1892 conveyed to Mary E. Runey, who in 1898 conveyed to her husband Harold, who in 1908 conveyed to Martha E. Burns, the stepmother of Mary L. Burnham. Mary Burnham has lived on the place since 1908, the property having been bought by her father as a home for her, although the record title for a part of the period was in the name of her stepmother. The plaintiff derives his title from his father who died about three years ago. For twenty-one years prior to his father's death the plaintiff and his wife had lived with him. During all of that time the defendant, Samuel Burnham, acting for his wife, had hauled wood from her lot across the plaintiff's land to

the highway. Until November, 1929, when trouble seems to have arisen between the brothers, no protest was ever made against his doing so by either his brother or by his father. There is some evidence in the case that the previous owner of the Mary Burnham lot, Mr. Runey, had also hauled wood in the same manner by permission of the plaintiff's father. The way which was used for this purpose was well defined, at times the defendant seems to have repaired it, and it is conceded that the use by him of it was open, notorious, and uninterrupted for a period of more than twenty years. The plaintiff contends, however, that such use was by permission of their father and was not adverse. The defendant, Samuel Burnham, claims, however, that he never received any permission from his father to cross his land, but that he exercised this right because the way had been used for many years. There is no evidence of any talk between them as to the character of the use, although the plaintiff does testify that Samuel Burnham said that his father had given him permission. The defendant, however, denies having ever made such statement.

THE MOTION

The defendant claims a prescriptive title to the right of way. We have by him an open, uninterrupted use for a period of more than twenty years. Obviously the plaintiff and his father before him knew of it and acquiesced in it. The plaintiff contends, however, that the use was permissive. If such claim is substantiated it could not have been adverse, *Pierre* v. *Fernald*, 26 Me., 436; *Jewett* v. *Hussey*, 70 Me., 433; and one of the elements necessary to create an easement by prescription is lacking. There is no direct evidence in the case of any consent and the ordinary rule is that, where there has been an unmolested, open, and continuous use of a way for twenty years or more with the knowledge and acquiescence of the owner of the servient estate, the use will be presumed to have been adverse and under a claim of right and sufficient to create a title by prescription unless contradicted or explained. *Thompson & Simmons* v. *Bowes*, 115 Me., 6, pages 9-10; *Truc* v. *Field*, 269 Mass., 524; *Swan* v. *Munch*, 65 Minn., 500; *Merrick* v. *Schleuder*, 179 Minn., 228; *Garrett* v. *Jackson*, 20 Pa. St., 331; *Barber* v.

Bailey, 86 Vt., 219; Washburn, Easements & Servitudes, 3 ed., p. 137; 9 R. C. L., 781.

To rebut such presumption the plaintiff calls attention to the fact that this is in effect a right claimed by a son against his father, and that such a use ordinarily would arise by reason of the consent of the parent given to the child. The relationship of the parties is evidence, which the jury has a right to consider in determining the character of the use, but it is not conclusive. The ultimate decision rests with the jury. *Bradley Fish Co.* v. *Dudley*, 37 Conn., 136. To all outward appearances the defendant regarded himself as entitled to pass over his father's property. He says that he exercised this right because his predecessors in title had done so before him, and not because of any consent from his parent. All that the father needed to have done to have prevented him from acquiring title to the easement was to have protested or to have made it clear that the use was with his consent. *Rollins* v. *Blackden*, 112 Me., 459; *Dartnell* v. *Bidwell*, 115 Me., 227. The failure to do so was evidence, which the jury had a right to consider, that the father acquiesced in an adverse use. *Noyes* v. *Levine*, 130 Me., 151.

The determination of the issue of fact in this case was properly left to the jury and we see no reason for disturbing their finding.

EXCEPTIONS

The first exception is to the admission of certain evidence relating to the inaccessibility to the highway of the land of Mary L. Burnham. It is claimed that such evidence was prejudicial to the plaintiff and was irrelevant as bearing on the issue as to whether the defendant had acquired an easement by prescription. The testimony was admitted by the court as tending to show that there was a continuous use of the way in question. The presiding Justice in his charge also made it clear to the jury that the defendant had no right to cross the plaintiff's land by reason of necessity or because of the inaccessibility of the land of Mary Burnham. The evidence may well have had some relevancy to prove that the use by the defendant was continuous, and in view of the caution given by the judge to the jury as to its bearing we think that the exception to its admission should not be sustained.

The second exception relates to the exclusion of a question asked of Samuel Burnham on cross-examination. He had testified that he had used the way because others had used it before him and that he did not claim a right to do so until trouble arose between him and his brother. By such claim of right it is evident that he is referring merely to the assertion of it to his brother. He was then asked with reference to the reason for his use of the way, "For how long a period of time did you follow that out, on that same mental attitude." The court held that the question was inadmissible, and we can not see that the plaintiff has any valid ground of exception. In determining the nature of the use the important considerations were what he did and the circumstances influencing his acts. *Barber* v. *Bailey*, supra.

The third exception is to a portion of the charge and to a refusal to charge. The presiding Justice told the jury that there was no presumption that a permission given to the predecessors in title of Mary L. Burnham, to use the way continued so that Mrs. Burnham would be prevented from gaining the right to use it by prescription. The requested instruction was that the presumption would be that such permission continued. The charge as given was correct and the requested instruction was properly refused. A license is a personal privilege, it creates no interest in land and can be neither assigned nor transferred. It does not pass with a conveyance of the land. 9 R. C. L., 575. There would be no presumption that it continued to a subsequent grantee.

The fourth exception is to a refusal to charge that if a private way is claimed over a former highway, as is claimed by the defendant here, he must prove when he ceased to use it as a highway and when his use became adverse. This requested instruction was properly refused. There is no evidence in the case which would justify it.

Motion overruled.
Exceptions overruled.

MARY TALIA *vs.* IDA MERRY.

Cumberland. Opinion November 12, 1931.

ALIENATION OF AFFECTIONS. VERDICTS. R. S., CHAP. 74, SEC. 7.

A verdict should not be directed for a defendant if, upon any reasonable view of the testimony, under the law, the plaintiff can recover.

In the case at bar, giving the most favorable view to the evidence introduced by the plaintiff, a *prima facie* case under the provisions of R. S., Chap. 74, Sec. 7, of alienation of the affections of the plaintiff's husband, could be found.

On exception by plaintiff. An action for alienating the affections of the plaintiff's husband. Trial was had at the April Term, 1931, of the Superior Court for the County of Cumberland. After the evidence had been presented, on motion of the defendant, the presiding Justice ordered a directed verdict for the defendant. Plaintiff seasonably excepted.

Exception sustained.

The case sufficiently appears in the opinion.

Samuel L. Bates,

John H. Devine, for plaintiff.

Hinckley, Hinckley and Shesong, for defendant.

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

STURGIS, J. This is a suit against the defendant for alienating the affections of the plaintiff's husband. At the close of the evidence, upon motion, the presiding Justice directed a verdict for the defendant. An exception was allowed.

By R. S., Chap. 74, Sec. 7, a married woman may recover damages in an action on the case for the alienation of the affections of her husband or the loss of his aid, comfort and society by any arts, enticements and inducements of another woman more than eighteen years of age.

Alienation of affections only is alleged. A detailed statement of the testimony is unnecessary. Giving the most favorable view to the evidence introduced by the plaintiff, a *prima facie* case of alienation of the affections of the plaintiff's husband may be found. It is settled law that a verdict should not be directed for a defendant if, upon any reasonable view of the testimony, under the law, the plaintiff can recover. *Tomlinson* v. *Clement Bros.*, 130 Me., 189.

Exception sustained.

INHABITANTS OF THE TOWN OF SOLON *vs.* MARTHA HOLWAY.

Somerset. Opinion November 14, 1931.

TAXATION. WORDS AND PHRASES. R. S., CHAP. 13, SEC. 6, PAR. IX.

The word "widow" as used in the statute means a woman whose husband is dead and who has not remarried.

In the case at bar, on her remarriage, the defendant ceased to be the widow of her first husband, and she did not revert to that status on the death of her second. The statute granting exemption to the widow of a Civil War veteran was inapplicable to her.

On report on an agreed statement. An action of debt to recover a tax assessed by the plaintiff town upon real estate of the defendant. Defendant claimed to be exempt as the widow of a Civil War veteran under the provisions of R. S., Chap. 13, Sec. 6, Par. IX. Judgment for the plaintiff for $92.93.

The case sufficiently appears in the opinion.

Butler and Butler, for plaintiff.

Harris D. Eaton, for defendant.

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

THAXTER, J. This case is an action of debt to recover a tax assessed for the year 1930 in the amount of ninety-two dollars and

ninety-three cents, and is reported to this court on an agreed statement of fact. From this it appears that the defendant, who was more than sixty-two years of age on April 1, 1930, married September 12, 1878, Emerson Googins Joy, a veteran who served in the army or the navy of the United States during the Civil War. He died in 1880 and in 1885 she married Isaac Holway who died in 1924. Under the provisions of Chap. 290, P. L. 1929, there is an exemption from taxation of "the estates to the value of five thousand dollars of all soldiers, sailors and marines, or the widows of soldiers, sailors or marines who served in the war of eighteen hundred sixty-one and five." The defendant claims that under such provision of the statutes she is exempt from taxation, since the value of the real estate assessed to her did not exceed five thousand dollars.

The claim of the plaintiff is that, when the defendant married again, she ceased to be the widow of a Civil War veteran, and that therefore the statute in question was not applicable to her even after the death of her second husband. With such contention we agree.

The question is as to the meaning of the word "widow" as used in the statute. It is to be construed according to its common meaning. R. S. 1916, Chap. 1, Sec. 6, Par. 1. So interpreted, a widow is a woman whose husband is dead and who has not remarried. Webster's New International Dictionary; *Commonwealth* v. *Powell*, 51 Pa., 438; *Inslee* v. *Rochester*, 213 N. Y. S., 6; *Debrot* v. *Marion County*, 164 Ia., 208, 214. On the death of her second husband the defendant became his widow, and did not revert to her former status as the widow of Emerson Joy.

Cases which might at first glance seem opposed to this principle are distinguishable. In some instances the legislative intent has been to make the statute applicable to a person regardless of her remarriage; and, in others, the term "widow" has been used to designate the person, who would on the death of her husband acquire a vested interest as in the case of a homestead exemption, *Brady* v. *Banta*, 46 Kan., 131; *Davis* v. *Neal*, 100 Ark., 399, or a vested right such as may be given in the Compensation Acts. *Hansen* v. *The Brann & Stewart Co.*, 90 N. J. L., 444.

Obviously the Pension Acts of the United States have no bearing on the construction of this, a purely local statute.

Judgment for the plaintiff for ninety-two dollars and ninety-three cents.

CLARENCE I. GILBERT *vs.* HORACE S. DODGE.

BERTHA ADAMS BECKLER *vs.* HORACE S. DODGE.

Androscoggin. Opinion November 14, 1931.

DECEIT. PLEADING AND PRACTICE. EXCEPTIONS.

Necessary allegations in an action of deceit to be sustained by proof are that the defendant made a false representation of a material fact known to him to be false or made in reckless carelessness as to whether it was true or false, intending that the plaintiff should act upon the same; that the plaintiff, without reasonable opportunity to verify the truth or falseness of such representation, relied and acted on the same to his damage.

Where a declaration is adjudged bad on demurrer, an amendment which is itself demurrable is not allowable.

When a demurrer is filed, joined and ruled upon, and exceptions noted and allowed, the case is to stand continued pending decision by the appellate court of the exceptions. The excepting party, by pleading and proceeding to trial upon the merits of the case, before having the validity of his exceptions to the overruling of his demurrer determined, waives such exceptions.

In the case at bar, the allowance of the demurrable amendments constituted reversible error.

Plaintiffs' original exceptions were not waived.

On exceptions and general motion for new trial by defendant. Two actions in deceit tried together at the June, 1931, Term of the Superior Court for the County of Androscoggin. The defendant demurred to the original declarations of the plaintiffs and the demurrers were sustained by the presiding Justice. To the allowance of amendments defendant seasonably excepted, and likewise ex-

cepted to the overruling of demurrers filed by him to the amended declarations. The jury found for the plaintiff in each case. General motions for new trials were thereupon filed by the defendant.

Exceptions to the allowance of amendments sustained.

The cases fully appear in the opinion.

Frank A. Morey, for plaintiffs.

Clifford E. McLaughlin, for defendant.

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

DUNN, J. These two actions, by different plaintiffs, are against the same defendant. Each original declaration consisted of a single count. Allegation was, in substance, that executory promises, made by the defendant to induce the purchase by the plaintiff of shares of the capital stock of a fertilizer company, had been broken, loss resulting. The statements, even if untrue, would not afford basis for tort for deceit.

General demurrers were sustained.

The respective plaintiffs amended, by leave of court, by adding a new count. The amendments were allowed, against objection by the defendant, who saved the law question.

The amendments, being themselves demurrable, did not avail the plaintiffs. *Garmong* v. *Henderson*, 112 Me., 383; *Gray* v. *Chase*, 115 Me., 350.

After reciting promises, not fraudulent in the legal sense, each new count alleges that a representation made by the defendant in offering the stock for sale, the representation going to the extent of the defendant's own pecuniary resources, and, being of relationship to his ability to buy back the stock, if plaintiff on becoming the purchaser thereof should ever want to sell the same, was false.

The declaration in an action of this nature requires formal averment of the elements of representation, falsity, scienter, deception, injury.

Material representations of past or existing facts must have been false, known by the defendant to be false when he made them, have been positively made as within his own knowledge, or in reckless carelessness as to whether they were true or false; the plain-

tiff must have relied and acted on the representations, as intendment or natural inducement was that he should, deception must have been successful, and plaintiff misled to his damage thereby. *Hammatt* v. *Emerson*, 27 Me., 308, 326; *Pratt* v. *Philbrook*, 33 Me., 17, 22; *Long* v. *Woodman*, 58 Me., 49, 52; *Braley* v. *Powers*, 92 Me., 203; *Atlas Shoe Company* v. *Bechard*, 102 Me., 197; *Eastern Trust & Banking Company* v. *Cunningham*, 103 Me., 455; *Hotchkiss* v. *Coal & Iron Company*, 108 Me., 34, 41; *Mullen* v. *Banking Company*, 108 Me., 498, 503; *Crossman* v. *Bacon & Robinson Company*, 119 Me., 105; *Prince* v. *Brackett, etc., Company*, 125 Me., 31.

Allowance of the demurrable amendments constituted reversible error. *Garmong* v. *Henderson*, supra.

Defendant demurred to each amendment. The demurrers were overruled and exceptions taken. Defendant then pleaded not guilty; the pleas were joined; the cases were tried jointly. The jury returned verdicts for the plaintiffs.

When a demurrer is filed, joined and ruled upon, and exceptions noted and allowed, the case is to stand continued pending decision by the appellate court of the exceptions. R. S., Chap. 96, Sec. 38; *Tripp* v. *Motor Corporation*, 122 Me., 59. The defendant, by pleading and proceeding to trial upon the merits of the cases, before having the validity of his exceptions to the overruling of his demurrers to the amendments determined, waived such exceptions. *Tripp* v. *Motor Corporation*, supra.

But the original exceptions — those to the allowance of the amendments — were not waived. The questions they raised properly remained in the trial court until final action in the cases there. R. S., Chap. 91, Sec. 28; *Cameron* v. *Tyler*, 71 Me., 27; *State* v. *Brown*, 75 Me., 456; *Copeland* v. *Hewett*, 93 Me., 554.

These exceptions being sustained, the writs are left with legally insufficient declarations. Exceptions saved at the trial are therefore not of importance, nor are the general motions filed by the defendant to set aside the jury verdicts.

In each case, the mandate will be,

Exception to the allowance of amendment sustained.

MARY MCINTOSH *vs.* SAMUEL I. BRAMSON.

Cumberland. Opinion November 16, 1931.

PLEADING AND PRACTICE. ABUSE OF PROCESS. TRUSTEE PROCESS. R. S., CHAP. 100, SEC. 55, PAR. 6.

Under the provisions of R. S., Chap. 100, *Sec.* 55, *a trustee is duty bound to pay his employee the amount of wages due and exempted from attachment at the time of service of the trustee process.*

If the suit has been prosecuted to judgment, the trustee is liable, however, to the creditor for the full amount of the wages due at the time of service unless he discloses the amount thereof exempted by statute.

A failure by a trustee to make full disclosure in such a case of exempted wages makes him liable to pay the amount thereof both to the creditor and the employee.

The mere service of a trustee process does not relieve the trustee from liability to the principal defendant for any part of the wages due at the time of service.

Regardless of the pendency of the process, the principal defendant may at any time commence action against the trustee for the full amount of wages due him.

In such a suit, recovery may be had for all exempted wages and for any balance of wages due which are not exempted, unless a judgment obtained against the trustee for the full amount thereof has been satisfied.

No payment to the creditor, without authority of the principal defendant will relieve the trustee from his liability to the latter, unless the payment be made to satisfy a judgment against the trustee and then only to the extent thereof exclusive of exempted wages.

Lacking proof of the existence of an ulterior motive on the part of the defendant or any act by him in the use of process not warranted or commanded by the writ, an action for abuse of process can not be maintained.

In the case at bar the defendant was attempting to collect a just and overdue account which the plaintiff owed. The subsequent demand of his attorney for wages due from the trustee and the latter's payment of them indicated an ig-

norance of the law and did not prove malice. The evidence viewed most favorably for the plaintiff was not sufficient to warrant a verdict in her favor, and the nonsuit was properly granted.

On exceptions by plaintiff. An action on the case to recover damages for alleged abuse of process. At the close of the plaintiff's evidence the presiding Justice granted defendant's motion for a nonsuit. Plaintiff seasonably excepted.

Exceptions overruled. The case fully appears in the opinion.

Harry E. Nixon, for plaintiff.

Udell Bramson, for defendant.

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

STURGIS, J. At the trial of this action for abuse of civil process, the presiding Justice granted the defendant's motion for a nonsuit. An incomplete report appears on the docket, but the case comes forward on exceptions.

Viewing the evidence most favorably for the plaintiff, the following material facts appear. The defendant, having an unpaid and overdue account for merchandise against the plaintiff, caused wages due her from one Frank Kernan to be attached under trustee process. The employer, without authority from the plaintiff and in disregard of the fact that a part of her wages was exempt from attachment under trustee process by R. S., Chap. 100, Sec. 55, Par. VI, paid the defendant's attorney, at his request, the full amount of wages due the plaintiff at the time of service. The plaintiff was still indebted to the defendant after this payment had been credited upon her account. It does not appear that, when the trustee suit was begun or the moneys received from the trustee, the defendant knew the amount of the plaintiff's weekly wage or in what sum or for what period her employer was then indebted to her. Nor is there proof that the defendant knew that the payment by the trustee was made without authority from the plaintiff.

By the Statute, a trustee is duty bound to pay his employee the amount of wages due at the time of service of a trustee process and exempted from attachment there under "at the same time and in

the same manner as if no process had been served." On the other hand, if the suit be prosecuted to judgment, the trustee is liable to the creditor, bringing suit, for the full amount of the wages due unless he discloses the amount of the indebtedness to the employee exempted by the Statute and thereby discharges himself to the extent thereof. *Lock* v. *Johnson*, 36 Me., 464; *Lord* v. *Crowell*, 75 Me., 399. A failure to make full disclosure in such a case renders the trustee liable to pay the amount of the exempted indebtedness to both the creditor and the principal defendant.

It seems almost needless to say that the mere service of a trustee process does not relieve the trustee from liability to the principal defendant for any part of the wages due at the time of service. Regardless of the pendency of the process, the principal defendant may, at any time, commence action against the trustee for the full amount of the wages due him and may recover the amount due him for exempted wages in any event, as also the balance of his wages due, unless a judgment obtained against the trustee for the full amount thereof be satisfied. *Ladd* v. *Jacobs*, 64 Me., 347. No payment to the creditor without authority of the principal defendant will relieve the trustee from his liability to the latter unless the payment be made to satisfy a judgment against the trustee, and then only, as already noted, to the extent of the judgment exclusive of exempted wages.

In trusteeing the wages due the plaintiff from Kernan, the defendant was attempting to collect a just and overdue account which the plaintiff owed. The subsequent demand of his attorney for the wages due from the trustee and the latter's payment of them indicate an ignorance of the law, but do not prove malice. It does not appear that the plaintiff's discharge is chargeable to the defendant. A repudiation of the payment made by the trustee to the defendant would preserve the plaintiff's right of recovery against the trustee of the full amount of the wages due her. Election to ratify the payment would reduce her indebtedness to the defendant accordingly. The mutual rights and liabilities of the trustee and the defendant are here immaterial. Lacking proof of the existence of an ulterior motive on the part of the defendant or any act by him in the use of process not warranted or commanded

by the writ, the plaintiff's action for abuse of process can not be maintained. *Lambert* v. *Breton*, 127 Me., 510.

Nor is the plaintiff's case strengthened by evidence of other trustee suits which the defendant subsequently brought against her while she was working at the New Chase House, Inc. The plaintiff's allegations in respect to such suits are incomplete and meaningless and no measure of proof will warrant a recovery under them. This evidence is not discussed by counsel on the brief. It can not be considered by this Court.

Exceptions overruled.

DOMINIQUE CHARPENTIER

vs.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY.

Androscoggin. Opinion November 16, 1931.

MASTER AND SERVANT. NEGLIGENCE.

A master is liable for the consequences of his negligence, if negligence is found, but he is not an insurer of his employee's safety.

It is the duty of a master to use reasonable care to furnish for his servant a reasonably safe place for him to do his work. He can not be held responsible for failure to use extraordinary care.

A jury finding clearly unwarranted by the evidence will be set aside.

In the case at bar, the defendant being a non-assenting employer under the Workmen's Compensation Act, could not avail itself of possible defenses arising from the fellow servant doctrine, assumption of risk or contributory negligence. It could be held liable only for its actual negligence. The evidence disclosed no failure to use reasonable care to furnish a reasonably safe place for the employee to do his work. Extraordinary care was not required. The jury finding was not warranted by the evidence.

On general motion for new trial by defendant. An action on the case by an employee to recover damages for personal injuries. Trial

was had at the March, 1931, Term of the Superior Court for the County of Androscoggin. The jury rendered a verdict for the plaintiff in the sum of $2,791.00. A general motion for new trial was thereupon filed by the defendant.

Motion sustained.

The case fully appears in the opinion.

Bermans, for plaintiff.

Carl F. Getchell, for defendant.

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

FARRINGTON, J. Action to recover for personal injuries due to alleged negligence of defendant.

On general motion after a verdict for plaintiff in the sum of $2,791.00.

Inasmuch as it was agreed that the defendant Company was a non-assenting employer under the Workmen's Compensation Act, it could not avail itself of possible defenses arising from the fellow servant doctrine, assumption of risk or contributory negligence and such defenses require no discussion, the only question involved being whether or not there was negligence on the part of the defendant Company.

The plaintiff was employed by the defendant as an assistant clerk in one of its stores located at the corner of Lisbon and Chandler Streets in Lewiston, Maine.

On one side of the store towards the rear was a meat cooler and on the other side a vegetable cooler, with a passageway between about four feet wide leading to a room in the rear used for storage purposes. Just before the store closed Saturday night, May 11, 1929, the plaintiff, as a part of his work, was carrying a fifty pound box of onions from the outside front of the store and fell in the passageway referred to above, suffering the injuries for which recovery was sought.

The plaintiff, when asked to tell what happened, testified, "Well, we had closed up and we had had some outside displays, potatoes and vegetables and lettuce and all stuff like that; and I was to take them in and put them in back so that the front place would be clean

for Sunday. And I was carrying this box of onions, and as I went out there, there was some of them leaves on the floor, and I stepped on one of them; and as I went I wanted to guarantee myself and as I fell I dropped the crate of onions and the same time pushed my leg toward the meat cooler and they both hit near the knee. Together. My weight going down on top of it." Interrogated as to whether he saw the leaf on which he claimed to have slipped, plaintiff replied, "I couldn't very well see it. I had this crate of onions in front of me, and if you hold something in front of you you can't really see where you put your foot down." When asked what was the condition of the floor at the time he fell, plaintiff replied, "The floor? When I fell, was all upset, residue of all kinds of things on the floor, and around in there where the display was, serving customers and don't bother really to take up the things that fall on the floor; and it was closing time and we don't sweep until the last thing." The plaintiff testified that on this Saturday, prior to the time of his injury, vegetable products consisting of lettuce, cabbage, cauliflower, carrots and beets had been unpacked in the passageway by Mr. Desjardins, the manager. Plaintiff also testified that he had swept up at the noon hour as a part of his duty, but that he had no opportunity to sweep up again at any later time up to the closing hour, but there is no evidence that after this noon sweeping there was any further unpacking of vegetable or other products, and there is undisputed testimony of Mr. Cote, manager of the meat department, that the unpacking was finished by nine or ten o'clock in the forenoon.

The plaintiff testified that Mr. Desjardins saw him fall and asked him if he hurt himself and talked with him while he was on the floor and plaintiff said, "I didn't think I hurt myself much." The record discloses no statement by plaintiff to Mr. Desjardins that he slipped on a leaf or any refuse in the passageway or that the alleged slipping was in any way due to conditions there. The plaintiff testified that he went home after the store closed and that he returned Monday morning and told Mr. Desjardins "that that fall I had Saturday night was pretty bad and that my leg was paining me quite a lot," and that he worked four days at light work of weighing and that he then gave up his job. There was

no evidence that at any time before leaving, or afterwards, up to the time suit was brought he made any talk or claim about his fall being caused by the presence of any leaf or by any other condition of the floor in the passageway.

There was no evidence as to the length of time the leaf or substance on which he claimed to have slipped was on the floor, whether all day or only a few moments or how long it was there. There is nothing to show any knowledge on the part of the defendant Company, or any of its employees, as to any condition which might have required their attention as a part of due care. As far as any evidence in the case is concerned, the leaves or leaf on which the plaintiff asserts he "stepped," and presumably on which he claims that he slipped, may have been dropped there only a few moments or immediately before he started to go through the passageway where the accident occurred. Even if the general condition of the floor were as described by the plaintiff, it could not be claimed that such general condition was the proximate cause of the accident. The plaintiff has definitely said that his fall was occasioned by stepping on one of the leaves on the floor, and in our opinion he has failed to show negligence on the part of the defendant Company in that respect as well as to the general condition of the floor.

In cases cited by counsel in which it was held that the jury's verdict for the plaintiff should be sustained, the facts and circumstances disclosed were such that there might well have been two views as to liability and in those cases it could not be said that the jury was manifestly wrong. The presence of other facts and circumstances which might possibly have been brought out, but which were not disclosed by the evidence, might have led to a different conclusion from that expressed in this opinion, but we are bound by the record as it has come to us.

The master is liable for the consequences of his negligence, if negligence is found, but he is not an insurer of the employee's safety. *Mosely* v. *Raines*, 37 S. W. (2d) 78 (Ark.); *Hall* v. *Proctor Coal Co.*, 236 Ky., 813, 34 S. W. (2d) 425.

In testing the correctness of the verdict, and giving the evidence its strongest probative force in favor of the plaintiff, we are unable to find that the defendant Company was negligent under the rule

laid down in the Maine cases, which is well settled that it is the duty of the master to use reasonable care to furnish for his servant a reasonably safe place for him to do his work. *Elliott* v. *Sawyer*, 107 Me., 195, 201; *Sheaff* v. *Huff*, 119 Me., 469; *Morey* v. *Maine Central Railroad Co.*, 125 Me., 272, 275, 127 Me., 190, 193; *Loring* v. *Maine Central Railroad Co.*, 129 Me., 369, 373.

In 125 Me., at page 275, *supra*, the Court said, "A primary duty of a railroad company is to use due care in providing a reasonably safe place and reasonably safe appliances for the use of its employees. It does not undertake to provide a reasonably safe place and reasonably safe appliances, but it does undertake to use due care to do so, and that is the measure of its duty." Citing *Sheaff* v. *Huff*, supra, in which the Court said, "It accordingly appears that the definition of the duty of an employer in furnishing a place for his workmen is in no sense technical, but one which carefully differentiates between making the employer an insurer of the reasonable safety of the place, and an observer of the universal rule of reasonable care to furnish such a place."

Not only can the defendant Company not be held as an insurer, but it can not be held responsible for failure to use extraordinary care, and in the case before us we feel that to sustain the verdict would be equivalent to placing such a burden upon it.

Recognizing the rule that a jury verdict should not be disturbed if the facts are such that reasonable men might differ as to their conclusions, we feel that in the instant case the jury was not warranted on the evidence in finding that the defendant did not use reasonable care to furnish a reasonably safe place in which the plaintiff was to do his work.

The entry must be,

Motion sustained.

JOSEPHINE MIZULA, PRO AMI *vs.* EMMA M. SAWYER ET AL.

JOSEPH MIZULA *vs.* EMMA M. SAWYER ET AL.

MARY CHEREPOWITCH *vs.* EMMA M. SAWYER ET AL.

Cumberland. Opinion November 18, 1931.

PLEADING AND PRACTICE. ATTORNEYS. VERDICTS.

When two arguable theories are presented, both sustained by evidence, and one is reflected in a jury verdict the Law Court is without authority to act. It is only when a verdict is plainly without support that a new trial on general motion may be ordered.

The practice indulged by many attorneys of attempting to divert the attention of the jury from matters properly before it by appeals to bias, prejudice, passion or sympathy, by statements of fact not based upon evidence or by unfair argument, the Court holds, can not be too unsparingly condemned.

The rule is well settled if counsel exceeds the limits of legitimate argument, it is the duty of opposing counsel to object at the time so that the presiding Justice may set the matter right and instruct the jury with reference thereto. If the Justice neglects or declines, after objection, to interfere redress may be sought by exceptions. If the offending counsel, after being required to desist or retract, refuses to do so, the remedy is by motion. So if the remarks are of such a character that even the intervention of the Justice is not deemed to have removed the prejudice and cured the evil, the remedy is by motion. But in any event, objection must be made at the time. If not so taken, it is considered waived.

In the case at bar, the failure of plaintiff's counsel to raise his objections at the time to the improper argument of counsel for Sawyer waived any rights that might thereby have accrued to him.

On general and special motions for new trial by plaintiffs as against defendant Sawyer. Three actions of tort tried together in which suit was brought against the defendants John M. O'Donnell and Emma M. Sawyer to recover damages for injuries sustained

by the plaintiffs resulting from a collision between the automobile owned and operated by defendant O'Donnell and an automobile owned and operated by defendant Sawyer. Trial was had at the February Term, 1931, of the Superior Court for the County of Cumberland. The jury rendered verdicts in favor of the plaintiffs against the defendant O'Donnell and in favor of the defendant Sawyer in each case. A general motion for new trial as against defendant Sawyer was thereupon filed by the plaintiffs, and a special motion to set aside the verdicts in favor of defendant Sawyer by reason of alleged misconduct of counsel for the defendant Sawyer.

Both motions overruled in each case. The cases fully appear in the opinion.

Jacob H. Berman,
Edmund P. Mahoney, for plaintiffs.
Herbert J. Welch, for defendant O'Donnell.
Ralph M. Ingalls,
William B. Mahoney, for defendant Sawyer.

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

PATTANGALL, C. J. Cases tried together. Verdicts against defendant O'Donnell in each case. Verdict for defendant Sawyer in each case. Cases come forward on plaintiffs' motions on usual grounds to set aside verdicts in Sawyer's favor and also special motions to set aside same verdicts because of misconduct of Sawyer's counsel. Action for damages by reason of collision between automobile and pedestrians alleged to have been caused by joint or concurrent negligence of defendants, whose cars collided in such a manner as to cause O'Donnell's car to strike plaintiffs Josephine Mizula and Mary Cherepowitch and to impose upon Joseph Mizula, father of Josephine, certain expenses incidental to the injury received by her.

No good purpose would be served by a discussion of the evidence. Apparently the jury accepted the statement of defendant Sawyer as to the manner in which the collision between her car and that of O'Donnell occurred. If that version of the affair was correct, she could not be found guilty of negligence as a matter of law. It can

not be said that her story is inherently improbable or that the jury manifestly erred in accepting it. No citation of authorities is needed to establish the proposition that when two arguable theories are presented, both sustained by evidence, and one is reflected in a jury verdict, this Court is without authority to act. It is only when a verdict is plainly without support that a new trial on general motion may be ordered.

The special motion presents a peculiar situation. It appears that counsel for Sawyer, in closing the case to the jury, dwelt on her age and limited financial ability. Just exactly what he said is not agreed upon, but very plainly his argument was irrelevant, improper and prejudicial.

References to the wealth or poverty of parties, unless the issues involved make such references admissible, may constitute reversible error. In *Davis* v. *Stowe Township* (Pa., 1917), 100 Atl., 529, plaintiff's counsel made the statement in argument that unless the case was decided in his client's favor, she and her children would be dependent upon charity; whereupon defendant moved for a mistrial, which was refused. A verdict for plaintiff was set aside on the ground of misconduct of counsel.

"Counsel will not be permitted to urge the poverty of his client as ground for a verdict." *Dziedzic* v. *Mfg. Co.*, 82 N. H., 473, 136 Atl., 261.

A prejudicial appeal to the jury not to give the plaintiff a verdict, thereby taking defendant's money from him, because he was a hard working worthy man who by industry had accumulated a little property is sufficient ground for setting aside a verdict. *Duplessis* v. *Guyon*, 80 N. H., 317, 116 Atl., 342.

Plaintiffs' counsel preferred to answer the argument thus presented rather than to object to it, and in his rebuttal attempted to counteract its effect by a discussion fully as irrelevant, improper and prejudicial as that advanced in behalf of defendant. He now presents motions to set the verdicts aside because of the unwarranted argument of counsel for Sawyer.

The issue raised by these motions has been the subject of frequent discussion by this court; and the practice, indulged in by many attorneys of attempting to divert the attention of the jury

from matters properly before it by appeals to bias, prejudice, passion or sympathy, by statements of fact not based upon evidence or by unfair argument, has been many times unsparingly condemned.

"The courts have usually been very firm, whenever occasion has required, in confining counsel within proper and reasonable grounds to whatever is pertinent to the matter on trial." *Rolfe* v. *Rumford*, 66 Me., 566.

Whether the point should be raised by motion or exceptions depends upon the procedure at *nisi prius*. If the presiding Justice permits counsel in addressing the jury, against seasonable interposition, to proceed with an improper argument, exceptions will lie to correct the error. *Rolfe* v. *Rumford*, supra.

"If defendant's counsel, as claimed by plaintiff, exceeded the proper license of an advocate in his argument to the jury, it was the duty of plaintiff's counsel, if he thought his client's rights were being prejudiced, to interpose an objection and if the judge declined to interfere, plaintiff might have exceptions. If the judge stopped counsel and required him to desist and retract and he refused to do so, plaintiff's remedy is by motion." *Powers* v. *Mitchell*, 77 Me., 368; *Sherman* v. *M. C. R. R.*, 86 Me., 424; *State* v. *Martel*, 103 Me., 66.

Obviously in the instant case exceptions would not lie. No error appears on the part of the Court. Plaintiff interposed no objection, at the time, to the argument of defendant's counsel. The presiding Justice was not requested to act. Hence, no fault can be attributed to him for not acting.

Nor will motion lie under the circumstances disclosed by this record. "The way to correct the effect of an argument which exceeds due limits is to object to it at the time, to answer it by counter argument or to ask suitable instructions to the jury." *Learned* v. *Hall*, 133 Mass., 417. "By electing to interpose no objection and rely upon the advantage he might have by counter assertion and argument in reply, he waived his right to exception or motion. The case is similar in principle to a case of disqualification or misconduct of a juror. If known to a party during the trial and he wishes to take advantage of it, he must interpose his objection.

He can not elect to take his chance of a verdict in his favor and if he fails, then raise the objection." *Powers* v. *Mitchell*, supra.

"If the county attorney in his argument to the jury transcended his legitimate province, the counsel for the respondent should have interposed their objection at the time, that the court might have set the matter right before the jury. Not having done so, it is too late to raise that question." *State* v. *Watson*, 63 Me., 138.

"The rule is well settled. If counsel in addressing the jury exceed the limits of legitimate argument, it is the duty of opposing counsel to object at the time, so that the presiding Justice may set the matter right, and instruct the jury with reference thereto. If the Justice neglects or declines, after objection, to interfere, redress may be sought by a bill of exceptions. If the offending counsel, after being required to desist or retract refuses to do so, the remedy is by a motion for a new trial. So, if the remarks are of such a character that even the intervention of the Justice is not deemed to have removed the prejudice and cured the evil, the remedy is by motion. But in any event, objection must be made at the time; if not so taken, it is considered as waived." *Knowlton* v. *Ross et al*, 114 Me., 19.

In so far as the opinion in *Stone* v. *Express Company*, 105 Me., 240, is in conflict with the cases cited above, it may be considered overruled.

Failure of plaintiffs' counsel to raise his objection at the time to the improper argument of counsel for Sawyer waived any rights that might thereby have accrued to him.

Both motions overruled in each case.

LOTTIE M. SMITH *vs.* THEODORE KERR.

Cumberland. Opinion November 18, 1931.

EQUITY. MORTGAGES. BILLS AND NOTES. EVIDENCE.

When the holder of a mortgage, under the statutory provision relating thereto, begins foreclosure proceedings by taking possession of the mortgaged premises peaceably and openly, and unopposed, the consent of the mortgagor is not necessary, and the mortgagor's occupation of one tenement of a three tenement house does not affect the continued possession of the holder of the mortgage, even though such occupation equals in time the statutory period necessary to complete the foreclosure. Although the mortgage holder does not himself live in or occupy any part of the premises, he has constructive possession which in legal contemplation is sufficient.

Where a mortgage is given to secure the payment of a note or bond and the two instruments are made at the same time, they may, when the nature of the transaction becomes material, be read and construed together as parts of the same transaction, provided there is no inconsistency, as the terms of the one may explain or modify the other, and a stipulation or condition inserted in the one may be an effective part of the contract of the parties, although not found in the other.

But if the note or the bond and the mortgages contain conflicting and irreconcilable provisions as to the character or terms of the debt or interest, or the time for its payment, the note will govern, as being the principal obligation.

Where it is not apparent on the face of the mortgage or note as to which one expresses the real intention and agreement of the parties extrinsic evidence may be received to show the facts.

In this state it is well settled that where the note stipulates a rate of interest in excess of the legal rate and makes no provision for the continuance of that rate after maturity, the note will draw the stipulated rate until maturity and only the legal rate thereafter.

In the case at bar it was error to have figured interest at ten per cent on the principal and on the overdue interest as provided in the mortgage. It should be figured at the rate of six per cent after maturity instead of ten per cent, with no interest on overdue payments of interest as the note made no provision relating thereto.

On appeal. A bill in equity to redeem certain real estate on which defendant as assignee of the mortgage had begun foreclosure proceedings. Appeal sustained. Decree in accordance with the opinion.

The case fully appears in the opinion.

Albert E. Neal, for plaintiff.

Clarence E. Sawyer, for defendant.

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

FARRINGTON, J. On Appeal. Bill in equity dated January 15, 1931, filed January 17, 1931, to redeem certain real estate on which the defendant had begun foreclosure proceedings and of whom an accounting had been demanded, because of alleged unreasonable refusal and neglect to render such account.

On September 26, 1926, the plaintiff, to secure the payment of the sum of three thousand dollars ($3,000.00), mortgaged to one Harry D. Currier certain real estate owned by her in Portland, Maine, consisting of a three family house and a three stall garage at No. 14 Fessenden Street, and a two and a half story, two family house, with garage, on Canton Street.

On May 22, 1929, Currier assigned the mortgage to the defendant and endorsed the note without recourse.

The note itself was as follows: "$3000.00. Portland, Maine, Sept. 18, 1926. One year after date I promise to pay to the order of Harry D. Currier Three Thousand and 00/100 Dollars at any bank in Portland, Maine. Value received with interest at 10%. Payable quarterly."

The defeasance clause of the mortgage, under the same date as the note, was "Provided nevertheless, that if the said grantor or her heirs, executors, administrators or assigns, shall pay unto the said grantee or his heirs, executors, administrators or assigns, the sum of three thousand dollars ($3000.00) in one year from this date, with interest on the amount unpaid and on overdue interest at the rate of ten per cent per annum, during said term, and for such further time as said principal sum or any part thereof shall remain unpaid payable quarter-annually," and then, after making certain

provisions including payment of taxes and insurance, it concluded as follows: "then this deed, as also a promissory note of even date herewith signed by the said grantor whereby promise to pay to the said grantee or order the said sum and interest at the time aforesaid, shall be void."

The plaintiff failed to pay the mortgage when it became due but endorsements on the note showed payment of all interest due up to June 20, 1928.

On July 18, 1930, the defendant, as assignee of the mortgage, acting under the provisions of the statute, entered in the presence of two witnesses and took possession of the premises on Fessenden Street and Canton Street, making separate entry as to each.

It was admitted by the plaintiff that the certificate of foreclosure which was duly and seasonably recorded conformed as to "form and substance" with the statutory requirements.

No question is raised as to the effectiveness of the foreclosure proceedings as far as the Canton Street property is concerned but it is contended that the facts as to Fessenden Street presented a different situation. This house was arranged for three tenements, one on the ground floor, occupied by a tenant at the time of entry, one on the middle floor unoccupied at the time, and one on the upper floor occupied by the plaintiff, who was engaged in canvassing and who was not there at the time but who lived there during the short intervals of time when in Portland and who was still occupying it in the same way at the time of the hearing on the Bill before us. The evidence showed that plaintiff's tenement was locked and was not itself entered by the defendant when he took possession under the statutory method of foreclosure.

The presiding Justice found "that the possession of the mortgaged premises was taken peaceably and openly in accordance with the terms of the Statute, on July 18, 1930," and that "the defendant did unreasonably refuse and neglect to render a true account in writing of the balance due on said mortgage" and sustained the bill with costs, also finding that the balance due on the mortgage was $4,109.74, represented by the face of the note, plus the sum of certain expenditures made by the defendant, duly itemized in the findings, and of interest reckoned on the note at the rate of ten per

cent from June 20, 1928, to January 17, 1931, and interest on overdue interest at the same rate from September 20, 1928, to January 17, 1931, less $551.95, the amount found as received for rentals.

The case is before us on appeal from the decree allowing the plaintiff to redeem on payment to the defendant of the said sum of $4,109.74 within sixty days from the date of the decree, less her taxable costs, and in default of payment the bill to be dismissed.

The plaintiff bases her claim under this appeal on six points of contention, the first and second of which raise questions particularly as to the foreclosure of the Fessenden Street property.

On July 18, 1930, when, for the purpose of foreclosure, the defendant made his entry, as he also did on the Canton Street parcel, the plaintiff was not in her tenement on the upper floor, nor was she anywhere within the building or on the premises as far as the record disclosed, and her door was locked. No actual entry was made into her rooms. The defendant with his two witnesses entered all three floors, having been admitted by someone on the first floor, and then went to the garage and then onto the land and in all these places repeated the statement that he was taking possession for the purpose of foreclosing the mortgage of which he was the owner and the terms of which had been broken.

The record discloses no evidence that anyone opposed the entry and we find that such entry was unopposed, and it must be regarded, despite the claim of the plaintiff, as having been made peaceably and openly as found by the presiding Justice and that finding should not be disturbed.

The evidence in the case shows that the plaintiff retained her tenement, occupying it when she was in Portland, and that she never paid any rent to the defendant, although he collected rent from the other occupants, made necessary repairs and exercised general control over the premises.

The plaintiff testified that she had never consented to defendant's taking of possession, and her consent was not necessary under the method of foreclosure used. She admitted that defendant made some suggestion to her about remaining in her rent, or, if she were away, of letting it furnished and having the proceeds applied on

the note and mortgage, and she replied that she "didn't care to have anything destroyed."

While the defendant did not himself live in or occupy any part of the premises, he was nevertheless in contemplation of law in such possession that a continuation of that possession for the statutory period would complete the foreclosure.

The Justice presiding made no findings as to defendant's continuance in possession as affecting final foreclosure of the right to redeem after the passing of the year, but in our opinion the character of the occupation of her tenement by the plaintiff as disclosed by this record, even if she were given notice to leave, did not affect the continued possession of defendant and that when the year required by the statute passed, the foreclosure would have been complete had it not been for the intervention of the demand for an accounting and the bill in equity seeking redemption.

In *Morse* v. *Bassett*, 132 Mass., 502, 509, the Court said that "The possession which the law contemplates may be constructive, and it will be presumed to continue after the open peaceable entry which the law requires has been formally made, even if the mortgagor remain on the premises."

In *Fletcher* v. *Carey*, 103 Mass., 475, 477, the Court used this language: "The possession which the mortgagee is required to take and to maintain, in order to accomplish an effectual foreclosure of the mortgage, is by no means a personal occupation of the mortgaged estate by himself, or even the actual appropriation of the rents and profits. It is a formal entry, and a constructive rather than a literal taking of possession. It is of no importance that it produces no change in the occupation. It is not an entry for the purpose of literally ousting and expelling the mortgagor * * *."

In *Ellis* v. *Drake et als*, 8 *Allen*, 161, 163, the Court said, "Permitting the mortgagor to continue in the occupation of the premises is also held not to defeat the operation of an entry for foreclosure. The rule of law as now held seems to be that the entry by the mortgagee for condition broken, in the presence of two witnesses, and a certificate thereof duly sworn to before a justice of the peace, and duly recorded, are all that is necessary to effect a foreclosure."

The plaintiff's third point of contention is that while the holder of the mortgage may be allowed for expenditures for necessary repairs, he is not entitled to charge expenditures made for improvements and that in the case at bar the various amounts claimed to have been expended by the defendant should not be allowed because they are too indefinite for just allowance.

Her fourth point is that the defendant should be charged not only with the rents and profits actually received but with those which by ordinary care and attention he should have received.

As to these contentions, we feel that the presiding Justice in establishing, for the purposes of redemption, the items of expenditures forming the balance due on the mortgage, outside of principal and interest thereon, made findings of fact which were amply supported by the evidence and which should not be disturbed. The record itself clearly shows that the expenditures were for necessary repairs. There is no evidence of any expenditures for improvements. As to the collection of rents, we find nothing in the record to show any error on the part of the Justice presiding, who found $551.95 as the amount to be accounted for as received from rentals. There is no evidence to show failure on the part of the defendant to use ordinary care and attention as to their collection and we regard the finding of the presiding Justice as to the amount of rents credited as warranted by the evidence and undisturbable as a finding of fact.

For her fifth and sixth points the plaintiff claims that the provisions of the mortgage should not have been followed in reckoning the interest due on the note but that the terms of the note governed and controlled.

Where a mortgage is given to secure the payment of a note or bond and the two instruments are made at the same time, they may, when the nature of the transaction becomes material, be read and construed together as parts of the same transaction, provided there is no inconsistency, as the terms of the one may explain or modify the other, and a stipulation or condition inserted in the one may be an effective part of the contract of the parties, although not found in the other. This is uniformly recognized by the courts as a sound principle of law and needs no citation of authority.

But if the note or the bond and the mortgage contain conflicting and irreconcilable provisions as to the character or terms of the debt or interest, or the time for its payment, the note will govern, as being the principal obligation. *Pacific Fruit Exchange* v. *Duke et al* (Cal. App.), 284 Pac., 729; *Conrad* v. *Scott et al* (Col.), 278 Pac., 798; *Linam et al* v. *Anderson*, 12 Ga. App., 735, 78 S. E., 424, 427; *Tipton et al* v. *Ellsworth et al*, 18 Ida., 207, 109 Pac., 134, 138; *Mowbray et al* v. *Simons et al*, 183 Ia., 1389, 168 N. W., 217; *Wilson et al* v. *Tollis et al* (Ia.), 229 N. W., 724, 727; *New England Mortgage Security Co.* v. *Casebier et al*, 3 Kan. App., 741, 45 Pac., 452, approved in *Kansas Loan & Trust Co.* v. *Thayer* (Kan.), 58 Pac., 238; *Hampden Cotton Mills* v. *Payson et al*, 130 Mass., 88; *Ferris et al* v. *Johnson et al*, 136 Mich., 227, 98 N .W., 1014; *Owings* v. *Mackenzie et al*, 133 Mo., 323, 33 S. W., 802; *Adler* v. *Berkowitz*, 254 N. Y., 433, 173 N. E., 574; *Rhodus* v. *Goins*, 129 S. C., 40, 123 S. E., 645, 646; *Lovell* v. *Musselman*, 81 Wash., 477, 478, 142 Pac., 1143; *Ogden* v. *Bradshaw*, 161 Wis., 49, 152 N. W., 654; *Lumbermen's Trust Co.* v. *Title Ins. & Inv. Co. et al*, 248 Fed., 212; *Railway Co.* v. *Sprague*, 103 U. S., 756, 761; 41 C. J., Sec. 340, p. 452; Jones on Mortgages, 8th Ed., Vol. 1, Sec. 89, p. 92; 19 R. C. L., p. 493, Sec. 287; id. p. 302, Sec. 76.

Authority may be found to the effect that, where it is not apparent on the face of the papers, in this case the mortgage and the note, as to which one expresses the real intention and agreement of the parties, extrinsic evidence may be received to show the fact. *Payson et al* v. *Lamson et als*, 134 Mass., 593, 596.

No such evidence was offered in the case before us, and we are, therefore, bound by the facts appearing in the record which show conflicting provisions in the mortgage and the note, provisions which on the evidence before us are irreconcilable, and the note must control.

Under the decisions in this state it is well settled that where the note stipulates a rate of interest in excess of the legal rate and makes no provision for the continuance of that rate after maturity, the note will draw the stipulated rate until maturity and only the legal rate thereafter. *Eaton* v. *Boissonnault*, 67 Me., 540; principle recognized in *Augusta National Bank* v. *Hewins et als*, 90

Me., 255; *Paine* v. *Caswell et als*, 68 Me., 80; *Flynn* v. *Banking & Trust Co. et als*, 104 Me., 141, 154.

It was error to have figured interest at ten per cent on the principal and on the overdue interest as provided in the mortgage. It should be figured at the rate of six per cent after maturity instead of ten per cent, with no interest on overdue payments of interest, as the note makes no provision relating thereto.

Inasmuch as there must be a new decree, it should include any additional expenditures that may have been properly made, together with a reckoning of additional interest and of further sums collected from rents to the date of such new decree.

Appeal sustained.
Decree in accordance with this opinion.

JULIA SHINE *vs.* RUTH B. DODGE.

Androscoggin. Opinion November 18, 1931.

DECEIT. PLEADING AND PRACTICE. DEMURRERS. DAMAGES.

A purchaser defrauded in a contract of sale may elect one of two remedies. He may rescind the sale, and, in an action of assumpsit for money had and received, recover back the purchase price, or he may, without rescission, sue in tort for deceit, in which case the measure of his damages is the difference between the actual value of the property at the time of the purchase and its value if it had been as represented.

There is no liability in an action of deceit for the false statement of an opinion an illustration of which is a misstatement of the value of property or of its cost.

An essential inquiry is, is the statement one on which a purchaser is justified in relying.

Whether a statement is material and whether it is one of fact or a mere expression of opinion are ordinarily questions for the court and not for the jury. The precise form of the language, however, is not always the controlling factor,

for it must be construed with reference to the relationship of the parties, the opportunity afforded for investigation, and the surrounding circumstances. Under such circumstances, it is often proper to leave the decision of the question to the jury under proper instructions of the court.

In the case at bar, the allegation in the declaration that the defendant represented that she would guarantee the dividends on the stock was immaterial, for the breach of a promise to do something in the future will not support an action of deceit even though there may have been a preconceived intention not to perform.

The representation charged in the declaration that stock in the Sagadahoc Fertilizer Company was better than the stock of the Central Maine Power Company was a mere expression of opinion. The statement by the defendant that she had invested $40,000 of her own money in the stock was immaterial, it being merely a statement of fact supporting her opinion of its worth.

The statement by the defendant charged in the declaration that the company was "in good financial standing," was "all right," was "sound financially," may have been an expression of opinion or an averment of a fact, depending on the surrounding circumstances which only the evidence would show. On demurrer it is impossible to hold that it was not a statement of fact.

The allegation in the declaration that the representation was made "with intent to deceive" imputes knowledge of its falsity to the defendant.

On exceptions by plaintiff. An action of deceit based on fraudulent representations in the sale of shares of stock of the Sagadahoc Fertilizer Company by defendant to plaintiff. The defendant filed a general demurrer which the presiding Justice sustained. Plaintiff seasonably excepted.

Exception sustained. The case fully appears in the opinion.

Frank A. Morey, for plaintiff.

Clifford E. McLaughlin, for defendant.

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

THAXTER, J. This is an action of deceit based on alleged fraudulent representations in the sale of shares of stock. To the declaration a general demurrer was filed by the defendant, and the case is before us on exceptions by the plaintiff to the ruling of the presiding Justice sustaining the demurrer.

After setting forth the purchase of a substantial amount of stock of the Sagadahoc Fertilizer Co. by the plaintiff of the defendant, the declaration avers that:

> "as an inducement to the plaintiff to buy the aforesaid stock of the Sagadahoc Fertilizer Company, and with intent to deceive the plaintiff the defendant falsely represented to her that she would guarantee to her that she would get dividends on both the common and the preferred stock, and as a further inducement to the said plaintiff to purchase said stock, and with intent to deceive the plaintiff the said defendant falsely represented to her that the stock that the plaintiff herein owned in the Central Maine Power Company, amounting to over fifteen thousand dollars ($15,000) was not as good stock as that of the Sagadahoc Fertilizer Company; that the Sagadahoc Fertilizer Company was in good financial standing and that its stock was better than the stock of the Central Maine Power Company, and paid more dividends; and the said defendant with intent to deceive the plaintiff further falsely represented to the plaintiff, and as an inducement for her to buy said stock in the Sagadahoc Fertilizer Company, that she had forty thousand dollars ($40,000) of her own money in stock in the Sagadahoc Fertilizer Company and that she would not have put her forty thousand dollars ($40,000) into the stock of the Sagadahoc Fertilizer Company had she not known that it was all right, and that the said company was all right, and that it was sound financially."

The declaration then alleges that the stock purchased was in fact worthless, that the company was insolvent at the time the plaintiff bought the stock and that the plaintiff relied on the false representations and was deceived by them.

A purchaser, defrauded in a contract of sale, may elect one of two remedies. He may rescind the sale, and, in an action of assumpsit for money had and received, recover back the purchase price; or he may without rescission sue in tort for deceit. *Carey* v. *Penney*, 129 Me., 320. In such case the measure of his damages is the difference between the actual value of the property at the time of the

purchase and its value if it had been as represented. *Wright* v. *Roach*, 57 Me., 600; *Mullen* v. *Eastern Trust & Banking Co.*, 108 Me., 498; *Morse* v. *Hutchins*, 102 Mass., 439. The plaintiff in this case, though his declaration contains several averments inapplicable to an action of deceit, did not rescind the contract of sale and has elected to sue in tort and not in contract.

The essential elements of an action for deceit have been so often and so recently stated by this court that it is unnecessary to reiterate them. *Allan* v. *Wescott*, 115 Me., 180; *Prince* v. *Brackett, Shaw & Lunt Co.*, 125 Me., 31; *Gilbert* v. *Dodge*, 130 Me., 417. The defendant's objection to the declaration is that it nowhere avers a misrepresentation by her of a material fact, but rather sets forth expressions of opinion by her as to the merits of the stock, or the breach of a promise by her to guarantee dividends on it in case of a default.

The allegation in the declaration that the defendant represented that she would guarantee the dividends on the stock is quite immaterial, for it is well settled in this state that the breach of a promise to do something in the future will not support an action of deceit, even though there may have been a preconceived intention not to perform. *Albee* v. *LaRoux*, 122 Me., 273.

It is likewise established that there is no liability in an action of deceit for a false statement of an opinion. *Martin* v. *Jordan*, 60 Me., 531; *Holbrook* v. *Connor*, 60 Me., 578; *Bourn* v. *Davis*, 76 Me., 223; *Clark* v. *Morrill*, 128 Me., 79. Deceit is a specific term and imports a false and fraudulent representation, which must not only influence the buyer's judgment in making the purchase, but also must relate to a fact which directly affects the value of the property sold. *Albee* v. *LaRoux*, supra. Thus a false statement as to the value of property is held to be merely an expression of opinion; and a false declaration of its cost is treated in the same category, because such fact is nothing more nor less than evidence of someone else's opinion of its value. *Holbrook* v. *Connor*, supra. On the other hand a false statement to a purchaser of shares of stock of a corporation of the amount paid to the corporation for such stock is a misrepresentation of a fact affecting directly the value of the stock purchased, for it relates to the amount of cash assets in the

treasury of the company. *Coolidge* v. *Goddard*, 77 Me., 578. Opinion as to value, the price paid for property, mere seller's talk, are regarded as collateral matters; they do not relate to facts affecting the value of property. In the words of this court "the fraud or deceit relied upon must relate distinctly and directly to the contract, must affect its very essence and substance, and it must be material to the contract." *Palmer* v. *Bell*, 85 Me., 352, 354. Furthermore, an essential inquiry is, is the statement one on which a purchaser is justified in relying. If it consists of nothing more than dealer's talk, or if it is an averment of a fact and the person to whom it is made has equal means with the maker of knowing the truth, the rule of *caveat emptor* applies, and the one relying on it does so at his peril. *Palmer* v. *Bell*, supra; *Bishop* v. *Small*, 63 Me., 12.

The line between what is a statement of fact and of opinion is often shadowy. The ordinary rule is that the determination of that question and of the general materiality of the representation is for the court and not for the jury. *Caswell* v. *Hunton*, 87 Me., 277; *Greenleaf* v. *Gerald*, 94 Me., 91. But the precise form of the language is not always the controlling factor. The relationship of the parties or the opportunity afforded for investigation and the reliance, which one is thereby justified in placing on the statement of the other, may transform into an averment of fact that which under ordinary circumstances would be merely an expression of opinion. *Bishop* v. *Small*, supra, page 14; *Ross* v. *Reynolds*, 112 Me., 223, 226; *Shelton* v. *Healy*, 74 Conn., 265; *Hauk* v. *Brownell*, 120 Ill., 161; *Andrews* v. *Jackson*, 168 Mass., 266. In construing what is in this respect the true meaning of the language used, it is often necessary to consider the subject matter and the surrounding circumstances, and it may be proper to leave the determination of this issue to the jury under proper instructions of the court. *Thompson* v. *Phoenix Insurance Co.*, 75 Me., 55, 60; *Hotchkiss* v. *Bon Air Coal & Iron Co.*, 108 Me., 34; *Stubbs* v. *Johnson*, 127 Mass., 219.

The charge in the declaration that the defendant alleged that the stock, which the plaintiff owned in the Central Maine Power Co., was not as good as the stock of the Sagadahoc Fertilizer Co. is

clearly an expression of opinion and nothing more. Likewise the statement of the defendant that she had invested $40,000 of her own money in the stock is nothing more than an assertion of fact supporting her opinion that the stock was good. As her opinion on that point would be immaterial, so would the statement of fact. *Holbrook* v. *Connor*, supra; *Dawe* v. *Morris*, 149 Mass., 188. The representation that the stock in the Sagadahoc Fertilizer Co. paid more dividends than the stock of the Central Maine Power Co. was an averment of fact; but the means of determining its truth or falsity were so obviously available to the plaintiff that it must be held to have been an immaterial statement, on which the plaintiff was not justified in relying.

The proper construction of the representation that the Sagadahoc Fertilizer Co. was "in good financial standing" was "all right" and was "sound financially" presents a more difficult problem. With respect to this allegation we think that the declaration may be read as follows:

> "as a further inducement to the said plaintiff to purchase said stock, and with the intent to deceive the plaintiff, the said defendant falsely represented to her that the Sagadahoc Fertilizer Company was all right, sound financially, and in good financial standing, whereas in truth and fact the said company was insolvent at the time of the purchase of said stock by the plaintiff of this defendant."

The representation that a corporation is in good financial standing may be nothing but an expression of opinion; but it may, depending on the surrounding circumstances, be properly construed as an averment of a fact. We can not hold in ruling on a demurrer that it is not actionable.

In the case of *Davis* v. *Coshnear*, 129 Me., 334, one of the allegations was that the company was a successful going concern.

In *Clark* v. *Morrill*, supra, page 82, the following language was used, which, though only a dictum, is significant: "As to the allegation that the Crescent Towing Line was solvent and doing a profitable business, if the evidence sustained the allegation and the plaintiff had no opportunity to investigate; it was false; and the

defendant knew it was false and made it intending to deceive, it might be actionable."

In *Andrews* v. *Jackson*, supra, the defendant represented to the plaintiff that certain promissory notes were "as good as gold." The Court said, page 267: "It is true that such a representation may be, and often is, a mere expression of opinion. But we think that it may be made under such circumstances and in such a way as properly to be understood as a statement of fact upon which one may well rely."

In *Ross* v. *Reynolds*, supra, the question was whether a statement that an automobile was in good running order and condition was a representation of fact or merely an expression of opinion. Chief Justice Savage said at page 226: "If the representation is capable of being understood either as an expression of opinion or as a statement of fact, which it is must be determined in accordance with the understanding of the parties. If it was made as a statement of fact and was so understood it lays the basis for an action of deceit. So, if the statement was fairly susceptible of being understood to be a statement of fact, and not a mere opinion, and the other party did so understand it."

Until the evidence is taken out showing the circumstances and conditions under which the representation was made that the Sagadahoc Fertilizer Co. was sound financially, we can not hold that such statement is not a representation of fact as distinguished from an expression of opinion.

The defendant contends that there is no allegation in the declaration that she knew that her statement was false or that it was made recklessly. The averment that it was made "with intent to deceive" imputes knowledge of its falsity and is sufficient.

Exception sustained.

CONSTANCE M. POLAND *vs.* ANNE DUNBAR.

HELEN COLLINS *vs.* ANNE DUNBAR.

FRANCES POLAND *vs.* ANNE DUNBAR.

Oxford. Opinion November 18, 1931.

MOTOR VEHICLES. INVITED GUESTS. NEGLIGENCE. LIABILITY INSURANCE.

In the trial of an action involving the question of negligent operation of a motor vehicle, introduction of evidence of insurance for the purpose of influencing decision on liability or damages is improper, whether offered by the plaintiff or by the defendant, and constitutes reversible error.

On exceptions and general motion for new trial by defendant. Three actions to recover damages for personal injuries sustained by plaintiffs while riding as guests of the defendant in her automobile. During the course of the trial evidence was introduced by one plaintiff tending to show that the defendant carried liability insurance. Defendant seasonably excepted to the admission of this testimony, and likewise excepted to the refusal of presiding Justice to direct verdicts for the defendant. After the jury had rendered verdicts for the plaintiffs, the defendant filed a general motion for new trial.

First exception, that to the introduction of prejudicial hearsay, sustained.

The cases sufficiently appear in the opinion.

Peter MacDonald,
Arthur J. Henry,
George Hutchins, for plaintiffs.

Arthur Beliveau,
Fred H. Lancaster, for defendant.

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

DUNN, J. These three cases were tried jointly.

The jury has found that the plaintiffs, while riding as guests of the defendant, in her automobile, sustained personal injuries, under circumstances entitling them to damages.

The cases are presented on exceptions and general motions.

The first exception goes to the introduction, over objection by the defendant, of evidence tending indirectly to prove that the defendant was insured against liability from the operation of her car.

On cross-examination, Helen Collins, one of the plaintiffs, identified her signature to a written statement, which counsel, when putting in the defense, introduced into the evidence without objection.

The statement recites that the defendant drove her automobile in a careful manner, at a moderate rate of speed, and that the witness thought that the defendant was not at fault for the accident.

For aught to the contrary, the statement had been freely made, and accurately written down. By whom it was written, there was no suggestion.

On the evidence of that statement, and of a similar one by the plaintiff Frances Poland, which latter statement was also introduced in defense, the case for the defendant was rested.

Counsel for the plaintiffs now recalled Helen Collins to the witness stand.

The transcript of the evidence and proceedings, so far as pertinent, is as follows:

"By Mr. Hutchins.

"Q. After the statement was made and signed, did you then learn who this man represented?

"A. I did.

"Q. And whom did he represent?

"Mr. Beliveau: I object, Your Honor.

"The Court: On what ground?

"Mr. Beliveau: I don't think it is material.

"(Conference at bench)

"The Court: Plaintiff's attorney stated the purpose of his question was to disclose that the man in question was a representative of the insurance company which carried insurance on

the car in question. The attorney for the defense objected to the question on the ground that its purpose wasn't a proper one, and inadmissible. Admitted; exception allowed.

"(Question read)

"A. The insurance company."

The objected evidence was but hearsay.

Since the evidence was not incident to proper proof, and was without probative value as respected any legitimate issue, its injection, without necessity or occasion, appears to have been deliberate and wilful, to inform the jury that an insurance company was interested. The reference to the insurer may have accomplished further purpose, and created a prejudice against the defendant.

The introduction of the evidence constituted reversible error. *Ritchie* v. *Perry*, 129 Me., 440; *Skillin* v. *Skillin*, 130 Me., 223.

Exception must be sustained.

Other exceptions saved on the trial, and exceptions to refusal, at the close of the evidence, to direct verdicts for the defendant, need not be considered, nor need the motions for new trials.

The reason is that the sustaining of the first exception sends the cases back to be tried again.

First exception, that to the introduction of prejudicial hearsay, sustained.

PENOBSCOT DEVELOPMENT COMPANY *vs.* WILLIAM SCOTT.

Aroostook. Opinion November 18, 1931.

ADVERSE POSSESSION. WILD LAND. R. S., CHAP. 119, SEC. 10.

The burden of proof of title by adverse possession rests upon the party asserting it.

Title by adverse possession to wild land is not acquired by occasional cutting of timber thereon. Such acts comport more nearly with trespass than with occupation and possession.

By virtue of Sec. 10, *Chap.* 119, *R. S.* 1930, *title by adverse possession may be acquired to a woodlot used in connection with a farm even though such lot is not inclosed.*

One who acquires title by adverse possession to a few acres of cultivated land adjacent to a large tract of wild land does not gain title to the latter by occasionally cutting a few trees therefrom, even though he uses them for fencing, repairs or firewood.

The exact line of demarcation between a woodlot and wild land is difficult to define, but it is ordinarily possible to distinguish one from the other in any given case.

An important factor of the statute which permits acquiring title to uninclosed and uncultivated land by adverse possession is that it shall be used in a manner "comporting with the ordinary management of a farm."

In the case at bar, no title was acquired to the land in real dispute. It could not be considered a woodlot appurtenant to a farm. It was wild land. The jury's interpretation of the evidence was clearly erroneous.

On general motion for new trial by plaintiff. An action of trespass *quare clausam.* Defendant justified on the ground that he had acquired title by adverse possession to the premises on which the alleged trespass took place. The jury found for the defendant. A general motion for new trial was thereupon filed by the plaintiff.

Motion sustained. The case fully appears in the opinion.

J. F. Gould,
Ballard F. Keith, for plaintiff.
Thomas S. Bridges,
J. F. Burns,
R. S. Shaw, for defendant.

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

PATTANGALL, C. J. On motion. Trespass *quare clausam.* Verdict for defendant. Plaintiff's declaration describes two tracts of land, both situate in Reed Plantation — the first being known as Section 23 in Southern Petitioners' Tract, containing five hundred thirty-six acres, eighteen acres having been conveyed to Mary Scott, wife of defendant, in 1910; the second being that portion of

two one hundred acre lots numbered 26 and 28 in the Squatters' Lots so-called which remained after conveying to defendant in 1910 a twenty-two and one-half acre strip thirty-six rods wide on the west end of both lots.

The particular trespass declared on, so far as Section 23 is concerned, is alleged to have occurred on January 1, 1930, and to have consisted in cutting and removing therefrom thirty-six cedar ties and three or four cords of spruce and fir wood. That declared on with regard to Lots 26 and 28 is alleged to have occurred on the same date and involved cutting and removing from these lots seven spruce and fir trees.

Defendant pleaded the general issue, but by his brief statement asserted title by adverse possession to the entire tracts described in plaintiff's declaration. The record title of the property is admittedly in plaintiff. It was acquired by purchase from the Springer Lumber Company in 1921, which traced its title to the original owners of the township through various mesne conveyances and partition proceedings.

The burden of proof of title by adverse possession being upon him who alleges it, *Landry* v. *Giguere*, 127 Me., 268, and cases cited, and defendant having admitted acts which, unless justified by his claim of title, constitute trespass, he is entitled to a verdict only on the theory that he has acquired title to the land on which they occurred.

The issue is clearly defined. If upon any reasonable interpretation of the evidence he has sustained the burden assumed by him, the finding of the jury must stand; otherwise not.

Concerning certain facts, there is no controversy. It appears that some forty years ago, defendant accompanied by his wife came to Reed Plantation and cleared a small tract of land on Section 23 on the westerly side of a highway leading in a general northerly direction from the settlement of Wytopitlock. Later this clearing was enlarged to include eighteen acres and extended across the highway so as to embrace a triangular piece of land containing approximately four acres on the easterly side thereof. Along both sides of this highway and south of defendant's clearing other settlers had located homes, among them being one Hardin Smith, who

occupied a strip of land east of the highway on the westerly portion of what later became known as Squatters' Lots 26 and 28.

None of these settlers occupied by right of purchase. They settled on the land, as did the defendant, in the manner of the early pioneers, built log huts from the trees which they cut down in making their clearings, after a time cultivated portions of the land, used some for pasture, cut firewood from the adjoining woods and logs for fences, generally occupying such of the territory as satisfied their limited needs, exactly as though they owned the fee.

The land was of small value and the clearings were not extensive. The owners of the township, after years had passed, recognized within certain limits the rights which were acquired by these so-called squatters, and the titles by prescription were in several cases confirmed by deed.

The deed of eighteen acres to defendant's wife included the original clearing on Section 23. The deed to defendant of twenty-two and one-half acres in lots 26 and 28 included land on which Hardin Smith settled and on which, after his death, defendant's father lived and died. These deeds are claimed by plaintiff to limit defendant's holdings.

His claim to more extensive ownership is based on the theory that irrespective of these deeds, he acquired by adverse possession the whole of Section 23, and that by continued adverse possession of Hardin Smith, his father, and himself, acquired title to the whole of Squatters' Lots 26 and 28.

It was incumbent on plaintiff, as a part of its *prima facie* case, to prove trespass by defendant during the period of its ownership. It offered no evidence in support of its allegation that defendant had within that time trespassed on lots 26 and 28. There was testimony that six or seven trees were cut on one of these lots, near the dividing line between them; but as to who cut them or when, the record is silent. Had the case involved these lots alone, regardless of the merits of the controversy between the parties as to title, the verdict, on this record, would have been justified.

There was testimony that since plaintiff purchased the land, defendant cut cedar ties on Section 23, in the vicinity of the eighteen acre lot, the record title to which was in defendant's wife and to

which defendant had apparently acquired title by adverse possession prior to the conveyance to her. The sole witness whom plaintiff called on this point testified that these trees were cut easterly of the lot and "might have been some of it cut westerly" thereof. Defendant, whom the jury had a right to believe, testified that they were cut "between me and the Mann land," evidently meaning between the eighteen acre lot and the east line of Section 23. This would apparently locate the cutting within the limits of the four acre triangle lying east of the highway, separated by it from the eighteen acre lot. The evidence is conclusive that defendant had acquired title by adverse possession to this small tract. This cutting, therefore, did not constitute a trespass.

There was, however, evidence offered by plaintiff that after it purchased the land, defendant cut wood "right along the road in 23." This could not be accepted as sufficient proof of trespass, even on plaintiff's theory, because defendant had unquestioned title to certain land along the road in Section 23. Plaintiff rested, therefore, without having proved any actionable trespass on the part of defendant, but defendant supplied the omission. He testified, in answer to a leading question by his counsel, that the wood which plaintiff's agent referred to as having been cut "right along the road in 23" was cut "just northerly of the eighteen acre piece," and that, even after having been forbidden to do so, he continued to cut and peel pulpwood at that point. This admitted an act of trespass, as charged in the writ, unless defendant proved his title to Section 23 aside from the land embraced in the eighteen acre lot and four acre triangle.

His claim, in that respect, rested entirely upon his unsupported evidence. The testimony of Mrs. Scott corroborated only their occupation and use of that part of Section 23 which made up the twenty-two acres comprising their farm and pasture and to Squatters' Lots 26 and 28.

He testified that the logs from which his house and barn were built and those that he used for fencing and firewood came from Section 23 but did not state whether from that part to which he unquestionably gained title by adverse possession or from the part in dispute; and there is no evidence that he cultivated, cleared,

fenced or used as pasture any other part of Section 23. The only use he had made of the land in dispute was to cut saw logs, poles, ties and pulpwood thereon at different times during forty years. Neither the exact location, the time of such cutting, nor the quantity cut is stated, but the fair inference from his testimony is that the operations were small and occurred at irregular intervals. They "comport far more nearly with acts of mere trespass than to actual occupation and possession." *Webber* v. *Barker*, 121 Me., 265.

But defendant contends that while the evidence would not sustain a finding that adverse possession at common law of the five hundred thirty-six acres of woodland had been proved, he is nevertheless entitled to a verdict by reason of the provisions of Sec. 10, Chap. 119, R. S. 1930:

> "To constitute a disseizin, or such exclusive and adverse possession of lands as to bar or limit the right of the true owner thereof to recover them, such lands need not be surrounded with fences or rendered inaccessible by water; but it is sufficient, if the possession, occupation, and improvement are open, notorious, and comporting with the ordinary management of a farm; although that part of the same, which composes the woodland belonging to such farm and used therewith as a woodlot, is not so enclosed."

The case therefore resolves itself into a single simple proposition. May one who acquires title by adverse possession to a twenty-two acre clearing in the forest sustain a claim of ownership to nearly a square mile of adjoining timberland simply because he has at various times during forty years cut an uncertain quantity of logs therefrom and converted them to his own use? The question answers itself. There is nothing in the record which would justify the conclusion that defendant's use of the premises in question "comported with the ordinary management of a farm," or that this extensive property was a mere woodlot, appurtenant to the modest estate which by praiseworthy energy and industry defendant and his wife had carved out of the wilderness.

Holden v. *Page*, 118 Me., 245, and *Power Co.* v. *Rollins*, 126 Me., 306, are relied upon by defendant. These cases are authority

for the statement that "when land is contiguous to improved and cultivated land and commonly used therewith for fuel, fencing, repairs or pasturing, it is no longer wild land." This statement of the law is unquestionably correct when applied to the facts involved in those cases, and title to such land may be acquired under the terms of the statute above referred to. But that statute, being in derogation of common law, must be strictly construed and it by no means follows that all land contiguous to improved and cultivated land to which title has been gained by adverse possession ceases to be wild land and becomes a woodlot in the purview of the statute simply because the owner of the improved land has cut fuel or fencing or lumber for repairing from a portion of it or used a part of it for pasture.

To so hold would enable a settler on a ten acre lot to acquire title to an entire township of timberland by exercising a limited dominion over a small portion of it. The land must be used in connection with the farm and be of such an extent and nature as to become a part thereof. Its use by the owner of the farm must be as a woodlot. The statute must be given a reasonable construction and the cases in which it has been considered by this Court have been decided on that basis.

While it is impossible to exactly define the line of demarcation between a woodlot and a tract of wild land, yet as a practical matter, there is usually no difficulty in distinguishing one from the other. There certainly is none in the case at bar. Evidence was offered tending to show that between 1903 and 1920 approximately 1,500,000 feet of logs were cut from this lot by parties holding the record title, and that it is heavily wooded at the present time. It could not be reasonably said that the five hundred thirty-six acres of timberland belonged to the twenty-two acre farm or, in the language of the statute, were "part of the same." *Adams* v. *Clapp*, 87 Me., 321. The size of the tract, the quantity of timber growing thereon, and the use made of it by defendant, are inconsistent with the ordinary conception of a woodlot. It was apparently wild land.

The testimony was voluminous and confusing. The simple issue involved was obscured by many controversies concerning collateral and unimportant matters. A study of the entire record, even

when viewed most favorably for the defendant, leads to but one conclusion. The verdict is not supported by the evidence.

Motion sustained.

MADELYN E. COUSENS *vs.* THEODORE S. WATSON, ET ALS.

Cumberland. Opinion November 18, 1931.

CONTRACTS. BROKERS.

A customer's written agreement that his stockbroker might sell securities from time to time carried in his account on margin whenever the margin was insufficient, without demand for additional margin or notice to the customer, while unilateral as executed becomes by the broker's acceptance a completed contract binding both parties.

The broker, in selling, under such contract, for insufficiency of margin must exercise proper regard for the customer's interests.

In the case at bar, the plaintiff's claim that the marginal agreement was modified by a later agreement was not borne out by the evidence. When, because of the market recession, the margin of the plaintiff became impaired, the obligation of the defendant to hold the stock ceased.

There was no evidence to warrant a finding that defendants did not act fairly or with proper regard to the interest of their customer.

On report. An action on the case for breach of contract. The cause was reported from the Superior Court for the County of Cumberland at the September Term, 1931, for determination by the Law Court upon the law and facts and upon so much of the evidence as was legally admissible.

Judgment for defendants. The case fully appears in the opinion.

Skillin, Dyer & Payson, for plaintiff.

Drummond & Drummond,

William B. Mahoney,

Theodore Gonya, for defendants.

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

DUNN, J. This case is here on report. This court is to say, from the legally admissible evidence, what the facts are, they being in dispute, and to apply the law to the facts, in final determination.

Defendants are stockbrokers, having offices in New York and Portland, who purchased Cities Service stock, by direction of the plaintiff, in various transactions, on margins, in contemplation of actual delivery to her.

The basic question of the case is:

Did defendants sell the stock on May 5, 1930, for insufficiency of margin, without notice to the plaintiff, after promising her that the stock would not be offered for sale on that day?

The answer to that question depends upon the action taken by the plaintiff's husband, William A. Cousens, as her agent, and James R. Hawkes, the manager of the Portland office of the defendants, on Saturday, May 3, 1930.

On that Saturday, a few minutes before, or after, the hour of twelve o'clock, meridian, the closing time on Saturday of the New York stock exchange, Mr. Cousens knew that, because of a decided fall in the price of shares, the marginal deposit had become exhausted, and that more margin was required.

The plaintiff, when her dealings with defendants were begun, signed and delivered to them, a writing, the material part of which is as follows:

"Portland, Me., Oct. 15, 1929,

Watson & White,

Dear Sirs:

I hereby consent: . . . . . that on all marginal business you may close transactions and may sell all securities from time to time carried in my account or deposited to protect the same whenever the margin may be deemed insufficient by you, all without demand for margin, notice of the closing or of sale or of the time or place thereof."

The instrument was signed by the plaintiff only, but acceptance by the defendants completed the contract.

Upon plaintiff's deposit becoming inadequate, defendants could have agreed, as plaintiff charges they did agree, that they would

not immediately sell her stock, but would defer selling, to afford her opportunity to procure margin.

Whether, at the conference at noonday on May 3, there was mere notice by Mr. Hawkes that further margin was requisite, not stating the amount, to which Mr. Cousens rejoined he had securities to the market value of approximately $8,000 — or inquiry by Mr. Hawkes regarding what amount Mr. Cousens could raise, reply being $8,000, which the former asked the latter to bring in, not in full of marginal requirement, but on account — is in conflict in the testimony.

But, whatever the fact about it may be, the brief of counsel for the plaintiff frankly concedes inference to be fairly warranted that Mr. Hawkes was given to understand that Mr. Cousens would deposit $8,000 during the afternoon of May 3.

No deposit was made.

Mr. Cousens testifies that he went to the bank where his safety deposit box was, only to find the bank closed. There is testimony later, it may here be marked, that the bank was open, as customary, on Saturday evening.

At three o'clock in the afternoon, Mr. Cousens was again in defendants' office, coming from his home by request. Mr. Hawkes, when Mr. Cousens entered, was in telephonic communication with the New York office, concerning the Cousens account.

Once again, statements of witnesses conflict.

Mr. Hawkes' testimony is (1) that he asked Mr. Cousens for the $8,000, and the latter answered that he would go out and get it; (2) that he told Mr. Cousens there had been call from the New York office since noon for the total marginal requirement of $22,000; (3) that Mr. Cousens said that he would go to Bangor, where he thought he could get a loan on timberlands, and that he would advise Mr. Hawkes before the opening of the market on Monday, how the loan was progressing, that he might "verify with the bank and let New York know." Mr. Cousens left the office, but did not return up to midnight, to which time Mr. Hawkes attests he remained to receive the promised $8,000. On Saturday night or Sunday, he attempted to get in communication with Mr. Cousens by telephone, but was unsuccessful.

The version of Mr. Cousens is that when he stepped into the office Mr. Hawkes was telephoning; that Mr. Hawkes put his hand over the transmitter, and addressing the witness, said, "He wants to know how much money you can give him; tell him $8,000." "I," to quote the reply, "said yes."

Mr. Cousens says it was he himself, and not Mr. Hawkes who observed that the safety of the account called for more than $8,000; that he would feel easier if the deposit should be at least $20,000, and that it was probable he could procure money at Bangor. On his story, he was to get in touch with Mr. Hawkes from Bangor, not in advance of the market opening, because "it might not be fitting," that is, it might conflict with other business, but as early as he could, on Monday.

Mr. Cousens had with him a letter he had written to Mr. Hawkes, which he did not leave, but later mailed under registered cover, to reach the addressee on Monday morning. The letter recited, in substance, that a loan was to be negotiated, that the writer was obliged to go to Bangor, that he would be heard from again on Monday, and "warned or requested" that the account be not sold out in the meantime, and concluded, "Am absolutely financially responsible."

When the letter was received, Mr. Cousens was in Bangor, having gone to that city on Sunday, and his whereabout there was not known to Mr. Hawkes. Telephone calls to all the Bangor banks failed to locate him.

On Monday afternoon, at seven minutes before one o'clock, Mr. Cousens telegraphed Mr. Hawkes:

"Matters working O.K. Delayed some account check up."

Except for this, he remained silent that day. Tuesday, while still in Bangor, he obtained from a sister of his, bonds to the amount of $18,000. At eleven o'clock in the forenoon, he telephoned a Mr. Gilliatt, in Portland, and inquired how matters stood. He was told of the sale the day before.

Wednesday (the defense says Thursday), in Portland, Mr. Cousens personally protested the sale, and told Mr. Hawkes he was prepared to take care of the account. Mr. Hawkes said the stock had been sold. Plaintiff, nor her agent, neither tendered margin nor demanded stock.

Mr. Cousens went to New York and talked with the defendants, and upon returning to Portland wrote the local office, an effort which proved futile, to effect a compromise and reinstate the account. To speak further of this is unnecessary.

On May 16, 1930, Mr. Cousens asked the Portland office for the balance of the account, in other words, for the amount remaining to the credit of the plaintiff, after discharging her indebtedness to the defendants, on the close by them of the marginal transactions.

A check was drawn to the order of the plaintiff for $2,414.58. She accepted and endorsed the check; her husband also endorsed it. The check was paid by the bank on which it was drawn.

Such, in summary, is the evidence.

The rights of the parties were initiated by the marginal agreement. Unilateral as executed, it became, as has been noticed before, mutually dependent, and bound both plaintiff and defendants.

Defendants undertook and agreed, on their part, to carry and hold such stock as they might buy for the plaintiff, so long as her margin was kept good against the fluctuations of the market. This is unquestioned.

Counsel for plaintiff argue, however, that marginal agreement was modified, or at least action on May 3, 1930, was such as to estop the defendants from selling the stock on the next business day, in the absence of prior notice to the plaintiff, without responsibility in damages.

The argument is a strong one, but the case is too weak to bear it. The evidence does not preponderate in favor of the plaintiff.

When, because of the market recession, the margin of the plaintiff became impaired, the obligation of the defendants to hold the stock ceased.

Although not obliged by the contract to give notice of marginal shortage, defendants did so. Upon failure of plaintiff to make further deposit, right to sell the stock became absolute.

In selling, the defendants were bound to act fairly and with proper regard to the interests of the plaintiff. There is no evidence to warrant finding that they did not do so.

On the authority of the report, the entry will be,

Judgment for defendants.

EDWARD D. FLYNN *vs.* WILLIAM J. CURRIE.

Aroostook. Opinion November 19, 1931.

BILLS AND NOTES. EVIDENCE.

The validity of a check negotiated outside of this state, but dated at a place in this state and drawn on a Maine bank, depends on the laws of this state.

A check is not invalid for the reason only that it is postdated, providing this is not done for an illegal or fraudulent purpose.

Where the drawer of a check stops payment thereon, he is liable to the holder of the check for the consequences of his conduct. In such event the situation is the same as if the check had been dishonored and notice thereof given to the drawer. The effect, so far as the drawer is concerned, is to change his conditional liability that he will pay the check according to its tenor if the drawee (bank) does not, to one free from the conditions; his position becomes like that of the maker of a promissory note due on demand, except so far as delay in presentment may have caused his loss.

In this case at bar the questions, whether or not the check was tainted by illegality, and whether or not the plaintiff took the check as a holder in due course without knowledge, were for the jury.

On exception by defendant. An action of assumpsit on a check, brought by the endorsee against the maker, who stopped payment. At the close of the evidence, the jury was ordered to return a verdict for the plaintiff, and defendant excepted.

Exception sustained. The case fully appears in the opinion.

Thomas B. Dougherty,
Bernard Archibald, for plaintiff.
N. H. Solomon,
A. S. Crawford, Jr., for defendant.

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

DUNN, J. This is an action of assumpsit on a check. It was brought by the endorsee against the maker, who stopped payment.

The plea is the general issue, and there is brief statement of special matter of defense, the nature of which will presently be apparent.

At the close of the evidence, the jury was ordered to return a verdict for the plaintiff, and defendant excepted.

The question presented is whether, upon any reasonable view of the evidence, the jury could have found a verdict for the defendant.

The check, though it appears to have been negotiated outside this State, bears upon its face every mark of a transaction to be performed in Maine. It was dated at Houlton, and drawn on a Houlton bank. Validity depends upon the laws of the State of Maine.

A check is a negotiable instrument. R. S., Chap. 164, Sec. 185. The instrument is not invalid for the reason only that it is post-dated, provided this is not done for an illegal or fraudulent purpose. R. S., Chap. 164, Sec. 12. Checks are equivalent to drawers' promises to pay. *Foster* v. *Paulk*, 41 Me., 425; *Merrill Trust Company* v. *Brown*, 122 Me., 101.

Where the drawer of a check stops payment thereon, he is liable to the holder of the check for the consequences of his conduct. In such event the situation is the same as if the check had been dishonored and notice thereof given to the drawer. The effect, so far as the drawer is concerned, is to change his conditional liability that he will pay the check according to its tenor if the drawee (bank) does not, to one free from the condition; his position becomes like that of the maker of a promissory note due on demand, except so far as delay in presentment may have caused him loss. R. S., Chap. 164, Sec. 184. *Patterson* v. *Oakes* (Iowa 1921), 181 N. W., 787.

There is undisputed evidence that the defendant, a resident of Houlton, personally purchased one hundred and forty-one gallons of that kind of intoxicating liquor known as alcohol, on July 15, 1930, in the Province of New Brunswick, Canada, for $950. He gave his check, dated July 19, 1930, to the order of the seller, one John H. Murray, in payment.

On purchase, the alcohol was transported to a point within eight miles of the international boundary line, and stored in an ice house.

Triers of fact might find, from the evidence, that the defendant bought the alcohol, intending to resell it, in violation of the prohibitory liquor statutes of Maine; but nothing shows that the liquor, or any of it, was ever brought into Maine.

The jury could have found that Mr. Murray, the payee, endorsed the check in blank, and left it with a hotel clerk, to be handed to Mr. Flynn, the plaintiff, whom Mr. Murray testifies he "just knew when he saw him"; and that Mr. Flynn thus acquired the check in payment of a preëxisting debt. An antecedent indebtedness constitutes value, and is sufficient consideration to support a simple contract. R. S., Chap. 164, Sec. 25; *Jordan* v. *Goodside*, 123 Me., 330.

The plaintiff himself did not testify.

Mr. Hartley, a New Brunswick barrister, introduced as a witness by the defense, testified that, in his country, on the day of the date of the sale of the alcohol, only the Government could have made a legal sale of intoxicating liquor.

The plaintiff, the defense tacitly concedes, made a *prima facie* case. The defense then introduced evidence. It is the contention of counsel that such evidence, assuming it true and giving it full probative value, tends to prove, directly and by inference, that the affair had the vitiating taint of illegality.

Counsel for plaintiff replies that contention goes too far. He argues that, whatever may be the original fact, the evidence falls short of tendency to establish that plaintiff was acquainted therewith. Insistence is that evidence shows that plaintiff took the check, as a holder in due course, without actual knowledge of any infirmity of consideration, or of such facts that his action in taking the instrument amounted to bad faith. Hence, plaintiff claims his title to be free from equities or defenses as between his transferrer and the drawer. That is the issue for determination; it is a question of fact.

The case was for the jury.

Exception sustained.

WALTER COPP *vs.* RALPH PARADIS.

Somerset. Opinion November 20, 1931.

MASTER AND SERVANT. NEGLIGENCE. EVIDENCE. BURDEN OF PROOF.

The relation of master and servant arises out of contract, and the assent of both parties is essential.

The employer has the right to select his employees and this right of selection lies at the foundation of his responsibility for their acts.

The relation of master and servant can not be imposed upon a person without his consent.

A master is liable to third persons for damages resulting from his servant's negligence while acting in the course of his employment, but the relation of master and servant at time of and in respect to the acts complained of must be shown.

The relation of master and servant may grow out of a servant's invitation or permission to another to assist him in the work with which he has been intrusted, if the servant be clothed with express or implied authority therefor.

Authority of a servant to employ an assistant, if not express, may be implied from the nature of the work to be performed or when an emergency arises requiring assistance or from the general course of conduct of the business of the master by the servant for so long a time that knowledge or consent on the part of the master may be inferred.

Where, however, a servant employs another to perform or assist him in the performance of his work without express or implied authority from or a subsequent ratification by his employer, the relation of master and servant between the employer and the assistant does not exist; but the employer is not, however, necessarily absolved from liability.

While an employee can not create the relation of master and servant between his employer and an assistant whom without authority he substitutes for himself in the employer's business, still if the negligence of the employee, in so engaging an assistant who is incompetent or in failing to supervise such an assistant be he competent or incompetent, is a proximate cause of the damage complained of, the employer is liable although the assistant's negligence in the presence of the employee, and in combination with his negligence, contributed proximately to the accident.

The burden of proof is on the plaintiff to sustain his allegations of negligence by prima facie *proof.*

In the case at bar, assent or authority from the defendant to his driver to permit a substitute operator to drive the truck could not be implied from the evidence.

No emergency was disclosed nor any general use of substitute drivers in defendant's business which warranted inference of his knowledge or consent to the employment of an assistant on this trip.

There was not *prima facie* proof that the assistant permitted to drive was incompetent, and the facts in evidence indicated that the collision resulted from a sudden and unexpected swerve of the truck, or a like failure to turn it away from the plaintiff's car sufficiently to clear the rear end, giving the original driver no reason to foresee the accident nor opportunity to avert it.

The negligent act of the assistant operating the car being so sudden or unexpected that the original driver had no reason to foresee nor opportunity to avert it, he can not be deemed negligent.

On exception by plaintiff. An action on the case to recover property damage occasioned by the alleged negligent operation of defendant's motor truck resulting in a collision between the truck and plaintiff's automobile. Defendant's truck was being operated by a person invited to ride, and permitted to drive by the defendant's servant. At the close of plaintiff's case a nonsuit was entered to which plaintiff excepted.

Exception overruled. The case fully appears in the opinion.

Bernard Gibbs, for plaintiff.

Butler & Butler, for defendant.

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

STURGIS, J. Action on the case to recover property damages resulting from the negligent operation of the defendant's truck by a person invited to ride and permitted to drive by the defendant's servant. At the close of the plaintiff's case, a nonsuit was entered and exceptions reserved.

The evidence warrants the finding that, on September 5, 1930, the defendant's truck driver, Arthur Tancread, having been ordered to haul a load of supplies from Lewiston to Dead River, in-

vited a friend, Leo Carpenter, to accompany him. Tancread drove until they stopped for gas on the return trip, when he permitted Carpenter to take the wheel and the latter was driving when the truck collided with the plaintiff's car. The defendant had given Tancread no express authority to invite Carpenter to ride with him or to drive and had no knowledge of his presence in the truck until he met it on its way to Dead River with the men in it. Tancread was then driving and, so far as the record shows, the defendant passed without speaking. When the collision occurred, the plaintiff himself was in the exercise of due care but the substitute operator was negligent.

The relation of master and servant arises out of contract and the assent of both parties is essential. Every person has a legal right to work for whom he pleases. The employer has the right to select his employees, and his right of selection lies at the foundation of his responsibility for the acts of his employer. The relation of master and servant can not be imposed upon a person without his consent. *Eaton* v. *European & North American Railway Co.*, 59 Me., 520; *Butler* v. *Mechanics' Iron Foundry Co.*, 259 Mass., 560, 54 A. L. R., 849; *Haluptzok* v. *Great Northern Railway Co.*, 55 Minn., 446; *Kirk* v. *Showell F. & Co., Inc.*, 276 Penn., 587.

A master is liable to third persons for damages resulting from his servant's negligence while acting in the course of his employment, or as it is sometimes expressed, within the scope of his authority, but the relation of master and servant at the time of and in respect to the acts complained of must be shown. *Karahleos* v. *Dillingham*, 119 Me., 165; *Maddox* v. *Brown*, 71 Me., 432. This relation may grow out of a servant's invitation or permission to another to assist him in the work with which he is entrusted if the servant be clothed with authority therefor, either express or implied. In such a case, the servant is held to have acted within the scope of his employment and the assistant, for the time being, to be the master's servant, for whose negligent acts he is liable. Such authority to employ an assistant, if not express, may be implied from the nature of the work to be performed or when an emergency arises requiring assistance or from the general course of conduct of the business of the master by the servant for so long a time that

knowledge or consent on the part of the master may be inferred. 18 R. C. L., 785; *Butler* v. *Mechanics Iron Foundry Co.*, supra; *Hollidge* v. *Duncan*, 199 Mass., 121; *Haluptzok* v. *Great Northern Railway Co.*, supra; *Kirk* v. *Showell F. & Co., Inc.*, supra.

The converse of the rule just stated is equally true. Where a servant employs another to perform or assist him in the performance of his work, without express or implied authority from or a subsequent ratification by his employer, the relation of master and servant between the employer and the assistant does not exist and the liability of the employer can not be predicated on that relation. *Emison* v. *Wylam Ice Cream Co.*, 215 Ala., 504; *Thyssen* v. *Ice & Storage Co.*, 134 Iowa, 749; 13 L. R. A. (N. S.), 572; *Haluptzok* v. *Great Northern Railway Co.*, supra; *Board of Trade, etc.* v. *Cralle*, 109 Va., 246; 39 Corpus Juris, 1272.

An examination of the decided cases, however, discloses a general acceptance of the view that, while the relation of master and servant does not exist between the employer and an assistant engaged by his servant, without previous authority or subsequent ratification, the employer is not necessarily absolved from liability for the results of the assistant's negligence. The courts accepting this doctrine are not in accord as to the circumstances which will impose liability or the reasons which underlie their conclusions.

The liability of the master is affirmed, in some cases where this question arises, on the ground of "constructive identity," as it is termed, and it is held that, where a servant to whom is entrusted the operation of his master's automobile, without authority or ratification, permits another in his presence to drive it in furtherance of the master's business, the master is liable for the results of the driver's negligence on the theory that the driver is an instrument in the hands of the servant. *Emison* v. *Wylam Ice Cream Co.*, supra; *Gibbons* v. *Naritoka*, 102 Cal. App., 669; *Indianapolis* v. *Lee*, 76 Ind. App., 506; *Thixton* v. *Palmer*, 210 Ky., 838; *Hendler Creamery Co.* v. *Miller*, 153 Md., 264; *Geiss* v. *Twin City Taxicab Co.*, 120 Minn., 368; *Slothower* v. *Clark*, 191 Mo. App., 105; *Thomas* v. *Lockwood Oil Co.*, 174 Wis., 486. These cases seem to hold that the negligence of the assistant in the presence of the servant imposes liability on the master without regard to whether the

negligence of the servant was also a proximate cause. An extended discussion of this broad theory of constructive identity and the supporting cases appears in the Annotation appended to the report of *Thixton* v. *Palmer*, supra, in 44 A. L. R., 1382.

In *Grant* v. *Knepfer*, 245 N. Y., 158, 54 A. L. R., 845, the rule just stated is somewhat qualified, and properly so, we think. Although the decision is finally based on Highway Law, Sec. 282 — e, the reasons and conclusions of that Court, in its discussion of the common law rule, are most instructive. It is there said that, while the unauthorized selection of any substitute by an employee, entrusted with the operation of his employer's automobile is a wrong to the employer, even so, the employer is not, at common law, relieved of liability to the public for negligence assignable to the employee, who still remains in the car with general power and authority of supervision and control. The employee may be found negligent in placing at the wheel a substitute without skill or experience in the management of cars, or in failing to properly supervise the operation thereafter and intervene to avert the loss when intervention would avail. However, "it is not negligence towards the public if the substitute is competent, perhaps more competent than the servant, and there is no failure thereafter of fitting supervision." The employee can not be deemed negligent nor liability attach to the employer if a competent substitute is "inattentive or remiss at a time when intervention by the servant would have been of no avail. The act of negligence may be 'so sudden or unexpected' that there is no reason to foresee it nor opportunity to avert it." Judge Cardozo, in stating the opinion of the Court, says, "The basis of liability is always the negligence of the servant. If such negligence exists and is found to be an effective cause, it does not lose its significance as a basis of liability because it may be found to be combined with the negligence of the substitute." In holding that the defendant would be liable at common law, that judgment of the Court is based "upon the ground that the negligence of the servant, though it fused with the negligence of the substitute, may none the less be found to have been the cause of the collision."

In *Thyssen* v. *Ice & Storage Co.*, supra, that Court, referring to

the authorities supporting the broader rule of liability already noted, says:

> "But, generally speaking, we think the rule of these authorities is not grounded upon the thought that one who assists a servant becomes thereby a servant of such servant's master, except it be in cases where we may find express or implied authority in the servant to employ or permit the assistance so rendered. In the absence of such authority, the one safe and logical ground upon which to rest the liability of a master for the negligence of a volunteer assistant of his servant is the negligence of the servant in inviting or permitting a stranger to perform or assist in the performance of the work which was intrusted to his own hand. Where such negligence is shown with injury proximately resulting therefrom to a third person, who is himself without fault, the master is liable under the familiar rule which imputes to him the negligence of the employee in the course of his employment."

In *Ricketts* v. *Thos. Tilling, Ltd.* (1915), 1 K. B., 644, the driver of a motor omnibus, sitting on the box, permitted the conductor, who was not authorized to drive and was inexperienced and incompetent, to operate the vehicle. Through the negligent driving of the conductor, the omnibus mounted the pavement and injured several pedestrians. Buckley, L. J., said:

> "It seems to me that the driver, who was authorized to drive, had the duty to prevent another person from driving, or, if he allowed another person to drive, to see that he drove properly. He was sitting beside the conductor and the driving by the conductor was conducted in his presence. * * * It is a question for the jury whether the effective cause of the accident was that the driver committed a breach of his duty (which was either to prevent another person from driving or, if he allowed him to drive, to see that he drove properly, or whether the driver had discharged that duty."

Pickford, L. J., observes:

> "It is admitted that the driver was sitting by the man who was driving and he could see all that was going on — he could

> control what was going on. It seems to me that the fact that he allowed somebody else to drive does not divest him of the responsibility and duty he has towards his masters to see that the omnibus is carefully, and not negligently, driven. * * * Where a man is entrusted with the duty of driving and controlling the driving of a motor omnibus and is setting alongside a person who is wrongfully driving and the motor omnibus is negligently driven and thereby an accident happens, there is evidence at any rate of negligence on the part of that driver in having allowed that negligent driving. I do not at all say that on an investigation of the facts it might not appear that the act of negligence was so sudden and unexpected that he had no reason to see it; and therefore it would come back to the question of whether he was responsible for allowing the other man to drive."

Liability is here predicated solely on the negligence of the servant and subject to the limitations stated in *Grant* v. *Knepfer*, supra, which, in some measure, bases its conclusions upon this decision of the English Court.

In *Engelhart* v. *Farrant & Co.* (1897), 1 Q. B., 240, the same principle is affirmed, and it is there held that a master may be liable for the negligence of his servant whereby opportunity is given for a third person to commit a negligent act immediately producing the damage complained of, if the original negligence of the servant was an effective cause.

Our attention is called to *Butler* v. *Mechanics Iron Foundry Co.*, supra, as a case in direct conflict with the view affirmed in *Grant* v. *Knepfer*. A careful reading of the opinion of the Court, however, does not convince us that the case has that status. There, the defendant's truck driver was instructed "to have nobody ride on the trucks." He, however, permitted a licensed chauffeur to ride and to operate the car in his presence, through whose negligence the plaintiff was injured. The opinion expressly states that no negligence on the part of the driver is shown to have contributed to the accident, it being wholly the fault of the substitute, which could not have been prevented by the driver. The case seems to turn, however, upon the lack of the employee's authority to delegate his

duties to a substitute, and thereby create the relation of master and servant between the employer and the substitute. If this conception of the grounds on which this case is decided is correct and any significance may be attached to the express mention of the absence of negligence on the part of the servant, we are not convinced that the Massachusetts Court is as yet committed to a repudiation of the present New York and English common law rule.

Nor is it clear that other cases cited present the conflict of opinion attributed to them. Some have been challenged or distinguished. In *Ricketts* v. *Thos. Tilling, Ltd.*, supra, it is noted that the single question involved in *Gwilliam* v. *Twist* (1895), 2 Q. B., 84, was whether there was a necessity for the employment of an assistant from which liability could be imposed upon the master under the doctrine of implied authority, and it is also pointed out that in *Beard* v. *London General Omnibus Co.* (1900), 2 Q. B., 530, there was no proof that the employee was negligent or that he was present when the substitute caused the loss. *Armstrong* v. *Sellers*, 182 Ala., 582, is subject to the recent adoption in *Emison* v. *Wylam Ice Cream Co.*, supra, of the broad and unqualified theory of constructive identity. In *White* v. *Levi & Co.*, 137 Ga., 269, the case turns on the lack of authority, express or implied, for the employment of an assistant by a servant, but the absence of the servant, at the time the negligence occurred, is noted. *Clough* v. *Company*, 75 N. H., 84, does not seem to be in point. And *Board of Trade Bldg. Corp.* v. *Cralle*, supra, must be read in the light of *Ches. & O. R. Co.* v. *Swartz*, 115 Va., 723.

We are impressed with the reasons underlying the New York and English rule. That concept of the law seems more logical than the broad theory of constructive identity or the denial of any liability unless the person directly causing the injury stands in the relation of servant to the master. We are of opinion that at common law, which prevails in this state, the sound rule is that, while an employee can not create the relation of master and servant between his employer and an assistant who, without authority, he substitutes for himself in the employer's business, still, if the negligence of the employee in so engaging an assistant who was incompetent or in failing to supervise such an assistant, be he competent or in-

competent, is a proximate cause of the damage complained of, the employer, is liable although the assistant's negligence in the presence of the employee and in combination with his negligence contributed proximately to the accident.

Applying the foregoing rules to the record before us, we find no error in the ruling below. With the burden on the plaintiff to sustain his allegations of negligence by *prima facie* proof, upon a most favorable view of his evidence, he shows no authority in the defendant's driver to permit his friend Carpenter to operate the truck. Assent to Carpenter's driving can not be fairly inferred from the defendant's discovery of his presence when he passed it on the highway. Tancread was then driving and there was nothing to indicate that he would surrender the wheel. The trip was not so long nor the load so heavy as to require a second driver and no emergency is disclosed. No more is there proof of any general use of substitute drivers in the defendant's business which warrants an inference of his knowledge or consent to the employment of an assistant on this trip.

The evidence does not support the charge that Carpenter was an incompetent driver. No witness testifies as to his knowledge or experience with automobiles and we are not impressed with the view that a legitimate inference of incompetency can be drawn from the incidents of this accident. The cars met at night at or near a culvert where the road was fifteen feet wide. The rear end of the truck undoubtedly hit the left forward wheel of the plaintiff's car. The plaintiff's assertion that his car was at the right of the middle of the traveled part of the road warrants an inference that Carpenter was negligent and no more. A competent driver might well have been as remiss in his duty and brought the same misfortune to the plaintiff. Incompetency is a matter of conjecture.

Nor can the defendant's driver be deemed negligent because of his failure to supervise his assistant's operation of the car. There is nothing in the evidence to indicate that a collision was anticipated by either party. The course of the two cars or their relative positions on the highway just before the accident is not shown with any degree of certainty. The facts attending the collision, which do appear, are consistent with the sudden and unexpected

swerve of the truck or a like failure to turn it away from the plaintiff's car sufficiently to clear the rear end. There is no determining factor in the case which leads to a contrary conclusion. Under the rule, if the operator's act of negligence was so sudden or unexpected that the driver had no reason to foresee it nor opportunity to avert it, he can not be deemed negligent. Nor can liability attach to the employer.

For the reasons stated, upon the evidence introduced by the plaintiff, the presiding Justice properly ordered a nonsuit. His ruling must be sustained.

Exceptions overruled.

VIOLA DAVIS *vs.* SADIE F. OLSON.

Hancock. Opinion December 7, 1931.

EXCEPTIONS.

In a cause brought to the Law Court on exceptions only such evidence, exhibits, or reports can be considered as are incorporated in and made a part of the bill of exceptions.

On exception by plaintiff. An action of assumpsit on an account annexed.

To the exclusion of certain sheets of paper, offered in evidence by plaintiff as the original entries of the items contained in the account, plaintiff seasonably excepted.

Exception overruled.

The case sufficiently appears in the opinion.

Ward & Shaw,

H. L. Graham, for plaintiff.

George E. Thompson,

Maxwell & Conquest, for defendant.

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

BARNES, J. Suit was brought in 1929 to recover a balance claimed for money and merchandise on an account current for more than five years. The declaration was on account annexed.

Plaintiff died before hearing, and the case was brought to trial and is prosecuted by her executrix.

At the trial, April Term, 1931, "three separate sheets of paper" were offered in evidence as the original entries of the items contained in the account annexed to the writ.

What the sheets would show was supplemented by testimony that the words and figures on the several sheets were written by the plaintiff.

But it appeared in testimony that more than was contained in the memoranda may have been incorporated in the count in the writ.

The witness was of counsel in the case, and argued before this Court.

He testified that the plaintiff took the three sheets from her pocketbook, in his office, and handed them to him during an interview previous to the bringing of the suit.

When asked whether from that memoranda he prepared the account sued on, he replied: "I did from that memoranda and I won't say positively whether all the account which I prepared is on that memoranda, but while she was there I prepared the account from the memoranda, and possibly from her memory, I wouldn't say."

On objection the sheets of paper were excluded, and exceptions taken.

The Justice, at trial, had before him the memoranda sheets. He had in mind the previous rulings of this Court on the question of their admissibility as expressed in *Mansfield* v. *Gushee*, 120 Me., 333 and the authorities there cited.

If we are to review his finding it is a prime essential that the sheets offered in evidence be made a part of the bill of exceptions. This has not been done. They are not before us. Without the papers that were excluded we can not overrule the trial court.

Exceptions overruled.

LEE TIRE & RUBBER COMPANY.

vs.

SNOW HUDSON CO., INC., AND
BLAISDELL AUTOMOBILE CO., TRUSTEE.

Knox. Opinion December 14, 1931.

BULK SALES ACT. EQUITY. SUBROGATION.

In conveyances of goods in violation of the Bulk Sales Act, as to the vendor and vendee and all the rest of the world except creditors of the vendor, the title passes, but as to such creditors the legal title has not passed, and they may proceed by trustee process against the goods in the vendee's possession or against the proceeds to the value thereof in case of resale.

Goods so conveyed in violation of the Bulk Sales Act, or the value thereof in case of resale, in equity or upon trustee process, are treated as held by the vendee in the nature of a trust fund for all the creditors, and the vendee, having in good faith paid any of the creditors their respective pro rata shares of the value of the goods, is entitled to be subrogated to the rights of such creditors therein and is liable only to unpaid creditors to the amount of their pro rata claims.

The doctrine of subrogation is a creature of equity and is administered so as to secure real and essential justice without regard to form, which it ignores, looking only to the substance.

The equitable principle underlying the application of the doctrine of subrogation to conveyances in violation of the Bulk Sales Act is that, if the value of the stock in trade is in fact and in good faith distributed among the vendor's creditors, it is not real and essential justice that the creditors so paid should reap the entire benefits of the transaction and the purchaser bear the loss.

It is equity that the purchaser should be substituted for the creditors to the extent at least of their pro rata claims against the stock, and the form or method of payment should not control.

In the case at bar the presiding Justice below, having found that the proceeds of the sale attacked were in fact applied to the payment of the claims of the vendor's creditors, the vendee, named as trustee in this action, was entitled to

be subrogated thereto regardless of the fact that the money passed through the vendor's hands. The real effect of the transaction was a payment by the trustee.

The plaintiff, by bringing suit against the principal defendant on its merchandise account and securing judgment thereon, had only the rights of a general creditor and was entitled only to its pro rata share of the value of the goods which the trustee purchased.

A re-computation indicates that the trustee should be charged for $19.68.

An action of debt on a judgment by plaintiff against principal defendant in which the Blaisdell Automobile Co. was alleged trustee.

This case was submitted on agreed statement of facts, and the trial Justice charged the trustee with nineteen dollars and nineteen cents ($19.19), without costs.

To his rulings and judgment the plaintiff seasonably excepted.

Exception overruled.

The case fully appears in the opinion.

Christopher S. Roberts, for plaintiff.

Allen L. Bird, for the defendant and trustee.

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

STURGIS, J. This action of debt, begun by trustee process, originated in the Superior Court. The principal defendant defaulted by agreement and the Security Trust Co., named as a trustee, was discharged. The Blaisdell Automobile Co., upon its disclosure, however, was adjudged trustee and the plaintiff reserved exceptions.

The facts appearing in the Agreed Statement, submitted below and included in the Bill of Exceptions, indicate that on September 24, 1928, the principal defendant sold its entire stock of merchandise, furniture, equipment and fixtures to the Blaisdell Automobile Co. for $4,000. The defendant then owed $19,081.69 to its unsecured creditors and the value of its stock in trade was $1,000. Neither the seller nor the purchaser made an inventory of the stock sold, nor were the creditors of the defendant notified in accordance with R. S., Chap. 123, Sec. 6, known as the Bulk Sales Act.

About a week later, the plaintiff received a letter from the de-

fendant announcing its insolvency and the sale of its stock to the trustee. A check for $17.50, dated October 2, 1928, and stated to be a 5% dividend on the plaintiff's claim, was inclosed and a further dividend promised when notes and accounts receivable were collected. In reply to this letter, on November 10, 1928, the plaintiff notified the defendant's attorney that it was unwilling to accede to the proposed liquidation and, in later correspondence, advanced the claim that its merchandise was sent to the defendant on consignment. Early in January, 1929, the plaintiff cashed its dividend check, received the preceding October, and on March 19, 1929, brought suit against the defendant on its merchandise account.

On August 12, 1929, the defendant, having proceeded with its voluntary liquidation, sent the plaintiff's attorney a check for $31.59 with the statement that the remittance was a second and final dividend of 9½% on the plaintiff's claim, reduced by the amount of the first dividend. The check, although retained, was not cashed and, on September 21, 1929, the plaintiff caused judgment to be entered in its pending suit against the defendant for $375.63. Four days later, this action of debt on that judgment was begun by trustee process and the Blaisdell Automobile Co., as also the Security Trust Co., was named trustee.

The presiding Justice hearing the disclosure found that, although the plaintiff accepted the first dividend check for $17.50, it represented a disbursement of proceeds of assets other than stock in trade, and the second and final dividend check of $31.59, which might include a pro rata division of proceeds of the stock in trade, had never been cashed. His further conclusion was that the defendant undertook in good faith to apply the proceeds of the sale of all its assets pro rata among its creditors and towards the liquidation of its indebtedness and had effected such a division except as to the plaintiff. He accepted the trustee's purchase of the stock in trade as a purchase made in good faith for full value. Upon these findings, the trustee was charged with $19.19 as being 5.11% of the plaintiff's judgment and the ratio which the value of the stock was found to bear to the defendant's total indebtedness.

The ruling below was made upon the authority of *Ticonic Na-*

tional Bank v. *The Fashion Waist Shop Co.*, and TRUSTEE, 123 Me., 509, where this Court in accord with the weight of authority holds that, in conveyances of goods in violation of the Bulk Sales Act, as to the vendor and vendee and all the rest of the world except creditors of the vendor, the title passes, but as to such creditors the legal title has not passed and they may proceed by trustee process against the goods in the vendee's possession or against the proceeds to the value thereof in case of resale. And the rule is adopted that the goods so conveyed or the value thereof, in case of resale, in equity or upon trustee process, are treated as held by the vendee in the nature of a trust fund for all the creditors, and the vendee, having in good faith paid any of the creditors their respective pro rata shares of the value of the goods, is entitled to be subrogated to the rights of such creditors therein and is liable only to unpaid creditors to the amount of their pro rata claims. Among the cases there cited are *Parham* v. *Potts-Thompson Co.*, 127 Ga., 303, 305; *Linn Bank* v. *Davis*, 103 Kan., 672; *Rabalsky* v. *Levenson*, 221 Mass., 289, 292; *Adams* v. *Young*, 200 Mass., 588, 591; *Fecheimer-Keifer Co.* v. *Burton*, 128 Tenn., 682; *Kohn* v. *Fishbach*, 36 Wash., 69.

The plaintiff, however, denies the application of the foregoing rule to the case at bar, pointing out that here the principal defendant, and not the trustee, paid the creditors. We do not think its contention should be sustained.

The Justice hearing the disclosure found, and his finding is not here questioned, that the trustee purchased the stock in trade, which the plaintiff seeks to reach, in good faith and for full value. He also found in effect, at least, that the vendor distributed the purchase price received pro rata among all its creditors, the plaintiff failing to receive its share only by reason of its neglect or refusal to cash its dividend check. If the record does not permit the inference that the payment by the vendor was made at the vendee's direction, it warrants the conclusion that it was in reality the vendee's money which passed to the creditors and enriched them at its expense.

In the *Ticonic National Bank* v. *The Fashion Waist Shop Co.*, supra, the purchase price of a stock in trade bought in violation

of the Bulk Sales Act was not paid to the vendor's creditors by the trustee, but deposited with an attorney who made the actual payments.

In *LaSalle O. H. Co.* v. *LaSalle Amus. Co.*, 289 Ill., 194, a garnishee was subrogated to the claims of creditors paid by the vendor out of purchase money received from the garnishee in a sale in violation of the Act.

In *Adams* v. *Young*, supra, the rule was applied in a proceeding in equity to set aside a sale of an entire stock in trade in violation of the Massachusetts Bulk Sales Law where the vendor, with the proceeds of the sale, paid and procured the discharge of a mortgage debt, and it was observed: "If it were necessary to pass upon that question, it would not be easy to avoid saying that they could rest also upon the mortgage which was paid and discharged. It was their money that paid the mortgage debts. The fact that the money passed through the hands of the mortgagor and the form of the transfer which the defendants took can not overcome the real effect of the transaction."

In *Fecheimer-Keifer Co.* v. *Burton*, supra, where a retail merchant sold his stock in bulk without compliance with the Bulk Sales Act and paid over the proceeds to a part of his creditors, the purchaser was subrogated to the claims of the creditors whose demands were thus paid.

The doctrine of subrogation is a creature of equity and is administered so as to secure real and essential justice without regard to form, which it ignores, looking only to the substance. The equitable principle underlying its application to conveyances in violation of the Bulk Sales Act we conceive to be, that if the value of a stock in trade so conveyed is in fact and in good faith distributed among the vendor's creditors, it is not real and essential justice that the creditors so paid should reap the entire benefits of the transaction and the purchaser bear the whole loss. It is equity that the purchaser should be substituted for the creditors to the extent, at least, of their pro rata claims against the stock. And we see no valid reason why the form or method of payment should control. The presiding Justice having found that the proceeds of the sale here attacked were in fact applied to the payment of the claims of

the vendor's creditors, we think, as in the cases noted, the Trustee was entitled to be subrogated thereto regardless of the fact that the money passed through the vendor's hands. The real effect of the transaction was a payment by the trustee.

The plaintiff, by bringing suit against the principal defendant on its merchandise account and securing judgment thereon, has only the rights of a general creditor and to its pro rata share of the value of the goods which the trustee purchased, a re-computation of which indicates that the trustee should be charged for $19.68.

The exception is overruled, but the slight mathematical error noted makes it necessary to remand the case to the court below, that judgment may be there entered for the plaintiff against the Trustee for $19.68 in accordance with this opinion.

So ordered.

IDA F. SHATTUCK *vs.* LILLIAN M. JENKINS ET ALS.

York. Opinion December 14, 1931.

EQUITY. LACHES. PLEADING AND PRACTICE.

Where a bill in equity shows such laches on the part of the plaintiff that a court ought not to give relief, and no sufficient reasons for the delay are stated, the defendant need not interpose a plea or answer, but may demur on the ground of want of equity apparent on the fact of the pleading.

The same rule applies to cross bills for relief.

If laches in prosecuting a claim or long acquiescence in the assertion of adverse rights appear on the face of a bill in equity, as against demurrer, reasons for delay which will excuse such laches or acquiescence must be set forth with sufficient certainty to apprise the court as to how the pleader or his privies remained so long in ignorance, how and when knowledge of the matters alleged first came to their knowledge and the particular means used to effect the concealment alleged so that from the pleading itself it may be determined whether by the exercise of ordinary diligence the discovery might not have been before made.

Ignorance due to negligence does not excuse laches.

In the case at bar, if the plaintiffs in the cross bill or their ancestor had knowledge of facts which would induce a reasonably prudent person to make inquiries which would have disclosed the true state of the title involved here, they are charged with the knowledge which could have been so attained. Means of knowledge are in effect the same thing as knowledge itself.

The allegation that "said Nathaniel Montgomery supposed and believed that said real estate was his own property standing in his own name" presents no justifiable cause or excuse for the laches apparent on the face of the bill in equity in this case.

Nor is the omission of a justifiable excuse for laches cured by the admissions of the demurrer, which are no broader than the allegations of the pleading and confess no conclusions of law.

It not appearing that the defects in the pleading can not be cured by further allegations, that the ends of justice may be promoted, leave to amend upon terms should be granted.

On appeal by defendants.

A bill in equity for partition.

From a ruling of the sitting Justice, sustaining a demurrer to a cross bill filed by defendants, appeal was taken.

Appeal dismissed.

Decree below affirmed.

The case remanded with leave to amend upon payment of costs.

Ray P. Hanscom, for plaintiff.

F. Roger Miller, for defendants.

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

STURGIS, J. In this proceeding in equity for partition, the defendants, Lillian M. Jenkins and Harry Montgomery, having answered, filed a cross bill denying the plaintiff's seisin with affirmative allegations of fraud and a trust resulting therefrom. Demurrer to the cross bill was sustained and that ruling comes forward on appeal.

In their cross bill, the plaintiffs, who are named defendants in the original bill, after alleging that they are the children and only heirs-at-law of Nathaniel Montgomery, late of Wells, who died in-

testate on October 29, 1927, and that his second wife, Hattie Perkins Montgomery, who was their stepmother, died intestate before her husband's decease, assert their belief that the interests or shares in the premises of which partition is here sought are claimed through title derived from said Hattie Perkins Montgomery and conclude as follows:

"6. That, on or before the thirtieth day of May, A. D. 1905, the said Nathaniel Montgomery bought the real estate mentioned in said original Bill for the sum of eight hundred and fifty dollars, ($850.00), and delivered his own money to said Hattie (Perkins) Montgomery with the understanding that she would buy said real estate with said money and take the deed thereof in his name. Yet the said Hattie (Perkins) Montgomery wrongfully purchased the said real estate with his money and took the deed thereof in her own name, a copy of which said deed is hereto attached marked 'Exhibit A.'

"7. That said Hattie (Perkins) Montgomery, (named in said deed as said Hattie A. Montgomery), paid no part of the purchase money for said property, but that the entire amount was paid by said Nathaniel Montgomery out of his own moneys, and said Nathaniel Montgomery supposed and believed that said real estate was his own property standing in his own name; and that as a matter of law there is a resulting trust for the benefit of his estate and of his heirs at law in said real estate."

Ida F. Shattuck, plaintiff in the original bill and named defendant in the cross bill, filed a demurrer and for special cause showed laches. The demurrer was sustained because on the face of the bill laches appears without any statement of a justifiable cause or excuse therefor.

It is well settled that, where a bill in equity shows such laches on the part of the plaintiff that a court ought not to give relief and no sufficient reasons for the delay are stated, the defendant need not interpose a plea or answer, but may demur on the ground of want of equity apparent on the face of the pleading. *Leathers* v. *Stewart*, 108 Me., 96, 101; *Stewart* v. *Joyce*, 201 Mass., 301;

Snow v. *Manufacturing Co.*, 153 Mass., 456; *Kerfoot* v. *Billings*, 160 Ill., 563; *Lansdale* v. *Smith*, 106 U. S., 392. The rule applies to cross bills for relief. 1 Story's Eq. Pl., Secs. 629, 630.

And it is held that reasons for delay which will excuse gross laches in prosecuting a claim or long acquiescence in the assertion of adverse rights must be set forth with sufficient certainty to apprise the court as to how the pleader or his privies remained so long in ignorance, how and when knowledge of the matters alleged first came to their knowledge and the particular means used to effect the concealment alleged, so that from the pleading itself it may be determined whether by the exercise of ordinary diligence the discovery might not have been before made. *Hardt* v. *Heidweiger*, 152 U. S., 547; *Tetrault* v. *Fournier*, 187 Mass., 58; 1 Pom. Eq. Rem., 54; 10 R. C. L., 416.

The plaintiffs do not deny that their pleadings show laches which, unexcused, denies them relief in equity. The allegations are that the wife of Nathaniel Montgomery, on May 30, 1905, used $850.00 of her husband's money to buy the parcel of real estate here involved and wrongfully took the deed thereof in her own name. It is also averred that Nathaniel Montgomery lived thereafter a little more than twenty-two years, dying on October 29, 1927, and that his wife had predeceased him. Upon the record, the plaintiffs' first attack on this transaction and claim to a resulting trust in their favor is in their cross bill of September 4, 1929. They there plead an excuse for their delay and that of their ancestor only by the allegation that "said Nathaniel Montgomery supposed and believed that said real estate was his own property standing in his own name."

If the plaintiffs may have the benefit of the inference that Nathaniel Montgomery remained ignorant until his death of the fact his wife took title to this property, no reason is advanced for the existence or long continuance of that ignorance nor the means used by his wife in her alleged fraudulent concealment. No more is it disclosed how and when the plaintiffs first gained knowledge of the facts they now allege or why they waited more than two years after death had removed the parties to the transaction before advancing the claim here made.

Ignorance due to negligence does not excuse laches. The plaintiffs and their ancestor, so far as the pleading discloses, may have remained ignorant of the facts they now allege as a ground of relief only because of their failure to exercise reasonable diligence in discovering the truth. If they had knowledge of facts which would induce a reasonably prudent person to make inquiries which would have disclosed the true state of the title involved here, they are charged with the knowledge which could have been so obtained. Means of knowledge are in effect the same thing as knowledge itself. *Trust Co.* v. *Insurance Companies*, 127 Me., 528, 539; *Steel Co.* v. *Smith & Rumery Co.*, 110 Me., 123; *Knapp* v. *Bailey*, 79 Me., 195, 204.

Tested by the rules stated, the cross bill is demurrable. As found by the sitting Justice, it contains no "statement of a justifiable cause or excuse" for the laches apparent on its face. The omission is not cured by the admissions of the demurrer, which are no broader than the allegations of the pleading and confess no conclusions of law.

It not appearing that the defects in the pleading can not be cured by further allegations and the ends of justice thereby promoted, leave to amend upon terms should be granted. The entry is,

Appeal dismissed.
Decree below affirmed.
Case remanded with leave to amend upon payment of costs.

CAMP MAQUA YOUNG WOMEN'S CHRISTIAN ASSOCIATION.

vs.

INHABITANTS OF THE TOWN OF POLAND.

Androscoggin. Opinion December 15, 1931.

RULES OF COURT.

Under provisions of rule XLII of the Supreme Judicial and Superior Courts, the right to except to a decision of a referee on questions of law may be reserved. Rule XXI, however, requires that objections to such report shall be made in writing, filed with the clerk, and shall set forth specifically the ground of the objections.

The invariable practice has been that this rule must be strictly complied with if the exceptions are to be considered. No objections in writing were filed in the case at bar in accordance with the rule.

On exception by plaintiff.

An action brought to recover from defendant town amounts paid by plaintiff for taxes for the years 1924 to 1930 inclusive.

Plaintiff claimed it was a benevolent and charitable corporation and thus exempt from taxation.

The referee before whom the case was heard found for the plaintiff. Defendant under Rule XLII of the Supreme Judicial and Superior Courts filed exception.

Exception overruled.

The case sufficiently appears in the opinion.

Benjamin B. Sanderson,

Freeman & Freeman, for plaintiff.

Tescus Atwood, for defendant.

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

THAXTER, J. This was an action brought to recover from the defendant town the taxes paid by the plaintiff for the years 1924 to 1930 inclusive with interest at six per cent. The basis of the claim is that the plaintiff is a benevolent and charitable corporation organized under the laws of Maine and is exempt from taxation.

The case was referred with right of exceptions reserved. The referee found for the plaintiff in the sum of $6,094.77; and at the September Term, 1931, this report was accepted and the defendant excepted.

Under the provisions of Rule XLII of the Supreme Judicial and Superior Courts, the right to except to a decision of a referee on questions of law may be reserved. The adoption of this rule on December 1, 1930, changed the practice which had been in force since the promulgation of Rule XLV in 1908, under the provisions of which no stipulation for a review of the finding of a referee on a question of law was permitted.

Rule XXI, which has been in effect since at least 1855, provides for the procedure which should be followed in objecting to the allowance of the report of a referee. It reads as follows:

> "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."

In this case the defendant has filed no objections in writing in accordance with this rule. The invariable practice in this state has been that there must be a strict compliance with its provisions, if the exceptions are to be considered by this court. *Bucksport* v. *Buck*, 89 Me., 320; *Witzler* v. *Collins*, 70 Me., 290; *Maberry* v. *Morse*, 43 Me., 176.

We might add, however, that were the merits of the case to be decided by us, we should be constrained to hold that the decision of the referee was correct.

Exception overruled.

JOSEPH PELLETIER *vs.* JOSEPH A. LANGLOIS ET AL.

Aroostook. Opinion December 17, 1931.

REAL ACTIONS. DEEDS. COVENANTS. ESTOPPEL. GUARDIAN AND WARD.

It is the object of the law to uphold conveyances rather than to defeat them. The law presumes that a grantor intended to convey something.

It is the general rule of law that the intention of the parties, ascertained from the deed itself, if consistent with the rules of law, prevails; and, if intention is doubtful, regard may be had to circumstances attending the execution of the instrument.

A guardian has no power or authority to bind the estate by a covenant of warranty. Such a covenant is binding upon the grantor personally.

A guardian conveying property by warranty deed binds herself and her heirs, and she and they are estopped from asserting any claim to an interest therein whether it be a present or an after-acquired interest.

In the case at bar, plaintiff's predecessor in title, Ringuette, acquired clear title to five-ninths undivided interest in the property by deed from Mrs. Martin. An additional two-ninths later passed to Ringuette when Mrs. Martin's son, Ernest, conveyed the same to her, she having given covenants of warranty in her previous deed to Ringuette. The remaining two-ninths came to Ringuette, by a new and proper guardian's deed from Mrs. Martin acting under license from the Probate Court. Plaintiff's title to the land in dispute was clear beyond question.

On exceptions by defendants. A real action to obtain title to and possession of certain real estate situated in Madawaska. Defendants disclaimed as to two-ninths in common and undivided and pleaded *nul disseizin* as to the remainder of the premises. The presiding Justice, before whom the case was heard without jury, found for the plaintiff and assessed damages at one dollar. To this finding and judgment for the plaintiff, the defendants seasonably excepted.

Exceptions overruled. The case fully appears in the opinion.

Ryder and Simpson,

H. C. McManus, for plaintiff.

F. A. Walsh,

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

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

PATTANGALL, C. J. On exceptions. Real action. Plea *nul disseizin* as to seven-ninths undivided interest in the demanded premises; disclaimer as to the remaining two-ninths. Heard before a single justice without the intervention of a jury. Right of exceptions reserved. Judgment below for plaintiff.

The case turns upon the construction of a deed given by Sophie Daigle Martin to George Ringuette, from whom plaintiff derived his title.

The land in question was originally part of lot no. 129 in Madawaska and occupied as a farm by Thomas Daigle who died intestate, leaving a widow Sophie Daigle, and adult married daughter Albertine Long, a minor daughter Eva, and a minor son Ernest. Shortly after her father's death, Albertine Long conveyed her interest in the land to her mother who had been appointed guardian of the minor children.

On September 18, 1922, the title to the property stood as follows: Sophie Daigle owned five-ninths undivided interest therein; Ernest and Eva each owned two-ninths. Lot no. 129 had been subdivided into smaller parcels, among which were two lots numbered 3 and 5, the demanded premises. On that date, Sophie Daigle as guardian of Eva and Ernest applied to Probate Court for leave to sell the interest of her wards in these two lots, and license was issued specifically authorizing the sale of "a two-thirds of two-thirds undivided interest" therein.

Prior to November 12, 1923, Mrs. Daigle married Levite Martin, and on that date she executed the following deed:

> "KNOW ALL MEN BY THESE PRESENTS that I, Sophie Martin (Nee Guerette), wife of Levite Martin of Edmundston, Province of New Brunswick, Canada, formerly of Madawaska, in consideration of Eleven Hundred Dollars paid by George Ringuette of Edmundston, New Brunswick, Canada, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said George Ringuette, his heirs and assigns forever, the following described real estate situated in the town of Madawaska, in the county of Aroostook and State of Maine, to wit: Lots of land numbered three and numbered five which as per plan is taken off of lot number one hundred twenty-nine (129) and lying on the north easterly side of the Main road leading from Van Buren to Fort Kent, and being the corner lot and one adjoining to the same the grantee having on the seventeenth day of October 1922 obtained licence from the Hon. Nicholas Fes-

senden Judge of Probate within and for the county of Aroostook and State of Maine, to sell and convey at private sale the real estate above mentioned. Said grantee in this conveyance is acting as guardian of Eva Daigle and Ernest Daigle as record shows.

"To Have and to Hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof, to the said Grantee, his heirs and assigns, to their use and behoof forever. And I do covenant with the said Grantee, his heirs and assigns, that I am lawfully seized in fee of the premises; that they are free of all incumbrances; that I have good right to sell and convey the same to the said Grantee, to hold as aforesaid, and that I and my heirs shall, and will, warrant and defend the same to the said Grantee, his heirs and assigns forever, against the lawful claims and demands of all persons.

"In Witness Whereof, I the said Grantor, Sophie Martin, and Levite Martin, husband of the said Grantor, in testimony of his relinquishment of the right to dower or title by descent in the above-described premises, for the consideration aforesaid have hereunto set our hands and seals, this twelfth day of November in the year of our Lord one thousand nine hundred and twenty-three.

Signed, Sealed and Delivered
in presence of — Sophie Martin (L.S.)
R. A. Daigle — his
wit. to mark L. M. — Levite X Martin (L.S.)
mark"

The word "grantee" was twice used inadvertently in place of the word "grantor" in the above deed, but this is obviously an error of the scrivener and is of no moment in the consideration of the case.

The parties are sharply at issue as to the effect of this deed. They agree that the interest of the minor children was not conveyed by it, if for no other reason than because the license to the guardian was limited to making a sale within one year from the date of the issuance of the license, which was the third Tuesday of October, 1922.

Plaintiff contends, however, that it was effective as a conveyance of Mrs. Martin's five-ninths interest in the property, while defendants claim that, failing to acquire the interest of the minor children by this deed, Ringuette took nothing by it.

"It is the object of the law to uphold rather than to defeat conveyances." *Wing* v. *Burgis*, 13 Me., 111. "The law presumes that the grantor intended to convey something." *Jewett* v. *Whitney*, 51 Me., 244. It is the general rule that the intention of the parties, ascertained from the deed itself, if consistent with rules of law, prevails; and if intention is doubtful, regard may be had to circumstances attending the execution of the instrument.

There is no difficulty in ascertaining the intention of the parties in the instant case, and nothing to prevent giving them effect so far as they are consistent with legal rules.

The deed contained a covenant of warranty. It purported to convey lots no. 3 and no. 5 in their entirety. The conveyance was not limited to the fractional four-ninths which Mrs. Martin was undertaking to sell as guardian. It named Mrs. Martin, as an individual, not as guardian, as grantor and was executed by her in her individual capacity, her husband joining in the conveyance. When her guardianship account was settled, four-ninths of the money paid her by Ringuette on November12, 1923, was accounted for. The balance she treated as her own. No reasonable construction can be put upon the deed other than that under the guidance of an unskilled scrivener, Mrs. Martin was endeavoring to combine in one instrument a conveyance of her interest as an individual together with the interest of her wards. She failed to accomplish the latter purpose but was successful in effecting the former.

Ringuette acquired title to five-ninths undivided interest in the property by this deed. *Bartlett* v. *Bartlett*, 4 Allen, 440; *Perkins* v. *Richardson*, 11 Allen, 538; *Sumner* v. *Williams*, 8 Mass., 162. It was binding upon Mrs. Martin, her heirs and assigns, even though she had intended to convey only as guardian, for she had no power to bind the estate by a covenant of warranty. *Allen* v. *Sayward*, 5 Me., 230; *Davis* v. *French*, 20 Me., 21; *Chapman* v. *Crane*, 20 Me., 172.

On March 22, 1924, Ernest, having attained his majority, con-

veyed by warranty deed to his mother his interest in certain real estate, including the demanded premises. Under her covenant of warranty in the former deed, the title to this interest passed at once to Ringuette. *Powers* v. *Patten*, 71 Me., 583; *Bennett* v. *Davis*, 90 Me., 457. And by this deed and the acceptance of his share of the purchase money paid by Ringuette, Ernest ratified the transfer of his interest to his mother's grantee. *Tracy* v. *Roberts*, 88 Me., 310.

When it was discovered that the earliest deed did not carry the interest of the minor children, Mrs. Martin petitioned a second time for leave to sell the same, and, license having been issued, by guardian's deed in regular form conveyed to Ringuette the two-ninths interest belonging to Eva, this deed containing the following statement: "This deed is being given this day for the purpose of perfecting title to the same property, as deed given November 12, 1923 was after the expiration of the license granted by the Court of Probate in October 1922 for one year. Having obtained a new license to convey this real estate, I do not deem it necessary to put Doc. stamps on this Document as the former deed had the amount of same required, cancelled."

This last deed closed the circle and completed Ringuette's title. He had in the meantime taken possession of the property, erected thereon a brick and cement building in which were housed a theatre and store, leased the store to these defendants and occupied the premises, either personally or through his tenants, until 1931 when he sold the property to plaintiff.

Meantime Sophie Daigle Martin had died, and, after her death, Albertine Long and Ernest Daigle conveyed to Eva Daigle all of the property which they owned as heirs-at-law of Thomas Daigle or as residuary legatees under the will of Sophie Daigle Martin. Relying upon the theory that Mrs. Martin's deeds to Ringuette carried title only to two-ninths interest in lots no. 3 and no. 5 originally belonging to her minor daughter, Eva executed a quitclaim deed of lots no. 3 and no. 5 to the defendant Langlois; and it is upon this deed that he bases his claim to ownership of seven-ninths undivided interest in the property in dispute. This contention is without merit.

Plaintiff's title is so clear that it is difficult to understand how or why any controversy arose concerning it.

Exceptions overruled.

ROBERT W. SELBERG *vs.* BAY OF NAPLES, INC.

Cumberland. Opinion December 26, 1931.

CONTRACTS. EXCEPTIONS. PLEADING AND PRACTICE.

It is not enough for an excepting party to show that a question technically admissible was excluded; he must go farther and show affirmatively that he was prejudiced by such exclusion. It must appear in the bill of exceptions or in the record that the answer would have been in favor of the excepting party, otherwise no harm could have been done. The bill of exceptions must show what the issue was and how the excepting party was aggrieved. Error must appear affirmatively.

In the case at bar, there was nothing in the bill of exceptions to indicate what the answers to the excluded questions would have been and the Law Court can not rely on inference or conjecture as to what they might have been. The first four exceptions must therefore be overruled.

The presiding Justice, however, charged the jury that the provision of the contract as to compliance with the requirements of Charles E. Eichel signified nothing more than that Mr. Eichel had a right to make regulations as to time, the kind of music at particular times, and to call for specific numbers or titles of music, and that the musicians should be able to render the various kinds of music with the ordinary skill and ability and experience of musicians. The jury was not instructed to consider the question as to whether or not the requirements disclosed in the record were reasonable or as to whether or not the plaintiff had complied with them as reasonable requirements under the facts and circumstances of the case. These questions should have been submitted to the jury and it should have been instructed that it was to consider them in connection with all the surrounding circumstances and in view of the evidence with due regard to the class of people who were to be served. Had such instructions been given, it is not impossible or unlikely that a different conclusion might have been reached. The scope of the jury's inquiry was confined within too narrow limits and defendant's exception should be sustained.

A careful consideration of the question of damages likewise discloses that the verdict was clearly excessive.

On exceptions and general motion for new trial by defendant. An action of covenant broken. To the exclusion of certain evidence offered by defendant and to certain instructions given by the presiding Justice, defendant seasonably excepted. The jury rendered a verdict for the plaintiff in the sum of eighteen hundred dollars. A general motion for new trial was thereupon filed by the defendant.

Exception to the instructions given by the presiding Justice sustained. Motion sustained. The case fully appears in the opinion.

Albert E. Anderson,
Harry C. Libby, for plaintiff.
Bernstein & Bernstein, for defendant.

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

FARRINGTON, J. Action seeking recovery for covenant broken by reason of breach of written agreement under seal between the plaintiff and the defendant. After a verdict for the plaintiff in the sum of eighteen hundred dollars ($1,800.00), the case is before this court on general motion, and on exceptions to be noted.

One of the provisions of the written agreement, which was dated June 11, 1930, and a breach of which was claimed as the basis of the suit, was that the plaintiff for the summer season of 1930, beginning June 28 and ending September 2, was to provide for the defendant an orchestra of seven musicians who were to furnish dinner music daily, dance music every night from half-past eight o'clock until midnight, music for rehearsals for plays at least two evenings a week, and concert music, both classical and jazz, three times a week. In the written agreement was a clause that "the said Selberg further agrees to comply with all the requirements of said Charles E. Eichel, the social director for said Company." The agreed price for all services was one hundred and eighty-five dollars ($185.00) a week, and in addition to this the plaintiff, his sister, who was a feature singer, and the seven musicians were to be furnished both board and room for the same period of time.

That the defendant on July 10, 1930, discharged the plaintiff and his orchestra is undisputed. The plaintiff claimed that the discharge was without just cause. The defendant, after pleading the general issue, filed a brief statement that the plaintiff had failed to comply with the requirements of Mr. Eichel, the social director, as provided in the contract, and that the plaintiff was not able to render the classical concert music although he represented that he was so able, and that he was not able to furnish the music for which the agreement called, and that the plaintiff was discharged for justifiable cause.

During the trial the deposition of Mr. Eichel named in the written agreement was offered in evidence. The presiding Justice excluded the answer to Interrogatory 12, which was, "Did the plaintiff comply with all your requirements?", and he also excluded the answer to Interrogatory 13, which was, "If your answer is in the negative, please state in detail in what respects the plaintiff did not comply with all of your requirements?". He also excluded the answer to Interrogatory 18 which was, "What were the representations made to you by Selberg as to the character and quality of the music furnished by his orchestra?"

Philip Dincin, manager of the defendant corporation, was called as a witness and testified that prior to engaging the plaintiff under the contract he had a talk with him as to the character and quality of the music plaintiff could furnish. He was then asked the question, "Will you state to the Court and the jury what statements Mr. Selberg did make in reference to the quality and character of his music?" The answer was excluded.

To the exclusion by the presiding Justice of the answers to the four questions as above stated, exceptions were noted and allowed. There is, however, nothing in the bill of exceptions before this Court to indicate what the answers to those questions would have been, and, without making any finding as to the admissibility of those answers, we repeat what has often been said by this Court, that we have no right to rely on inference or conjecture as to what they might have been.

It is not enough for the excepting party to show that a question technically admissible was excluded; he must go farther and show

affirmatively that he was prejudiced by such exclusion. It must appear in the bill of exceptions or in the record that the answer would have been in favor of the excepting party, otherwise no harm could have been done. *State* v. *Dow*, 122 Me., 448, 449.

The bill of exceptions must show what the issue was, and how the excepting party was aggrieved. Error must appear affirmatively. *Jones* v. *Jones et al*, 101 Me., 447, 450; *Doylestown Agricultural Co.* v. *Brackett, Shaw & Lunt Co.*, 109 Me., 301, 308, and cases cited; *Feltis et als* v. *Lincoln County Power Co.*, 120 Me., 101; *State* v. *Dow*, supra; *D. E. McCann's Sons* v. *Foley*, 129 Me., 486.

The defendant having failed in its bill of exceptions to set forth enough to enable the Court to determine that the points raised were material and that the rulings to which exceptions were taken were erroneous and prejudicial, the first four exceptions must be overruled.

There were two other exceptions also seasonably taken and allowed, one of which was to the following portion of the charge: "* * * and I give you as the rule of law, * * * that under this contract these musicians who were rendering the personal services in playing for that hotel were required and obliged to be of ordinary skill, of ordinary experience and ability to play the various classes of music which this contract calls for, 'dance music, dinner music, music for rehearsals for plays, concert music, both classical and jazz'; and that it was not the intent, and cannot be read into this contract, that it should be to the personal satisfaction or taste, or technical requirement of the social director, Mr. Eichel, but that the true meaning of that provision is that he had a right to make regulations as to time, as to, perhaps, the kind of music at particular times. I think it would be within the purview of that to call for specific numbers or titles of music and things like that with reference to the carrying out of the agreement to furnish the kinds of music that are required; also that they must be able to perform these various kinds of music with the ordinary skill and ability and experience of musicians. They are held to that. They are bound to live up to that requirement; but they are not bound to satisfy the perhaps critical or hypercritical taste or whim or caprice of any particular individual."

We can not agree with the presiding Justice that the true meaning of the provision as to compliance with the requirements of the social director, Mr. Eichel, was limited to the right to make regulations as to time and possibly the kind of music at particular times, or to the right to call for specific numbers or titles of music, or to insistence upon the various kinds of music being performed "with the ordinary skill and ability and experience of musicians." We regard the clause as carrying with it the right to make reasonable requirements as to the manner of performance of the service to be rendered, requirements by which might be measured the ability to perform the various kinds of music with the ordinary skill, ability and experience of musicians *under the facts and circumstances of this particular case.*

Nowhere in this portion of the charge, and nowhere in any other part of the charge, was the jury instructed to consider the question of whether or not such requirements as were disclosed in the record were reasonable or as to whether or not the plaintiff had complied with them as reasonable requirements relating to the rendering or playing of the various kinds of music *under the facts and circumstances of this particular case.*

We feel that these questions should have been submitted to the jury and that it should have been instructed that it was to consider them in connection with all the surrounding circumstances and in view of all the evidence, with due regard to the class of people who were to be served. Had the jury been told that it was to consider this phase of the case, it is not impossible or unlikely that a different conclusion might have been reached. The effect of the above portion of the charge confined within too narrow limits the scope of the jury's inquiry, to the prejudice of the defendant. The statement that the plaintiff was not bound to satisfy what might be the "critical or hypercritical taste or whim or caprice of any particular individual," unqualified by reference to reasonable requirements and compliance therewith, might well have emphasized to the prejudice of the defendant the thought of unreasonableness as conveyed by the charge and might well have misled the jury. The exception should be sustained.

As the case must go back for a new trial, the other exception need not be considered.

The case is also here on general motion and while we feel there is a serious question as to whether the jury, in view of all the evidence, was justified in finding the defendant liable in damages, we make no further comment as to that.

But we are of the opinion that the verdict is clearly excessive in amount. We are unable to give credence to the testimony of the plaintiff and other witnesses as to the manner of obtaining funds with which the plaintiff claims to have paid his orchestra after he and they were discharged by the defendant. If, as he claimed, the plaintiff had obligated himself personally to furnish employment to his orchestra for the remainder of the season, it would not have been necessary for him to show that he had actually paid the members of his organization. The utter unreasonableness of the evidence produced as to his payments to them, and of the evidence as to the sources of the money with which he claimed to have made the payments, compels our disbelief not only as to the fact of the payments but also as to his testimony that he was under any legal obligation to pay, and we feel that the jury was not justified in basing its computation of damages, as it must have done, on its conclusion that there was such obligation on the plaintiff's part. If he was under no such obligation to his associates, the measure of his damages was his own personal loss and that alone. The motion on the ground of excessive damages should be sustained.

Exception sustained.
Motion sustained.

WILLIAM J. C. MILLIKEN, WESLEY M. MEWER, CARL H. DAVIS, WILBUR F. EMMONS, H. DAYTON BENWAY, ASHLEY L. TARBOX, GEORGE H. KITCHEN, FRED L. GOOCH, JOHN E. KENNETT, FRANK H. LIBBY, KING E. SEARS, FRANK H. JEWETT

vs.

HOWARD GILPATRICK, TREASURER OF THE TOWN OF OLD ORCHARD BEACH, ARTHUR W. MCLEOD AND THE INHABITANTS OF THE TOWN OF OLD ORCHARD BEACH.

York. Opinion December 28, 1931.

MUNICIPAL CORPORATIONS. R. S. 1930, CHAP. 91, SEC. 36, PAR. XIII.

The payment, under a vote of the town, of a weekly salary to a selectman who performs full time duty, is a payment for a purpose authorized by law.

On appeal by plaintiffs. Bill in equity by twelve taxable citizens of the town of Old Orchard Beach under the provisions of Subdivision XIII of Sec. 36, Chap. 91, R. S., seeking an injunction against the payment of any sum of money for what, in the bill, is alleged as salary for services as clerk of the Board of Selectmen for 1931 to Arthur W. McLeod, a duly qualified selectman, and asking that the town be reimbursed for money paid to him. Injunctions were denied and the bill dismissed. Appeal was thereupon taken. Appeal dismissed. Decree below affirmed.

The case fully appears in the opinion.

Harry C. Wilbur,
Wesley M. Mewer, for plaintiffs.
Willard & Willard, for defendants.

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

FARRINGTON, J. Bill in equity by twelve taxable citizens of the town of Old Orchard Beach, under the provisions of Subdivision

XIII of Sec. 36, Chap. 91, R. S. 1930, providing that "When counties, cities, towns, school districts, village or other public corporations, for a purpose not authorized by law, vote to pledge their credit or to raise money by taxation or to exempt property therefrom, or to pay money from their treasury, or if any of their officers or agents attempt to pay out such money for such purpose, the court shall have equity jurisdiction on petition or application of not less than ten taxable inhabitants thereof, briefly setting forth the cause of complaint," seeking an injunction against the payment to Arthur W. McLeod, one of the duly elected and qualified selectmen of said town, of any sum of money for what is alleged in the bill as salary for his services as Clerk of the Board of Selectmen for 1931 and asking that the town be reimbursed for whatever money had been paid to said McLeod prior to the bringing of the bill, with general prayer for relief.

Both temporary and permanent injunctions were denied and by the decree of the presiding Justice the bill was, after due hearing, dismissed with costs, and the case comes to us on appeal from that decree.

The presiding Justice found that the town at its annual town meeting of 1931 "voted to pay thirty dollars a week to the person who performed the duties of remaining in attendance at the town hall and doing extra work required of the Board of Selectmen of the town of Old Orchard Beach" and that the purpose for which the town voted to pay this money was a purpose authorized by law, "namely, to pay for services rendered by Mr. McLeod, which services were for the government of the said town * * * ."

The annual town meeting of the defendant town was held on Monday, March 2, 1931, and at that meeting Arthur W. McLeod, one of the defendants, Lyman Abbott and Fred I. Luce were duly elected as selectmen and were duly qualified.

In order to furnish the proper background, it will be well to go back to 1925 when, as far as the record shows, the first action was taken to provide that one selectman should be on duty every day.

Mr. Luce, who was town clerk from 1925 to 1931 inclusive, testified from the records of the annual town meeting of March 2, 1925, that under an article "To see what action the town will take

in relation to pay of town officers" it was, among other things, "Voted to have one of the selectmen on duty at the town hall five hours per day throughout the year, the salary to be twenty-five dollars per week. In addition to handling the general town business that may develop he shall do all the work on the assessors' books without additional pay and shall collect all special licenses and supplementary taxes." He also testified that under another article in the warrant "To see what sum of money the town would raise for the pay of town officers," it was voted to pay town officers twenty-eight hundred and fifty dollars, and to take from the contingent fund five hundred dollars.

From his testimony, it also appeared that at the annual town meeting in 1926, under an article in the warrant to see what action the town would take in regard to pay of town officers, it was "Voted to pay town officers the same salary as last year, under same provisions," and that under another article in the warrant to see what sum of money the town would raise for pay of town officers it was "Voted to appropriate for the pay of town officers twenty-eight hundred and fifty dollars; five hundred dollars to be taken from the contingent fund. The same arrangements as last year in regard to one Selectman."

It also appeared from his testimony that at the annual town meeting in 1927 under an article in the warrant to see what action the town would take in relation to pay of town officers, it was voted to appoint a committee of three to investigate and report later in the meeting. That committee's report, which was accepted and the recommendations of which were adopted, was as follows: "We recommend the following pay increases of town officers and that the sum of sixteen hundred and ten dollars be added to the regular appropriation of twenty-eight hundred and fifty dollars to meet the same, Clerk of Board of Selectmen increased from twenty-five dollars to thirty dollars per week, two hundred and sixty dollars."

From the printed record of the case, it may be concluded that the town voted an appropriation sufficient to cover the increases and the same amount of twenty-eight hundred and fifty dollars for pay of town officers that was raised the previous year.

Mr. Luce was asked the question, "And the man that was called

'Clerk' was the man who stayed on duty five hours a day, as provided in the vote of 1925?" and he answered, "Yes." and it appeared that he himself performed the same duties voted in 1925 and was designated as clerk, and that he himself drew the compensation as such clerk or full time member of the Board from 1925 to 1930 inclusive, and that he drew the first week's pay for 1931.

In the annual town meetings of 1928, 1929 and 1930 on articles to see what action the town would take in relation to pay of town officers, it was voted to pay the several town officers the same amounts as were paid the year before, and "under the same arrangement," or equivalent words, the only difference being a $200 increase for treasurer. Mr. Luce stated that in 1928, under the article to see what sum of money the town would raise for the pay of town officers, the record, without showing a vote to appropriate, was, under the heading of appropriations, "Town officers $4500, any deficiency from contingent fund." On a similar article, in 1929 the record was "Appropriations, Town. Pay town officers $4500, under same arrangements as last year." And in 1930 the record was "Town appropriations. Pay of town officers, $4500. Balance contingent fund."

Mr. Luce testified that under an article in the warrant for the town meeting of March 2, 1931, "to see what action the town will take in relation to pay of town officers," the recorded vote was, "Voted to pay the same as last year.", and that that was the whole record and that there was nothing in the vote about taking from the contingent fund. He testified that under an article in the warrant to see what sum of money the town would raise for the pay of town officers the record was "Town officers $4500."

While in 1928, 1929, 1930 and 1931 the record in words did not disclose a vote, this Court has a right to and does assume that what ought to have been done was done and that an actual vote was taken.

The record of the case shows that $4,500 was the same amount raised for the pay of town officers from 1927 to and including 1931 and that it carried the compensation of selectmen and other town officers except as provision may have been made for taking any portion from the contingent fund.

There is nothing in the printed record of the case to show that from 1927 to 1931 a salary was voted for any one member of the Board of Selectmen as specifically different from that of the others, except as to the one who might be selected as full time member, and no specific appropriation for a salary for a "clerk" of the board as such is shown, but we do not regard those facts as of importance. Mr. Luce, who from 1925 to 1930 inclusive drew first the $25 a week and later the $30 a week, testified that the one who was on duty five hours a day, as provided in the vote of the 1925 town meeting, was called the "clerk." The report of the committee which in 1927 recommended certain pay increases clearly used the words "Clerk of Board of Selectmen" as applied to the selectman who under the 1925 vote, and thereafter, might be selected to be on duty at the town hall five hours each day throughout the year. Nowhere except in 1927 is reference of record made to the full time member as "clerk."

We agree that no payment of salary could be legally made by a town unless specifically authorized either by statute or by vote of the town.

In the instant case we regard the compensation to Mr. McLeod, the one selected to do full time service, as having been authorized by vote of the town at its annual meeting in 1931 and that that vote had back of it statutory authority found in Sec. 86, Chap. 13, R. S. (1930) providing that "a town having less than three thousand inhabitants may, by majority vote at its annual town meeting fix the compensation of its board of selectmen, allowing such sum as may be commensurate with the duties of the office."

We find nothing in the case which warrants the conclusion that the full time member of the Board of Selectmen was intended to be regarded, or that he was regarded, as one holding the position of a clerk in a capacity separate and distinct from his position as a member of the board. It was not unnatural or strange that the man who was chosen to be on duty at the town hall should in time be called the clerk, and the natural thing happened. In this same connection we do not regard it as important that the evidence shows that at the meeting of organization on March 7, 1931, Mr. McLeod was elected as clerk of the Board. In our opinion it meant nothing

more than that he was chosen for the full time service and his compensation had already been fixed by vote of the town meeting on March 2, 1931.

There is undisputed evidence that Mr. McLeod, after his election as the so-called clerk, made up his records of that meeting and that he inscribed on those records a memorandum taken from the town clerk's books to the effect that the full time selectman was to be in the town hall five hours per day and also make up the assessors' books at the salary of $30 a week. This certainly indicates his understanding of the capacity in which he was working, regardless of the appellation of "clerk."

As far as the case before us is concerned, we see no force in the suggestion that McLeod was not an assessor, and that he had not done any work on the assessors' books nor collected any special taxes nor license fees. We are not here confronted by any problem arising out of suit to collect salary.

While the conduct of town meetings and the manner of taking and recording the various votes as representing the action of the town at those meetings might well be improved, as also the manner of recording the votes appropriating money for various purposes, yet, where, in connection with pay of town officers, it was "Voted to pay the same as last year," we do not regard it as fatal to the validity of such a vote that it might become necessary to go back over the previous years when similar votes were passed until a definite vote should be established as shown by the facts of the case at bar. The 1925 record is clear and the 1927 record is also established. We can not doubt that the voters at the 1931 meeting had full means and opportunity to know, and that they did know, what they were doing, and that the will of those voters as expressed by the words, "Voted to pay the same as last year," even with the omission of the words, "under the same arrangement," signified that the town officers were to receive the compensation that had been paid the year before and impliedly under the same arrangement. A careful reading of the record leads to the belief that Mr. Luce could have explained why the 1931 town clerk's record made no reference to the arrangement of previous years. But it is not necessary to discuss or consider what reasons or mo-

tives led to the bill in equity which has brought the matter to this court.

After a careful consideration of the entire record of the case, our conclusion is that the 1931 vote was to pay thirty dollars a week to the selectmen who should perform full time duty, as found by the presiding Justice, and we regard the purpose for which the town voted to pay this money as a purpose authorized by law. We see no reason to disturb the findings below.

The entry must be,

Appeal dismissed.
Decree below affirmed.

LEWIS B. DANIELS, ADMINISTRATOR *vs.* SADIE PRIEST.

Somerset. Opinion December 30, 1931.

TROVER. EXECUTORS AND ADMINISTRATORS.

For a cause of action accruing subsequent to the death of an intestate, if the money or property recovered would be assets of the estate, the administrator has the option of suing in his representative capacity or in his own name.

In the case at bar, the automobile received by the administrator in settlement of the debt belonged to the estate of which he was the representative, and it was not necessary for him to transfer title to himself as administrator before bringing suit.

On exception by defendant. An action of trover by an administrator who took in his own name a note of one indebted to the estate with an automobile as security. The debtor turned over the car to the administrator. The defendant, who had the car for storage, refused to surrender it to the administrator until the storage bill was paid. Trial was had at the May Term, 1931, of the Superior Court for the County of Somerset. To the refusal of the presiding Justice to direct a verdict for the defendant, exception was seasonably taken.

Exception overruled. The case sufficiently appears in the opinion.

W. L. Waldron, for plaintiff.

H. R. Coolidge, for defendant.

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

THAXTER, J. The plaintiff brought this action of trover as administrator of the estate of his brother, Elmer Daniels, who shortly before his death had sold a Dodge automobile to one Cochran. A claim of $450, being the balance of the purchase price due at the time of the death of the intestate, was one of the assets of his estate. Cochran, being unable to pay this, gave to the administrator a Holmes note with the car as security. This note, however, was payable not to Daniels as administrator but to him as an individual. It was obviously, however, intended to be treated by him as an asset of the estate. Cochran after he had paid $115 on this note was unable to meet the balance, and agreed to surrender the car to Daniels in return for a discharge of the note. The car was kept in the garage of the defendant, who refused to deliver it to the plaintiff until a storage bill of $84 was paid. The plaintiff refused to pay this and brought this action of trover. After a verdict for the plaintiff for $218, the case is before this Court on the defendant's exception to the refusal of the presiding Justice to direct a verdict in her favor.

The contention of the defendant is that the action can not be maintained by the plaintiff as administrator, because he took title to the car as an individual, and as administrator acquired only an equitable interest in it. Such claim has a more tender regard for the form than for the substance of the transaction.

The arrangement between the administrator and the car owner seems to have been a practical method of settling the claim due the estate; but we are not concerned with its propriety. That is a matter to be settled by the Probate Court on the allowance of the administrator's account. However the Holmes note may have read, it was regarded as an asset of the estate, and the administrator in bringing suit for conversion of the car elected to treat the title to it in himself as administrator. It was hardly necessary for him before

bringing that action to sit down and execute a bill of sale from himself as an individual to himself as administrator.

If an executor or administrator for an indebtedness due the estate takes a negotiable note in his own name, he may nevertheless sue on that in his representative capacity. *Krutz* v. *Stewart*, 76 Ind., 9, 11; Schouler: Wills, Executors & Administrators, 5 ed., Sec. 1293.

Indeed the ordinary rule is well settled that for a cause of action accruing subsequent to the death of an intestate, whether it be in tort or in contract, if the money or property recovered would be assets of the estate, the administrator has the option of suing in his representative capacity or in his own name. *Pierce* v. *Strickland*, 26 Me., 277, 290; *Heath* v. *Chilton*, 12 M & W, 631, 637; *Mowry* v. *Adams*, 14 Mass., 327, 329; *Kent* v. *Bothwell*, 152 Mass., 341; *Lawson's Executor* v. *Lawson*, 16 Gratt, 230, 80 Am. Dec., 702; *Kane* v. *Paul*, 14 Pet., 33, 10 L. Ed., 341; Greenleaf, Evidence, 13 ed., Vol. 2, Sec. 338.

The property received by the plaintiff in the settlement belonged to the estate of which he was the representative. That he had not before bringing suit transferred title to himself as administrator does not bar his right to sue in his representative capacity. To hold otherwise would be to deny him a just remedy in favor of a fruitless observance of a mere form.

Exception overruled.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

JOSEPH B. KAHILL *vs.* WALTER E. REID.

Cumberland County. Decided January 12, 1931. This action in assumpsit for services resulted in verdict for the amount demanded and we review the case on motion for new trial and on exceptions to refusal to direct a verdict, and to charge as requested in two particulars.

The Judge could not direct a verdict because the evidence for defendant did not indisputably outweigh that for plaintiff.

Neither requested instruction should have been given, for each lacked matter, the absence of which made either fatal to plaintiff's claim.

As to the motion; the case was tried on the issue, was there a contract for the services of the plaintiff, which, but for defendant's refusal to act at all in certain phases of the transaction where he and no one else could direct, was carried out by plaintiff?

We find no evidence of prejudice, passion, bias, error or improper motive on the part of the jury in arriving at their verdict.

Hence it shall stand. Exceptions and motion overruled. *Frank P. Preti*, for plaintiff. *Frederick R. Dyer, Nathan W. Thompson*, for defendant.

EDMUND A. CLOUTIER *vs.* OSIAS J. GIGUERE.

Kennebec County. Decided January 12, 1931. This is an appeal from a decree of a single Justice dismissing the plaintiff's bill in equity. The bill was brought for an accounting. The plaintiff alleges that he was employed by the defendant to manage a department in his store, that he was to receive fifty per cent of the net profits after payment to himself of a salary of twenty-five dollars a week, and that the salary was subsequently raised to forty dollars a week. The defendant in his answer claims that the plaintiff was employed at a salary of twenty-five dollars per week, which was afterwards raised to forty dollars, but denies that there was ever any profit-sharing agreement, an accounting on which is asked for by the plaintiff.

The Justice, who heard the cause and had the opportunity to observe the witnesses who testified before him, filed a decree dismissing the bill, thereby sustaining the defendant's contention that there was no profit-sharing agreement. The evidence is conflicting but there is ample to justify the finding. Under the well established equity practice, such findings of fact will not be disturbed unless clearly incorrect. *Sposedo* v. *Merriman*, 111 Me., 530. Appeal dismissed. *Gordon F. Gallert*, for plaintiff. *F. Harold Dubord*, for defendant.

L. M. LONGLEY & SON *vs.* GERTRUDE D. HAMMOND.

Oxford County. Decided January 12, 1931. The controversy in this case is over liability for work and materials used on farm property of the defendant. The questions were all of fact, and the only error on the part of the jury which the court perceives is failure to allow defendant a conceded credit of $2.20.

This error entitles defendant to a new trial, unless plaintiff within fifteen days from the filing of mandate files remittitur of the aforesaid amount. So ordered. *E. Walker Abbott*, for plaintiff. *Nicolaus Harillias*, for defendant.

STATE *vs.* L. C. GOVE.

Androscoggin County. Decided January 17, 1931. The appellant was indicted at the June Term, 1930, of the Superior Court, in Androscoggin County, for uttering and publishing as true, knowing it to be false, forged and counterfeit, a written instrument purporting to be a check on an Auburn bank for $115.00.

The case was committed to the jury at that term and a verdict of guilty returned. Upon this, motion was made to the presiding Justice to set aside the verdict and grant a new trial on the ground that, in weight and sufficiency, the evidence was not such as to warrant conviction. The motion was denied. Thereupon, an appeal was made to this Court. Exceptions taken during the trial are not pressed for attention. It, then, becomes unnecessary to enter upon the consideration of any other question than the appeal.

The government offered evidence tending to prove that the prisoner, who had done trucking for the purported drawer of the check, had been paid by checks on the same bank, and that following hearing in the Court of first instance, the prisoner asked such drawer, in the dooryard of his home, and in the presence and hearing of his wife, "Why didn't you come to me like a man about this?"

The bank teller testified he was "quite sure it was Mr. Gove" who presented the check for payment. The treasurer gave evidence he had seen Gove in the bank a few times. Specimens of the handwriting of the prisoner, admitted to be genuine, were introduced as standards for comparison, and compared by experts. The experts expressed the opinion that the one hand had written the standards and the check.

The defense, beyond testimony by the prisoner that he did not commit the alleged crime, and that his presence in the bank had been subsequent to the transaction of the particular check, was that of an alibi.

The case presented questions of fact for determination by a jury. The trial Judge, the record tacitly concedes, properly charged the jury. And, in the view of this Court the verdict must stand. Appeal dismissed. Judgment for the State. *Fred H. Lancaster*, County Attorney, for State. *A. E. Verrill*, for respondent.

WILLIAM G. BUNKER ET AL *vs.* CITY OF OLD TOWN.

Kennebec County. Decided February 14, 1931. The case comes up on exceptions to an order of nonsuit.

The plaintiffs, a firm of architects in Augusta, Maine, prepared preliminary plans or sketches of possible proposed additions to the High School building in the defendant City. Their correspondence and dealings, whatever they were, were entirely with the Superintendent of Schools and the Superintending School Committee of Old Town. By letter dated May 9, 1929, about a month after the plaintiffs were first interested in the situation, they were notified that the Old Town Superintending School Committee had decided to accept the plans of another firm of architects and the plaintiffs' plans and estimates were returned to them. The letter stated that "We are not yet absolutely sure of building anything this year." Although an addition was in fact erected in the year 1929, prior to and during the period within which the plaintiffs were dealing with the Superintendent of Schools and the Superintending School Committee, no action whatever had been taken by the City of Old Town with reference to any addition to the High School building. Nothing appears in the record which could justify a finding that the defendant City is liable to the plaintiffs in this action to recover for their preliminary sketches.

We see no force in the plaintiffs' contention that the Superintending School Committee had any authority under "management" and "care" as provided in Chap. 16, Sec. 37, R. S. (1916), Chap. 19, Sec. 43, R. S. (1930), by which it could hold defendant City liable in the present case, and not only are we unable to find the slightest evidence of any ratification on its part but we also fail to find evidence in the record that it even had knowledge of the plaintiffs' transactions or dealings with the Superintendent of Schools and the Superintending School Committee.

On the facts disclosed in the case, we are unable to see any principle or authority of law, statutory or otherwise, on which the plaintiffs could base a recovery from the City of Old Town. The nonsuit was properly ordered and the entry must be, Exceptions overruled. *Locke, Perkins & Williamson*, for plaintiffs. *Needham & Powell*, for defendants.

JOHN N. FISH *vs.* CYRUS E. WALKER.

Somerset County. Decided February 16, 1931. On motion. Action for damages for breach of warranty in sale of a horse. Verdict for plaintiff. Damages assessed at $175. The evidence is sufficient to sustain the finding of liability. The damages are clearly excessive. The value of the horse as described by the seller and understood by the buyer is agreed to be $120. The only testimony as to its real value comes from plaintiff who states it to be $50. The verdict could not properly exceed $70.

This case presents a typical instance of an error on the part of the jury, which should have been corrected on motion directed to and heard by the presiding Justice at *nisi prius*. It can be corrected here but a considerable unnecessary expense has been incurred in bringing it before us. Motion overruled, if within thirty days after filing of rescript plaintiff remits all of the verdict in excess of $70; otherwise motion sustained, new trial granted. *James H. Thorne*, for plaintiff. *Ames & Ames*, for defendant.

GEORGE W. PERRY *vs.* INTERNATIONAL HARVESTER COMPANY.

Aroostook County. Decided February 17, 1931. On motion. Action brought to recover damages on account of injury to automobile caused by collision between cars of plaintiff and defendant. Verdict for plaintiff with reasonable assessment of damages.

The case presents simple issues of fact and the record discloses sufficient apparently credible evidence to justify the jury in finding negligence on the part of defendant and the exercise of ordinary care by the plaintiff. Motion overruled. *Bernard Archibald*, for plaintiff. *Ransford W. Shaw*, for defendant.

EDMUND LOUIS LAFORGE *vs.* MRS. LEONA GARDNER.

Penobscot County. Decided February 27, 1931. This is an action for the obstruction of a right of way claimed by the plain-

tiff across land of the defendant. The jury returned a verdict for the defendant and the case is before this court on the plaintiff's general motion for a new trial.

The parties were the owners of adjoining lots of land in Old Town. The defendant acquired title to her lot May 2, 1902, the plaintiff to his lot in 1891. The plaintiff claims a right of way over the defendant's land by prescription. As the plaintiff was one of the grantors in the deed to the defendant in which there was no reservation of any right in the defendant's land, a title by prescription must be based on an adverse use for twenty years since 1902.

The defendant admits that the plaintiff did pass and repass across her land, but contends that such use was promiscuous and general and was not confined to any definite way, that the use was not adverse but permissive, and that, if there was any adverse use, it was interrupted by the defendant during the twenty year period. To sustain these claims evidence was introduced. The testimony for the plaintiff and for the defendant was conflicting. The jury saw and heard the witnesses and in the absence of exceptions we must assume were properly instructed on the law. The determination of the issues of fact was peculiarly the province of the jury, and we see no reason for disturbing their verdict. Motion overruled. *Percy Higgins*, for plaintiff. *Stanley F. Needham*, *George E. Thompson*, for defendant.

ANNIE E. STONE, ADMINISTRATRIX *vs.* OSCAR ROGER.

Androscoggin County. Decided March 5, 1931. As the plaintiff's intestate, on the evening of November 21, 1929, attempted to cross Sabattus Street in Lewiston, near its intersection with Ash Street and Central Avenue, he was struck by the automobile driven by the defendant and died in a few hours without conscious suffering. This action by his personal representative is brought under R. S. (1916), Chap. 92, Sec. 9, for the benefit of his two grandchildren. The verdict below for the plaintiff, with damages assessed at $500, is here on a general motion.

At the intersection, slowing down to allow a car coming in from Central Avenue to cross in front of him, the defendant, then with unobstructed view and a clear road, drove on practically in the middle of Sabattus Street, running down the decedent as he crossed from the corner of Central Avenue. Sabattus Street at this point is forty-five feet wide. By his own admissions, the defendant did not see the decedent. Had he been watching the street ahead and operating his car with reasonable care under the circumstances, the defendant had ample opportunity to avoid the accident. He was clearly negligent.

Nor can it be said as a matter of law that the decedent was guilty of contributory negligence. In this class of cases, the person for whose death an action of damages is brought is presumed to have been in the exercise of due care at the time of his injury and contributory negligence is a defense to be pleaded and proved by the defendant. R. S. (1916), Chap. 87, Sec. 48. Upon the facts here shown, a finding by the jury that no negligence on the part of the decedent contributed as a proximate cause to his death can not be disturbed.

Nor are the damages excessive. The decedent's expectancy of life, his probable future earnings or receipts, and his relations with his grandchildren, point to their pecuniary injury to the amount of the award. Motion overruled. *Berman & Berman*, for plaintiff. *Frank A. Morey*, for defendant.

LINWOOD S. GRANT, COLLECTOR

vs.

MAINE SAND & GRAVEL COMPANY.

Androscoggin County. Decided March 6, 1931. Debt brought in the name of the tax collector to recover certain taxes alleged to have been legally assessed on the real estate of the defendant, for the respective municipal years of 1928 and 1929, in the town of Leeds.

Defendant pleaded the general issue with brief statement. The brief statement is not of importance.

The jury returned a verdict for defendant, by direction.

Plaintiff saved and has argued an exception.

The objection interposed to the recovery of the taxes was that prior to the commencement of this action, the collector had, in each year, enforced full collection of the tax by a sale of the property against which assessment had been laid. The proof established this. Moreover, it appeared in evidence that the collector had properly accounted for the proceeds of such sale.

So far as the particular taxes were concerned, they had been collected, and the duties of the collector ended before this action was begun. Exception overruled. *Frank A. Morey*, for plaintiff. *Laughlin & Gurney*, for defendant.

THOMAS L. FENN

vs.

WILLIAM H. FENN, EDWARD D. NOYES AND HORACE MANNING, AS TRUSTEES ET ALS.

Cumberland County. Decided March 10, 1931. The record in this case is insufficient. Insufficiency may be due to oversights and omissions on the part of the clerical compiler of the record, but, whatever the cause, the case may not have consideration at this time, and the report must be discharged. Report discharged. *George C. Otto* and *Frederick R. Dyer*, for plaintiff. *John F. Dana* and *Eugene L. Bodge*, for defendants.

LEO DAY *vs.* MICHAEL KANE AND EDWARD F. KANE.

Penobscot County. Decided April 4, 1931. This action was brought to recover damages for personal injuries suffered by the plaintiff as the result of being struck by an automobile owned by

the defendants and by their agent operated as a public car. The plaintiff was the sole witness giving testimony as to the accident itself. The jury returned a verdict in his favor in the sum of $841.67. The case is before this Court on general motion.

The evidence contained in the record clearly establishes the negligence of the defendants, and there is nothing to indicate to this Court that the jury was not fully justified in finding that the plaintiff was free from negligence.

The contention of the defendants that the jury was not warranted in finding that the car which struck the plaintiff belonged to them is not sustained. The evidence was sufficient to establish the contrary fact that it did belong to them.

No question is raised as to the amount of the verdict. The entry will be, Motion overruled. *John H. Needham* and *S. F. Needham*, for plaintiff. *George E. Thompson* and *A. M. Rudman*, for defendants.

WARREN HARDING *vs.* LEAH B. HARDING.

Kennebec County. Decided April 8, 1931. Action of money had and received to recover moneys claimed to have been contributed by the plaintiff towards the purchase of land and buildings in Benton, Maine, title to which was taken in the name of the defendant under her agreement, joined in by her husband now deceased, that the plaintiff should have a home thereon for the remainder of his life. The case is reported to the Law Court for final determination, including the assessment of damages if judgment is awarded to the plaintiff.

This case can not be finally determined and damages, if due, fairly assessed upon this report. If the plaintiff prevails, he can only recover the balance due him after satisfying the defendant's counter demand for his use and enjoyment of her property and for any uncompensated services rendered him. There is no evidence as to the amount due therefor. Report discharged. *J. Howard Haley* and *Harvey D. Eaton*, for plaintiff. *Paul L. Woodworth*, for defendant.

JAMES A. MITCHELL'S CASE.

Penobscot County. Decided April 8, 1931. Appeal from decree of the Superior Court affirming the decision of the Industrial Accident Commission awarding compensation to the petitioner as dependent widow of James A. Mitchell, accidentally killed June 26, 1930, while hauling gravel for the respondent Wyman & Simpson, Inc. The defense is that the deceased was an independent contractor.

The evidence before the Commissioner, as here reported, supports the finding that a few days prior to June 23, 1930, the superintendent of the respondent Corporation hired the deceased to do hauling with his truck on its highway construction job between Northern Maine Junction and Hermon Center. The hiring was indefinite as to the duration of the employment and the particular hauling to be done. The deceased was expected to work and did work the regular hours of the crew, but was paid at the rate of $2.50 an hour. The superintendent or the foreman in charge of the job had the right to direct the deceased in the place, manner and method of his work except in the detail of the actual operation of the truck. Directed to haul gravel from a pit a mile away, he continued in this work until he was struck by a Maine Central Railroad train as he crossed its tracks on his way to the pit.

The admission in the record that the deceased had been engaged in the trucking business for several years prior to this employment is a circumstance to be properly considered with other facts in determining his status. It is not, however, a decisive factor. *Dobson's Case*, 124 Me., 304; Note, 42 A. L. R., 622. Upon all the evidence, this case can not be distinguished in principle from *Dobson's Case*, supra, or *Mitchell's Case*, 121 Me., 455.

The finding of the Commissioner that the deceased was an "employee" and not an "independent contractor" must be upheld. Appeal dismissed. Decree affirmed. Court below to fix employee's expenses on appeal. *Oscar H. Dunbar*, for petitioner. *Hinckley, Hinckley & Shesong, J. Frank Scannell*, for respondents.

GEORGE F. LOWE *vs.* WILLIAM E. MAXCY.

Kennebec County. Decided April 9, 1930. The plaintiff bought of the defendant certain real estate situated on Bridge Street in Gardiner. This consisted of a lot of land and a building on it. The purchase price was $2,000, of which $500 was paid in cash and the balance in notes secured by a mortgage on the property. After the consummation of the deal, the plaintiff repented of it. He claims that the building was out of repair, and it is uncontroverted that the defendant agreed to take the property back. On just what terms this reconveyance was made is one of the disputed issues in the case. The plaintiff contends that the defendant agreed to pay him back the purchase price; the defendant claims that under the terms of the agreement he was to cancel the mortgage notes in return for a reconveyance of the premises, and that the amount of cash to be repaid was to be left to his discretion. It is a fact that the notes were cancelled, that the property was reconveyed, and that the defendant gave to the plaintiff fifty dollars of the five hundred which had been paid. The plaintiff, seeking to recover the balance of the purchase price, has brought this action for money had and received. In his specifications he alleges fraud on the part of the defendant in making the sale; and he also sets forth that there was a rescission of the contract, and an agreement by the defendant to return the purchase price. There was a verdict for the plaintiff, and the case is before this court on the defendant's motion for a new trial.

A careful reading of the record discloses no evidence to substantiate the charge of fraud. The plaintiff bought the property with his eyes open; there was no assertion by the defendant that it was in proper repair; and the purchase price was presumably paid for it as it was.

It is obvious that there was some arrangement by the parties for a rescission. What the terms of that were was an issue for the jury to decide. The testimony was conflicting, but we can not say that there is not sufficient evidence to sustain the verdict. Motion overruled. *George E. Heselton*, for plaintiff. *Ernest L. Goodspeed*, for defendant.

HARRY T. THORNTON

vs.

BYER MFG. COMPANY AND FEDERAL MUTUAL LIABILITY INS. CO.

Penobscot County. Decided April 21, 1931. This is a workmen's compensation case heard by the commissioner, who found that the petitioner did not suffer an injury from accident entitling him to compensation. A decree was duly filed in accordance with such finding and an appeal taken therefrom.

The petitioner was employed as a riveter. It was his duty to insert rivets in an article manufactured by his employer, and hold this in a machine while the rivets were headed. It is conceded that there was some pounding by the machine, and that the petitioner had a tingling or stinging sensation in his finger tips from this. Gangrene developed in certain of his fingers and one of them had to be amputated. A reading of the evidence indicates that this gangrenous condition was caused by an obstruction in one of the arteries in his arm.

The commissioner found that the petitioner did not suffer a compensable accident directly responsible for the incapacity suffered, nor an accident, as a result of his employment, resulting in incapacity because of aggravation of a preëxisting physical condition. This finding is amply supported by the evidence. Appeal dismissed. Decree affirmed. *Arthur L. Thayer*, Bangor, Me., for appellant. *Hinckley & Hinckley*, Portland, for respondent.

CHRISTOPHER C. SAWYER *vs.* JAMES W. G. JOHNSON.

Cumberland County. Decided May 12, 1931. Parties to this bill in equity, on January 5, 1925, entered into a contract that bound plaintiff to allow defendant, for the period of five years from execution of the contract, to enter certain woodland and cut and remove therefrom cordwood of the hardwood trees thereon.

Defendant agreed to pay one thousand dollars as consideration.

The five year period had expired before the bill was brought;

full consideration had been paid, and prayer was for injunction against further cutting or removal of wood.

It is agreed that after expiration of the time specified in the contract, defendant gained permission to cut and did cut wood of value sufficient to pay the balance of the consideration then due and unpaid.

He alleges in his answer that at the time he secured permission to cut wood to complete payment of balance of consideration, the conditions of the written agreement were abrogated by a radically different parole contract.

But in his testimony he informed the Court that nothing was said about departing from the terms of the written contract. Appeal dismissed. Decree below affirmed. *Coombs & Gould*, for plaintiff. *Howard Davies*, for defendant.

STATE *vs.* WINFIELD S. JOY.

Sagadahoc County. Decided May 15, 1931. The respondent was convicted of unlawfully and carnally knowing and abusing a female child of the age of five years, contrary to R. S., Chap. 129, Sec. 16. His appeal, based on the insufficiency of the evidence adduced by the State, raises the question of whether, upon all the evidence, the jury were warranted in believing him guilty, beyond a reasonable doubt, of the offense charged in the indictment.

The respondent was not obliged to take the stand in his own defense. R. S., Chap. 146, Sec. 19. Electing to do so, however, his testimony as to the presence of the child with him in an unoccupied house, at the time laid in the indictment, supplied all necessary details of proof of his guilt otherwise lacking. A respondent can not complain that the evidence adduced by the prosecution is insufficient where he himself supplies the deficiency, Underhill's Crim. Ev. (Third Ed), 50; 16 Corpus Juris, 759. Upon all the evidence, there is no reasonable doubt of the respondent's guilt. Appeal dismissed. Judgment for the State. *Ralph O. Dale*, County Attorney, for State. *Edward W. Bridgham*, for respondent.

CHRIS AMUNDSEN *vs.* THOMAS S. THOMPSON.

Kennebec County. Decided June 15, 1931. Action of tort for personal injuries. Verdict for the plaintiff. General motion for a new trial on the usual grounds.

The plaintiff was injured while working for the defendant at Southwest Harbor. As he stooped to throw paving blocks into a pan to be loaded on a barge, two blocks came down from the pile above, crushing his thumbs and the third finger of his left hand. There was evidence tending to show that the plaintiff's injuries resulted from improper piling of the paving blocks and the negligence of a fellow servant, for both of which the defendant is chargeable.

It appearing, by stipulation of the parties, that the defendant has not assented to become subject to the provisions of the Workmen's Compensation Act, by R. S., Chap. 55, Sec. 3, the defenses that the plaintiff's injury was due to his own assumption of risk or contributory negligence, or was the result of the negligence of a fellow servant, are barred. The verdict must be sustained. Motion overruled. *McLean, Fogg & Southard*, for plaintiff. *Buzzell & Thornton*, for defendant.

THOMAS L. FENN

vs.

WILLIAM H. FENN, EDWARD D. NOYES, HORACE MANNING, TRUSTEES ET ALS.

Cumberland County. Decided July 30, 1931. This report of this cause in equity, brought to obtain a construction of the will of William H. Fenn, late of Portland, Maine, deceased, must be discharged. Of the thirty-seven defendants, individual and representative, sixteen only appear, answer and agree to this report. Twenty-one defendants failed to appear, the bill is taken *pro confesso* against them and the cause reported without their agreement.

This Law Court has jurisdiction to determine causes in equity certified on report only when the presiding Justice is of opinion, and so certifies, that a question of law is involved of sufficient importance or doubt to justify the same, and the parties agree thereto. R. S., Chap. 91, Sec. 56; *Baker* v. *Johnson*, 41 Me., 15; *Whittemore* v. *Russell*, 78 Me., 337. Defendants in default in an equity action under a decree *pro confesso* are still parties and have some rights. Unless all parties agree to a report of the cause in which they are joined, we think it is the duty of the sitting Justice to hear the evidence and make such rules, orders or decrees thereon as the law of the case requires. Under this procedure, any party aggrieved has the right of exception and appeal reserved to him and the rights of all other parties are left unimpaired. Report discharged. *George C. Otto* and *Frederick R. Dyer*, for plaintiff. *John F. Dana, Eugene L. Bodge, John B. Kehoe*, for defendants.

GEORGE E. MCINTIRE *vs.* BERTHA L. MCINTIRE.

Penobscot County. Decided August 22, 1931. This is a petition for a partition of real estate under the statute. The petitioner alleges that he is the owner of an undivided third in a certain parcel of real estate of which the respondent owns the remaining two-thirds, that his interest in said property was acquired by reason of the fact that a divorce was granted to him by the Supreme Judicial Court at a term held at Skowhegan in the County of Somerset in September, 1922, and that, in accordance with the provisions of Sec. 10, Chap. 65, R. S. 1916, he thereby became entitled to one-third in common and undivided of this parcel of real estate then owned by her. The respondent sets up special matter in defense, the material part of which reads as follows:

"That prior to the decree of divorce between these parties as set out in this petition, they mutually entered into an agreement by and between themselves in settlement of their property affairs whereby said George E. McIntire agreed to and

with the said Bertha L. McIntire to deed and convey to her by good and sufficient deed the premises described in his said petition to be in full settlement of their property affairs, and in pursuance of said agreement said George E. McIntire did, on the fifteenth day of March, A.D. 1921, deed and convey unto said Bertha L. McIntire the said premises by his deed of warranty recorded in Penobscot Registry of Deeds in Book 946, Page 335, here in Court to be produced."

The petitioner has demurred to this plea on the ground as stated in argument that it does not set forth a legal consideration for the promise of the petitioner to deed the real estate in question, and that it does not aver that the deed was accepted by the respondent in full settlement of their property rights. The trial court overruled this demurrer and the case is before us on an exception to this ruling.

The plea alleges in effect that the parties entered into an agreement for the adjustment of their property rights under the terms of which the conveyance of the real estate in question to the defendant was to be in full settlement, and that in pursuance of said agreement the deed was given. In our opinion such allegations are sufficient to constitute a defense. Exception overruled. *Crosby & Crosby*, for petitioner. *L. B. Waldron*, for defendant.

PEARL M. TIBBETTS *vs.* ARDEN MCCORRISON.

Knox County. Decided October 14, 1931. Action to recover for personal injuries and for damage to plaintiff's automobile resulting from a collision with a truck admittedly belonging to the defendant. The case is before this court on general motion after a verdict for $750.00.

While the defendant maintains that there is insufficient evidence of negligence on the part of one Farrow, who was driving the truck, and that the plaintiff himself was guilty of negligence, his main contention is that the evidence is not sufficient to have warranted

the jury in finding that Farrow was the agent of the defendant. No question was raised in argument as to the amount of the verdict.

After a careful examination of the entire record, we are satisfied that the jury was fully justified in finding that the driver of the truck was negligent and that the plaintiff was not guilty of contributory negligence, and, after carefully weighing all the record evidence bearing on the point, and bearing in mind the oft repeated statement that the jury had the opportunity of seeing and hearing the witnesses as they testified, we can not say that its conclusion that Farrow was the agent of the defendant was so manifestly wrong that the verdict should be set aside. The case was one "peculiarly within the province of a jury to hear, and to determine the liability and the proper amount of damages." No exceptions appearing, we must assume that proper instructions were given to the jury relating to the matter of agency, and the entry must be, Motion overruled. *Charles T. Smalley*, for plaintiff. *Fred Lancaster*, for defendant.

VEILLEUX'S CASE.

Sagadahoc County. Decided December 4, 1931. Appeal from decree of a Justice of the Superior Court affirming the decree of Industrial Accident Commissioner denying compensation to and dismissing petition of Frederick Veilleux for award of compensation under the Maine Workmen's Compensation Act.

Petitioner was employed as a blacksmith's helper at the ship building plant of the Bath Iron Works Corporation at Bath, Maine. He and the other employees at the plant were given time off with pay from ten to half-past ten o'clock in the forenoon of April 10, 1930, the day on which the Morgan yacht was launched. A rung of a ladder which petitioner was using to reach the roof of the electrical shop, a part of the plant, in order to take advantage of the good view of the launching there afforded, gave way, resulting in a fall and the injuries for which compensation was claimed. The accident occurred at quarter-past ten o'clock.

The Commissioner found that there was no evidence of knowledge on the part of the employer as to any custom on the part of the employees to climb onto the roof of the electrical shop during launchings and no evidence that there was such a general practice or custom, and he also found that the petitioner did not receive his injury in the course of his employment.

After a reading of the record, which is very brief, we see no occasion to disturb the findings of the Commissioner.

It is clear, under the decisions in this state, that the accident did not arise out of or in the course of the petitioner's employment.

The mandate must be, Appeal dismissed. Decree affirmed. *John P. Carey*, for petitioner. *Eben F. Littlefield* and *William B. Mahoney*, for respondents.

FRANK THORNDIKE *vs.* MANZIE ROGERS.

E. STEWART OBERTON *vs.* MANZIE ROGERS.

Knox County. Decided December 7, 1931. On motion. Verdicts for plaintiffs. Cases tried together although they involved entirely distinct issues. Both were suits brought to recover compensation for material furnished defendant for use in road building.

Thorndike's claim was based on a *quantum meruit*. The issue was the determination of a fair price or market price for the material furnished by him. There was no dispute as to the quantity. Defendant is dissatisfied with the price which the jury decided upon, after hearing considerable evidence on the point. We can not say that the verdict is manifestly wrong.

Oberton's claim rested on an alleged promise on the part of defendant, after receiving the material furnished, to pay the sum of one hundred and fifty dollars in full satisfaction of the balance of plaintiff's account. He testified to the agreement. Defendant denied it. The jury believed plaintiff. There was nothing inherently improbable in his statement. The verdict must stand. Motion overruled in both cases. *Z. M. Dwinal*, for plaintiffs. *A. L. Thayer*, for defendant.

CLARENCE C. CRAWFORD *vs.* LIONEL LANCASTER.

Penobscot County. Decided December 13, 1931. Motion for a new trial in an action of negligence in which the plaintiff has a verdict against the defendant for fifteen hundred ($1500.00) dollars for personal and property damages resulting from a collision of their automobiles.

As the plaintiff, on September 1, 1930, drove his automobile along Center Street in the city of Old Town and turned into Seventh Street, the defendant, driving his automobile in the same direction, came from the rear and struck the plaintiff's car.

The defendant admits his own negligence. The evidence warrants the finding that the plaintiff, driving at a moderate rate of speed on the right lane of the street, extended his arm and hand out to the left as a signal, looked into his mirror and back through the open side of his car and, seeing no automobile approaching from behind, turned across the street. The collision occurred just as the plaintiff's car reached the edge of the concrete way.

The plaintiff is a painter and paper hanger by trade. In the collision he was hit in the side, bruised and shaken up. He introduces evidence tending to show resulting nervous shock and disability which continued to the time of the trial, is diagnosed as traumatic neurasthenia and may continue for a period of from six months to a year.

The triers of fact were not clearly wrong in their conclusion, evidenced by the verdict, that the plaintiff, before and while turning his car across the street, took such precautions as a reasonably prudent person would have taken under the same or like circumstances and was free from contributory negligence.

The plaintiff is entitled to just compensation for the injuries he received to his person and property as a result of the defendant's negligence. The damages awarded him are not grossly excessive. Motion overruled. *Clinton C. Stevens* and *A. S. Crawford, Jr.*, for plaintiff. *Butterfield & Weatherby*, for defendant.

FIRMIN MARQUIS *vs.* FRED C. PRATT.

Franklin County. Decided December 30, 1931. This is an action for breach of contract, and is before us after a verdict for the plaintiff on defendant's motion for a new trial. Under the terms of the contract between the parties the plaintiff planted for the defendant, a corn packer, three and a quarter acres of corn which he agreed to deliver to the factory of the defendant "at such time or times as said packer may designate, being when corn is in green and milky condition, suitable for canning purposes." The corn from approximately one acre was delivered and paid for, but the defendant refused to receive the balance alleging that it was not delivered as ordered, was overripe and unfit for canning.

According to the plaintiff's testimony he picked a small lot of corn on September 10; he started to pick again on Monday, the sixteenth, but was told by the defendant's foreman to wait before delivering more until after the Franklin County fair which closed on Thursday, the nineteenth. He says that he followed such instructions and made deliveries on Friday and Saturday and was told on Saturday to get the balance in on Sunday, when the defendant refused to receive it. The plaintiff also introduced evidence to contradict the defendant's contention that the corn delivered on Sunday was overripe. The testimony of the defendant's foreman was to the effect that he may have directed the defendant to stop picking on Monday, but that he ordered that the corn should be delivered on Thursday.

The evidence was sharply conflicting. If the jury believed the testimony of the plaintiff and his witnesses a verdict in his favor was justified. The issue was one of fact and was within the province of the jury. We can not say that their finding on the points in controversy is manifestly wrong or that the damages awarded are excessive. Motion overruled. *Currier C. Holman*, for plaintiff. *Frank W. Butler*, for defendant.

RULES FOR
PROBATE COURT

STATE OF MAINE

TO THE HONORABLE JUDGES OF THE SUPREME JUDICIAL COURT:

The undersigned Judges and Registers of the Probate Court, duly appointed and qualified pursuant to Sec. 48, Chap. 75, R. S. 1930, authorized and directed by said statute to make new rules and blanks or amendments to existing rules and blanks, have prepared and respectfully submit the annexed rules to be used in Probate Courts, for your approval, agreeable to said statute.

CHARLES O. SMALL
HARRY B. AYER
BENJAMIN L. BERMAN
HENRY A. PEABODY
RALPH W. LEIGHTON

STATE OF MAINE

SUPREME JUDICIAL COURT

WHEREAS, it is provided by Sec. 48, Chap. 75, R. S. 1930, that a Commission composed of three Judges and two Registers of Probate, appointed by the Governor, may make new rules and blanks or amendments to existing rules and blanks, which shall, when approved by the Supreme Judicial Court, or a majority of the Justices thereof, take effect and be in force in all Courts of Probate, and WHEREAS a Commission, duly appointed and qualified as aforesaid, has prepared certain rules for use in said Courts of Probate, which are hereunto annexed and have submitted them to the Supreme Judicial Court for approval in accordance with said statute.

Said rules having been examined by the Justices of the Supreme Judicial Court,

IT IS HEREBY ORDERED, that the rules be approved and that they take effect and be in force in all Courts of Probate in this state on and after January 1, 1932.

Augusta, Maine, December 3, A.D. 1931.

W. R. PATTANGALL
CHARLES J. DUNN
GUY H. STURGIS
CHARLES P. BARNES
FRANK G. FARRINGTON
SIDNEY ST. F. THAXTER

RULES FOR PROBATE COURT

GOVERNING PRACTICE AND PROCEDURE IN THE COURTS OF THE STATE OF MAINE

I.

If a party shall change his attorney pending any proceeding, the name of the new attorney shall be substituted on the docket for that of the former attorney and said party shall give notice thereof to the adverse party; and until such notice or change, all notices given to or by the attorney first appointed shall be considered in all respects as notice to or from his client, except in cases in which by law a notice is required to be given to the party personally; provided, however, that nothing in these rules shall be construed to prevent any party interested from appearing for himself, in the manner provided by law, and in such case the party so appearing shall be subject to the same rules that are or may be provided for attorneys in like cases, so far as the same are applicable.

II.

When the authority of an attorney at law to appear for any party shall be demanded, if the attorney shall declare that he has

been duly authorized to appear by an application made directly to him by such party or by some person whom he believes to have been authorized to employ him, such declaration may be deemed and taken to be evidence of authority to appear and prosecute or defend in any proceeding in said court.

III.

Petitions and other matters upon which notice has been ordered will not be acted upon until after the return hour, and any attorney or other duly authorized person who desires to appear to contest, or to object to any matter in order for hearing, shall give notice to that effect on or before the opening hour of the session of the court at which such hearing is to be had.

IV.

Approved blanks will be furnished by the Register and must be used in all proceedings to which they are applicable. In all inventories and accounts where there is not sufficient space in the original blank, additions or riders may be attached on schedule paper to be furnished by the Register as provided above and not otherwise.

V.

Notice will not be ordered on any petition, report, account or other instrument until the same has been actually filed in court.

VI.

The names of attorneys and persons acting *pro se* presenting petitions and other instruments in court to be acted upon should be indorsed thereon to secure the prompt issuing of notices and for other purposes.

VII.

Petitions to sell, mortgage, lease or exchange real estate or to sell personal property, or for allowances to widows or minor children will not be acted upon until the inventory in that estate has been duly filed in court and approved.

VIII.

Petitions to sell real estate for the payment of debts, or legacies, except where the amount has been ascertained by the settlement of an account or the report of Commissioners of insolvency, must be accompanied with a list under oath, of the debts (and legacies, if any) due from the estate, and the estimated amount of the expenses of administration.

IX.

No commission to take a deposition of witnesses to a will shall issue before the return day of the petition for probate of said will.

X.

All petitions for assessment of inheritance taxes, and all instruments required by the provisions of the Uniform Veterans Guardianship Act shall be filed in duplicate.

XI.

Notice will be ordered on all petitions for the appointment of an administrator *de bonis non* or *de bonis non* with the will annexed, unless the appointment of a person entitled by law to administer the estate is requested, or the petition is assented to, to the satisfaction of the Court.

XII.

Representations of insolvency shall be accompanied with a statement, under oath, of the amount of the debts due from the estate so far as can be ascertained, and of the amount of the appraisal of the real and personal property.

XIII.

The Court may appoint a guardian *ad litem*, for any party interested in any proceedings before it when it is deemed advisable.

XIV.

Accounts presented for order of notice must include dates of receipts and expenditures and must be fully stated before notice will be ordered thereon.

XV.

Charges and fees of the Register shall be paid in advance. The Court may refuse to hear any cause or matter, or allow any account until such charges and fees have been paid.

XVI.

When a surety company is offered as surety on a Probate bond, no such bond shall be approved unless the name of the person executing the bond for the surety company has been certified to the Register by the insurance commissioner, or unless and until such surety company shall have filed with the Register a power of attorney or a certified copy thereof authorizing the execution of such bond. The Court may require proof in the form of an affidavit or otherwise, that the person purporting to be an officer of any surety company and executing in behalf of the company any bond, letter or power of attorney, is in fact such an officer.

XVII.

The names and residences of principals and sureties on all Probate bonds shall be written or printed in full, and the signatures thereto witnessed.

XVIII.

Sureties on the bonds of administrators, executors, guardians, trustees or conservators will not be appointed appraisers or commissioners on the same estate, nor will any person who is related to the administrator, executor, guardian, trustee, conservator or heirs at law within the sixth degree be appointed to either of said trusts. Christian names and residences of appraisers and commissioners shall be fully stated.

XIX.

Any petition addressed to the Court, or any Probate Account may be amended under the direction of the Court, with or without notice, when the rights of parties will not be affected.

XX.

All petitions for license to sell real estate shall contain a description of the real estate to be sold, sufficiently accurate to make a conveyance thereof.

XXI.

All official communications relating to cases and business in court shall be addressed to the Register of Probate to avoid delay.

XXII.

Parties not familiar with the proceedings in the Probate Court are expected to secure assistance of competent counsellors qualified to practice law within this state. Neither the Judge nor Register are allowed by law to advise in matters coming before the Court.

XXIII.

No person entitled by law to administer an estate shall be appointed within thirty days after the death of the decedent without written consent of all other persons so entitled, who are resident in this state.

XXIV.

Judges of Probate may order notices on all petitions and other matters presented to their several courts.

XXV.

Letters testamentary or of administration with the will annexed and bonds in cases of nuncupative or lost wills are to follow the general form of letters testamentary and of administrations with the will annexed and bonds prescribed in other cases of testate estates.

XXVI.

All depositions shall be opened and filed by the Register at the term for which they were taken; and if the matters in which they are to be used shall be continued, such depositions shall remain on file and be open to all objections when offered at the trial or hearing as at the return term, and all depositions shall remain on file at least fourteen days; the party producing a deposition may then withdraw it by leave of Court, in which case it shall not be used by either party.

XXVII.

When written evidence is in the hands of an adverse party, no evidence of its contents shall be admitted unless reasonable notice to produce it on trial or hearing shall have been given to such adverse party, or his attorney, and comments by counsel upon a refusal to produce it will not be allowed without first proving such notice.

XXVIII.

In all contested cases, the party objecting may be required to file specifications of the grounds of the objection before the day of hearing, but amendments thereto may be filed by leave of the Court, upon such terms as may be deemed reasonable, but not without granting a continuance, if requested, and in such cases the hearing shall be confined to the grounds of objection specified.

XXIX.

In cases of license to sell real estate at private sale or to mortgage, lease or exchange real estate, a certificate under oath, of such sale, mortgage, lease or exchange shall be filed in the Registry of Probate within thirty days, showing the amount received or the real estate taken in exchange, and the person to whom sold, mortgaged, leased or with whom exchanged.

XXX.

No private claim of an administrator, executor, trustee, guardian of an adult or conservator of an estate shall be allowed in his

account or otherwise, unless particularly stated in writing, and notice of such claim included in the notice on said account, or given on petition for allowance of such claim.

XXXI.

Wills must in every case be proved and allowed in open court, and in case the testimony of the witness or witnesses proving the will is not taken down by the court stenographer and certified, the testimony shall be preserved by an affidavit taken before the Judge or Register, and filed with the other papers in the case, and in no case shall evidence be taken out to prove said will before the return day of the petition for probate thereof.

XXXII.

All personal surety bonds, when presented for approval, should bear on the back thereof a certificate of a Justice of the Peace or Notary Public of the following tenor:

> I hereby certify that I have made due inquiry into the financial standing of the sureties on the within bond, and find them to be jointly worth, above their liabilities, the sum of $. I therefore recommend the acceptance and approval of the within bond.
>
> Justice of the Peace.
> Notary Public.

XXXIII.

The Judge may direct that letters testamentary or of administration shall not issue from the Probate office (and in such cases no certificate of appointment shall issue) until twenty days shall have elapsed after date of the decree.

XXXIV.

When claims are filed in the Probate office after the qualification of an administrator or executor, verified as required by law, the Register shall forthwith give notice of such filing by mail to the administrator or executor of the estate.

XXXV.

Petitions for administration filed for notice and petitions for probate of wills shall contain the addresses of the widow or widower and of the heirs at law and next of kin of deceased so far as known to the petitioner, and the Register shall give notice, by mail, of the filing of said petition to all persons whose addresses are so given, at least seven days before the return day. If any of the heirs are minors, they should be so designated.

XXXVI.

Letters testamentary and of administration, letters of guardianship, conservatorship and of trust shall be accompanied by a warrant to appraisers and shall not issue until appraisers are appointed. The warrant need not be recorded until returned, but the fact of issue shall be entered on the docket.

XXXVII.

All petitions by administrators, executors, guardians, conservators or trustees of foreign estates for license to collect or receive personal property and all petitions by administrators, executors, guardians or conservators of foreign estates to sell real estate shall be filed in the office of the Register of Probate in duplicate, and the Register shall forward to the office of the Attorney General one of said duplicates seven days at least before the return day.

XXXVIII.

The petition for the reduction of the penal sum of any Probate bond signed by a surety company as surety and the petition for the discharge of liability of a surety or sureties on any Probate bond will not be granted until the principal on such bond has filed and settled his account in court.

XXXIX.

Real estate listed in any inventory filed in court shall be sufficiently described to identify it.

XL.

Before the allowance of any account, when personal assets or the evidence thereof are not exhibited to the Court, the Court may require a signed statement from an official of the bank, or other custodian with whom the securities belonging to the estate are kept or deposited, that they are intact in accordance with the schedule of said account, or such a signed statement may be made on the original account.

XLI.

If any account filed by an administrator, executor or trustee in a solvent estate is not assented to in writing by the heirs, legatees or beneficiaries as the case may be, the Court shall order public notice on said account, and in addition the Court may in its discretion, order such administrator, executor or trustee to give to the heirs, legatees or beneficiaries actual notice by mail or otherwise of the time of filing said account and the time when the public notice on said account is returnable; and, in case such actual notice is ordered, said administrator, executor or trustee shall make return to the Court under oath that he has given such notice before said account can be allowed.

XLII.

Before administration is granted on the estate of a non-resident decedent or before any foreign will shall be allowed, the petitioner shall file in court an affidavit stating the total amount of property in the entire estate, the total amount of the indebtedness of said estate, the approximate amount of property in the State of Maine, including amount of stock in Maine corporations.

XLIII.

The Court may refuse to approve a bond of any Surety Company which does not coöperate with the Court in requiring a trust officer to account in accordance with the requirements of law.

XLIV.

Commissioners in insolvent estates and on disputed claims shall notify in writing all claimants whose claims have been presented to them of the filing of their reports. Such notice shall be sent by mail to the last known address of the claimant five days at least before the filing of the report and shall give the amount allowed or disallowed.

XLV.

Service of all petitions filed in the Probate Court by a husband or wife, alleging desertion, shall be by a copy of the petition and order of Court thereon, fourteen days at least before the same is returnable. If the residence of the party is known or can be ascertained by reasonable diligence, actual notice shall be obtained; otherwise notice shall be given in such manner and by such means as the Court may order.

XLVI.

Rule days in equity proceedings in the Probate Courts shall be the fixed days to which all matters requiring public notice are returnable, as held in the different counties of the State.

XLVII.

The equity rules of the Supreme Judicial and Superior Courts of the State shall be the rules for equity proceedings in the Probate Court, so far as the same are applicable thereto.

XLVIII.

Causes in equity shall be begun by bill or petition filed in the Register's office, upon which subpoena shall issue as a matter of course, returnable on a rule day of the Probate Court of the county in which the bill or petition is filed, held within sixty days after the filing of such bill or petition. In all cases service shall be made by a copy of subpoena and bill or petition attested by the Register. The Court may order such further or other notice as may be deemed expedient.

NORMAN LESLIE BASSETT

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT AUGUSTA, NOVEMBER 17, 1931, IN MEMORY OF

HONORABLE NORMAN LESLIE BASSETT

LATE ASSOCIATE JUSTICE OF THE SUPREME JUDICIAL COURT

Born June 23, 1869. Died September 29, 1931.

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

HON. L. T. CARLETON, SENIOR, President of the Kennebec Bar Association, addressed the Court as follows:

MAY IT PLEASE THE COURT:

I am instructed by the Kennebec Bar Association to ask this Honorable Court to pause for a brief time in the performance of its great and important work and permit a Committee of this Bar to present to the Court resolutions and submit remarks upon the life, character and attainments of our late brother, a member of this Bar and a former member of this Court who lately departed this life, NORMAN L. BASSETT.

MAY IT PLEASE THE COURT:

Before calling upon the Committee of the Kennebec Bar Association who will submit the resolutions, and distinguished members of the Bar in this and other counties who will follow me, I beg leave to be permitted to say a few words as my personal tribute to JUDGE BASSETT.

I count myself fortunate indeed that I had a long and somewhat intimate acquaintance with him. I first met him, then a country boy, in his father's country store in the town of Winslow, in this county, more than fifty years ago. That acquaintance continued through the years until his death. It was of great benefit to me in many ways. I cherish the memory of that friendship.

Stricken with startling suddenness and a lingering illness deprived the community and the Bench of another fine servant. His life was of large accomplishment. After his advent to the Bench he added to his fame and his great measure of usefulness. That his final call should come so early in life added a touch of drama to his passing.

Perhaps the finest lesson he has bequeathed to the Bar and the community is a glorification of the common lot of us all, Work.

He was a wise and dependable counsellor whose advice was sane and sound and sought by multitudes. Many went to him as children to a father, how many, only a census of sorrowing hearts could tell.

We look into the open book of his fruitful life and find it an illuminated scroll. Every paragraph records some worthy service. Every page finds him giving of himself to the society and the institutions which he adorned. Every chapter points to the service, not to the reward as the relentless impulse and objective of his busy life. But here at last is the flower of all rewards, the common love which puts him like a meteor in the heavens of our grateful memories. He was a devout religionist to whom the church was the temple of his abiding faith and the workshop of his dearest labors. He was the Samaritan who gave not merely of his substance but of his own great heart and wholesome self. He was gentle, yet brave. He was kindly and companionate. He was true as steel. He believed in friendship and never tarnished it. He believed in God and served Him with unbroken zeal. I think of him as the personification of the poet's prophecy

"I know we are building our Heaven
Each day as we go on our way.
Each thought is a nail that is driven,
That cannot decay, and heaven shall at last be given
To us as we build it today."

It is said that there is a surplus of lawyers in the country today but there will never be a surplus of lawyers like

NORMAN L. BASSETT.

HERBERT E. LOCKE, ESQ., of the Kennebec Bar Association then spoke presenting Resolutions of that Association.

MAY IT PLEASE THE COURT:

With profound sorrow and with a keen sense of personal loss in the heart of each member, the Kennebec Bar Association formally calls to the Court's attention the death of MR. JUSTICE NORMAN LESLIE BASSETT at his home in Augusta on September 29 last.

Born at Winslow, Maine, June 23, 1869, NORMAN BASSETT performed his life work for the most part here in Kennebec County. As a boy, he attended school in the old "District No. 2" in Winslow, which has sent its share of useful citizens out into the world. Graduating from Coburn Classical Institute in 1887 he entered Colby College from which he was graduated with the degree of Bachelor of Arts in 1891. His was next the highest rank in the graduating class of that year. He was in Colby a member of the Phi Beta Kappa fraternity.

Always a student of the classics, he remained at Colby College as instructor in Greek and Latin until the fall of 1895 when he entered Harvard Law School.

There he distinguished himself by close application to his studies and was one of the editors of the Law Review. He received his degree of Bachelor of Laws (cum laude) in 1898.

His start in practice of law was under most auspicious circumstances. Admitted October 18, 1898, he entered the office of his uncle, Leslie C. Cornish, then at the height of his career as one of Maine's most brilliant lawyers. The young lawyer promptly demonstrated his worth and ability: three years later the partnership of Cornish & Bassett was formed.

When, six years later, Leslie C. Cornish was appointed to our Supreme Court, NORMAN BASSETT continued in practice, preserving in the office all the traditions bequeathed by his distinguished uncle. From 1907 to 1925, when he was appointed to the Supreme Court, he was the trusted adviser of many of the outstanding busi-

ness men of Maine. Advocacy of causes in court did not have for him the fascination it has for some. Yet no attorney at the Bar appreciated more keenly the ready retort and the brilliant argument of the advocate.

Probably no lawyer in his time devoted more careful attention, gave more meticulous thought to each detail of his work. Such clients as the Boston & Maine Railroad, the New England Telephone and Telegraph Company were his.

Practicing before banking institutions came to do the trust and estate work formerly performed by lawyers, NORMAN BASSETT acted as trustee of several of the largest and most important estates in Maine, including that of Ex-Governor John F. Hill, of Augusta.

Despite the grave responsibilities of an important practice, his very nature required him to perform helpful service in other fields. Probably no Maine college ever had on its Board of Trustees a more interested, earnest and hardworking member than Colby College found in NORMAN BASSETT.

As director, and, following Judge Cornish, as president of the Augusta Savings Bank, he maintained its traditional policy of sound banking combined with sympathetic help to its depositors and patrons.

Such institutions as Coburn Classical Institute, the Howard Benevolent Union, the Y. M. C. A., the Maine Unitarian Association, and, in his own city, the Lithgow Library, found in him an intelligent adviser and an active worker.

He particularly loved his work as Secretary of the Maine Bar Association, which office he held from 1907 to 1925; and by his careful attention to every detail he made the meetings of the Association memorable occasions in the history of the Bar of Maine. By his efforts the influence and accomplishments of the Association were extended and the present custom of preserving the records in permanent and attractive form was inaugurated.

Public affairs claimed their share of his interest. From 1905 to 1907 he was a member of the Maine Enforcement Commission. From 1911 to 1915 he served his city as a member of its government. His interest in public matters was lively but never unreasonably partisan.

It was in his home and among his friends, away from the cares of professional life, that he displayed those delightful qualities of humor and happy companionship that were found in his uncle, Judge Cornish.

He married June 24, 1903, Lula J. Holden of Bennington, Vermont. Although they had no children, their many friends always found their home a happy one and cherish fond recollections of happy evenings spent there.

In later years Colby College and University of Maine conferred upon JUDGE BASSETT the degree of Doctor of Laws in recognition of the splendid service he had rendered as a member of his profession and while on the Bench.

From his uncle, the beloved Chief Justice, he particularly inherited the guardianship of All Souls Unitarian Church in Augusta, and no guardian ever performed his duties with more care and thoughtful attention.

In short, in all these activities and many others which might be mentioned, NORMAN BASSETT displayed a combination of abilities not always found. A sound thinker, capable of viewing in their true breadth important problems and accomplishing their solution, he possessed also the ability to devote to each matter of tedious detail all the care and attention possible to bestow upon it. A whole-souled man not incapable of attending to small matters, as well as large.

In his five years of active work on the Bench we, who tried cases before him, found that even and judicial temperament which is so highly desirable in the trial Judge. I recall particularly a long trial in Wiscasset, lasting over a week, in which the counsel on both sides after raising many issues agreed upon this, and as I recall only upon this, that JUDGE BASSETT had been eminently fair to both sides and that no better charge to the jury could have been given.

His opinions as a member of the Law Court, soundly reasoned and well expressed, have merited and received more than passing interest from the reviewers.

Traditions based upon sound principles of law and ethics contribute more to our happiness and successful progress through life than many of us realize. In NORMAN BASSETT, every member of Kennebec Bar—and all persons everywhere who came to know him

at all—met and knew one whose recognition of those traditions made him a leader among men.

We respectfully offer the following Resolutions:

Resolved: That in the person of NORMAN LESLIE BASSETT the members of this Association found a true friend, a loyal brother, a gentleman of the Bar who by his every word and deed revealed that rare unity of lofty character with tender kindness toward his fellows to which we all aspire, an able and conscientious Judge whose decisions we sought with confidence and observed with respect.

Resolved: That we mourn his death; we honor his memory; we affirm our allegiance to the principles he fostered, and our devotion to the ideals he loved and helped us to understand.

"Remove not the ancient landmark, which
Thy Fathers have set."

Resolved: That we present these resolutions to the Court with a request that they be entered on its permanent records, and that a copy of them be sent to his widow, as our expression of sympathy in her bereavement.

For the Kennebec Bar Association
HERBERT E. LOCKE
ROBERT B. WILLIAMSON
CHARLES A. KNIGHT
CARROLL N. PERKINS
Committee.

Former CHIEF JUSTICE SCOTT WILSON, now Judge of the United States Circuit Court of Appeals, then spoke as follows:

MAY IT PLEASE THE COURT:

May I not first express my appreciation of the opportunity of joining with my brethren of the Bar in seconding the motion of its committee for the adoption by the Court of the resolutions just read in recognition of the distinguished services of a former member of this Court, an able jurist, a public-spirited citizen and a friend of mankind.

I do not deem it my task to speak in detail of his early training and many-sided life and the multifold services he rendered outside of his profession. Sufficeth for me to say that when he reached

maturity and assumed the responsibilities of manhood, he possessed in full measure those assets that assured him eminent success in his chosen profession, among which were a New England heritage, a well-rounded classical education, an ambitious spirit, rare personal charm and a legal training in the Harvard Law School and in the office of a great lawyer and jurist, a former Chief Justice of this Court, following whose resignation from the Bench he was appointed an associate Justice and served until his forced retirement from illness.

During his brief period of service on the Bench, JUSTICE BASSETT endeared himself to his associates and at once secured for himself the respect and good will of the members of the Bar throughout the state.

To semi-public services, if I may term them such, he also gave willingly and freely of his time and strength; to the cause of education, to the support of the church at which he worshipped, and to the civic and commercial life of the community in which he lived, as a trustee of his alma mater, Colby College, a trustee of his church organization, as president of one of the principal savings banks in this city, as a director of its leading financial institution and as the adviser of many of its large business organizations.

It was as a jurist, however, that I came to know him best and to appreciate his conscientious devotion to duty and the high ideals that finally relentlessly drove him to overtax his strength. Exact justice, even though he realized it was unattainable, was his aim in all his judicial work.

As he once remarked to a friend, he strove to make each opinion an enduring monument. He may not have attained his goal. Perfection is denied to us all, but the twenty-five opinions he completed disclose how nearly he approached it and the painstaking care he bestowed on each. They will at least be found, without exception, to serve as monuments to guide his brethren at the Bar along the devious pathways of the law.

I can see him now toiling at his judicial tasks with his law books spread out on his desk for ready reference as he carefully wrought out and moulded his conclusions into written opinions, which for clarity of thought and exactness in expression are seldom excelled. I shall remember him at his best in his delightful home as a host,

surrounded by congenial friends, and at his desk in chambers absorbed in his work and in the pursuit of his ideals. The lintel of the door to every judicial chamber, as a reminder to him who labors within of the great responsibilities that are his, might well bear that wonderfully appropriate inscription, the creation, I am told, of the brain of a great lawyer and statesman of Massachusetts, and which greets the citizens of that commonwealth at the entrance of one of its court houses:

"Here speaketh the conscience of the Commonwealth."

So I like to think of JUSTICE BASSETT as constantly striving to weave into his opinions the principles of justice that to him represented the conscience of the state.

No one who had occasion to call upon him in chambers in this building, which to him was indeed a temple of justice, will forget the cheery smile which greeted him on his approach, and the hearty welcoming handclasp.

We shall miss his services in behalf of all these institutions. We shall miss his work on the Bench as a jurist, but even more, because they were personal to us, shall we miss his cheery greeting, his charm, his love of companionship and of a "tale well told." Full of friendliness for his fellowmen, interested in all the problems of his state and nation and of mankind, fond of good books and of all the humanities, and as an ideal host, we shall not soon look upon his like again.

Those of us who were privileged to serve with him on the Bench and enjoy his confidence and friendship, will not forget; nor will the people of his state soon forget the great sacrifice he made in the interest of justice, of education, of the church, and in the promotion of the public and civic welfare of the state.

He has now passed beyond our ken and entered upon what Barrie termed The Great Adventure, and while another generation may forget or know naught of his many lovable personal qualities, his judicial work will remain a lasting contribution to the jurisprudence of our state.

GOVERNOR WILLIAM TUDOR GARDINER then spoke as follows:

MAY IT PLEASE THE COURT:

The state records its tribute to the memory of JUSTICE NORMAN L. BASSETT. His service to the public as a member of the Supreme Judicial Court was all too short. His experience at the Bar and his good offices in the State Bar Association brought him to the Bench with honor and the love of the members of his profession. In him as a member of the Supreme Court the State found a worthy continuation of the best traditions of the past. Not only does the Court touch intimately upon the lives and property of many of our citizens, but the Court represents to the people whom it serves the sovereign power of a sovereign people solemnly vested in representatives whose character and ideals must speak for themselves.

It is difficult to speak of JUDGE BASSETT simply as a public official. The warmth of his friendship passed beyond the forms and ceremonies of official life.

His memory lives vividly in the minds of those who knew him, because of his personal characteristics, his probity, his scholarly mind and his kindness.

His probity led him to a real love of justice and led him also to look for the best in everyone about him.

JUDGE BASSETT'S scholarliness was apparent even to the passer-by. Hardly a brief conversation even of commonplace things went by without revealing his great love of reading of prose and of poetry. He was always seeking to apply the ideas of great writers or philosophies of great men to matters of everyday life. His keen enthusiasm for learning and for literature stimulated himself and those with whom he came in contact.

JUDGE BASSETT'S kindness came from a habit of thought that readily translated itself into action. I am glad to recall his kind attitude and ready response when consulted by young men starting the practice of law or taking some step toward public service. His hospitality was unbounded, and friendship he seized and created with eagerness.

Even from the recital of this brief and inadequate tribute, whether we be associates in public service or members of his profession, or friends or acquaintances, is there any wonder that we

wish to couple our memorial tribute with the expression of our own personal sense of loss at his going.

HON. LEONARD PIERCE, President of the State Bar Association, next addressed the Court.

MAY IT PLEASE THE COURT:

It seems particularly appropriate that the present officers of the Maine State Bar Association should participate in these Memorial Exercises for him whom we are today gathered to honor.

For eighteen years, JUDGE BASSETT served as the Secretary of that Association, resigning only upon his appointment to this Court. As we go back in memory over the meetings of that Association, the one figure which stands out, the one personality that is indelibly associated with our recollection of those meetings, is his. His care and interest extended to every feature of it—the arrangement of the programs, the procuring of the speakers, the menu, the printing of all accompanying literature—over all of these he exercised the most watchful supervision, the most enthusiastic interest. Without him the Association would undoubtedly have continued, but its meetings certainly would have been less interesting, less joyous, less profitable.

JUDGE BASSETT was the happy combination of the energy and enthusiasms of youth joined with the scholarship, judgment, and loyalty of maturity. For years, he was one of the leading members of the Bar in this county and represented, often in a most confidential manner, its most prominent citizens and its leading business interests. He accepted to the full every public responsibility. To his church, his college, his adopted city, and its various public and charitable enterprises, he gave unstintingly of his time and effort.

He was a real lawyer. For him, the practice of law was no mere trade but a real profession, with every attribute a profession ought to have. Other lawyers were to him fellow members of a great fraternity, serving with him in the temple of justice not for mere sordid motives but with the primary and ultimate purpose that as between citizen and citizen, and as between citizen and State, justice might be done and right might prevail.

I know that the experience of everyone who happened to be so associated with him is like my own. We were delighted to be with him. We enjoyed every occasion which called for a conference, and whatever the conclusion of our employment might be, we could not but regret that its termination made our occasions to see him less frequent.

Nature had endowed him with a brilliant intellect. Diligent study in college and law school, long association with his maternal uncle, former Chief Justice Cornish, and the extent of his own research, quickened and strengthened his mental powers; and yet I am sure that it was neither his scholarship, nor his brilliancy, unusual as they were, which most impressed opponent or associate. Rather, it was his absolute sense of fairness, his firm desire that the result arrived at should be that which fairly ought to be, which most impressed all of us.

On the personal side, his keen sense of humor, his universal courtesy, his never varying consideration for others made association with him pleasure not work. A more charming companion we can never hope to find. Every evening spent with him added something real to our lives.

No one would deprecate more than he extravagant statements on such an occasion as this but of him it can truthfully be said that his standards of professional conduct and of private life were as high as those of any man of our time who has practiced at our Bar, or sat upon our Court, and to those high standards he adhered under whatever circumstances. He loved the ancient oath taken by all candidates for admission, and loved it, not as a mere historic phrase but as setting forth principles of conduct to be followed. No one who knew him but would say that he "did conduct himself in the office of an attorney within the Courts according to the best of his knowledge and discretion and with all good fidelity to the Court as to his clients."

His judicial career others can portray more fittingly than I, but speaking more as one of those who worked with him in our calling, who felt honored by his friendship, I know it can be truly said that life in our State—at our Bar—was brighter and better because of him. Surely, nothing more can be said of any man.

HON. WILLIAM H. FISHER, Justice of the Superior Court, then addressed the Court.

MAY IT PLEASE THE COURT:

It is always with feelings of sadness that we render homage to the memory of those whom we mourn. Tributes to the memory of the dead should be such as we could have truthfully uttered of them while living, and, in the few words which I shall speak on this occasion, I would like to express my thoughts and feelings in a way which would meet with the approval of our late brother, JUSTICE BASSETT, if he could hear what I say, not extravagant phrases of fulsome praise, for I know he would not care for such, but simple words expressing my sincere admiration for him as a friend, as a fellow lawyer, and as a judge.

JUSTICE BASSETT, notwithstanding his very great learning, his acknowledged ability as a lawyer and as a member of this Court, ever remained the sincere, unaffected, affable, everyday type of man whom it was an inspiration to know and a pleasure to be associated with.

Others have spoken and will speak of his early life and characteristics as a boy and as a young man and for me to do so would be mere repetition, but I cannot refrain from remarking that he was fortunate in his ancestry and in his environment. He had the advantages of a thorough educational preparation for his chosen profession and the benefit of association with his illustrious uncle, Chief Justice Cornish, and he possessed the high moral character and splendid qualities of mind which enabled him early to take a high place in the estimation of his fellow members of the Bar, of his business associates, and of all those with whom he came in contact.

I am told that in his college days he had some reputation as a wit; and, although he must soon have become convinced that this was not a distinction to be desired and not a gift to cultivate, he never lost that keen sense of humor which was a delight to his friends and which lightened the cares of his laborious life.

JUDGE BASSETT never ceased to be a student but always retained his love of literature and found diversion in the company of the great thinkers and writers of all the ages.

Although never extravagant in statement or thought, he was an

enthusiast in everything he undertook; enthusiastic in his love for his church, for his college, for his friends, for the law as a science, in his love for his great profession, for the duties of the Bench which he adorned, and in his devotion to the great jurists and judges who, "following the gladsome light of jurisprudence," have benefited their fellow men.

While it is with sadness that we contemplate his untimely sickness and death, we should be thankful that he lived among us as long as he did; that we had his example as a good citizen, as a good friend, as a good husband, as a good lawyer, and as a good judge. The people of this community in which he lived and the State of Maine, which he loved so dearly, will always cherish the memory of NORMAN BASSETT as one of its best and foremost citizens.

And, may it please the Court, I would like to have the record show that all the Judges of the Superior Court are present at these Memorial Exercises, having adjourned their courts and come here from distant parts of the State to join in the tributes to the memory of our distinguished friend, JUSTICE BASSETT, for whom we all had high regard and affection.

HON. WILLIAM T. COBB, former Governor of Maine, then addressed the Court.

MR. PRESIDENT, YOUR HONORS, GENTLEMEN OF THE BAR, AND FRIENDS:

Among the many traditions that have attached themselves to the profession of the law, none makes a stronger appeal to the laity, none seems more fitting, more in accord with the dignity and responsibility of the profession itself and the true spirit of companionship and mutual respect that prevails among its members, than the custom of holding a formal service in memory and honor of an associate who has heard and answered the summons of death. As one then wholly apart from the Courts and the practice of the law, I am deeply sensible of the compliment contained in an invitation to speak in such a place, to such an assemblage and upon such an occasion as this.

You will not expect from me an attempted recital of the abilities and characteristics that made JUDGE BASSETT an outstanding fig-

ure at the Bar, or an analysis of the qualities that won for him a deserved elevation to the Bench. That story is one to be told by others, by those who engaged in a similar calling are familiar with his work and accomplishments in a particular field of effort, and can appraise without prejudice the methods he employed there and the success he attained. I speak simply as a friend of NORMAN BASSETT, as one to whom for many years that friendship was very dear, and now that the ties have been broken by his passing, as one who counts it a privilege indeed to pay in these surroundings a brief but sincere tribute to his memory.

He had the gift of making friends and what is infinitely finer, the gift of keeping them, for this last rests not alone upon charm of manner but upon the more substantial foundations of a character without deceit, a sympathy quick to understand, and a tolerance willing at all times to weigh the opinions of others and to give to them the heed that may be their due. These unusual qualities were united in JUDGE BASSETT, and because of it a host of friends now hold him in grateful and affectionate remembrance.

He was a most joyous companion, for he was both keen and kindly, and with the saving grace of humor, looked upon life as an adventure well worth while, and upon men as fellow travelers with pleasures and burdens like his own. Always a student of books and familiar with the history and events of an earlier day, he was even more a student of our own times. Facts, realities, the thoughts of men as indicated by their private and public acts were never ignored by him, and nothing seemed to give him greater delight than to search for reasons that might explain the quick shifting currents of modern life, and to speculate upon the impending results to governments and to humanity of the social and economic problems we face today.

In the intimate discussion of questions such as these he brought into full play the resources of a trained and scholarly mind, alert powers of analysis, and a characteristic eagerness for the truth, and whoever by happy chance has sat with him at his own fireside in the home he held so dear when talk ran in these channels, has seen JUDGE BASSETT at his best and has caught something lasting of his nature and his charm.

And how fine and clean was his life; not long in years perhaps,

but measured by the opportunities for well doing and usefulness he accepted not as a task but as a cheerful duty, how full it was and how enduring its memory.

Nor did his career lack the recognition and honor that was its just reward, for to the State he was a conscientious Judge, to his legal associates a lawyer devoted to the high ideals of a great profession, to his Alma Mater a loyal son and to the people of his home a citizen to whom no decent civic cause appealed in vain.

All these public tributes come to him now and are given freely, and yet those of us who knew NORMAN BASSETT so long and so well in other ways, and loved him so much, like to believe that the splendid qualities of his heart and mind found their best expression when bestowed upon close and abiding friends. To them his memory is tender, forever.

Response for the Court by CHIEF JUSTICE WM. R. PATTANGALL.

MEMBERS OF THE BENCH AND BAR:

In accordance with long established and appropriate custom, this day has been set apart by the Court in order that Bench and Bar may unite in paying solemn tribute to the memory of a companion who has completed his earthly labors and lain down to peaceful, well-earned rest.

We are not indulging in a formal ceremony. We pay no mere lip service to our departed brother. Every word of praise that is spoken of him here is heartfelt; every kindly thought expressed is prompted by sincere regard and deep affection.

It is difficult for those of us who enjoyed close and intimate relations with JUSTICE BASSETT to realize that he is gone from us. His buoyant personality, his enthusiasm, his active interest in all the manifold lines of work in which he was engaged, were such that to think of him as silent and inactive is, and will be for a long time to come, impossible.

His was a nature that moved affection as well as respect. He loved mankind and because he did so, men loved him. His kindliness, his thoughtful consideration for those about him, his desire to be of service to all with whom he came in contact, brought a prompt response from his associates. An aristocrat in intellect, a democrat

in his sympathies, he loved life itself and all that life meant in its broadest and best conception.

Although he was a man of strong convictions, with an unerring sense of right and wrong, and stood courageously for the right as he saw it, hated injustice and had not the slightest trace of hypocrisy in his nature, he was so broadly tolerant that it was rare indeed for him to speak in condemnation of any man or set of men. He sought to find the smallest particle of gold that gleamed against the dull background of the least attractive character. Bitterness, malice, envy, the kind of ambition that leads men to tear down those in their pathway that they may the more easily gain the heights themselves, were foreign to him.

No unworthy thought found lodgment in his mind; no mean and selfish motive disturbed the steady beating of his kindly, generous heart. He was in the full sense of the term a Christian gentleman, a type only too rarely found in the busy, contentious, competitive life of our generation.

The high note of his character was a desire to be useful and helpful, and he fulfilled that ambition to an extent that wasted his strength and energy and finally cost his health and life. It is no exaggeration to say that he sacrificed himself to his sense of duty and to his insistent conscientious determination to do his full share in every work he undertook. No man of his time filled a larger part in the life of this city and county, and his field of usefulness was by no means local.

The courts, his college, his church, beneficiaries of the various trusts which he was engaged in administering, the great bank of which he was president, the charities in the affairs of which his counsel was a controlling factor, all miss his presence, his judgment, his inspiring optimism, his ability to adjust differences, to induce constructive and progressive activity.

The influence which he exerted can not be overestimated or overstated. It might seem to one who viewed his life casually and without the benefit of intimate association that he unduly scattered his efforts and that if he had confined them within a closer compass he would have accomplished greater results. This might be true if his life work was reduced to terms consistent with selfish ambition. It is an entirely incorrect assumption if studied from the stand-

point of real accomplishment. He crowded into every unforgiving minute of his active life sixty seconds worth of honest effort, earnest labor, high endeavor to realize the exalted ideal of duty which possessed his soul. Others who confined themselves to narrow fields of work may have gone farther on single lines than he, but no man whose career I have followed produced more worthwhile results in so many varied directions than did he.

Whatever may be the personal view of any one of us concerning the immortality of the individual, no thoughtful person can deny the eternal nature of cause and effect. No word, spoken or written, no thought expressed, no deed performed, can fail to produce a result from which another result proceeds and still another, until an unbroken chain is formed that reaches from earth to heaven and has no ending even there.

All along throughout his life, JUSTICE BASSETT scattered the immortal seeds of kindly thoughts, of loving words, of generous acts. Years after his memory has become but a tradition in the minds of those who love to delve into the past and learn its lessons by the study of men and women who preceded them, they who seek to establish justice in the courts, truth in religion, enlightenment in education, righteousness in human relations, will find in the life and work of Justice BASSETT much that will make their task less difficult.

We mourn his passing, but we glory in his achievements. Successful, in the highest sense, he left the world better than he found it, and contributed as much to its advancement as was possible within the limits of the time and opportunity accorded him. His memory will ever be with us an inspiration, his life a challenge to live as he lived for the glory of God and the good of humankind.

The resolutions submitted by the committee of the local Bar Association of which he was a member are gratefully received by the Court and ordered spread upon its records.

As a further mark of our love and honor for JUSTICE BASSETT, the Court will now adjourn for the day.

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ABUSE OF PROCESS.

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retract, refuses to do so, the remedy is by motion. So if the remarks are of such a character that even the intervention of the Justice is not deemed to have removed the prejudice and cured the evil, the remedy is by motion. But in any event, objection must be made at the time. If not so taken, it is considered waived.

Mizula and Cherepowitch v. *Sawyer et al*, 428.

AUTOMOBILES.

See Motor Vehicles.

BANKS AND BANKING.

See *Foss* v. *National Bank*, 22.

BILLS AND NOTES.

If the holder of a promissory note intentionally destroys it, he thereby discharges the debt evidenced by it and can not maintain an action based on the instrument.

In a suit on a note, the burden of proving its destruction and a discharge of the debt is on the maker.

Norton v. *Smith*, 58.

Where a mortgage is given to secure the payment of a note or bond and the two instruments are made at the same time, they may, when the nature of the transaction becomes material, be read and construed together as parts of the same transaction, provided there is no inconsistency, as the terms of the one may explain or modify the other, and a stipulation or condition inserted in the one may be an effective part of the contract of the parties, although not found in the other.

But if the note or the bond and the mortgages contain conflicting and irreconcilable provisions as to the character or terms of the debt or interest, or the time for its payment, the note will govern, as being the principal obligation.

Where it is not apparent on the face of the mortgage or note as to which one expresses the real intention and agreement of the parties, extrinsic evidence may be received to show the facts.

In this state it is well settled that where the note stipulates a rate of interest in excess of the legal rate and makes no provision for the continuance of that rate after maturity, the note will draw the stipulated rate until maturity and only the legal rate thereafter.

Smith v. *Kerr*, 433.

The validity of a check negotiated outside of this state, but dated at a place in this state and drawn on a Maine bank, depends on the laws of this state.

A check is not invalid for the reason only that it is postdated, providing this is not done for an illegal or fraudulent purpose.

Where the drawer of a check stops payment thereon, he is liable to the holder of the check for the consequences of his conduct. In such event the situation is the same as if the check had been dishonored and notice thereof given to the drawer. The effect, so far as the drawer is concerned, is to change his conditional liability that he will pay the check according to its tenor if the drawee (bank) does not, to one free from the conditions; his position becomes like that of the maker of a promissory note due on demand, except so far as delay in presentment may have caused his loss.

Flynn v. *Currie*, 461.

BONDS.

See Stocks and Bonds.

BROKERS.

A real estate broker's right to compensation is wholly dependent on a contract of employment. Such contract may be express or implied.

To demonstrate the existence of an implied contract, facts and circumstances must be presented from which a hiring can be implied: it must appear that the broker rendered services in behalf of the seller, with the knowledge and consent of the latter.

Morrill v. *Farr*, 384.

A customer's written agreement that his stockbroker might sell securities from time to time carried in his account on margin whenever the margin was insufficient, without demand for additional margin or notice to the customer, while unilateral as executed, becomes by the broker's acceptance a completed contract binding both parties.

The broker, in selling, under such contract, for insufficiency of margin must exercise proper regard for the customer's interests.

Cousens v. *Watson et als*, 456.

BULK SALES ACT.

In conveyances of goods in violation of the Bulk Sales Act, as to the vendor and vendee and all the rest of the world except creditors of the vendor, the title passes, but as to such creditors the legal title has not passed, and they may proceed by trustee process against the goods in the vendee's possession or against the proceeds to the value thereof in case of resale.

Goods so conveyed in violation of the Bulk Sales Act, or the value thereof in case of resale, in equity or upon trustee process, are treated as held by the vendee in the nature of a trust fund for all the creditors, and the vendee, having in good faith paid any of the creditors their respective pro rata shares of the value of the goods, is entitled to be subrogated to the rights of such creditors therein and is liable only to unpaid creditors to the amount of their pro rata claims.

The equitable principle underlying the application of the doctrine of subrogation to conveyances in violation of the Bulk Sales Act is that, if the value of the stock in trade is in fact and in good faith distributed among the vendor's creditors, it is not real and essential justice that the creditors so paid should reap the entire benefits of the transaction and the purchaser bear the loss.

It is equity that the purchaser should be substituted for the creditors to the extent at least of their pro rata claims against the stock, and the form or method of payment should not control. *Lee Co.* v. *Automobile Co.*, 475.

BURDEN OF PROOF.

In a suit on a note, the burden of proving its destruction and a discharge of the debt is on the maker. *Norton* v. *Smith*, 58.

See *Murray's Case*, 181.

In the probate of a will the burden of proof in respect to the execution of the will and the sound and disposing mind and memory of the testator, is upon the proponent.

On the issue, however, of undue influence and fraud, the burden of proof is upon the party alleging the same. *Hiltz, Appellant*, 243.

The burden of proof is on the plaintiff to sustain his allegations of negligence by *prima facie* proof. *Copp* v. *Paradis*, 464.

CARRIERS.

In order to recover on account of delivery to a consignee by a carrier of merchandise in damaged condition, it is necessary for the consignee to prove that the merchandise was, at time of its receipt by carrier, in at least a better condition that when it reached its destination.

When it appears that a shipment was in good condition at time of its delivery to carrier for transportation and was delivered to consignee in damaged condition, it will be presumed that the damage was caused by the delivering carrier.

CHATTEL MORTGAGES.

See Conditional Sales.

CHECKS.

See Bills and Notes.

CLAIMS.

See *Harmon* v. *Fagan*, 171.

CONDITIONAL SALES.

A conditional sale agreement is not binding upon a purchaser from the original vendee unless it is recorded in the office of the town clerk in the place where the original vendee resided. The burden of establishing a compliance with the requirement as to its record is on the vendor.

The phrase "duly recorded" means recorded according to law.

CONSPIRACY.

CONSTITUTIONAL LAW.

CONSTITUTION OF THE UNITED STATES.

CONTRACTS.

In construing a written contract, actual intention, as expressed in the writing, is the chief thing to be looked to and ascertained. The subject matter of the contract, and the situation of the parties when the contract was made, are to be considered in determining the meaning of the language used. Words are to be understood in their common and everyday sense, and all parts of the contract construed so as to be given effect.

An agreement to deliver goods is usually assignable by the person to whom the goods are to be delivered, but all rights under contracts may not be assigned.

One party to a contract can not have another person thrust upon him without his consent.

An executory contract for personal services, or a contract otherwise involving personal credits, trust or confidence, can not be assigned by the sole act of one of the parties thereto.

Seed Company v. *Trust Company*, 69.

In an action to recover damages for breach of a contract, one must show performance of the terms of the contract as declared upon.

Heron v. *York*, 113.

The finding by a jury that a written contract has been abandoned and an oral agreement substituted must be supported by reasonably clear and convincing evidence.

The mere statement by the plaintiff that such was the case, met with square denial by defendant and not only uncorroborated but contradicted by every circumstance in the case and by irresistible inference drawn from documentary evidence, is not sufficient to sustain such a finding.

Written contracts may be rescinded or modified by the parties thereto, and new and different arrangements substituted for them; they may be abandoned and oral contracts substituted for them; but they are not to be lightly set aside. The business of the world depends upon them.

Lemieux & Co. v. *Letourneau*, 201.

Contracts to dispose of property by will in return for services rendered will not be sustained unless they are proved by full, clear, and convincing evidence. Such contracts may divert from natural channels large portions of estates and should always be regarded as containing elements of danger and to be subjected to the very closest scrutiny.

Lang v. *Chase*, 267.

A real estate broker's right to compensation is wholly dependent on a contract of employment. Such contract may be express or implied.

To demonstrate the existence of an implied contract facts and circumstances must be presented from which a hiring can be implied: it must appear that the

CONTRIBUTORY NEGLIGENCE.

See Negligence.

CORPORATIONS.

See *In re Central Maine Power Company*, 28.

Shares of stock in a corporation organized and existing by virtue of the laws of the State of Maine are within its jurisdiction and there subject to an inheritance tax, even though the owner was a non-resident decedent, regardless of whether the certificates of stock were at the time of the death in the state of the domicile or in this state, and such a tax does not violate any provision of the Fourteenth Amendment of the Constitution of the United States.

State v. *National Bank*, 123.

NOTE: Overruled by Supreme Court of the United States.

Corporations engaging in *quasi* public occupations hold their franchises not only for their stockholders, but also in trust for the public. A *quasi* public corporation may not, without legislative consent, so deal with its property as to incapacitate itself from performing its public duties.

A court of equity will not compel performance of an *ultra vires* agreement.

Water District v. *Water Supply Co.*, 217.

Equity takes jurisdiction when directors of a corporation are called to account for losses sustained by their mismanagement even though an action at law for money had and received might lie.

The statute of limitations does not begin to run where the defendant directors are in control of the corporation and charged with the duty of bringing an action against themselves in the name of the corporation until they cease to be directors and have given up control of the corporation or until a further reasonable time has elapsed to enable their successors to familiarize themselves with the facts.

COSTS.

COVENANTS.

CRIMINAL LAW.

The Law Court has no authority in such case to set aside a verdict on general motion. Such a motion should be addressed to the presiding Justice. His decision, if adverse to the respondent, is subject to appeal and if not appealed from is final.

State v. *Gross*, 161.

See *State* v. *Rist*, 163.

See *State* v. *Plant*, 261.

To expose or offer for sale, sell or purchase a light fitted for use in hunting in the night time, is in this state forbidden by statute.

State v. *Rice & Miller*, 316.

One who acts merely as the agent or messenger of another in purchasing liquor is not guilty of a sale where he has no personal interest in the transaction, and the fact that the agent advances his own money to make the purchase, being reimbursed by the principal on delivery, does not affect the relation of principal and agent so as to make the latter punishable unless the purchasing of liquor is made an offense by statute.

Whether or not the respondent was a bona fide agent of the buyer or was making a sale of the liquor on his own account or as agent for another, was a question for the jury and should have been submitted to them.

State v. *Parady*, 371.

The combination of two or more persons by concerted action to commit a crime, whether of the grade of a felony or a misdemeanor, and whether an offense at common law or by statute, is a conspiracy at common law.

Common law conspiracy is an indictable offense recognized and made punishable by R. S., Chap. 138, Sec. 26.

The manufacture of intoxicating liquor, other than cider, to wit, alcohol, is a misdemeanor under R. S., Chap. 137, Sec. 1.

The inclusion of a defective second count in an indictment does not vitiate the indictment.

A motion in arrest of judgment will not be sustained on an indictment containing several counts some of which are bad but some valid, if a general verdict of guilty is rendered upon the whole.

State v. *Vermette, Lumbarti*, 387.

DAMAGES.

While it is the duty of the jury, in an action brought to recover damages for personal injuries, to compute just compensation for pain and suffering, in the

DECEIT.

DEEDS.

DELIVERY AND ACCEPTANCE.

DEMURRER.

Where a declaration is adjudged bad on demurrer, an amendment which is itself demurrable is not allowable.

When a demurrer is filed, joined and ruled upon, and exceptions noted and allowed, the case is to stand continued pending decision by the appellate court of the exceptions. The excepting party, by pleading and proceeding to trial upon the merits of the case, before having the validity of his exceptions to the overruling of his demurrer determined, waives such exceptions.

Gilbert and Beckler v. *Dodge*, 417.

DIVORCE.

The statement of the residence of the libellee in the writ of attachment to which the libel for divorce is affixed constitutes a full compliance with the statutory requirement that the residence of the libellee "shall be named in the libel," even though the said residence is not stated in the body of the libel.

Jurisdiction over divorce is purely statutory, and every power exercised by the court with reference to it must be found in the statutes or it does not exist.

McIntire v. *McIntire*, 326.

EASEMENTS.

A road, like any other easement, may be extinguished by a nonuser. A cesser for twenty years, unexplained, to use a way acquired by use, is regarded as a presumption, either that the former presumptive right has been extinguished in favor of some adverse right, or, where no such adverse right appears, that the former has been surrendered, or, that it never existed.

While the nonuser of a prescriptive easement, for a period sufficient to create an easement by prescription, is evidence of an intention to abandon the easement, it is open to explanation, and may be controlled by proof that such intention did not exist. A voluntary and intentional desertion of a highway, the acquirement of a new road in its place, its travel and recognition by the public, may operate as an abandonment of the former.

When a highway is abandoned from the strip of land over which the public has a right of way, the land is discharged of the burden, and the private right revived.

Piper v. *Voorhees*, 305.

To create an easement by prescription it is necessary to prove that the use has been adverse.

Burnham v. *Burnham*, 409.

EQUITY.

Equity takes jurisdiction when directors of a corporation are called to account for losses sustained by their mismanagement even though an action at law for money had and received might lie.

A court in equity has power to review the action of a board of directors in fixing the salaries of officers, even when such action has been ratified or acquiesced in by the common stockholders, and to inquire into the reasonableness of the amounts thereof considering all of the factors involved. If the salaries are found to be excessive, adequate relief may be furnished, but it is not the province of the Court to act as general manager of a private corporation or to assume the regulation of its internal affairs.

Shirt Company v. *Waite*, 352.

A decretal order not within the jurisdiction of the tribunal entering it is null and void.

The statutory provision (R. S., Chap. 118, Sec. 48, et seq.) authorizing the quieting of actual exclusive retention of realty by mandatory provision that another claimant to the same land bring his action to try his title thereto, creates a remedy not in equity, nor superseding the jurisdiction of courts of equity to remove clouds from titles, but at law.

Hoadley v. *Wheelwright et al*, 395.

The doctrine of subrogation is a creature of equity and is administered so as to secure real and essential justice without regard to form, which it ignores, looking only to the substance.

The equitable principle underlying the application of the doctrine of subrogation to conveyances in violation of the Bulk Sales Act is that, if the value of the stock in trade is in fact and in good faith distributed among the vendor's creditors, it is not real and essential justice that the creditors so paid should reap the entire benefits of the transaction and the purchaser bear the loss.

It is equity that the purchaser should be substituted for the creditors to the extent at least of their pro rata claims against the stock, and the form or method of payment should not control.

Lee Co. v. *Automobile Co.*, 475.

Where a bill in equity shows such laches on the part of the plaintiff that a court ought not to give relief, and no sufficient reasons for the delay are stated, the defendant need not interpose a plea or answer, but may demur on the ground of want of equity apparent on the fact of the pleading.

The same rule applies to cross bills for relief.

If laches in prosecuting a claim or long acquiescence in the assertion of adverse rights appear on the face of a bill in equity, as against demurrer, reasons for delay which will excuse such laches or acquiescence must be set forth with sufficient certainty to apprise the court as to how the pleader or his privies re-

ESTOPPEL.

EVIDENCE.

EXCEPTIONS.

EXECUTORS AND ADMINISTRATORS.

FALSE REPRESENTATIONS.

See Deceit.

FELLOW-SERVANTS.

See Master and Servant.

FINDINGS OF FACT.

See Jury Findings.

FISH AND GAME.

FORECLOSURE.

See Mortgages.

FRAUD.

FRAUDULENT CONVEYANCES.

A transfer of property from a husband to a wife without more carries with it no implication of fraud. When, however, such a transaction is made under unusual conditions, for no apparent reason or by a man in failing circumstances or on the eve of bankruptcy it will be carefully scrutinized and may require an explanation by the parties.

When a plaintiff, who is seeking to set aside a transfer as fraudulent, proves that it was made by a debtor on the eve of bankruptcy, that it involved a payment of money to a near relative, that it was made secretly or in an underhanded way, he has made out a *prima facie* case. He does not have to go farther and prove that no consideration in fact passed. Under such circumstances the burden of establishing good faith, of overcoming the presumption of such evidence, is on a defendant who was a participant in the affair.

Maxwell v. *Adams*, 230.

GUARDIAN AND WARD.

The power of a guardian over the personal estate of his ward is coextensive with that of an executor of a will. In the management of the ward's estate it is for the guardian to apply the income and profits for the maintenance of the ward; if these be insufficient, principal may be used. The use of principal may involve selling property; borrowing money is an alternative mode of raising funds.

The statute providing that the Probate Court may license a guardian to sell or mortgage the estate of his ward is, in relation to personal estate, permissive and not restrictive. A guardian may protect the interests of himself and sureties by procuring a license, and thus establish in advance that a sale or mortgage is for the interest of the ward, instead of leaving that fact open to dispute at a future day; but he is not obliged to do so.

If one loans to a guardian on collateral of the ward, with knowledge or reason to know that the guardian intends to misapply the money, or that he is in fact applying it to his own private use, the pledge is not good. When, however, one loans in good faith it is of no moment what becomes of the borrowed money. The lender is not bound to see to its application.

Post v. *Trust Company*, 313.

A guardian has no power or authority to bind the estate by a covenant of warranty. Such a covenant is binding upon the grantor personally.

A guardian conveying property by warranty deed binds herself and her heirs, and she and they are estopped from asserting any claim to an interest therein whether it be a present or an after-acquired interest.

Pelletier v. *Langlois et al*, 486.

HABEAS CORPUS

Habeas corpus lies to release from imprisonment one who was committed as a result of a sentence from which he seasonably undertook to appeal, the magistrate denying him the right.

Rafferty v. *Hassett*, 241.

HIGHWAYS.

For the propagation of fish and for the protection of migratory birds the State may exercise certain control of its waters, but it is beyond the power of the legislature to suspend the general use of a navigable river as a highway.

State v. *Plant*, 261.

HUSBAND AND WIFE.

To warrant a recovery of damages in an action by a husband against his wife's father and mother for alienation of the wife's affections it must be proven that the parent caused the separation complained of without justification. In such a case the plaintiff must establish a case of aggravated interference or detention.

A parent may use proper and reasonable argument in counseling his child and if it later appears that the parent acted upon mistaken premises or upon false information or that his advice and interference may have been unfortunate, nevertheless if he acts in good faith for the child's good, upon reasonable grounds of belief, he is not liable to the husband.

It must appear clearly that the plaintiff maliciously alienated the daughter's affection.

Malice will not be presumed but must be proven by evidence of wrongful and unjustifiable conduct, prompted by wicked or malicious intent.

Miller v. *Levine*, 153.

INDICTMENT.

See Criminal Law.

INHERITANCE TAX.

Jurisdiction for the purpose of imposing a succession tax exists when the exercise of some essential privilege incident to the transfer of the title depends for its legality upon the law of the state levying the tax.

Shares of stock in a corporation organized and existing by virtue of the laws of the State of Maine are within its jurisdiction and there subject to an inheritance tax, even though the owner was a non-resident decedent, regardless of whether the certificates of stock were at the time of the death in the state of the domicile or in this state, and such a tax does not violate any provision of the Fourteenth Amendment of the Constitution of the United States.

State v. *National Bank*, 123.

NOTE: Overruled by Supreme Court of the United States.

INSURANCE.

The fact that a defendant carries liability insurance can neither enlarge nor restrict the right of a plaintiff to recover. The introduction of evidence of insurance for the purpose of influencing a decision on liability or damages is improper whether offered by a plaintiff or by a defendant.

Skillin v. *Skillin*, 223.

As held in *Ritchie* v. *Perry*, 129 Me., 440, when it develops in the course of trial that the defendant carries liability insurance, "the only safe course to be followed is to order a mistrial when requested to do so by the 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 conduct of counsel merits rebuke, and in the other, possibility of a prejudiced verdict is imminent."

Trumpfeller v. *Crandall*, 279.

In the trial of an action involving the question of negligent operation of a motor vehicle, introduction of evidence of insurance for the purpose of influencing decision on liability or damages is improper, whether offered by the plaintiff or by the defendant, and constitutes reversible error.

Poland v. *Dunbar*, 447.

INTEREST.

Bond discount is deferred interest. Interest is payable out of earnings, not out of capital, and neither bond discount nor short term notes given to cover bond discount may properly be capitalized.

In re Central Maine Power Company, 28.

In this state it is well settled that where the note stipulates a rate of interest in excess of the legal rate and makes no provision for the continuance of that rate after maturity, the note will draw the stipulated rate until maturity and only the legal rate thereafter.

Smith v. *Kerr*, 433.

INTOXICATING LIQUORS.

See *State* v. *Rist*, 163.

One who acts merely as the agent or messenger of another in purchasing liquor is not guilty of a sale where he has no personal interest in the transaction, and the fact that the agent advances his own money to make the purchase, being reimbursed by the principal on delivery, does not affect the relation of principal and agent so as to make the latter punishable unless the purchasing of liquor is made an offense by statute.

Whether or not the respondent was a bona fide agent of the buyer or was making a sale of the liquor on his own account or as agent for another, was a question for the jury and should have been submitted to them.

State v. *Parady*, 371.

The manufacture of intoxicating liquor, other than cider, to wit, alcohol, is a misdeameanor under R. S., Chap. 137, Sec. 1.

State v. *Vermette, Lumbarti*, 387.

INVITED GUESTS.

See Motor Vehicles.

JURISDICTION.

Jurisdiction of the court can not be established by considerations arising from the conduct of the parties.

Hoadley v. *Wheelwright et al*, 395.

JURY.

While it is the duty of the jury, in an action brought to recover damages for personal injuries, to compute just compensation for pain and suffering, in the event that such compensation is not confined within reasonable limits, it is the province of the Law Court to set the verdict aside and to assess damages in a reasonable sum.

Tilley v. *Johnson*, 18.

Whether a statement is material and whether it is one of fact or a mere expression of opinion are ordinarily questions for the court and not for the jury. The precise form of the language, however, is not always the controlling factor, for it must be construed with reference to the relationship of the parties, the

JURY FINDINGS.

LACHES.

LANDLORD AND TENANT.

LAST CLEAR CHANCE.

LAW COURT.

On the retrial of a cause returned by the Law Court to the Superior Court, the ruling of the Law Court as to the legal import of the facts disclosed by the evidence is binding on the Trial Court to be observed by it as law thereto applying.

Morrison v. *Park Association*, 390.

In a cause brought to the Law Court on exceptions only such evidence, exhibits, or reports can be considered as are incorporated in and made a part of the bill of exceptions.

Davis v. *Olson*, 473.

LEASE.

See Landlord and Tenant.

LIABILITY INSURANCE.

See Insurance.

LICENSES.

A license is a personal privilege. It creates no interest in land and can neither be assigned nor transferred. It does not pass with a conveyance of land. There would be no presumption that it continued to a subsequent grantee.

Burnham v. *Burnham*, 409.

LIMITATION OF ACTIONS.

By R. S. (1916) Chap. 92, Sec. 22 (R. S. 1930, Chap. 101, Sec. 20), if the Supreme Judicial Court, upon a bill in equity filed by a creditor who is unable to present his disputed claim to commissioners within the statutory period, is of the opinion that justice and equity require it and that such creditor is not chargeable with culpable neglect in not so presenting his claim within the time so limited, it may give him judgment for the amount of his claim against the estate of the deceased person.

Relief can be granted under this statute, however, only in those cases that are unmistakably shown to be within the express provisions of the statute strictly construed.

To hold otherwise would be to practically nullify the statute of limitations and indefinitely prolong the administration of the estates.

The creditor must not only show that he has a valid claim against the estate, good in equity and justice, but he must also prove that he is not chargeable with "culpable neglect."

"Culpable neglect" is defined to be "censurable" or "blameworthy" neglect, which exists when the loss can be fairly ascribed to the creditor's own carelessness, improvidence, or folly, or that of another for whose acts or omissions he is chargeable.

Harmon v. *Fagan*, 171.

The statute of limitations does not begin to run where the defendant directors are in control of the corporation and charged with the duty of bringing an action against themselves in the name of the corporation until they cease to be directors and have given up control of the corporation or until a further reasonable time has elapsed to enable their successors to familiarize themselves with the facts.

Shirt Company v. *Waite*, 352.

In a Workmen's Compensation Case, failure to file a petition seasonably must be noted in respondent's answer or is considered waived. The statute of limitations must be specially pleaded.

Comer v. *Oil Company*, 373.

LOGS AND LOGGING.

Before a so-called head scaler may accept as accurate the findings of an assistant, he must have more knowledge of such assistant's work than would be conveyed by a report submitted by another who is a stranger to the operation. He must be satisfied of the accuracy of the report presented.

The head scaler must have seen the assistant at work, in the same or a like operation, in order to satisfy himself that the method of scaling is his own, or what he can approve. The data obtained by his assistants in their measurements and scale of the logs, and the entries and memoranda thereof made by them, acting under his direction, and inspected, corrected and adopted by him, may be used by the scaler in the determination of the quantity of logs scaled.

Brannen v. *Plywood Corporation*, 15.

MALICE.

See Alienation of Affections.

MASTER AND SERVANT.

See *Beaulieu* v. *Tremblay*, 51.

A master is liable for the consequences of his negligence, if negligence is found, but he is not an insurer of his employee's safety.

MISTRIAL.

MONEY HAD AND RECEIVED.

MONEY PAID.

MORTGAGES.

sary to complete the foreclosure. Although the mortgage holder does not himself live in or occupy any part of the premises, he has constructive possession which in legal contemplation is sufficient.

Where a mortgage is given to secure the payment of a note or bond and the two instruments are made at the same time, they may, when the nature of the transaction becomes material, be read and construed together as parts of the same transaction, provided there is no inconsistency, as the terms of the one may explain or modify the other, and a stipulation or condition inserted in the one may be an effective part of the contract of the parties, although not found in the other.

But if the note or the bond and the mortgages contain conflicting and irreconcilable provisions as to the character or terms of the debt or interest, or the time for its payment, the note will govern, as being the principal obligation.

Where it is not apparent on the face of the mortgage or note as to which one expresses the real intention and agreement of the parties, extrinsic evidence may be received to show the facts.

In this state it is well settled that where the note stipulates a rate of interest in excess of the legal rate and makes no provision for the continuance of that rate after maturity, the note will draw the stipulated rate until maturity and only the legal rate thereafter.

Smith v. *Kerr*, 433.

MOTOR VEHICLES.

See *Cooper & Company* v. *Can Company*, 76.

The law imposes upon one confronted by an emergency that degree of care which an ordinarily prudent person would use under the same or similar circumstances. Extraordinary care is not required.

Byron v. *O'Connor*, 90.

See *Roak* v. *Roak & Co.*, 114.

In an action to recover for injuries sustained in a collision, one may recover in spite of his negligence, if there came a time prior to the collision when he could not, and the defendant could, by the exercise of due care, have prevented the accident.

If, however, the negligent operation by the plaintiff continued to the moment of the collision or for such a period of time that the defendant could not thereafter, by the exercise of due care, have stopped his car before the crash, there can be no recovery.

Kirouac v. *Railway Company*, 147.

The exercise of ordinary prudence requires the driver of a motor vehicle, suddenly and unexpectedly confronted with peril, although it arises from the fault of another, to seek to avoid a collision, if it is reasonably practicable to do so. Forbearance, rather than undue insistence upon the technical right of way, becomes the duty of every operator of a motor vehicle on the public ways.

Whether, in the presence of danger, the driver of an automobile has taken the proper course, depends upon all the circumstances of the individual case, having reference not to the highest degree of care, nor even the degree of care which a highly prudent person would use, but upon the average of reasonable care.

Tomlinson v. *Clement Bros.*, 189.

A traveller upon the highway in approaching a railroad crossing at grade must be on the alert to ascertain by the use of sight and hearing and by any other appropriate means, the approach of trains so as to seasonably avoid collision with them.

The train having the right of way, a collision at a railroad crossing is *prima facie* evidence of negligence on the part of the traveller. A traveller approaching the railroad crossing should never assume that the track or crossing is clear. He should apprehend the danger, and use every reasonable precaution to ascertain surely whether a train or locomotive is near.

When the traveller's view of the track is obstructed, greater care is required in looking and listening.

Hesseltine v. *Railroad Company*, 196.

The failure of a passenger to warn the driver of an automobile of danger or lack of proper caution in his driving is not, in the absence of unusual circumstances, negligence as a matter of law.

The negligence of the driver is not imputable to the passenger.

Seeming modification arising out of the relation of principal and agent or by reason of joint control over operation of the car does not affect the principle of the above general rule.

The fact that a defendant carries liability insurance can neither enlarge nor restrict the right of a plaintiff to recover. The introduction of evidence of insurance for the purpose of influencing a decision on liability or damages is improper whether offered by a plaintiff or by a defendant.

Skillin v. *Skillin*, 223.

One riding as a passenger or guest may not place his safety entirely in the keeping of the driver of an automobile, but must exercise due and reasonable care for his own protection in a position of danger.

The negligence of the driver of an automobile will not be imputed to an invited guest unless they are engaged in a joint enterprise. In order to have a joint

enterprise there must be a community of interest in the object and purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other in respect thereto. Each must have some voice and right to be heard in the control or management.

Trumpfeller v. *Crandall*, 279.

The driver of a motor vehicle making a left hand turn and crossing the street in front of another vehicle should so watch and time the movements of the other as to reasonably insure himself a safe passage either in front of or behind it, even to the extent of stopping and waiting if necessary.

Negligence in this respect, however, does not excuse lack of due care on the part of the driver of the vehicle in front of which he attempts to pass.

It is the duty of the driver of a motor vehicle to keep it at all times under reasonable control.

It is negligence to drive a motor cycle at a speed so excessive that it is impossible to stop it within a reasonable distance or to guide it so as to avoid contact with an obstruction in plain view and so situated as to permit passage on either side.

One may not operate a motor vehicle at excessive speed so as to prevent its reasonable control in an emergency and be permitted to say, after an emergency arose, that he did all he reasonably could with the means at hand to avoid the injury.

The fact that the driver may have done all that could have been done in attempting to stop and to avoid a collision after discovering a vehicle in front of him by no means relieves him from the charge of negligence. If he, at the time of the discovery of the defendant's position, was travelling at an excessive rate of speed under the conditions presented, the fact that he did all he could to stop, when the manner in which he had been driving had rendered it impossible for him to do so, instead of relieving the plaintiff subjects him to the charge of negligence.

Esponette v. *Wiseman*, 297.

An individual owning or operating an automobile must, for the safety of his guest in the vehicle, exercise in his conduct ordinary care, which is that degree of care that a person of ordinary intelligence, and reasonable prudence and judgment, ordinarily exercises under like or similar circumstances.

For the failure on the part of the owner or operator to exercise ordinary care for the protection of his guest, the guest not having assumed other than the risks and dangers usually or naturally incident to such transportation and not having been guilty of contributory negligence, such owner or operator will be held negligent, and liable for the damages between which and such failure, causal connection existed.

The driver of an automobile owes to his guest the duty of exercising ordinary care not unreasonably to expose the latter to an additional peril, or subject him to a newly created danger.

Where an automobile, and the operation thereof, are exclusively within the control of the defendant, whose guest is injured, and it is not reasonably in the power of such guest to prove the cause of the accident, which is one not commonly incident, according to everyday experience, to the operation of an automobile, the occurrence itself, although unexplained, is *prima facie* evidence of negligence on the part of the defendant. *Res ipsa loquitur*—the thing speaks for itself. The question of the defendant's negligence arises as a matter of law.

The maxim of *res ipsa loquitur* has been held as applicable to automobile carriers without reward, as to carriers for hire.

Chaisson v. *Williams*, 341.

The fact that a driver of an automobile has the technical right of way does not relieve him from liability or responsibility to the driver of another automobile. Such right of way is not absolute. The supreme rule of the road is the rule of mutual forbearance.

Passengers are not expected to assume control over the operation of automobiles. The responsibility for operation rests on the driver, and constant suggestion as to the details of management of the car often does more harm than good. There is, however, a duty to warn of known and apparent dangers.

The failure by a passenger to warn the driver of an automobile, or to protest at his management of the car, can not be held to be negligence as a matter of law. It is a question of fact in each case for the jury to determine.

The driver of an automobile approaching a dangerous curve or intersection properly so marked by signs, has the right to assume until the contrary appears, that other automobiles approaching that spot will be operated in accordance with the laws of the state.

The provisions of Chap. 172, Public Laws of 1929, providing for the designation of through ways, do not modify the requirements of the law in this state in regard to speed. They merely relate to the right of way at intersections of a designated through way.

Keller v. *Banks*, 397.

In the trial of an action involving the question of negligent operation of a motor vehicle, introduction of evidence of insurance for the purpose of influencing decision on liability or damages is improper, whether offered by the plaintiff or by the defendant, and constitutes reversible error.

Poland v. *Dunbar*, 447.

MUNICIPAL CORPORATIONS.

By the act passed in 1874, giving general equity powers to the Supreme Judicial Court, the equitable remedies of taxable inhabitants of cities and towns were extended, and they now have a right to enjoin a town or city from the performances of illegal acts. Such equitable remedies are confined to applications for preventive relief.

Town officials are in a position of trustees for the public. A contract in which such an official is pecuniarily interested and which places him in a situation of temptation to serve his personal interests to the prejudice of the interests of the town is illegal.

In the case at bar, neither the provisions of R. S. 1916, Chap. 4, Secs. 42, 43, and 44, nor the provisions of Chap. 82, Sec. 6, XIII, providing for remedies in certain cases in equity against cities and towns on application of ten taxable inhabitants, applied, but the remedies were under the act of 1874 giving general equity powers to the Supreme Judicial Court on petition of taxable inhabitants of a city or town.

The indebtedness of Myron E. Smith to Clyde H. Smith, which the former had no means of paying except through the successful operation or sale of his moving picture business, created a pecuniary interest in the latter in the granting of the lease by the board of selectmen of the town. The lease in this case was therefore void.

Tuscan v. *Smith*, 36.

The liability of cities and towns for the negligence of their officers and agents depends upon which of their two classes of powers, that of sovereignty or merely corporate, is being exercised when the damage complained of is done.

A municipality maintaining a hospital for public welfare only, is not liable to a private action for neglect to perform, or the negligent performance of, duties legislatively imposed on it, unless right of action has been given by statute.

When, however, public use descends to private profit, even incidentally, liability attaches.

Anderson v. *City of Portland*, 214.

See *Mahoney* v. *City of Biddeford*, 295.

The payment, under a vote of the town, of a weekly salary to a selectman who performs full time duty, is a payment for a purpose authorized by law.

Milliken et als v. *Town of Old Orchard Beach*, 498.

MUNICIPAL OFFICERS.

Under the provisions of Sec. 8, Chap. 22, R. S. 1930, local health officers are appointed by municipal officers subject to the approval of the State Commis-

sioner of Health and are not qualified to perform the duties of the office until their appointment is so approved.

By authority of an ordinance of the defendant city such an officer holds until his successor is elected and qualified, unless sooner removed by the city council.

A duly elected and qualified local health officer, not having been legally removed from the position and no successor having qualified to succeed him has a legal right to the office and is legally entitled to the salary.

Mahoney v. *City of Biddeford*, 295.

NEGLIGENCE.

In the protection of his person or property when about to emerge from a position of security and step onto a travelled highway a pedestrian must exercise due care.

In determining the proximate cause of an injury, the elements of natural and probable result and that the result ought to have been forseen by a person of ordinary intelligence and prudence in the light of the attending circumstances, are controlling facts.

Whether one's negligence is a proximate cause of an accident depends on whether he exercises due care under the attending circumstances.

Cooper & Company v. *Can Company*, 76.

The law imposes upon one confronted by an emergency that degree of care which an ordinarily prudent person would use under the same or similar circumstances. Extraordinary care is not required.

Byron v. *O'Connor*, 90.

See *Roak* v. *Roak & Co.*, 114.

In an action to recover for injuries sustained in a collision, one may recover in spite of his negligence, if there came a time prior to the collision when he could not, and the defendant could, by the exercise of due care, have prevented the accident.

If, however, the negligent operation by the plaintiff continued to the moment of the collision or for such a period of time that the defendant could not thereafter, by the exercise of due care, have stopped his car before the crash, there can be no recovery.

Kirouac v. *Railway Company*, 147.

The exercise of ordinary prudence requires the driver of a motor vehicle, suddenly and unexpectedly confronted with peril, although it arises from the fault

of another, to seek to avoid a collision, if it is reasonably practicable to do so. Forbearance, rather than undue insistence upon the technical right of way, becomes the duty of every operator of a motor vehicle on the public ways.

Whether, in the presence of danger, the driver of an automobile has taken the proper course, depends upon all the circumstances of the individual case, having reference not to the highest degree of care, nor even the degree of care which a highly prudent person would use, but upon the average of reasonable care.

In negligence cases, except when the case is so palpably right or wrong that men of fair mind or ordinary intelligence could not reasonably disagree in their opinion about it, the question is for the jury and not for the court.

Tomlinson v. *Clement Bros.*, 189.

The train having the right of way, a collision at a railroad crossing is *prima facie* evidence of negligence on the part of the traveller. A traveller approaching the railroad crossing should never assume that the track or crossing is clear. He should apprehend the danger, and use every reasonable precaution to ascertain surely whether a train or locomotive is near.

Hesseltine v. *Railroad Company*, 196.

The failure of a passenger to warn the driver of an automobile of danger or lack of proper caution in his driving is not, in the absence of unusual circumstances, negligence as a matter of law.

The negligence of the driver is not imputable to the passenger.

Seeming modification arising out of the relation of principal and agent or by reason of joint control over operation of the car does not affect the principle of the above general rule.

Skillin v. *Skillin*, 223.

One riding as a passenger or guest may not place his safety entirely in the keeping of the driver of an automobile, but must exercise due and reasonable care for his own protection in a position of danger.

The negligence of the driver of an automobile will not be imputed to an invited guest unless they are engaged in a joint enterprise. In order to have a joint enterprise there must be a community of interest in the object and purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other in respect thereto. Each must have some voice and right to be heard in the control or management.

Trumpfeller v. *Crandall*, 279.

The driver of a motor vehicle making a left hand turn and crossing the street in front of another vehicle should so watch and time the movements of the other as to reasonably insure himself a safe passage either in front of or behind it, even to the extent of stopping and waiting if necessary.

Negligence in this respect, however, does not excuse lack of due care on the part of the driver of the vehicle in front of which he attempts to pass.

It is the duty of the driver of a motor vehicle to keep it at all times under reasonable control.

It is negligence to drive a motor cycle at a speed so excessive that it is impossible to stop it within a reasonable distance or to guide it so as to avoid contact with an obstruction in plain view and so situated as to permit passage on either side.

One may not operate a motor vehicle at excessive speed so as to prevent its reasonable control in an emergency and be permitted to say, after an emergency arose, that he did all he reasonably could with the means at hand to avoid the injury.

The fact that the driver may have done all that could have been done in attempting to stop and to avoid a collision after discovering a vehicle in front of him by no means relieves him from the charge of negligence. If he, at the time of the discovery of the defendant's position, was travelling at an excessive rate of speed under the conditions presented, the fact that he did all he could to stop, when the manner in which he had been driving had rendered it impossible for him to do so, instead of relieving the plaintiff subjects him to the charge of negligence.

Contributory negligence is usually a jury question but when, in the face of admitted facts positively proving such negligence, the finding of the jury is wholly inconsistent with those facts and the verdict depends upon that finding, it is the duty of the Law Court to set the verdict aside.

Esponette v. *Wiseman*, 297.

An individual owning or operating an automobile must, for the safety of his guest in the vehicle, exercise in his conduct ordinary care, which is that degree of care that a person of ordinary intelligence, and reasonable prudence and judgment, ordinarily exercises under like or similar circumstances.

For the failure on the part of the owner or operator to exercise ordinary care for the protection of his guest, the guest not having assumed other than the risks and dangers usually or naturally incident to such transportation and not having been guilty of contributory negligence, such owner or operator will be held negligent, and liable for the damages between which and such failure, causal connection existed.

The driver of an automobile owes to his guest the duty of exercising ordinary care, not unreasonably to expose the latter to an additional peril, or subject him to a newly created danger.

Where an automobile, and the operation thereof, are exclusively within the control of the defendant, whose guest is injured, and it is not reasonably in the power of such guest to prove the cause of the accident, which is one not com-

monly incident, according to everyday experience, to the operation of an automobile, the occurrence itself, although unexplained, is *prima facie* evidence of negligence on the part of the defendant. *Res ipsa loquitur*—the thing speaks for itself. The question of the defendant's negligence arises as a matter of law.

Res ipsa loquitur, in whatever latitude taken, is a rule of evidence which warrants, but does not compel, the inference of negligence from circumstantial facts.

The doctrine of *res ipsa loquitur* does not dispense with the rule that the person alleging negligence must prove it, but is simply a mode of proving the negligence of the defendant, inferentially, without changing the burden of proof. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff. The doctrine is not to be invoked when all the facts attending the injury are disclosed by the evidence, and nothing is left to inference.

Chaisson v. *Williams*, 341.

The failure by a passenger to warn the driver of an automobile, or to protest at his management of the car, can not be held to be negligence as a matter of law. It is a question of fact in each case for the jury to determine.

The driver of an automobile approaching a dangerous curve or intersection properly so marked by signs, has the right to assume until the contrary appears, that other automobiles approaching that spot will be operated in accordance with the laws of the state.

Keller v. *Banks*, 397.

A master is liable for the consequences of his negligence, if negligence is found, but he is not an insurer of his employee's safety.

It is the duty of a master to use reasonable care to furnish for his servant a reasonably safe place for him to do his work. He can not be held responsible for failure to use extraordinary care.

Charpentier v. *Tea Co.*, 423.

In the trial of an action involving the question of negligent operation of a motor vehicle, introduction of evidence of insurance for the purpose of influencing decision on liability or damages is improper, whether offered by the plaintiff or by the defendant, and constitutes reversible error.

Poland v. *Dunbar*, 447.

A master is liable to third persons for damages resulting from his servant's negligence while acting in the course of his employment, but the relation of master and servant at time of and in respect to the acts complained of must be shown.

PRESCRIPTION.

PRESUMPTIONS.

See above, *Burnham* v. *Burnham*, 409.

PRINCIPAL AND AGENT.

Where the principal receives the benefits of an unauthorized act of his agent, when he is apprised of the facts, if he has suffered no prejudice and can make restitution, he must elect whether to ratify or disaffirm, and if he decides not to ratify, he must return the fruits of the unauthorized act within a reasonable time.

If he retains, uses or disposes of what he has received, he will be held to have ratified the act of his agent unless restoration would be of no practical value to the other party.

This rule applies if the principal retains the benefits of the contract notwithstanding his denial of the agent's authority or his express disapproval or repudiation of the agent's acts.

Wilkins v. *Lumber Company*, 5.

One who acts merely as the agent or messenger of another in purchasing liquor is not guilty of a sale where he has no personal interest in the transaction, and the fact that the agent advances his own money to make the purchase, being reimbursed by the principal on delivery, does not affect the relation of principal and agent so as to make the latter punishable unless the purchasing of liquor is made an offense by statute.

State v. *Parady*, 371.

PROBATE COURTS.

When a disputed claim is committed to commissioners, jurisdiction over the claim is transferred from the Common Law Courts to the Probate Court.

Jurisdiction of the Probate Court does not attach to a disputed claim, however, if it is not committed to commissioners until action upon it is barred by the special statute of limitations.

While Probate Courts are tribunals of special and limited jurisdiction, they may exercise the powers directly conferred upon them by legislative enactment and also such as may be incidentally necessary to the execution thereof.

When an executor or administrator elects to submit a disputed claim against an estate to commissioners, on service of the petition therefor upon the creditor, the latter becomes a party to the proceeding, entitled to be heard and to invoke the aid of the Probate Court to compel an adjudication of his claim.

If commissioners on disputed claims accept their appointment, the Probate Court has power to compel obedience to its decree and warrant, including the power to extend the time for the commissioners' action and report.

Harmon v. *Fagan*, 171.

PUBLIC UTILITIES.

PUBLIC UTILITIES COMMISSION.

RAILROADS.

RULES OF COURT.

SALES.

SHERIFFS AND DEPUTIES.

SPECIFIC PERFORMANCE.

STATE DEPARTMENT OF HEALTH.

STATUTES, CONSTRUCTION OF.

STATUTE OF FRAUDS.

STOCKS AND BONDS.

A sale of bonds at a price less than face value is not only legitimate but frequently desirable from the standpoint of practical business.

The difference between the face value of bonds so sold and the proceeds of the sale is usually denominated bond discount.

Bond discount is deferred interest. Interest is payable out of earnings, not out of capital, and neither bond discount nor short term notes given to cover bond discount may properly be capitalized.

To permit the issuance of stock to take up such notes would be to capitalize future earnings. This is not permissible under our statutes.

In re Central Maine Power Company, 28.

SUBROGATION.

The doctrine of subrogation is a creature of equity and is administered so as to secure real and essential justice without regard to form, which it ignores, looking only to the substance.

Lee Co. v. *Automobile Co.*, 475.

TAXATION.

The word "widow" as used in the statute means a woman whose husband is dead and who has not remarried.

In the case at bar, on her remarriage, the defendant ceased to be the widow of her first husband, and she did not revert to that status on the death of her second. The statute granting exemption to the widow of a Civil War veteran was inapplicable to her.

Town of Solon v. *Holway*, 415.

TITLE TO REAL ESTATE.

A court of equity is not the proper tribunal in which to try out the question of title to real estate when the sole question involved is the location of lines on the face of the earth.

To allege and claim a cloud on title is not sufficient of itself to give a court of equity jurisdiction. The proper forum to try title to land is a court of law, and this jurisdiction can not be withdrawn at pleasure and transferred to a court of equity under the pretense of removing clouds from title. It is not the business of equity to try titles and to put one party out and another in.

Equity will not take jurisdiction where the remedy at law is plain, adequate and complete. In all cases where the plaintiff holds or claims to have a purely legal estate in land, and simply seeks to have his title adjudicated upon, or

to recover possession against an adverse claimant who also relies upon an alleged legal title, there being no equitable feature of fraud, mistake, or otherwise, calling for the application of equitable doctrines or the granting of peculiar equitable reliefs, the remedy at law is adequate, and the concurrent jurisdiction of equity does not exist. A suit in equity, under its concurrent jurisdiction, will not be maintained to take the place of the action of ejectment, and to try adverse claims and titles of land which are wholly legal, and to award the relief of a recovery of possession.

York v. *McCausland*, 245.

TOWNS.

See Municipal Corporations.

TOWN OFFICERS.

Town officials are in a position of trustees for the public. A contract in which such an official is pecuniarily interested and which places him in a situation of temptation to serve his personal interests to the prejudice of the interests of the town is illegal.

Tuscan v. *Smith*, 36.

TROVER.

See *Daniels* v. *Priest*, 504.

TRUSTS.

Where money or other property is delivered by one person to another to be by the latter paid or delivered over for the benefit of a third person, the party receiving the money or other property holds it upon a trust necessarily implied from the nature of the transaction and in favor of the beneficiary.

Foss v. *National Bank*, 22.

Where there is no plain intention to the contrary expressed in a will, and a trust created therein is an active one, trustees are entitled to possession of the trust estate during the term of the trust and are chargeable with its care and administration for the benefit of a *Cestui Que Trust.*

By implication, sufficient estate is vested in the trustees for a proper execution of their trusts.

A beneficiary, who is one of the trustees, has a common and undivided authority and power in the administration of the trust and can not rightfully be excluded from possession of the trust property.

Bunker v. *Bunker*, 103.

Where no power to lease is expressly given in the will, but trustees are directed to hold, manage and care for the property given them by the testator, to collect the income therefrom, and to expend it for purposes enumerated, a power to make leases is necessarily implied.

A trustee may give a valid lease even though it runs beyond the period of the trust, provided it terminates within a reasonable time thereafter.

North v. *Real Estate Ass'n*, 254.

TRUSTEE PROCESS.

In a trustee process equitable considerations must prevail as fully as possible. Such a process, though in form an action at law, is in substance an equitable proceeding to determine the ownership of a fund in dispute, especially where a claimant has appeared and become a party to the suit.

Foss v. *National Bank*, 22.

See *Bean* v. *Ingraham*, 47.

The validity of trustee process depends upon the state of facts existing at the time of the service of the writ on the alleged trustee.

Trustee process is not designed to attach that to the possession and enjoyment of which the principal defendant may never succeed.

Upon exceptions in a trustee process, as in review on an appeal in equity, the Law Court can not only overrule or sustain the exceptions, but also reëxamine and determine the whole case, or make such final disposition of it as justice requires.

Holmes v. *Hilliard*, 392.

Under the provisions of R. S., Chap. 100, Sec. 55, a trustee is duty bound to pay his employee the amount of wages due and exempted from attachment at the time of service of the trustee process.

If the suit has been prosecuted to judgment, the trustee is liable, however, to the creditor for the full amount of the wages due at the time of service unless he discloses the amount thereof exempted by statute.

A failure by a trustee to make full disclosure in such a case of exempted wages makes him liable to pay the amount thereof both to the creditor and the employee.

The mere service of a trustee process does not relieve the trustee from liability to the principal defendant for any part of the wages due at the time of service.

Regardless of the pendency of the process, the principal defendant may at any time commence action against the trustee for the full amount of wages due him.

In such a suit, recovery may be had for all exempted wages and for any balance of wages due which are not exempted, unless a judgment obtained against the trustee for the full amount thereof has been satisfied.

No payment to the creditor, without authority of the principal defendant will relieve the trustee from his liability to the latter, unless the payment be made to satisfy a judgment against the trustee and then only to the extent thereof exclusive of exempted wages.

McIntosh v. *Bramson*, 420.

VERDICTS.

While full determination of facts is for the jury, a verdict can not be allowed to stand unless based on testimony and evidence, and on reasonable inferences logically drawn from the testimony and physical facts duly proven to have existed.

Cooper & Company v. *Can Company*, 76.

A verdict can not be based on sympathy, but must be grounded in evidence justifying it.

Byron v. *O'Connor*, 90.

Where a verdict is substantially right no new trial will be granted although there may have been some mistakes committed in the trial, but a verdict will be set aside as against the evidence when it is not such as reasonable minds are warranted in believing, or is inconsistent with the proved circumstances of the case, or when the evidence to the contrary of the verdict is so overweighing as to induce the belief that the jury were led into mistake, or were so moved by passion or prejudice as not to give due consideration and effect to all the evidence.

Miller v. *Levine*, 153.

A verdict should not be directed for a defendant if, in any reasonable view of the testimony, under the law, the plaintiff can recover.

Tomlinson v. *Clement Bros.*, 189.

To sustain a verdict against two defendants, evidence to support a verdict against one defendant only, with no inference from any proven fact tending to indicate liability on the part of both defendants, is not sufficient.

Robinson v. *Buswell*, 209.

On a general motion a jury's verdict will not be set aside unless manifestly wrong or the result of bias or prejudice.

Maxwell v. *Adams*, 230.

WAGES.

WAIVER.

WARRANTY.

WATERS.

WILD LAND.

One who acquires title by adverse possession to a few acres of cultivated land adjacent to a large tract of wild land does not gain title to the latter by occasionally cutting a few trees therefrom, even though he uses them for fencing, repairs or firewood.

The exact line of demarcation between a woodlot and wild land is difficult to define, but it is ordinarily possible to distinguish one from the other in any given case.

An important factor of the statute which permits acquiring title to uninclosed and uncultivated land by adverse possession is that it shall be used in a manner "comporting with the ordinary management of a farm."

Development Co. v. *Scott*, 449.

WILLS.

Where there is no plain intention to the contrary expressed in a will, and a trust created therein is an active one, trustees are entitled to possession of the trust estate during the term of the trust and are chargeable with its care and administration for the benefit of a *Cestui Que Trust.*

By implication, sufficient estate is vested in the trustees for a proper execution of their trusts.

A beneficiary, who is one of the trustees, has a common and undivided authority and power in the administration of the trust and can not rightfully be excluded from possession of the trust property.

Where no express or implied intention appears on the part of a testator to make an outright gift of income to a life tenant, unexpended income remaining at the death of the life tenant which can be traced and identified must be included in the residuary estate to be then distributed as intestate property.

A widow who voluntarily accepts provisions made for her benefit by her husband in his will, is barred from any right by descent in his real estate remaining undisposed of.

Where no intention appears in the will to the contrary, a widow, who accepts the provisions of the will for her benefit, may in addition thereto be entitled to her distributive share of the personalty remaining undisposed of after her life estate.

Bunker v. *Bunker*, 103.

In the probate of a will the burden of proof in respect to the execution of the will and the sound and disposing mind and memory of the testator, is upon the proponent.

On the issue, however, of undue influence and fraud the burden of proof is upon the party alleging the same.

Hiltz, Appellant, 243.

WORDS AND PHRASES.

WORKMEN'S COMPENSATION ACT

An Agreement between an employer and employee in regard to compensation under the Workmen's Compensation Act, having been approved by the Commissioner of Labor, has the force of a judgment and is final and binding to the extent of the facts agreed upon and the conditions covered by them as a basis for the compensation to be paid.

Such an Agreement having been made, on a Petition for Review of Incapacity under Section 37 of the Workmen's Compensation Act, the question open is whether such incapacity, if it continues, has subsequently increased or diminished, or has it ended.

Medical opinions, based upon assumptions, not grounded on facts but mere speculation, surmise or conjecture, have no probative value.

Expert medical opinion evidence is not always essential to the making of sound findings of fact.

The Commissioner's conclusion in a compensation case, if rational and natural, and based on facts proven or inferences logically drawn therefrom, must stand even though it lacks the support of expert opinion.

The receipt of inadmissible conjectural opinion does not alone require reversal of findings if there is sufficient competent evidence otherwise in the case on which the Commissioner's finding may rest.

Mike Crowley's Case, 1.

One who engages in work under the direction, control, and with the coöperation and assistance of another, is not, with respect to that party, an independent contractor.

Breen's Case, 64.

The servant of a general employer may, with respect to a particular work, be transferred with his own consent or acquiescence to the service of another so that he becomes the servant of the special employer.

Consent or acquiescence of a servant to such change of employment may be inferred from his acceptance of or obedience to orders given by the special employer or his representative.

In determining whether a servant is an employee of his original master or of the person to whom he has been furnished, the test is whether, in the particular service in which he is engaged or requested to perform, he continues liable to the direction and control of his original master or becomes subject to that of the party to whom he is lent or hired.

If men are under the exclusive control of a special employer in the performance of work which is a part of his business, they may be, for the time being, his employees although they remain general servants of their regular employer.

In the case at bar, applying these tests, the conclusion of the Commission that the acts as presented reasonably indicated that the petitioner was an employee of the respondent when injured was supported by competent evidence.

Torsey's Case, 65.

Where the facts presented with respect to the relation of an employer and employee are as consistent with the relation of agency as with that of independent contractor, one asserting the existence of the latter relation has the burden of proof.

When the facts are not in dispute and but one reasonable conclusion is inferable, the question of relationship is one of law and open on review.

In an action against an employer for injuries, a presumption arises that a person performing work on a defendant's premises and for his benefit is a mere servant; and if defendant seeks to avoid liability on the ground that such a person is an independent contractor, the burden is on him to show the fact.

An employee as defined in the Workmen's Compensation Act is a person in the service of another, under a contract of hire, express or implied, oral or written.

An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of his work.

The test of relationship is the right to control. It is not the fact of actual interference with the control but the right to interfere that makes the difference between an independent contractor and a servant or agent.

In applying the general principles of law governing the relation of master and servant to cases involving Workmen's Compensation, by explicit legislative mandate, the provisions of the Act are to be liberally construed.

Commonly recognized tests of the relationship in issue, although not necessarily concurrent or each in itself controlling, are (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or his distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies and materials; (5) his right to control the progress of the work except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer.

The most important point in determining whether the relationship is that of contractor or employee is the right of either to terminate the relation without liability.

Murray's Case, 181.

WRITS.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

STATUTES OF THE UNITED STATES.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES.

ERRATA.

Substitute "1883" for "1893" in the fifteenth line from bottom of page 111.

Substitute "limitations" for "limitions" in the second and third lines of paragraph two, page 172.

Substitute Sec. 19, Chap. 331, P. L. 1929 for Sec. 19, P. L. 1929 on page 262.

In case *McIntire* v. *McIntire*, substitute "there" for "their" in the seventh line, page 327.

Substitute "defendant" for "plaintiff" in line one in third paragraph, page 485.